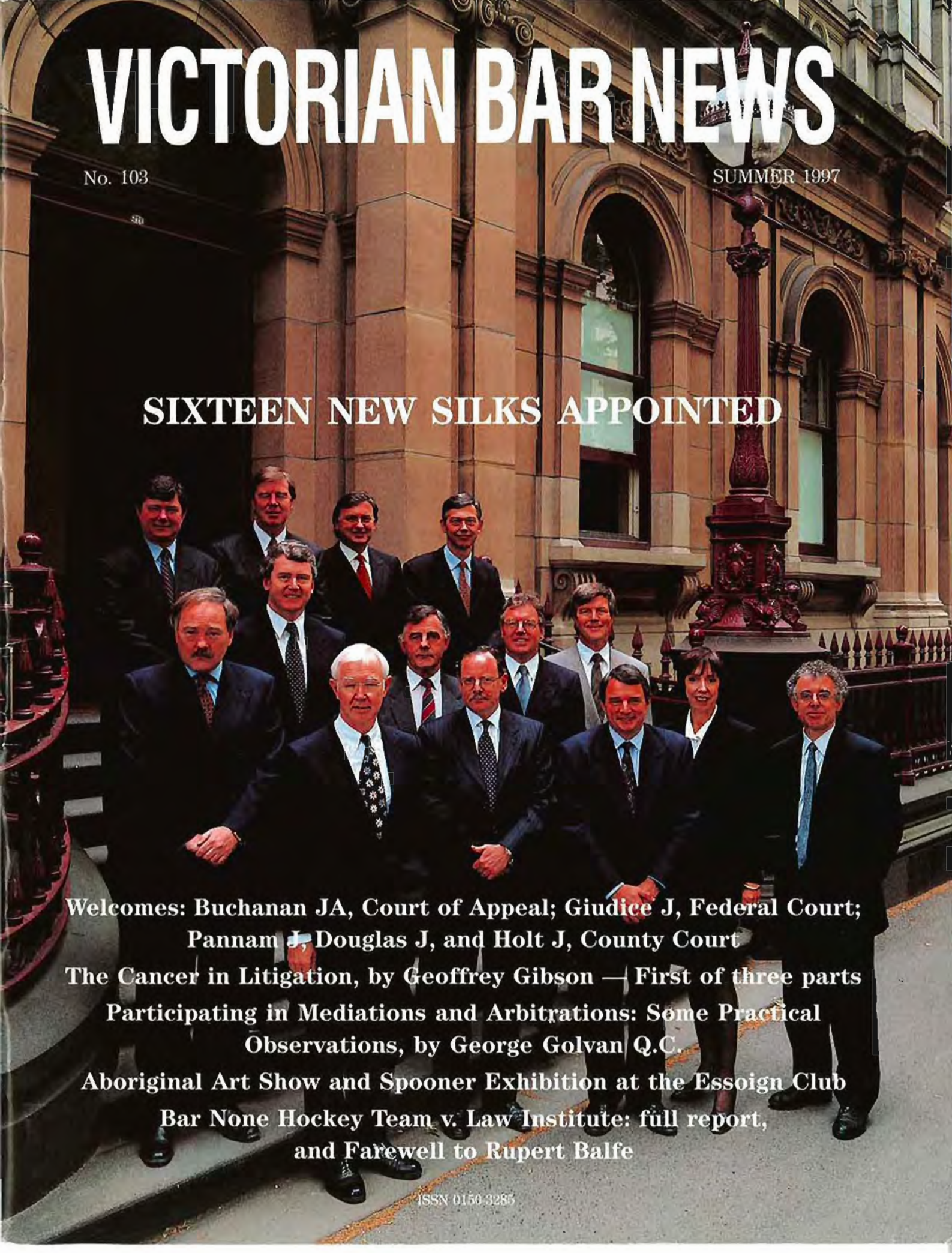
VICTORIAN BAR NEWS

No. 103 SUMMER 1997

SIXTEEN NEW SILKS APPOINTED



Welcomes: Buchanan JA, Court of Appeal; Giudice J, Federal Court; Pannam J, Douglas J, and Holt J, County Court

The Cancer in Litigation, by Geoffrey Gibson — First of three parts

Participating in Mediations and Arbitrations: Some Practical Observations, by George Golvan Q.C.

Aboriginal Art Show and Spooner Exhibition at the Essoign Club

Bar None Hockey Team v. Law Institute: full report, and Farewell to Rupert Balfe

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VICTORIAN BAR NEWS

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Cover:
The 1997 New Silks assembled at the Supreme Court's Banco Court steps for our group cover photograph. See full details on pages 35 to 37.

Welcome Justice Buchanan

Welcome Justice Giudice

Welcome Judge Pannam

Welcome Judge Douglas

Welcome Judge Holt

Farewell Justice Hase

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for the year 1997/98
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Death of the Common Law?

MONOPOLIES AND THE LEGAL PROFESSION

WE have canvassed in these pages on a number of occasions the obsession of governments with the philosophy of competition. We of the legal profession are told that we should not have any rules – or should have as few rules as possible – because rules are inconsistent with competition. Does the same principal apply to the Victorian Workcover Authority or to Victorian Legal Aid, which appear to have a virtual monopoly in the provision of defendants work in the areas of workcover and criminal law?

Competition is good for the Bar. Essential services such as gas, electricity and water supply are being privatised in the interests of "competition" and "efficiency".

If it is appropriate to privatise the provisions of basic services, and desirable to replace the old monopolies with a number of "competing" entities because competition is a "good thing", why is it appropriate to have monopolies (or virtual monopolies) such as the Transport Accident Commission, the Workcover Authority or Victoria Legal Aid? This question becomes highly pertinent when the workcover Authority and Legal Aid are seen as using their monopoly power to undercut market rates. In the State of Victoria and throughout the Commonwealth of Australia in 1977 we have been indoctrinated with the idea that monopoly is not a "good thing". Presumably, abuse of monopoly power is even less a "good thing".

In the case of Victoria Legal Aid the problem is deeper. Legal Aid has proposed terms of employment that are inconsistent with performance by the legal representatives of an accused of their common law duty to their clients. This use of monopoly power cannot be justified otherwise than on the basis that the common law rights of the individual are irrelevant to the efficient functioning of the State.

WILL THE COMMON LAW LAST 1000 YEARS?

Nearly a millennium ago the Normans won the Battle of Hastings. They rapidly took control of the whole of England and became the primary landholders, the lawgivers and the law-enforcers. They found already in existence three main bodies of "common law", Mercian law, Dane law and West Saxon law. The Normans added to this "an admixture of Norman laws and customs, and some fragments of the Canon and Roman Law". Under Henry I and Henry II the beginnings of the centralised judicial system substituted one common law for "that confused mass of local customs of which the law of England had formerly consisted".

It is interesting to note that no legislation was passed abolishing Saxon title to land. William The Conqueror and his offsiders found that force was more effective than legislation. We are not, however, concerned to embark upon a noble crusade in support of "Land Rights for Saxons". Rather we are concerned here to look at the contrast between the common law, "the law of the community", and law imposed from above.

The Norman Kings passed relatively little legislation. When King John in 1215 agreed to abide by the law, he was not agreeing to abide by such law as he should promulgate but to abide by the law of the land, to which he was subject. Despite its baronial source Magna Carta has throughout the centuries been seen as a symbol of the freedom of the individual under the law and as a statement that the executive is subject to the law.

LEGISLATORS AND BUREAUCRATS AS LAWGIVERS

In the late 20th century, however, freedom of the individual at a political, economic or legal level seems to be unacceptable. Almost everything we do is policed by the state. If the controls imposed by the state turn out to leave the individual a degree of freedom which the executive considers inappropriate, a compliant parliament will, in most cases, alter the law at the wish of the executive.

The state is no longer bound by the law of the community; the community is bound by the laws imposed from above. The plethora of legislation has left little of the common law untouched.

Sometimes legislation reflects the will of the community; sometimes it reflects a knee-jerk reaction by particular politicians to an immediate problem or perceived problem. Most legislation is not the subject of deep and considered thought and research, but rather reflects an immediate pragmatic reaction to a problem that was more likely to be political than communal.

Whatever the reason for legislation, however, and whatever the merits of particular legislation, it is clear that the sheer quantity of legislation creates work for lawyers, adds to the costs of business, encourages the destruction of forests and is gradually eroding the common law rights of the individual.

It is half a century since Lord Hewart entitled his book on the subject of delegated legislation *The New Despotism*. One wonders what he would have thought if he had read in *The Age* of Saturday 22 November 1997 an article dealing with the

hours during which lawnmowers, vacuum cleaners, air conditioners and the like may be used. The criteria to be applied are not criteria laid down by the community or by Parliament; they do not even stem from an all-powerful executive but are imposed pursuant to regulatory criteria determined by the Environmental Protection Authority.

The erosion of the common law has been highlighted recently in the debate over workcare payments and common law claims.

WORKERS' COMMON LAW RIGHTS

In Bismark's Germany legislation was introduced to protect workers by entitling them to compensation for injuries suffered in the course of employment even when there was no fault on the part of the employer. This legislation was adopted in somewhat different form in England in 1897 and in Victoria in 1914.

The *Worker's Compensation Act 1914* in Victoria had the effect of entitling workers to compensation irrespective of the doctrines of common employment, volenti non fit iniuria, and contributory negligence. As Lord James of Hereford put it in *Johnson* v. *Marshall, Sons & Co.* [1906] AC 409 and 412:

> The intention was to make 'the business' bear the burden of the accidents that arose in the course of the employment, and relief from this liability is not found even if the injured workman be guilty of negligence . . .

Lord MacNaghten in *Fenton's* case [1903] AC at 447 said:

> Parliament is making a new departure in the interest of labour.

The legislation was introduced to increase the rights of workers, to ameliorate their position. It was intended to increase the rights of the worker not to limit those rights. The legislative compensation provided by the scheme was intended, and has always been seen, as an addition the common law right to sue in tort. The current legislation being debated in Parliament in December 1997 says that compensation should not be seen as an extension of the common law right but should be substituted for it. The common law right is too expensive. It costs insurance companies too much money. Therefore it should cease to exist.

The legislature proposes that the compensation that a worker should obtain for work-related injury should be limited to payment by reference to a scale, irrespective of the actual loss suffered, and irrespective of whether the injury was caused by blatant reckless disregard for the worker's safety.

The policy of limiting the compensation that should be paid as a result of negligence or worse on the part of a wrong-doer is, strangely, limited to the two areas in which physical injury is most common, namely the areas of employment and motor traffic accident. The negligent or careless driver should not bear the burden of his or her wrong-doing. The negligent or careless employer should not bear that burden.

One must ask why enterprise liability should be limited in this way. Such a question is highly relevant when other negligent acts causing physical injury are not the subject of such a restriction. More significant is the fact that enterprise liability is not limited in any such way when an architect or publisher negligently breaches copyright or a manufacturer produces goods which, unknown to him or her, infringe Section 52 of the *Trade Practices Act*.

Perhaps it is more important to protect the community against economic loss than against physical injury? Perhaps a stolen idea is more valuable than a lost arm? Perhaps economic wrong-doing is more wrongful than the infliction of personal injury? Are rights of property really more important than the individual?

FORFEITURE OF PROPERTY

One can understand the "moral need" to ensure that "good triumphs" and "evil suffers". One can appreciate the need and desirability for forfeiture of assets derived from crime.

But the Attorney General's column in this issue espouses new legislation under which *if the Director of Public Prosecutions or the director of the new "Assets Confiscation Office" can prove on the balance of probabilities that a person charged with trafficking in or cultivating commercial quantities of illicit drugs has committed the offence of which he or she is charged, that person's property may be forfeited.*

To avoid forfeiture, the person who has been charged (and who, be it noted, may never be convicted) must prove that the property was lawfully acquired and was not used in or derived from unlawful activity.

THE RIGHT TO LEGAL REPRESENTATION

A person charged with an offence and in respect of whose property a restraining order has been made will no longer be allowed access to restrained property to meet his or her legal expenses. If he or she has insufficient unrestrained assets or income to pay for legal expenses the Court may order that he or she receives legal assistance. The Attorney states — and this has to be seen in light of the attitude of Victoria Legal Aid to the provision of proper and adequate legal assistance:

> "This ensures that they will be properly represented and will not be deprived of a fair trial. Victoria Legal Aid will be provided with the charge over the restrained property and at the end of proceedings will be able to recover its costs."

We commend to the attention of the Victorian Parliament and of individual members the provisions of Clauses 20 and 39 of Magna Carta. We also commend to the attention of the executive the reference to the fate of James II made by Brennan J. (as he then was) in the *Asis* case (156 CLR at 580).

WELCOME 1984

We therefore have a situation in Victoria today under which:

1. the common law right to sue in tort in respect of personal injuries is greatly restricted and in some areas removed;
2. the Crown may forfeit the property of a person on the ground that it is the proceeds of crime, without ever proving beyond reasonable doubt that that person has committed any crime;
3. a person charged with trafficking in or cultivating commercial quantities of illicit drugs may be deprived of the opportunity to mount a private defence and left to the mercy of legal aid.

It seems that the only thing George Orwell had wrong was the year.

In England the common law is being swallowed by the European Court of Justice and the directives issuing from the European Union. In Victoria outside influences do not seem to be needed. This State can strangle its own common law.

We did not think we would ever find ourselves saying "Thank God for the United States. There they still have some understanding of the common law." They actually read Blackstone!

The American offspring from the English common law may not be identical with its parent or with the Australian child. But they, at least, do not propose to kill their child.

The Editors

A Busy and Testing Time

COMMON LAW RIGHTS

SINCE the last edition of *Bar News*, the Bar as a whole, and the Bar Council, have endured a busy and testing time. The first major task which faced the newly elected Bar Council last month was to address the State Government's proposal to abolish common law rights for injured workers. In the Bar Council's view, the proposed changes are harsh, unjustified and ill-conceived. The Bar Council believes that the overall effect of the proposed changes will be to reduce benefits to workers, and increase the long-term costs of the scheme. Submissions by the Bar Council, the Law Institute and self-insurers to this effect have been dismissed out of hand. Yet neither the Government, nor the WorkCover Authority, has produced hard statistical evidence that justifies the changes or backs up their assertions about the cost of common law claims.

It is also regrettable that the Minister responsible for the changes, Mr Hallam, refused to consult with the Bar Council. Indeed, in the month leading up to the introduction of the Bill into Parliament, Mr Hallam simply failed to answer correspondence from the Bar Council and refused all requests for a meeting. The Common Law Bar Association has been actively involved in fighting anticipated amendments since June this year, and received financial support from the Bar Council towards their campaign. In media releases, submissions, and in correspondence with Government and WorkCover representatives, the Bar Council has argued that if common law payouts have increased this year, it is only because the courts, through their own efforts and assisted by the profession, have been reducing the backlog of cases by processing and settling more claims.

The Bar Council is currently undertaking further analysis of the Bill, and will continue to present appropriate submissions to the Attorney-General and the Finance Minister. One particular area of concern is the group of amendments that govern the run of common law cases. Submissions have been put to government to the effect that the new provisions dealing with statutory offers are harsh and oppressive in several respects: first, s.135A(13A) would force a worker to pay his own costs

even if he recovers significantly more than the Authority's statutory offer to him; and secondly, sub-section (13B) would reduce the applicable scale of costs by 10 per cent.

Concern about these proposed amendments has been compounded by recent decisions apparently taken by the WorkCover Authority. It has already been made known to the Bar that the WorkCover Authority is prepared to offer workers' compensation practitioners fees both at a lesser scale than in fact applies, and then at only 80 per cent of that scale. The Common Law Bar Association has resolved that the court scales reflect what courts, the government and the profession on the whole would consider to be a minimum appropriate level of fees. The Bar Council has written both to the Finance Minister and to the WorkCover Authority to protest against this unreasonable policy. To date the Bar has received no response. The Chief Executive of the WorkCover Authority has refused to meet with the Chairman to discuss these matters. As a result, the Bar Council has made submissions to the Attorney-General seeking her intervention to ensure that the WorkCover Authority adheres to applicable court scales.

LEGAL AID

The Bar Council is continuing its long-running dialogue with the Board of Victoria Legal Aid (VLA) concerning VLA's unreasonable fee structures and briefing arrangements. These structures and arrangements continue to erode the principle of access to justice, and continue to unfairly compromise the livelihood of many members of the Bar.

The Bar Council awaits the considered response of VLA as to the comprehensive review of barristers' fee scales presented to the Bar by accountants Price Waterhouse Urwick. The Council has rejected VLA's current proposals for "limited practitioner panels", which would, if effected, have empanelled barristers working as de facto employees of VLA. The Bar Council has made constructive suggestions to VLA for a more inclusive and competitive system for channelling work to competent barristers, to which VLA has not yet responded. The Bar Council is also pleased to see that VLA has apparently resiled from its earlier policy of not paying counsel's preparation fees where a trial did not proceed for reasons outside counsel's control.

The Bar Council is preparing a supplementary submission to the Senate Legal Aid Inquiry, and has offered its support to the Criminal Bar Association in their ongoing negotiations with VLA, including the provision of Bar Council office space to serve as a Criminal Bar Association legal aid campaign secretariat. It is also worth noting that VLA's 1996/1997 annual report discloses a $3M annual profit, and shows that in the last financial year VLA received no reduction in Commonwealth funding.

CRIMINAL LAW REFORM IN VICTORIA

Other State Government initiatives that may have great impact upon criminal law in Victoria are the Confiscation Bill and the parliamentary review of the right to silence which was recently announced by the Attorney-General. The Bar Council is concerned about the potential impact of these proposed changes on civil liberties in Victoria, and will monitor both developments closely. The Bar Council has indicated to the Attorney-General that it is preparing submissions in relation to both matters.

AUDITOR-GENERAL

In recent months the Bar Council has publicly opposed legislative changes to the

powers of the office of the Auditor-General. The legislation will remove the Auditor-General's power to conduct audits, and envisages the removal of the Auditor-General's staff to Audit Victoria. Audit Victoria will be a body that will compete with private firms for public sector audits. If the changes go ahead, Audit Victoria will be under Government control. Like the courts, the DPP, the Ombudsman, the legal profession and the police, the Auditor-General must be responsible to the community and independent of government. The Bar Council considers that the proposed changes are damaging to Victoria's constitutional framework.

FOI REVIEW

The Bar Council has noted recent reports in the press that indicate that the Government is considering abolishing the right to seek review of Freedom of Information decisions in the State Administrative Appeals Tribunal, and replacing it with the ability to make complaints to an Ombudsman. In the view of the Bar Council, this would also be a retrograde step, and would reduce the transparency of government decision-making. In anticipation of an FOI Act review, the Bar Council has lodged with the Attorney-General a detailed submission setting out the Bar's concerns in this area. The Bar Council is grateful to Susan Cohen and Mark Derham Q.C. for their assistance in preparing the Bar's submission.

ALRC'S ADVERSARIAL SYSTEM REFERENCE

Last month, members of the Bar met with representatives of the Australian Law Reform Commission. The ALRC is in the process of consulting various legal professional organisations in relation to their reference into the adversarial system. Earlier this year the Bar lodged a detailed submission with the ALRC in response to their Issues Paper 20, "Review of the adversarial system of litigation: rethinking the federal civil litigations system".

In November the Bar hosted a series of meetings in the course of two days, covering the following topics which arise from the Issues Paper: federal civil litigation; alternative dispute resolution; case management; interlocutory issues; the tribunal system; information technology; and readership and education. The President of the Commission, Mr Alan Rose, was present for part of the introductory meeting with the Chairman of the Bar Council, Neil Young Q.C., and Mark Derham Q.C. Commissioner Dr Kathryn Cronin and Dr Tanya Sourden attended all meetings. The Bar Council is grateful for the assistance of all those members of the Bar who assisted with the meetings, including Julian Burnside Q.C., Robin Brett Q.C., Felicity Hampel Q.C., Tony Cavanough Q.C., Ross Gillies Q.C., Peter Murdoch Q.C., Bill Martin Q.C., John Karkar Q.C., Bruce Caine, Melanie Sloss, Peter Hanks, David Levin and David Forbes.

The Bar Council will make further submissions to the ALRC in relation to Issues Paper 22, "Rethinking family law proceedings", through the Law Council of Australia, and will closely follow the course of the ALRC's adversarial system reference in the coming months.

FINANCE

One internal matter currently occupying the Bar Council is the development of a long-term financial plan for the Bar Council and Barristers' Chambers Limited. One objective of the plain is to ensure that BCL has the funds necessary to provide quality accommodation and facilities for its barrister tenants. The preparation of the plan will involve a review of all forms of income and expenditure, and thus involves consideration of issues such as membership subscription levels, rent levels, and the retirement of debt. In the view of the Bar Council, it is important that sensible long-term commercial planning be applied to the finances of BCL and the Bar. The interests of BCL and the Bar as a whole are closely bound together. BCL is owned and controlled by the Victorian Bar, and it is the vehicle through which the Bar provides essential facilities, including accommodation and telecommunications, to members of the Bar.

The Bar Council is pleased to report that the refurbishment of Four Courts Chambers and its re-establishment as Douglas Menzies Chambers has proved to be an unqualified success. BCL expects that Douglas Menzies Chambers will be fully tenanted by January/February 1998. Members of the Bar should note that an opening ceremony for Douglas Menzies Chambers is planned for 5 p.m. on 3 February 1998. Members of the Bar should note also that BCL has obtained for its members an insurance cover placement facility at extremely competitive rates.

LIBRARY

Bar Council plans to renovate the 13th floor of Owen Dixon Chambers East and to expand the Bar library are at last reaching a conclusion. A final plan has been determined and is being detailed and costed by our architects. The plan involves expanding library shelving, and converting the existing library annex into a multi-purpose room that will provide library accommodation and services, meeting room facilities for small groups, and a reception area for Essoign Club functions. We anticipate that the work will commence early next year.

CONTINUING LEGAL EDUCATION

Recently the Bar Council resolved that the existing Readers' Practice Course Committee and the Academic and Continuing Legal Education Steering Committee should be disbanded and a new standing committee, entitled the "Legal Education Committee", should be established. In doing so, the Bar Council's aim is to continue to offer a Readers' Course of the highest standard, and at the same time to transform the Bar's currently informal series of continuing legal education seminars into a fully resourced and structured CLE program for barristers. It is intended that the Readers' Course will, to some extent, be integrated with subsequent CLE courses.

In relation to CLE, the Legal Education Committee's functions will be as follows:

- to formulate and approve the general structure of a CLE program for barristers;
- to implement a CLE program;
- to maintain familiarity with current requirements regarding admission to practice;
- to cultivate and maintain the Bar's relationship with universities;
- to recommend policy for the Bar on all educational and academic matters.

APPOINTMENTS

Since the last issue of *Bar News*, there have been a number of judicial appointments to State and Federal Courts from the Victorian Bar. The Bar Council commends both State and Federal Governments in selecting experienced trial lawyers for senior judicial positions. The Bar Council congratulates his Honour Justice Geoffrey Giudice on his appointment to the Federal Court of Australia and to the office of President of the Australian Industrial Relations Commission, her Honour Judge Carolyn Douglas on her appointment to the County Court, his Honour Justice Peter Buchanan on his appointment to the Supreme Court of Victoria and the Court of Appeal, and, most recently, his Honour Judge Tim Wood on his appointment to the County Court of Victoria.

Neil Young Q.C.
Chairman

Legislation to Establish New Assets Confiscation Scheme

THIS session of Parliament the Government is enacting legislation to establish a new assets confiscation scheme. The reforms will strengthen the effectiveness of confiscation and provide a more effective means of attacking organised criminal enterprises, centred around drug trafficking and fraud, by focusing on accumulations of wealth over a period of time. I would like to take this opportunity to give members a summary of this legislation.

The Government has been examining the effectiveness of the confiscation scheme over a number of years. In developing this legislation and scheme we have taken into account:

- the Government's commitment to fighting drug trafficking and other serious crimes, such as major fraud;
- developments in other jurisdictions, particularly New South Wales and the Commonwealth;
- the Report of the Premier's Drug Advisory Council which recommended that confiscation orders be followed up more effectively and also recognised the need for measures targeted at reducing the levels of commercial drug trafficking; a report into the operation and effectiveness of the Act from a committee chaired by Mr. Peter Faris Q.C. and whose membership included both the Commonwealth and Victoria's Directors of Public Prosecution. This Committee identified several administrative difficulties with the current scheme and detailed deficiencies in the Act itself which diminished its effectiveness;
- the *Victims of Crime Assistance Act 1996* which introduced provisions enabling victims to recover restitution orders for pain and suffering against an offender. The Asset Confiscation Scheme complements these reforms by allowing the court to freeze property belonging to an offender so that the property can be used to satisfy a restitution or compensation order awarded to a victim.

ASSETS CONFISCATION OFFICE

A new Assets Confiscation Office (ACO) has been established under this scheme and it will commence operation on 1 January 1998.

The ACO will be responsible for coordinating key areas of the confiscation process and will manage restrained assets. The ACO will also play a central role in ensuring that orders for the forfeiture of property or the payment of Pecuniary Penalty Orders are enforced.

There are two new forfeiture systems established under the legislation. The first relates to automatic forfeiture.

AUTOMATIC FORFEITURE

The new provisions allow for the automatic forfeiture of assets and seek to target long-term accumulations of wealth in certain circumstances.

Under the current Act assets may only be confiscated if the State can prove that the property is the proceeds of the particular crime, or has been used in the crime or that a crime has been committed from which a benefit of some sort has been derived. The existing legislation does not deal with accumulations of wealth derived from long-term criminal activity.

Under the Bill, the restrained property of persons convicted of certain serious offences such as trafficking in or cultivating commercial quantities of illicit drugs, serious fraud offences involving more than $100,000 and money laundering involving more than $100,000 is deemed to be unlawfully acquired unless the person can prove otherwise.

If a person is charged with these offences, the Director of Public Prosecutions (DPP) can apply for a restraining order, which will result in the automatic forfeiture of assets two months after conviction unless the defendant is able to prove that all or part of the property was lawfully acquired.

CIVIL FORFEITURE

The other new forfeiture system is civil forfeiture. The Bill establishes a harsher confiscation regime to apply to persons charged with trafficking in or cultivating commercial quantities of illicit drugs. These reforms follow on from similar amendments in other jurisdictions such as New South Wales.

Under the procedure, the DPP or the Director of the ACO may apply for a restraining order over all or part of the person's property. Within a specified time, an application for civil forfeiture must then be made. The prosecution must prove on the balance of probabilities that the person committed the offence charged and that the property sought is property that belongs to them. Prior to any property being forfeited, the person will have the opportunity to prove on the balance of probabilities that the property was lawfully acquired and was not used in or derived from unlawful activity. If successful in this, then the property will not be confiscated.

The Bill contains safeguards to ensure that this procedure is utilised in appropriate cases. Only the DPP and the ACO are empowered to apply for civil forfeiture, and application must be made to the Supreme Court.

LEGAL EXPENSES

The Act currently provides that a person whose property has been restrained may apply to the Supreme Court for permission to access restrained property to pay for their reasonable legal expenses. It allows restrained property to be dissipated through legal expenses.

There have been a number of cases where claims for legal expenses have resulted in protracted disputes in the courts. For example, in a Queensland case known as "Operation Tableau" 12 defendants to drug charges used restrained assets for legal representation. $1.2 million was spent on legal fees during the committal and the

assets were all but exhausted. Ultimately, all defendants pleaded guilty to the charges.

Under the changes, defendants will no longer be allowed to access restrained property for legal expenses. However, if a person has insufficient unrestrained assets or income to pay for legal expenses, the court may order that they receive legal assistance. This ensures that they will be properly represented and will not be deprived of a fair trial. Victoria Legal Aid will be provided with a charge over the restrained property and at the end of proceedings will be able to recover its costs.

INCREASED SENTENCES

The Bill also amends the *Sentencing Act* to provide for increased sentences for a continuing criminal enterprise offender. Where a person is convicted of three offences within ten years and the amount involved in each offence is more than $50,000, the person will be liable to a maximum penalty of double the maximum penalty which applies to that offence or up to 25 years imprisonment. The relevant offences are theft, robbery, armed robbery, obtaining property by deception, obtaining a financial advantage by deception, conspiracy to defraud, false accounting, handling stolen goods and destroying or damaging property.

The automatic forfeiture provisions of the Bill will also apply to an offender sentenced as a continuing criminal enterprise offender.

RESTITUTION FOR VICTIMS

Currently the Act does not enable property to be restrained for the purpose of restitution to victims of crime. Under the Bill, the applicant for a restraining order will be empowered to apply for the order for the purpose of ultimate restitution for the victims of crime, complementing reforms introduced in the *Victims of Crime Assistance Act 1996*. If a victim obtains an award for damages from the defendant, property forfeited to the State may be used to ensure that the victim is compensated as fully as possible. This procedure enhances the range of effective restitution mechanisms for victims of crime and will prevent offenders dissipating or destroying their property to avoid having to satisfy such an order.

JURISDICTION

Currently, the Act provides that only the Supreme Court can hear and determine applications for restraining orders. This Bill amends those provisions to enable all courts to hear applications for restraining orders. As many forfeiture applications concern property that is not of substantial value, it is appropriate to extend this power to the Magistrates' Court to promote efficiency and cost-effective use of resources. The Magistrates' Court jurisdiction is limited to the amount of its civil jurisdiction.

I recognise that these amendments are tough. However, given the serious consequences of these types of crimes in our community, the response of the Government is appropriate and timely.

Jan Wade M.P.
Attorney-General

The Victorian Bar Inc.

LEGAL PROFESSION TRIBUNAL — PUBLICATION OF ORDERS

UNDER section 166 of the *Legal Practice Act 1996*, the Victorian Bar Inc., as a Recognised Professional Association, is required to provide the following information in relation to orders made by the Legal Profession Tribunal ("the Tribunal") against one of its regulated practitioners, Basil Lloyd Stafford.

(a) Name of practitioner: Basil Lloyd Stafford ("the legal practitioner")

(b) Tribunal Findings and the Nature of the Offence

(i) that the legal practitioner was guilty of misconduct as defined by paragraph (a)(i) of the definition of misconduct in section 137 of the *Legal Practice Act* 1996, in that he wilfully contravened section 149(1)(a) of that Act by failing to comply with a requirement of the Legal Ombudsman made on 2 April 1997 ("the first finding"); and

(ii) that the legal practitioner was guilty of a disciplinary offence as defined in paragraphs (a) and (c) of section 14B of the *Legal Profession Practice Act* 1958 in that on 23 April 1996 he conducted himself in the manner set out in paragraphs 13 and 15 of the charges annexed to the notice of hearing dated 23 September 1997 ("the second finding"); namely that

(A) when he appeared as counsel at the Magistrates' Court at Preston on 23 April 1996 and during the course of the evidence of the informant he made audible comments at the Bar Table of the Court directed to the prosecutor saying "This is fucking outrageous" and "This is a fucking disgrace"; and

(B) at the conclusion of the hearing and after the court was adjourned he said to the informant, Hudson, in a threatening and provocative manner, "You're a fucking disgrace. I'll fix you up. I'll fix you at appeal."

(c) The orders of the Tribunal were as follows:

(i) In respect of the first finding, the legal practitioner is to pay to the Legal Practice Board by 20 December 1997 a fine of $600.00.

(ii) In respect of the second finding, the legal practitioner is to pay to the Legal Practice Board by 20 December 1997 a fine of $1000.00.

(iii) The legal practitioner is to pay to the Legal Ombudsman by 20 November 1997 her costs of these proceedings fixed at $4237.20.

(d) As at the date of publication no notice of appeal against the orders of the Tribunal has been lodged. The time for service of such notice having expired.

PRACTICE RULES — RULES OF CONDUCT

Regulated practitioners of the Victorian Bar had previously been advised that new Rules of Conduct were to be introduced with effect from 19 November 1997. The Bar Council submitted copies of the proposed new Rules to the Legal Practice Board and Legal Ombudsman for comment. Unfortunately this process has taken longer than had been anticipated and therefore the proposed date for implementation of the new Rules has been deferred until 2 February 1998.

At least 21 days prior to the new Rules becoming effective practitioners will be given a summary of the significant changes and provided with a copy of the new rules.

Preparation Fees — VLA's Change of Policy

MEMBERS of the Bar should be aware that, between September and November this year, Victoria Legal Aid has altered its policy in relation to the payment of counsel's preparation fees.

In a letter of 19 September 1997, the Managing Director of VLA, Mr Robert Cornall, notified the Bar that VLA's policy in respect of preparation fees was that preparation fees are agreed on the basis that the barrister appears for the accused person at the trial. Under that policy, if the barrister failed to appear due to other commitments or any other reason, then preparation fees would not be payable.

The Chairman of the Bar Council, Neil Young Q.C., responded to Mr Cornall's letter by pointing out that the policy was harsh, unfair and unjust. The policy did not describe what was to occur if the preparation work is done, the barrister appears at the trial, but the trial does not proceed for other reasons, such as the fact that the accused absconds.

On 13 November 1997, the Chairman received a letter from Mr Cornall in these terms:

"On reviewing earlier correspondence, I see I may not have fully answered your enquiry concerning the payment of preparation fees where the defendant absconds.

If the defendant is not found or the barrister is unable to represent the defendant at the final hearing (due to clashing commitments), VLA would pay the preparation fee for the preparation undertaken but in effect thrown away as a result of the need to change counsel or not utilise the preparation if the trial does not proceed at all".

Where there's a Will . . .

IN November 1997 a new *Wills Act 1997* was passed by Parliament. Widely expected to be proclaimed early in the New Year, the Bill is a complete rewrite of the law of Wills as we presently know it. (The Act received the Royal Assent on about 27 November 1997.)

For anyone who wants to know more, of course, the new Butterworths Loose Leaf — *Wills Probate and the Administration of Estates in Victoria* will contain, as from January 1998, an annotated *Wills Act 1997*.

The new Act effects change in a number of areas:

1 Section 91 of the *Administration and Probate Act* is being amended to broaden the scope of Part IV proceedings beyond what any of us imagined.
2 An "informal wills" regime is being introduced, whereby the Court has power to disregard the formalities of will making and admit to probate various informal documents.
3 The "interested witness" provisions are removed.
4 A "statutory wills" regime is being introduced so that a Court has the power to make wills for minors and people otherwise unable to make wills.

It also makes many other changes — part of the rule against the delegation of testamentary power is abrogated, the "soldier's wills" regime is removed, requires that beneficiaries survive for thirty days else the gift is deemed to lapse (subject to contrary intention) and deems certain gifts to unincorporated associations to be gifts to the funds of the association rather than to the members.

Some of the provisions of the new Act will apply to wills made after the commencement of the new Act, and some will apply to wills made at any time, so long as the deceased died after the commencement of the new Act. The Act should be checked carefully to work out which starting date applies to your particular brief.

FAMILY PROVISION

Section 91 of the *Administration and Probate Act* is being rewritten completely to remove the existing categories of claimants, opening up applications to "any person" with "a family or other relationship" with the deceased. This is going to broaden the scope of such claims enormously. The Act will theoretically allow claims by de facto spouses, same-sex couples, step-children, foster children and so on. The new section does not require any 'dependency' and is arguably even broader than the New South Wales section, which has allowed claims by non-family members, such as housekeepers.

However, the court must still ask the same questions as to contribution by the claimant, moral claim and need as the court presently asks.

The new section gives the court a broad discretion on costs, including the power to award costs against claimants for "vexatious" claims.

There has been some talk to the effect that Parliament will monitor the use of section 91. If the Parliament forms the view that the "floodgates" have opened too wide, it may amend the legislation to reintroduce more limited categories of claimant.

The new provisions apply to any applications made after the commencement of the new Act.

INFORMAL WILLS

The new Act will empower the Court to allow "informal wills" to probate. Whilst the basic formalities that now exist are preserved by section 7, section 9 allows the court to dispense with those requirements for execution. A similar regime in New South Wales has admitted to probate such documents as letters of instruction to solicitors and casual handwritten documents bearing only the testator's signature. (In South Australia, a wall has been admitted to probate!) Needless to say, the scope for such applications is very large indeed.

The NSW Courts have admitted informal documents to probate if satisfied that there is (i) a document (ii) which embodies the testamentary intentions of the deceased (iii) and which the deceased intended to be a will, (rather than some general statement of testamentary intention) (see *In the estate of Masters (1994) NSWLR446; Application of Brown (1991) 23 NSWLR 535*.)

RECTIFICATION

The new section 31 of the Act also allows a court to rectify wills, if the will "does not carry out the intention of the testator because a clerical error was made or the will does not give effect to a testator's instructions".

Presently, courts construe the meaning and intention of a will according to the words on its face. That is done without recourse to statements by the testator as to his or her intentions. This regime is now reversed in certain cases and applications will be made to rewrite wills according to what the family or the lawyers believe was "really" the testator's intention. It is yet to be seen whether the court will do any more than the removal of otiose words by "blue pencilling" as may occur now. The Court will only act if there is clear cogent and unequivocal evidence of the testator's intentions and the fact the will fails to carry them out. Where a testator did not turn their mind to the point, or where the will (or instructions) are equivocal, the court will not intervene. Whilst the section will be of benefit where there has been some error, it certainly opens up additional scope for disputes about the "true" meaning of a will.

INTERESTED WITNESSES

This will be a widely welcomed change, (after the decision in *Hill* v. *Van Erp (1997) 142 ALR 687*).

The previous regime, whereby witnesses (and their spouses) obtained limited benefits under wills, is repealed. Persons are now not prevented from obtaining benefits simply by reason of the fact they were witnesses. An "interested witness" now has exactly the same status as any other witness.

STATUTORY WILLS

This will be a very interesting regime indeed. The width of the court's powers is quite surprising, given that even the Guardianship and Administration Board has no power to make wills on behalf of an incapable person.

The Court is now authorised to make wills for minors and for persons lacking in testamentary capacity. Other jurisdictions (for example, England) recognise that it is appropriate for minors to make wills in certain circumstances (for example, marriage or parenthood at a young age), and it may be that similar fact situations will attract the regime in Australia.

In order to grant leave, the Court must be satisfied that:

- the putative testator does not have testamentary capacity;
- the proposed will accurately reflects the

likely intentions of the person, if he or she had capacity;
- it is reasonable in all the circumstances to authorise the making of the will.

On the hearing of the application for leave, the court is not bound by the rules of evidence and may inform itself in any manner it sees fit, but may specifically require the information set out in section 28. This includes a written statement of the nature of the application and the reasons for making it, a reasonable estimate of the size of the estate, a draft of the proposed will, evidence of the wishes of the testator (including the terms of any previous will of the person), any evidence of the likelihood of the "testator" regaining capacity, evidence of the likelihood of any application for further provision, evidence of the circumstances of the putative "beneficiaries" of the will, evidence of the person entitled to claim on intestacy and evidence of any charitable gifts that might be expected to be made.

The Court's power in the event of the lack of testamentary capacity is an extraordinary one. The question of simply determining the wishes of a person without capacity will be difficult, and, as with may applications before the Guardianship and Administration Board, will be the heart of violent family disagreement. The second reading speech contemplates limited circumstances, but human nature being what it is, applications are unlikely to be limited to those circumstances.

CONCLUSION

The new *Wills Act* dramatically alters the law in Victoria. Everyone who works in this area should be making themselves familiar with the new Act. Of course, the best thing members of counsel can do to bring themselves up to date on the new *Wills Act*, is to subscribe to the new Butterworths service, and receive an annotated copy of the Act in the New Year.

Carolyn Sparke

Law Reform References

TERMS OF REFERENCE FOR REVIEW OF THE *FENCES ACT 1968*

Under the powers found in Section 4F (1) (a) (ii) and Section 4F (3) of the *Parliamentary Committees Act 1968* the Governor in Council refers the following matters to the Law Reform Committee:

(a) The Committee is requested to review the Victorian *Fences Act 1968* ("the Act") and in particular to consider:
   - whether the Act meets the objectives of planning schemes in Victoria as defined in Section 4 (1) of the *Planning and Environment Act 1987*, especially having regard to the need to encourage the development of well-designed medium-density housing;
   - whether the Act otherwise adequately deals with all situations associated with separating the lands of different occupiers, such as where buildings form a part of a common boundary between properties;
   - whether the Act should be amended to provide a quicker, less expensive and more accessible means of resolving fencing disputes.

(b) The Committee is requested to make its final report to Parliament by the first sitting day of the 1998 Spring parliamentary sittings.

Dated 23 September 1997
Responsible Minister:
Jan Wade
Attorney-General

TERMS OF REFERENCE FOR AN EXAMINATION OF TECHNOLOGY AND THE LAW

Under the powers found in Section 4F (1) (a) (ii) and Section 4F (3) of the *Parliamentary Committees Act 1968* the Governor in Council refers the following matters to the Law Reform Committee:

(a) The Committee is requested to report on the opportunities available in the use of new technologies to streamline the administration of courts and tribunals and to improve access to courts and tribunals by members of the public.

(b) The Committee, in undertaking this review, should have regard to a number of projects which are currently underway in Government Departments and the Courts:
   - the proposed Electronic Commerce Framework Bill;
   - audio and video linking;
   - the Pathfinder Project;
   - the Civil Justice Review Project; and
   - the Data Improvement Project.

(c) The Committee is requested to consider the impact of these reforms in so far as they affect courts and tribunals and to take a wider view of the opportunities that technology could present. In particular, the Committee is requested to examine:
   - access to information about courts, tribunals, judgements, status of cases, etc. via electronic means;
   - the future of videolinking and technologies beyond videolinking;
   - improvements to and application of court reporting services.

(d) The Committee is requested to make its final report to Parliament by the first day of the 1998 Spring parliamentary sittings.

Dated 23 September 1997
Responsible Minister:
Jan Wade
Attorney-General

Silvana Villella
Acting Clerk of the Executive Council

Fees in WorkCover Matters

THE Victorian WorkCover Authority, in November through solicitors advised barristers' clerks of a fee schedule the VWA was prepared to pay barristers in industrial accident cases both at common law and workers' compensation.

The correspondence indicated that circuit fees, conference fees and preparation fees would on no account be paid. Further, a 20 per cent across-the-board reduction on County Court scale fees was also indicated.

The proposed schedule of fees was introduced without consultation with individual barristers, the associations that represent them or the Bar Council. No reason has been proffered by the VWA for the revised fee structure.

At a joint meeting of the Common Law Bar Association and the Workers' Compensation Bar Association held on 20 November, those present resolved that the court scales reflect what courts, the government, and the profession on the whole would consider to be a minimum appropriate level of fees. The Bar Council has written to both the Finance Minister and to the WorkCover Authority to protest against this unreasonable policy. The Bar Council has also made submissions to the Attorney-General seeking her intervention to ensure that the WorkCover Authority adheres to applicable court scales.

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30 October 1997
Dear Practitioner,

OPENING OF THE LEGAL YEAR: MONDAY, 2 FEBRUARY 1998

The Services for the Opening of the Legal Year are as follows:

St Paul's Cathedral
Cnr Swanston and Flinders Streets,
MELBOURNE at 9:30 a.m.

St Patrick's Cathedral
Albert Street,
EAST MELBOURNE at 9.00 a.m.
(Red Mass)

Toorak Synagogue
Toorak Road,
SOUTH MELBOURNE at 9.00 a.m.

There will be no Greek Service because of the clash in the Greek Orthodox calendar.

I hope that many of you will find time to celebrate this event with your colleagues. Family and friends are also most welcome.

Members of the judiciary, Queen's Council and the Bar are invited to robe for the precession in the various robing rooms in a good time for the start of the procession, in which all members of the profession are invited to join. Marshals will be present at the services to indicate the order of the procession.

Yours sincerely,
JOHN HARBOUR PHILLIPS
Chief Justice

Invitation

Opening of the Legal Year Breakfast

St Paul's Cathedral is pleased to invite all practitioners to
The Opening of the 1998 Legal Year Breakfast

to be held at:

The Chapter House
St Paul's Cathedral
199 Flinders Lane, Melbourne
on
Monday, 2 February 1998
at
8.00 a.m.

We hope that you will join us and your colleagues at this breakfast prior to attending your preferred Opening of the Legal Year Service.

Please contact Merryn Lawson on (Phone) 9653 4220 or (Fax) 9653 4268 to purchase your ticket, which will cost $25.00.

Unless otherwise requested, tables will be organised according to practitioners' years of graduation, giving you an opportunity to catch up with friends.

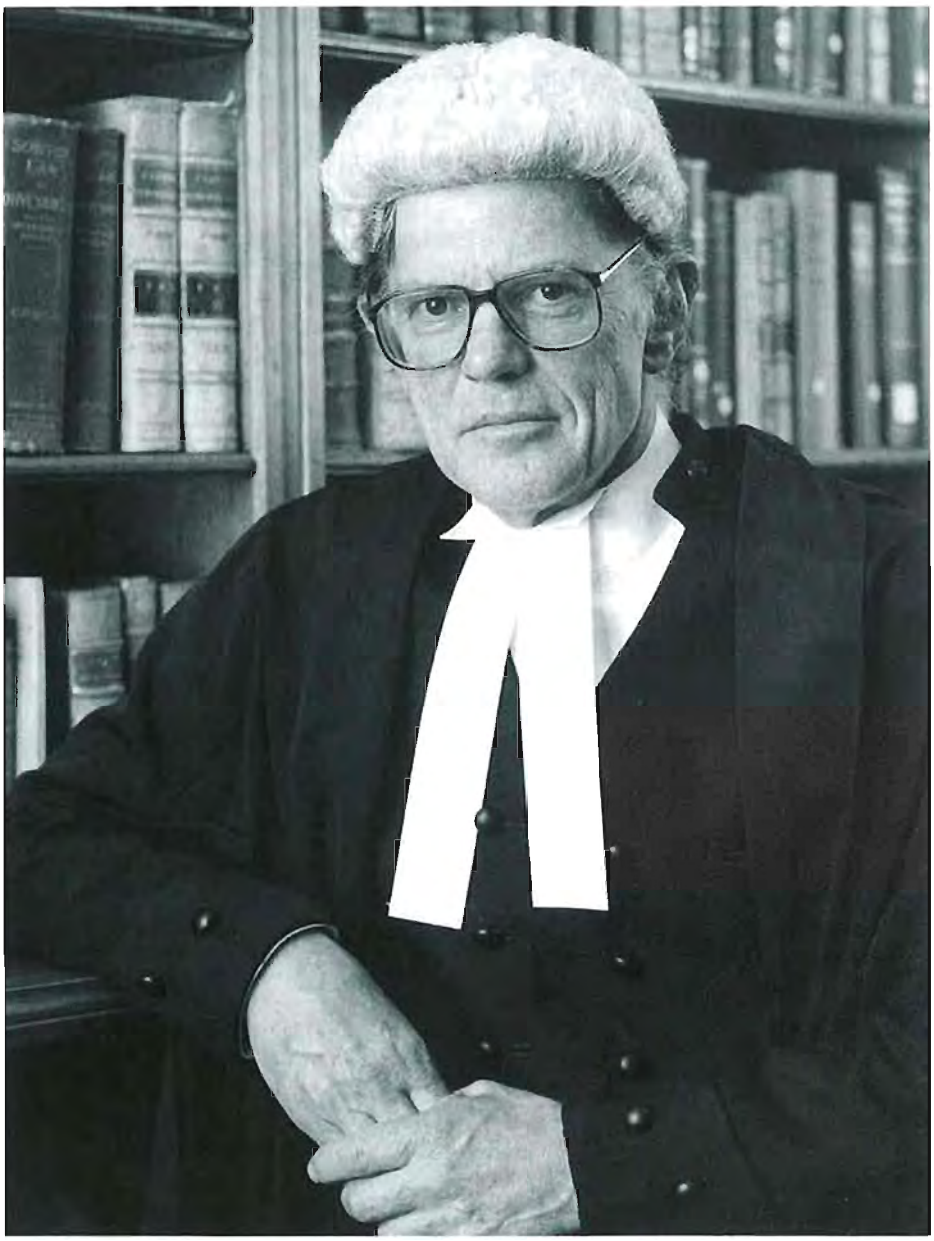
Buchanan JA, Court of Appeal

AS is often the case with exceptional appointments to judicial office, the branch of the profession from whose ranks the appointment is made is left to experience real loss. Recognising its inevitability is no consolation although the appointment may be regarded as a great honour to the profession as well as the appointee. So it is with the recent appointment of Dr Peter Buchanan Q.C. as a Judge of the Court of Appeal of the Supreme Court of Victoria. The Victorian Bar is honoured by the appointment, which confirms and further consolidates the reputation of the Court of Appeal in this State as the pre-eminent State Court of Appeal in the country.

During the period of his Honour's practice at the Victorian Bar he had a reputation for decisive, focused and economical advocacy. His ability to quickly discern the real issue, stripping away that which was otiose or less persuasive, set a benchmark for the profession. Above all, his Honour was a very private person, which explains in part why his welcome by the profession was replete with anecdotes rather than facts. It was and remains difficult to assemble hard evidence of his Honour's professional and private life; it is therefore difficult to separate fact from legend.

His Honour attended Scotch College for the majority of his primary and secondary education. Upon his father's transfer to Canberra to take up the position of Director of Civil Defence, his Honour attended Canberra High School, graduating in 1959. His Honour undertook his undergraduate studies at the Australian National University. He graduated in 1965 with a First Class Honours degree in law and arts. In 1970 his Honour attained the degree of Doctor of Philosophy from University College, London University. The degree was awarded for a thesis on non-charitable purpose trusts and gifts to unincorporated associations. The work was never published, notwithstanding its obvious merit and encouragement from reviewers. His reluctance to publish is consistent with his Honour's self-effacing yet confident approach to his professional and private life.

His Honour was always available to his colleagues, and in particular junior members of the Bar who sought his assistance on a wide range of legal and personal problems. He had a constant stream of "visitors" to his chambers and would never refuse his full attention and a gracious response even when interrupted at the busiest and most difficult stages in a preparation of a case. His quick wit was a constant pleasure to his colleagues and friends. He was never sarcastic. His wit was often employed against himself or to deflect attention from himself. One very apt example was given by Sir Daryl Dawson when opening a new floor of barristers forming part of Aickin Chambers at Level 28, 200 Queen Street. Sir Daryl, reflecting on his life as a barrister, told of an occasion when he was leading his Honour in the High Court. Sir Daryl and his Honour were returning to Court after lunch and about to cross a busy street. Sir Daryl stepped into the roadway into the path of an oncoming car. His Honour, grabbing Sir Daryl by the arm, pulled him to the safety of the foot-



Buchanan JA

path. When he had recovered his composure Sir Daryl thanked his Honour for saving his life. His Honour said, "It wasn't your life I was saving, it was mine — I might have been called on to reply."

His Honour's practice at the Bar can be described as "commercial" although only in the most general way. He signed the Bar Roll in 1970 and very rapidly established a daunting reputation. His Honour undertook many large cases involving complex contract, corporations, trade practices, insolvency and equity law issues. His Honour also practised extensively in the areas of administrative and constitutional law and even undertook some criminal cases. His Honour was appointed one of Her Majesty's counsel for the State of Victoria in 1984. He was also admitted to practice in South Australia, New South Wales and Tasmania although holding the firm view that a knowledge of local practice and the bench was so important that interstate practitioners suffered a great disadvantage.

His Honour had a large number of readers who were, in order, Moran, Singh, Reicher, O'Brien, Brenner, Judd Q.C., Staindl and Gillespie, all of whom can vouch for his Honour's sartorial attire. His Honour possessed a suit purchased, it is thought, when his Honour commenced at the Bar and at about the same time as his Honour also purchased his shirts, shoes and a small can of shoe polish. His Honour's approach to his personal needs was, as in his style of advocacy, economical. It is a reflection of his Honour's high regard for his new office and the occasion of his appointment that he acquired a new suit, shirts and shoes. The polish, we think, comes with the appointment. Nor, we suspect, will fellow judges be as acquainted with the "Ducati" T-shirt and jeans as were his colleagues at the Bar.

His Honour's inclination to accept appointment may have been influenced by the disruption caused to his otherwise orderly professional life by his recent move from the 13th floor of Owen Dixon Chambers West to Aickin Chambers at 200 Queen Street. His Honour occupied his new chambers, with an expansive (and distracting) view of Port Phillip Bay, for only a few months. He will be missed by his colleagues on the 28th floor. Jopling Q.C. will now enjoy his view.

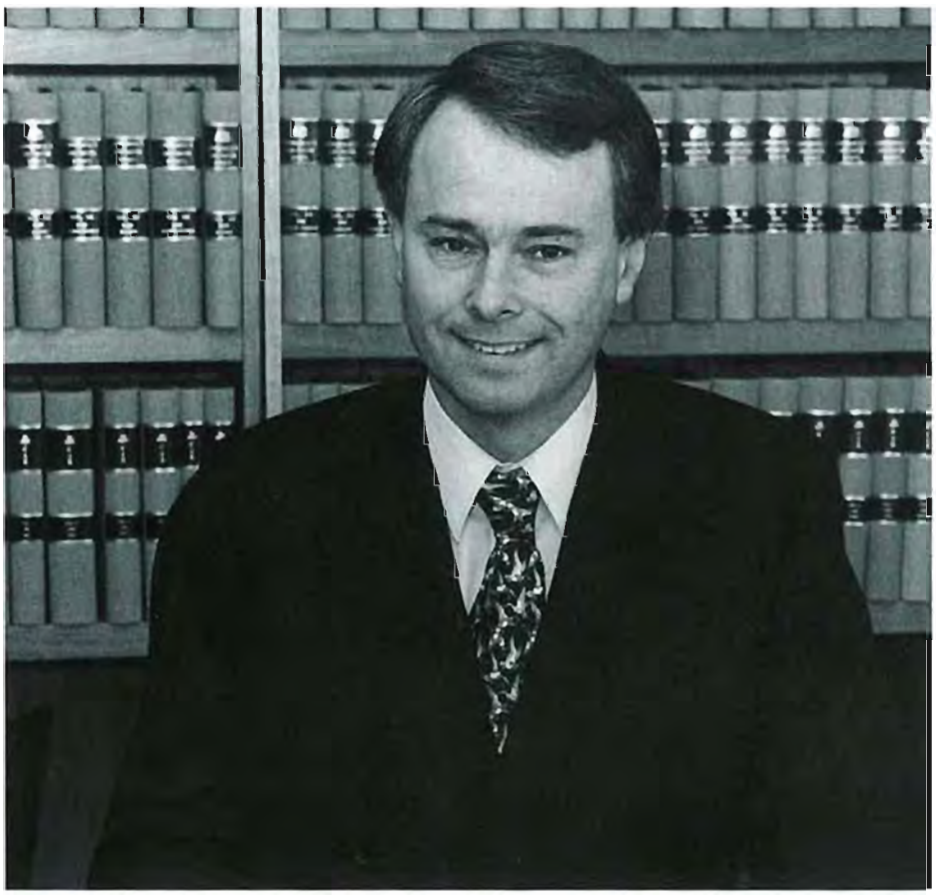
His Honour's experience and intellect make him a most suitable appointment to the Court of Appeal. His patience, humour and consideration for others will enrich the Court and the administration of justice in this State. The Victorian Bar extends its warmest congratulations to his Honour who can be confident in the whole-hearted support of the legal profession.

Giudice J, Federal Court

HIS Honour was born in Bendigo in December 1947, and educated at Xavier College and University of Melbourne, graduating with degrees in Arts and Law.

His Honour was admitted to the Supreme Court of Victoria on 1 August 1979. Before coming to the Bar His Honour was employed as an articled clerk and later as a solicitor with Moule Hamilton and Derham, now part of Freehill Hollingdale & Page. Having completed articles with Steve Alley, later to become Mr Justice Alley of this Commission, he followed a distinguished lineage of predecessors including Mr Justice Barry Madden, Mr Alan Stockdale M.P., Mr Ian Douglas Q.C., and Mr Chris Jessup Q.C. In July 1980 His Honour was appointed a partner of Moule Hamilton and Derham, solicitors.

His Honour signed the Victorian Bar roll of counsel on 22 November 1984, reading with Chris Jessup Q.C. From the outset of his career at the bar he specialised in industrial relations cases. His Honour represented major clients in the oil industry, mining, airlines, finance and telecommunications, in cases that laid down new principles for industrial law in Australia. His Honour was sought after not only on the basis of legal ability, but also because he had practical experience in industry: before his admission to practise



Giudice J

His Honour had worked as an industrial relations officer at the Hospital Employees Federation, now the Health and Community Services Union, under the leadership of Mr Don Joiner. Later he worked as an industrial relations manager at The Myer Emporium Ltd. At the Bar His Honour appeared in the national wage cases which were heard in the Commission from 1989 to 1991, acting as counsel for the Confederation of Australian Industry. In 1989 he appeared as counsel in the 1989 airline dispute. More recently he was involved in the CRA Weipa dispute as the company advocate.

His Honour's outstanding legal ability and impressive curriculum vitae have been supplemented by the quality of absolute courtesy in all dealings with clients and counsel. His Honour is clearly a man of contradictions. For many years he was known for the pride he took in his law library, particularly his set of Commonwealth Law Reports, which were always beautifully polished and preserved. However, in recent times His Honour has turned his back on the books, having embraced the world of the Internet. Last week one of His Honour's colleagues at the Bar observed His Honour searching for the word "Giudice" in the on-line industrial reports.

It is highly appropriate that His Honour should be appointed to the bench, appropriate for reasons other than his obvious legal prowess and broad experience. *Giudice* is the Italian word for "judge". His Honour's elevation to the bench means in literal form he is, the "Honourable Mr Justice Judge". Henceforth, when greeted in the street it would be very appropriate for one to say "Good morning, Judge!" However, in doing so His Honour would never be sure whether he is being accorded the respect due to a member of the Federal Court or whether he is merely being offered a translation of his own name! Perhaps in view of His Honour's appointment to the office of President of the Commission, the community should be thankful that His Honour's given name is not *Presidente*!

In all the matters in which His Honour has appeared he has won the respect and admiration of both his colleagues and fiercest opponents. His Honour is rightly regarded at the Bar as something of a "quiet achiever", despite the unavoidably controversial nature of the cases in which he has taken briefs. At the Bar His Honour showed that he is gifted in the art of negotiation, and has a keen and subtle understanding of the respective merits of both his client's and opponent's case. His Honour always supported the collegial spirit of the Bar. His extensive library, including his "precious" CLRS, was free for other barristers to use, and he was always willing to offer advice when it was sought by his colleagues. His Honour is hard-working and sensible, with a great knowledge of and dedication to the law. These are qualities that will serve His Honour well. The Victorian Bar congratulates His Honour on his two appointments to the Federal Court and as President of the Australian Industrial Relations Commission.

Judge Pannam, County Court

JANET Margaret Pannam, Senior Partner in the firm of Stedman and Cameron, and a long-serving member of the Law Institute Council was appointed to the County Court of Victoria on 7 October 1997.

Her Honour impresses as a pragmatic realist. In the area of family law where her practice predominantly lay, she was respected as a formidable opponent. That her performance is impressive is borne out by the fact that Her Honour was made a partner in Stedman and Cameron some 18 months after she had represented what Geoff Provis, the President of the Law Institute described at her welcome as "a rather unlovely husband against Miss Cameron, who did not deserve the success Your Honour won for him, both at first instance and then on appeal".

Her contribution to the legal profession to date has been significant, not only through her extensive practice but also through the service she has given to the Law Institute and to the legal profession generally.

At the Law Institute she was a member of the Solicitors' Disciplinary Tribunal; she chaired the Institute's Ethics Committee; she was an inaugural member of the Environmental Law section; she was a member

Judge Pannam

of the Family Law section from 1978 and chaired that section in 1985 and 1986; she served on the Property and Maintenance Committee; the Courts' Practice Committee, the Children and Youth Issues Committee and the Road Trauma Committee and the Committee of Management. She also served on the Law Institute Council for many years and was until earlier this year Treasurer of the Law Institute.

She has served as a member of the Board of Examiners, is former Vice-President of the National Council of Women and a former member of the Lyceum Club Board.

She served on these Committees and conducted a busy practice at the same time as rearing a young family. In fact, although she began her legal studies at the University of Melbourne in 1956, those studies were interrupted by marriage, child-bearing and divorce, and she completed her Law Degree part-time after her divorce whilst raising two young sons.

The flavour of Her Honour's approach to the law may perhaps be garnered from what Geoff Provis said at her welcome. Speaking of the benefit he received from her advice he said:

> This ranged from technical questions in family law, "just get the bastard into Court, Geoff, and let Neil deal with him", through to matters of legal etiquette, "that mongrel knows even less than you do".

Her Honour enjoys a good argument and often commences one merely for its own sake. If that characteristic is continued in her judicial role, it will certainly keep counsel on their toes. If, at the same time, her sense of humour and style of expression remain unchanged, the Verbatim section of *Bar News* will no doubt be deeply enriched.

Although Her Honour comes to the County Court with a varied experience extending to all levels of litigation, town planning, conveyancing, matrimonial and criminal law, the emphasis of her practice over recent years has been matrimonial law.

From the terms of her reply to the welcomes extended to her by the two branches of the profession, it would seem that Her Honour is conscious of the need to refresh her memory in certain areas and also conscious of the fact that a good lawyer is a good lawyer is a good lawyer:

> My appointment is a source of great personal pride and I have every intention that with the assistance of Counsel and my assiduous application, together with the sense of balance, that I will justify my appointment as a Judge of this Court.

Her Honour's history of assiduous application, of attention to detail and a capacity to focus on the "bloody shovel" rather than on some "deep delving doover", her perspicacity and common sense and her technical competence as a lawyer, combined with her willingness to be a warm human being leave little doubt that that appointment is well and truly justified.

Her Honour is a welcome and respected addition to the County Court Bench and we wish her every success in this new phase of her career.

Judge Douglas, County Court

HER Honour was educated at Firbank Anglican School and Monash University, graduating with degrees in Arts and Law. However, before even commencing her studies in law she worked as a law clerk for Peter Barker at Barker Harty & Co. Solicitors. Her Honour was encouraged by members of that firm to undertake a career in the law. After university Her Honour was admitted to practice in the Supreme Court of Victoria on 9 November 1977. On 9 February 1978 she signed the Victorian Bar roll.

Her Honour's practice included both criminal and civil work. In the early days her briefs were in family law and common law. As a criminal barrister Her Honour did some defence work, mostly in the Magistrates Court, but subsequently she took a prosecutorial practice. As a result of Her Honour's intelligence and ability to work extremely hard, she quickly established a reputation as one of the best young prosecutors at the Bar; or, to put it in Her Honour's modest terms, "you were a cab on the rank and the Crown just kept flagging you down". Her Honour's rooms were in Tate Chambers, where she was a member of a tight-knit group of young criminal barristers known sometimes apprehensively, but mostly affectionately, as "the cabal". Her Honour later moved to chambers in Four Courts. From those early Tate Chambers days Her Honour appeared as a prosecutor many times in the Magistrates Court, the County Court, the Federal Court and the Supreme Court and, as a junior, in the High Court. Her Honour was involved in some celebrated cases, including *Sumner and Others*, known variously as "the Cigarette Trial" or, even more evocatively, "the Big Fag Trial". "The Big Fag Trial" involved the hijack of a cigarette van by several unsavoury men of imposing physique. Her Honour successfully conducted the prosecution of the cigarette hijackers in the Supreme Court who appealed against their conviction. Her Honour appeared for the Crown as respondent. Members of the Bar recall one Supreme Court judge who sat on the appeal staring at Her Honour and exclaiming to one of his brethren, "You mean to say that all those big bad crims over there were potted by this little girl?"

Her Honour was also prosecutor in the Hugo Rich (formerly Olaf Dietrich) case, which was a very difficult prosecution, and in the celebrated prosecution for perjury of Wendy Pierce, which arose out of the Walsh Street murder trial.

In January 1986, shortly after the Sumner trial, Her Honour was appointed to the office of Prosecutor for the Queen; Her Honour and Betty King Q.C. were the first women ever appointed to that office. As a Crown Prosecutor Her Honour has appeared in many murder trials and many appeals against conviction and sentence. Her Honour has always enjoyed and excelled in appellate work, which is a reflection of Her Honour's love of the law and her undoubted legal ability. A very large number of the appellate cases in which she has appeared have been reported. The only criticism that has been heard of Her Honour's performance as a Crown Prosecutor relates to her driving skill in the prosecutorial car park: it is said that Her Honour once nearly wrote off a large four-wheel drive before she had even left her parking space!

Her Honour has always made a great contribution to the Bar, particularly to the Readers' Course, where she has sat as a magistrate. She has taught advocacy at the Leo Cussen Institute, and Her Honour has served as a member of the Executive of the Criminal Bar Association, where it is said Her Honour represented three special in-

Judge Douglas

terest groups: women, junior criminal barristers, and Crown Prosecutors. It must be some indication of Her Honour's political success that whilst these constituencies could once have been described as minority groups, their minority status is now not so certain.

Her Honour has a sense of humour that is often described as "wicked", but is sometimes described simply as "bad". Fellow members of the Bar complain that Her Honour will tell awful jokes to anybody who will listen. There are other complaints too. Her Honour's male colleagues at the Bar, in particular, have complained that when they lent Her Honour their barristers robes, Her Honour put dents in them! However, despite all this, Her Honour is also one of the most well-liked and highly regarded members of our Bar, with many, many friends, all of whom hope and expect Her Honour to maintain her close links with the Bar. It has been noted that on the very first day that Her Honour sat as a judge she spent most of the day chatting to her former colleagues in Dominos Cafe in the basement Owen Dixon West because Her Honour had managed to lock herself out of Her Honour's Judge's Chambers. Perhaps as the Bar has enjoyed Her Honour's company so much it should arrange for Her Honour to be locked out more often!

Her Honour is clearly accomplished at trials, with a great expertise in the rules of evidence, expertise learnt at the coalface of the criminal Bar. Her Honour's legal knowledge has always been evident in the way in which she has handled some extremely contentious and complex prosecutions and appeals in Her Honour's long criminal law career. In particular, Her Honour has always been scrupulously fair in the way she has conducted cases. For all these reasons, Her Honour can depend upon the support of the Bar in her new office: Her Honour's appointment has been long-awaited and is well deserved. The Victorian Bar congratulates Her Honour on her appointment and wishes her a long and happy career on the bench.

Judge Holt, County Court

TIMOTHY Mark Holt was appointed to the County Court of Victoria in October 1997. He comes to the County Court with what some older practitioners would regard as the perfect qualification: he worked under Perc Malbon.

Originally the young Holt intended to study law at ANU. The Vietnam war and the lottery associated with that war, however, changed his plans. After completing service in Vietnam he worked in the Prothonotary's Office in the Supreme Court of Victoria while studying part-time at RMIT. If it had not been for the Vietnam war he would probably have remained in that sheltered cul-de-sac known as the ACT. His Honour subsequently obtained an LL.B. from the University of Melbourne in 1975.

During his articles, His Honour became involved in the Beach Inquiry into the Victoria Police, acting as instructing solicitor to Cairns Villeneuve-Smith and John Coldrey who were counsel assisting the Commission.

His Honour learned at first hand in the Prothonotary's Office that bureaucrats are not always to be trusted. He was at first impressed by the encyclopaedic knowledge of the rules and practice of the Supreme Court which some of the senior clerks in that office showed when answering questions put by practitioners. But he gradually learned that the answers given referred in many instances to non-existence cases or rules that did not apply. His Honour married in 1976 and at the same time moved into policy work. His Honour's first venture into policy (if his exposure in the course of the Beach Inquiry did not involve any question of policy) occurred when he was appointed legal assistant to Brian Waldron, the then Commissioner for Corporate Affairs.

Effectively the next six years of His Honour's life were devoted largely to the formulation and drafting of the first national co-operative companies code which saw the light of day as the Companies Code 1981. In the following year he was appointed Deputy Commissioner for Corporate Affairs (Legislation and Policy) and in that capacity continued his work on development of the National Companies and Securities Scheme.

During 1987 His Honour took leave from the Public Service to frolic in the pastures of private practice. During his leave His Honour carried out general commercial work, matters involving taxation law, trade practices, stamp duty and company and securities law and drafting of general documents with Cooke & Cussen. From Cooke & Cussen he returned briefly to serve as an acting legal officer with the Department of Consumer Affairs before moving into what His Honour describes as his "tribunal phase".

Judge Holt

From 1988 he served as Deputy Chairman on several government authorities, including the Motor Car Traders' Licensing Authority, the Motor Car Traders' Guarantee Fund Claims Committee, the Travel Agents' Licensing Authority, the Credit Licensing Authority, the Credit Authority, the

Estate Agents' Disciplinary and Licensing Appeals Tribunal and the Prostitution Control Board.

His Honour brings to the Bench not only an insight into procedure "as she is practised" from his tutelage under Perc Malbon, but an appreciation of the realities of Administrative Law and a deep knowledge of Company Law.

Rumour hath it that His Honour likes to go shoeless. It is said that His Honour wore to Tribunal hearings a pair of brightly coloured trainers rather than shoes.

At His Honour's welcome Mark Derham said:

> Perhaps this is so that Your Honour's imminent arrival at the hearing room may be inaudible, or perhaps it is so that you are able to make a quick getaway when adjournments are announced. At any rate, I look forward to a refreshing departure from the often uniformed sartorial practices of the Court.

If His Honour is to continue his practice we hope that he will wear purple trainers to match His Honour's purple sash.

His experiences in Vietnam should qualify him to accept technical pleas made by accused persons. He himself having fallen asleep while resting in an open paddy field in Vietnam awoke to find his rifle had gone. He was charged with leaving his rifle unattended. At his Welcome His Honour told this story in the following words:

> The day after we returned to base at Nui Dat, I was paraded before the Company Commander on the all-encompassing charge of conduct to the prejudice of good order and military discipline. It's the military version of the 'fit and proper' test. I do not recall seeing a copy of the charge prior to the hearing and there was no duty lawyer in attendance. The charge was read out: that I did on such-and-such a day at such-and-such a place contrary to the prejudice of good order and military discipline, leave weapon numbered 6402642 unattended. I was asked whether I admitted or denied the charge. I denied it. Those assembled were somewhat puzzled and tempers became a little frayed until I explained that I could not be guilty of that charge because the weapon officially assigned to me was numbered 6402644. My first technical plea found no favour with the Bench.

It is to be hoped that His Honour remembers that the burden is really on the prosecution to get it right.

We believe that his varied background, tribunal experience and concern for justice will ensure that the individual pitted against the might of the State in His Honour's Court will receive not only a fair hearing but will receive the benefit of all doubts, technical or otherwise.

The Bar welcomes His Honour to the Bench and wishes him a long and successful tenure.

Hase J, Family Court

HIS Honour was born on 20 November 1931. In 1950 he commenced a Law Arts degree at the University of Melbourne. Five years later His Honour took time off from his degree to travel to London, where he gained employment as a managing clerk in a solicitor's office. His Honour then completed his degree at Melbourne University by correspondence from England. Subsequently he took articles in London.

As a young lawyer in London, His Honour found time to involve himself in charitable work for the disadvantaged members of that society, in particular helping wards of the state and delinquent young people towards a better life.

His Honour was unable to be admitted as a solicitor in London due to a technical rule and so returned to Australia. To the extent that the Byzantine intricacies of the rules governing the English legal profession were responsible for His Honour having returned to Australia, the Victorian Bar is extremely grateful for those rules, because once back in Melbourne His Honour was admitted to practice on 2 April 1959 and came to the Bar the following day.

His Honour read with Peter Murphy, later to become a judge of the Supreme Court of Victoria.

His Honour came to the Bar with a strong sense of integrity and a strong sense of the professional and social responsibilities of the lawyer. His rooms were on the 7th floor of Owen Dixon Chambers, in close proximity to the rooms of Joseph Kay, now a judge of the Family Court.

At the Bar His Honour frequently acted on behalf of the less powerful members of our society. He successfully represented many workers in industrial arbitrations and before the Industrial Court. His Honour also developed a wide-ranging common law practice, acting for injured plainfiffs. Members of the Bar remember the satisfaction that His Honour derived from this work, as well as his great expertise and prowess as an advocate. For many years His Honour was the leading personal injury union advocate at the Bar, typically running ten such matters in the Supreme Court at any one time.

His Honour had two readers, Geoffrey Eames, now Justice Eames of the Supreme Court of Victoria, and Russell Byard, now a Deputy President of the Victorian Administrative Appeals Tribunal. In 1978 he took silk.

Hase J

His Honour was sworn in as a judge of the Family Court on 10 December 1979. When appointed to the Court, the personalia pages of the *Victorian Bar News* stated that Peter Hase's new job "is in line with his view of life that he direct his energies to where he believes he can benefit ordinary folk". There can be no doubt that in His Honour's long career at the Bar and then on the bench, he constantly directed his energies towards the interests of "ordinary folk". His Honour could truly be described as an unsung hero of the underprivileged. Today, at a time when the rights of the individual citizen in our legal system are the subject of erosion, it is all the more appropriate that we have the opportunity to remember the qualities that His Honour has exemplified as a lawyer. As a Judge in the Family Court he will be long remembered for the courtesy he consistently displayed towards members of the Bar and the profession generally.

His Honour is a keen and competent tennis player, and a keen golfer. He has been a great supporter of the Bench and Bar tennis matches and the fact that the Bar regularly received a thrashing at the hands of the solicitors has been through no fault of his.

The Victorian Bar congratulates His Honour on his many years of service to this Court and the community, and wishes him a happy and successful retirement.

John Peter Bicknell ("Bick")

JOHN Peter Bicknell was a member of the Victorian Bar from 1975 to 1993. For someone who enjoyed life as much as he did, his death on the 25 October this year at the age of fifty-three was much too early.

"Bick" was born in Victoria in October 1944 and was a boarder at Geelong Grammar School until 1962. At school he studied ancient history and it was this subject that developed his keen interest in the lifestyles of the ancient Roman patricians; an interest he sought to perfect for the rest of his life.

After Geelong Grammar he attended law school at the University of Melbourne. In these days at University and particularly in his time as a resident in Queens College, John formed many long-term friendships, particularly with fellow law students, that continued until his death. It was also at this time that many of his exploits developed legendary status.

In 1969 he was admitted to practice having completed his articles with H.B.V. Dimelow & Co. in Temple Court. John Bowman was also with the firm and recalls fondly one of "Bicks" better career moves. One morning when feeling poorly after a long and enjoyable evening "Bick" arrived at the office to find his principal's poodle on the desk enjoying his biscuit and coffee.

John Bicknell

The well placed dropkick propelled the animal through the office door only to land at the feet of the owner principal.

John accordingly sought and obtained a position with Ellison Hewison and Whitehead where he worked in the Common Law and Workers Compensation jurisdictions. After a few years his sense of adventure led him to London, and in the early 1970's he worked with Clifford Turner. It was at this time that many of his friends in the legal profession visited him in London and all will attest to many enjoyable encounters with him.

On his return to Melbourne in 1975 John signed the Bar Roll and commenced reading with Howard Nathan. He quickly developed a substantial Workers Compensation practice with circuit practices in Geelong and Ballarat. One of John's greatest skills was his ability to listen to people and it was this skill, particularly with clients and instructing solicitors, that enabled him to act for both employers and plaintiffs.

In 1992, shortly after the Judges of the Accident Compensation Tribunal were dismissed, John chose to leave the Bar and follow a career in stockbroking. He continued his contact with his friends from the Bar and successfully handled many of their share portfolios until his untimely death.

Although John left the Bar in 1993 he did on occasions afterwards express the desire to return to the Bar at some time in the future. It is our loss that such a larger than life character and good friend will not be returning.

John is survived by his wife Belinda and sons Giles, David and Alexander.

The Cancer in Litigation

By Geoffrey Gibson

Geoffrey Gibson, a former member of the Bar and now a litigation partner at Blake Dawson Waldron, has, like many of us, become disillusioned with the way in which litigation operates today: lengthy trials, mountains of paper, excessive costs, and an inability to focus on the true issues.
This is the first instalment of a three-part analysis of *The Cancer in Litigation*.

I have now practised law for nearly thirty years, about half of that time at the bar, and half as a solicitor. I have also been running the Taxation Division of the Victorian AAT for twelve years. Over my thirty years I have seen litigation change greatly. Unfortunately it has been for the worse. The Court of Appeal has now expressed its concern that the criminal trial system is out of control after the fiascos involving Sir Andrew Grimwade and Mr John Elliott. In my view the civil justice system is in just as bad a state. The paper that I have prepared for a Judges' Conference looks at those criminal trials and at some bad civil trials. It then goes on to look at ten ways in which we have made litigation worse, and why people are voting with their feet by staying away from it. The main problems are seen to be too much law, too much paper, too much adventurism from appellate courts, a failure of nerve in lawyers at all levels, a failure to arm judges with the authority to run a sensible trial, and such other things as the lure of the cop-out of mediation. I have also looked at how the High Court in its Romantic phase has been bad for business. While people are looking at mediation and questioning the adversarial system, it is important to understand why the present system has gone off the rails. When that is done, we can then look to see how to fix it. But I have the clear view that the present system is fast becoming obsolete for the commercial community, and that the profession as a whole has let business down badly.

INTRODUCTION

THERE is nothing new in the process of the law being so afflicted that people get worried and hurt by it, and some lawyers get rich on it, but the malady that litigation is currently suffering from is a product of our own time, and it does seem to me to warrant the name of cancer. If that description is fair, and if the *Shorter Oxford English Dictionary* is correct, we have a real problem. Cancer is defined as "a malignant growth or tumour, that tends to spread and reproduce itself; it corrodes the part concerned, and generally ends in death". It is also very painful and debilitating, and, for those who apply modern science to its treatment, expensive.

Criminal Trials Out of Control

Two recent cases involving members of the Melbourne establishment have caused appellate judges in Victoria to ask whether the criminal justice system is out of control in that State. Each case was for its own reasons horrific, and of concern to the public and lawyers alike. The resources of the Crown were mustered on one side. The accused — some said targets — somehow got together sufficient funds not just to fight a battle, but to last out a war. In each case it was difficult to dispel a suspicion that so much public money would not have been devoted to the pursuit had those who were being pursued been less prominent in public life. As against that, there were criminal proceedings against another leading commercial figure in Melbourne at about the same time where huge amounts of money and many lawyers were dedicated to the defence and to collateral civil attacks on the Crown. The weight of the response made it difficult to avoid the impression that the accused and their advisers had determined to outspend and stare down the Commonwealth Crown. In each case there looked to be an abuse of process on one side or the other. The third case I have mentioned is still alive, so I mention briefly those involving Sir Andrew Grimwade and Mr John Elliott.

The case against Sir Andrew Grimwade and others turned into what young people would call the trial from hell. The first trial was aborted when the wife of Sir Andrew died. It had gone for 33 calendar weeks. The second trial went for 294 sitting days, 96 weeks, and 23 months after the empanelment of the jury. One of the jurors conceived and gave birth within that time. The trial concluded in 1992, more than eleven years after the events that were the subject of the charges. The Court of Criminal Appeal referred to the "grotesque state that the proceeding assumed" and said that it was obvious by the end of the Crown case that "the trial had become unmanageable". The Court said that the basic assumption of a fair trial — that the jury could determine guilt or innocence upon the evidence — had gone, and that the verdicts of guilty had to be set aside. A retrial was unthinkable.

The case against Mr John Elliott and others was a disaster for other reasons. The Crown charged the accused with theft of money that they never got following the attempted takeover of BHP in 1986. The accused were discharged. They never had to put their case to the Court or be examined. The people who were examined, and over a long period of time, were those responsible for the prosecution, mostly lawyers. Instead of a trial of the accused, the trial was of the accusers, and it became something like an inquisition into the running of the National Crime Authority. After nearly six months of argument and evidence the trial judge ruled that a lot of the evidence obtained by the National Crime Authority had been obtained by its acting outside its powers. He exercised a discretion to exclude the evidence. The case of the Crown collapsed. The accused were acquitted, so that they cannot be tried again. Now the Court of Criminal Appeal has ruled (in September 1997) that the trial judge was wrong in excluding the evidence. No jury was ever empanelled. Some press reports put the costs of the pursuit at more than $30 million, and the costs of all parties at $60 million.

Other Trials

The course of those two cases must make people think that the law is working badly — they must bring the law into disrepute. Each case was truly awful. You can get some perspective by reflecting on the course of one *cause célèbre* in England and one in this country. Each was fascinating enough to become the subject of a movie.

The English case of Craig and Bentley engaged the attention of the nation. Bentley was 19 years of age and Craig was 16 years of age. In the course of a robbery Craig shot and killed a policeman after Bentley uttered the equivocal words "let him have it". Both were found guilty of murder. The jury recommended mercy for Bentley. Lord Goddard CJ disagreed. Bentley was the only one old enough to be hanged. The crime was committed on 2 November 1952. The accused were convicted on 11 December 1952. Lord Goddard sentenced Bentley to death. The Court of

Criminal Appeal dismissed an appeal against convictions on 13 January 1953. Bentley was hanged on 28 January 1953. That was less than three months after the crime.

Azaria Chamberlain went missing on 17 August 1980. She was never found. There was no body, no witness, and no motive. There were two inquests, in one of which the Crown appeared to toy with Mr and Mrs Chamberlain. Mrs Lindy Chamberlain was convicted of murder, notwithstanding a very strong charge from the judge in her favour, on 29 October 1982. The appeal to the Full Federal Court was refused. The appeal to the High Court was heard on three days in November 1983. On 22 February 1984 the Court delivered judgments covering 110 pages, by a narrow majority dismissing the appeal. Subsequently there was a Royal Commission, and in 1987 the original conviction was declared unsafe.

There is of course one critical difference. Mrs Chamberlain is still walking around, but Mr Bentley is still dead (he would now be 64). But there was no dispute that Mr Craig shot the policeman, and you cannot account for the tremendous difference in the courses of these two cases just by reference to the nature of the crimes. The case of Craig and Bentley was too quick, and too brutal, for modern sensibilities, and Lord Goddard is not the subject of fond remembrance. But take another case, probably the most important and difficult criminal trial in the history of the world. It commenced at Nuremberg on 20 December 1945. Twenty-four leaders of Nazi Germany were charged with crimes against humanity, including waging aggressive war and the deliberate murder of millions of people. The trial concluded in less than twelve months. Ten were hanged on 16 October 1946. It is appalling to record that emanations of the Crown in Australia could have taken so many years to get it wrong in the cases against Sir Andrew Grimwade and Mr John Elliott, and so many years to get it right for Mrs Chamberlain.

You get the same sense of other worldliness when you read accounts of libel trials fought by the leading English advocates. The claim by Princess Youssoupoff against MGM for depicting her in a movie as having had sex with the mad monk Rasputin had everything you could want from a libel trial for entertainment. Among other things, the plaintiff had to call her husband, a surviving Russian Prince, to say he was involved in the murder. The case involved a novel point for which it is still authority on whether it is defamatory of a woman to say that she has been the victim of a rape. Sir Patrick Hastings KC appeared for the plaintiff. He later said that he had learnt from his master, who happened to be the judge presiding in that case, never to take a note on a brief. After "several days" hearing, during which the jury had twice gone to see the film itself, the jury returned with a verdict for £25,000 damages, a prodigious sum in those days. The Court of Appeal heard argument and gave judgment on the one day, 17 July 1934.

The obscenity prosecution of Penguin for *Lady Chatterley's Lover* in 1960 involved evidence from nearly 40 writers, politicians, publishers, clerics and academics — not a group renowned for their reluctance to give the world the benefit of their opinions. The jury gave their verdict on the sixth day. In beginning his speech for the defence on the fifth day, Lord Gardiner commented on the obvious patience with which the jury had borne their duties, and said "all those who work in these Courts have very much in mind the real hardship which jury service may sometimes impose". That, I repeat, was on day five of a very diverting case.

Lord Gardiner also appeared for the defence in the libel action brought in 1964 by Dr Dering, who had been a doctor at Auschwitz, against Mr Leon Uris, the writer of *Exodus*. The trial became the subject of a telemovie, *QBVII*, with Anthony Hopkins as the plaintiff and Ben Gazzara as the defendant. Lord Denning was to say that no report of State trials or famous trials would have greater interest or importance. The jury gave its verdict on the eighteenth day.

The problems with criminal trials are well publicised. In my experience, the problems with civil trials, certainly the big civil trials, are just as serious but not as well publicised. People are losing whatever faith they had in the system. Most people cannot afford litigation out of their own pocket. Legal aid is very hard to get. The business community is finding it hard to rationalise economically its continued participation in the system. Most of the cases have become too long, too dear, and too risky.

Four Grotesque Civil Cases

Let me give four examples of civil cases gone wrong. They do not have the drama of those I have referred to, but they do illustrate why we are failing to deliver in commercial litigation.

In the first case a shareholder in a co-operative began a derivative shareholder's action against its board, its CEO, and a large firm of accountants. When the plaintiff got a favourable judgment on a scheme of arrangement in 1989, he alleged fraud and conspiracy against the directors. There was evidence that the plaintiff had been acquiring shares with a view to taking over the co-operative. Part of the defence was that his action was brought as part of that scheme. The action did not come on for trial until March 1992. When it did, it went for 65 days. The plaintiff sought to make a case of conspiracy from the crates of documentation discovered. After the trial had been going for some weeks, he discovered some documents that suggested he was involved in trying to take over other co-operatives. Each of the directors gave evidence and was cross-examined for a day or so. The Chairman was in the box for six days. The CEO was cross-examined for three days. The vehemence of the attack was such that from time to time the trial judge felt the need to leave the court to allow things to settle down. The plaintiff stayed out of the box. When it came to dirt, he thought it was better to give than receive.

A case that began on a discrete issue of the obligation of directors to make disclosure to shareholders wound up canvassing the history of this co-operative, and the position of co-operatives generally. On the legal issue, the case could have been run, and perhaps won, in about three days. The judgment occupies 120 pages in the Victorian Reports and the case took the trial judge out of action for the best part of a year. Fortunately for the directors, their D&O insurers were paying their defence costs on the drip. Those costs came to $700,000. As it happens, the insurers got about 90 per cent back. (They were American, and they thought it was Christmas.) Frequently the insured do not get this protection, and the insurer very rarely gets that sort of recovery. Had the insurers not been paying, the case of the directors may not have been sustained, and may have been lost by default. I do not think the directors, who were mainly farmers, could have sustained the fight from their own resources — emotionally or financially. It was their case that the assets of the co-operative, worth about $100,000,000, would have fallen into the hands of a corporate raider.

The second case involved a claim against a failed merchant bank and a firm of lawyers. The bank had induced other lenders to part with millions of dollars to a company that had some unfortunate people running its affairs. The money was lost. The other lenders complained that the lead bank had been less than frank when it got

them into it. On the eve of the trial a document was discovered from the solicitors for the lead bank. It indicated that one of the matters that the banks were complaining they had not been told of had been revealed in answers to requisitions that were delivered at settlement. The case was put off so that the solicitors could be joined. Two of the most senior leading counsel in the country said the trial could be disposed of in ten days. It was thrown out of the Commercial List about four days later on the basis that this estimate was hopeless. It eventually went for 35 days. It cost the PI insurers of the firm of solicitors more than $500,000 to defend the claim.

The partner who received the answers to requisitions was cross-examined for three days. When you act for professional people who get sued for professional negligence, you get an eerie sense of unreality about seeing half a dozen lawyers with days and weeks to think about it, and yards of documents to contemplate, thinking of ways they can complain about what someone did in the space of a couple of moments in the ordinary course of practice. It is enlightening to watch how the complaints change the longer the lawyers have to think about them. We get paid for forethought, but hindsight is a truly beautiful luxury. Some judges are fabulous at it.

The merchant bank could have settled the case for $5 million. It refused to do so because the solicitors refused to put in $1 million. It went down to the tune of $15 million. Another lender then brought its claim on for trial. For a long time the merchant bank, which had settled an appeal on the first claim, refused to accept that the same result would follow. It embarked on further discovery exercises notwithstanding the enormous amount that had been previously discovered. It also took the firm of solicitors to court because they refused to agree with its choice of a mediator. A grand mediation, which must have cost a hundred thousand to put on, aborted in under a morning. It was not until the case was about to come on for another trial, effectively a rerun of the first, scheduled to run for 70 days, twice the period of the first, that it was finally settled. The total costs of the solicitors in defending claims arising out of how they dealt with an adventitious response to a requisition received in the course of a settlement, an everyday occurrence of not the slightest apparent significance, exceeded three-quarters of a million dollars.

The third case involved one of those big disputes that had to settle because of its weight. The amount involved was about $20 million. There were about six parties. There were many tricky legal questions. There were questions involving breach of trust, and two leading law firms participating as parties. Some of the allegations were going to be unpleasant. The case settled after a long and difficult mediation. The insurer of one party stood out of the mediation. The issue was a discrete one about the wording of a proviso to the policy. It was the sort of issue that you would think could be dealt with by a commercial court in London in less than a day.

Instead the parties started alleging estoppels and the inquiry widened. The insurers then insisted on embarking on a discovery campaign. The matter wound up being the subject of controverted evidence as well as legal argument about the policy over six days in the Supreme Court. After twelve months, the insured is still waiting for judgment. The litigation on this one point cost it more than $100,000. The overall cost of the whole dispute for the insured was of the order of $600,000. This party is now based in England. From time to time its corporate counsel, who used to be at the Bar in London, rings me to ask if Australia is still part of the world. The Court Books in the insurance case (insured v. insurer) ran to four volumes, 1938 pages. At the Court rate of $1.20 per page, the cost of preparing the six sets that the Court required the plaintiff to prepare was more than $14,000. In dollar terms, that is over $2000 more than my wife and I paid for our first house, and more than three times the jurisdiction in contract of the County Court when I commenced practice — *for printing Court Books*.

The fourth case was a straightforward one involving a dispute between a bank and farmers about the level of debt arising from foreign currency transactions going back to 1984. The case involved the usual sort of foreign currency loan allegations against a bank. It was in the Commercial List of the Supreme Court. The case was complicated because the farmers had executed three releases of all claims against the bank. They raised estoppels and other equitable issues. There were repeated applications and orders for further discovery against the bank. Although the trial was to turn mainly, if not solely, on issues of credit, it ran for 19 days. The Court Books ran to 13 volumes (4650 pages). That was on liability alone.

The borrowers had determined to give what they had to the lawyers rather than the bank. It cost the bank more than $700,000 to defend the claims against it. The bank got judgment in September 1997, nearly 18 months after the trial concluded. If I may say so with respect to the judge, the time taken for the preparation and delivery of that judgment was twice that required for the gestation and delivery of a child. The farmers had borrowed $1M in 1984. They won a stay on foreclosure, but interest had taken the debt to $3.6M. The securities were worth about $1.2M. The day after the formal judgment was pronounced, the lawyers for the farmers inspected the share registry of the bank. They discovered the judge held 2400 shares and a debenture in it. On the advice of their senior counsel they filed an application to have the judgment revoked and to get a retrial on the ground of bias — perceived or *actual bias*. The judge said he had formed his views within a few days after the hearing, and well before he inherited the securities (five months after the trial), but the issue was referred to the Court of Appeal.

These four cases may not be typical, but they are not unique. I had some involvement with each of the six cases (four civil and two criminal) I have been discussing, and I find it hard to say which unsettled me the most. You can compare these sad stories with what Lord Devlin told a vacation course for foreign lawyers at Cambridge was the position in England in 1976. He said the general experience was that trials were taking longer than they used to, that it was rare for a trial to last less than a day, and that a "heavy" case may last for a fortnight or more. An opening speech could last for a day, and if there were a lot of law in it, counsel may spend hours reading out the authoritative judgments in earlier cases. The plaintiff or defendant or their principal witnesses may be cross-examined for a day or more. The documents put in might rise to a pile of a foot or two on the judge's desk, all except a few strays being properly arranged in bundles and paginated for reference.

It is obvious that various parts of our profession may have contributed to the excesses revealed in the cases I have mentioned. I will not attempt to apportion responsibility. Nor do I claim that the part of the profession in which I presently practise is immune from criticism for the sorts of problems I am discussing. But I do not believe that any lawyer whose views would command general professional assent could be satisfied with a system of justice that tolerates, much less encourages, cases like these. And I do have a very clear view that if you were to explain these sorts of cases to the man in the street, he would ask how we have let the lawyers contrive or conspire to hijack his system of justice.

Participating in Mediations and Arbitrations: Some Practical Observations

By George H. Golvan Q.C.

"Always do right. This will gratify some people, and astonish the rest."

Mark Twain

ALTHOUGH mediation and arbitration are significantly different dispute resolution processes, achieving success in mediation and arbitration requires an appreciation of some common elements:

- The key to success invariably involves persuasion. In the case of mediation, convincing the other parties to the mediation that a proposed settlement is better than the alternative, generally litigation or arbitration. In the case of arbitration, persuading the arbitrator to decide the dispute in your favour.
- To succeed in both mediation and arbitration, three factors are generally very important — Preparation! Preparation! and Preparation! It is necessary to have a first class understanding of your case — both its strengths and weaknesses — and prepare logical and well-structured arguments which appeal to fairness and common sense.
- It is desirable to establish a credible theme to explain your case. A theme is the central proposition in your case. For example, if a dispute involves the construction of an agreement, then the theme may be that your construction is the only one which fairly achieves the commercial purpose of the agreement.
- Finally, it cannot be over-emphasised that both processes are only as good as the people conducting them. Be sure to select a mediator or arbitrator with experience in the process, and generally some expertise in the subject matter of the dispute.

PREPARING FOR MEDIATION

There is sometimes a perception amongst parties to mediation that mediation is an easy option which can be conducted with little preparation or thought. That is, of course, totally incorrect. Preparing for mediation requires planning, keeping in mind the following considerations:

- The selection of a good mediator is paramount. The quality of the mediator is of critical importance to the success of the process. A good mediator generally has the attributes of experience, intelligence, patience, creativity, an understanding of the mediation process, and usually some knowledge of the subject matter of the dispute. The best way to select a good mediator is usually by recommendation from others who have used the mediator. Conducting a successful mediation is a unique skill, and the best barristers, solicitors or consultants do not necessarily make the best mediators. It is also important to learn about the style of the mediator. Not all mediators adopt the same style or techniques. Some mediators are very quick to impose their own opinions. Other mediators adopt a technique of skilled neutral facilitation as a means of assisting the parties to arrive at their own resolution of the dispute. A mediator's successful track record for achieving resolution is another factor that should be taken into account.

THE TIMING FOR THE MEDIATION CONFERENCE

It is important to ensure that the Mediation conference occurs at a time when the parties are in a position to settle. Generally parties are not in a position to settle until they are in a position to evaluate their case and the opposing case. For example, there is no point in a construction dispute involving technical issues to attend a mediation conference before experts' reports have been obtained. This applies to all parties. Similarly, parties usually want to complete discovery and obtain particulars of damages claims before commencing negotiations. It is generally helpful not to rush into mediation until you have all the relevant information at your disposal. At the same time, it is often preferable to go to mediation before substantial legal costs are incurred, so that the saving of legal costs is an incentive to settlement, rather than legal costs being a significant obstacle, as sometimes occurs.

THE VENUE FOR THE MEDIATION

It is generally preferable to select a neutral specialist venue such as the Victorian Bar Mediation Centre, Douglas Menzies Chambers, corner William and Little Bourke Streets, Melbourne, or Conflict Management Centre, Level 20, 500 Collins Street, Melbourne. The parties feel more comfortable in a neutral venue; there are no unnecessary interruptions, and the neutral venues I have described are purpose-built facilities that provide adequate seating, appropriate-sized conference tables, caucus rooms and whiteboards. In my experience, the selection of the venue is an important consideration. Do not be afraid to pay a little extra for the venue in order to obtain the best conference facilities available.

THE TIME FOR MEDIATION

It is best to start early when the parties are fresh and "ready to go". Accordingly, I normally start my mediation conferences at 9.30 a.m. I find that in most mediations it is necessary to allocate one day without a fixed termination time, although it is my normal procedure to assess how the mediation is going at about 4.30 p.m., if the case has not settled, and make a decision at that stage whether the mediation conference should continue. It is generally helpful not to set a specified time for the conclusion of the mediation as this sometimes creates artificial pressures. A successful mediation necessarily takes time and patience. Each dispute has its own particular momentum. Equally, it is important not to allocate excessive time. Generally, parties tend to reserve their best offers until the end and

George Golvan Q.C.

excessive time merely encourages delay and procrastination. I invariably find that the majority of mediations can be conducted in one day, with the parties making a decision at the conclusion of that day whether to continue with the mediation or not in the event that the dispute is still unresolved. Only in the most complex cases, or in multi-party disputes, where considerable time will necessarily be taken to draw out the facts, should a longer period be allocated.

PREPARING FOR THE MEDIATION

It should be remembered that the goal or function of mediation is to persuade the other side to settle the dispute on a basis that is fair and reasonable to your client, having regard to the likely result of a court hearing or arbitration. Other considerations also need to be taken into account, such as the advantages to your client of an early and certain settlement of a dispute. It is therefore important that the following matters are given consideration during the preparation for the mediation:

- What do you perceive as the predictable result if the dispute is not settled at mediation? It is generally desirable to form an assessment of both your "best case" scenario and "worst case" scenario, and prepare a range of figures that equate with the predicted results.
- The delay that will occur before the case can be heard, and the approximate duration of the case and the judgment, including the prospect of an Appeal. Remember, some judges and arbitrators are often extremely tardy in delivering their final decisions.
- The likely costs of the litigation or arbitration, and the proportion of such costs that will be recoverable if your client is successful.
- Any other important interests of your client which may have a significant impact upon a decision to settle. For instance, a desire to preserve an existing commercial relationship, time constraints affecting your client's key personnel which may prevent them from allocating the necessary time to prepare and participate in a hearing, or an urgent need for funds to meet pressing financial commitments.

All these factors should be taken into consideration. It is useful to establish some general target figures, i.e. a negotiated figure that your client would be happy to take (the high point), which will generally be your opening bid, a negotiated figure that your client would be willing to take (the middle point), and a negotiated figure that your client would be reluctant to move below (the low point). These target figures should not be fixed in concrete because there are things that a party may become aware of during the mediation conference that will undoubtedly have an impact upon a negotiation position.

THE POSITION STATEMENT

Most mediators, these days, require parties to exchange position statements before a mediation conference, summarising critical issues and matters of concern. The position statement should be a persuasive tool that starts the groundwork for the subsequent negotiations. Ensure that the position statement is short and clear, as its intended purpose is to be read and understood by the other party and the mediator. Summarise the key issues and facts fairly, and get to the merits of the dispute rapidly. Give the mediator an understanding of the background and circumstances of the dispute, and why your case or defence is strong. A good position paper should not be more than four clearly set out and tightly argued pages. It is best to set out a position paper in numbered paragraphs with sub-headings. Long extracts from cases are generally counter-productive, although if there is some leading decision that supports your client's case, identify the decision and briefly explain its significance. It is often useful to set out the current state of the dispute, for example, whether the case has been fixed for trial and what previous negotiations have taken place. Make sure that the position statements are exchanged a reasonable time before the mediation conference so that you can read and consider the position statement provided by the opposing party before the mediation, and be in a position at the mediation conference to

provide a considered response to any significant matters that may be raised.

THE OPENING STATEMENT

It has become conventional for most mediators to commence the mediation with opening statements from each side. Often, the opening statements are presented by the parties themselves, rather than their legal advisers. This is often the first occasion the other side has to assess the merits of your case and your client's effectiveness as a potential witness. It is important to work with your client before the mediation conference to ensure that your client explains the case in a succinct, clear, emphatic and non-adversarial way. Rehearse the points that you want your client to make. The opening statement should be presented in an emphatic, but non-aggressive or antagonistic way. Prepare and have available critical documents and visual aids as communication tools, for example, extracts from experts' reports, key memoranda, some failed products or materials, photographs and even a video if it will prove persuasive. Such demonstrative evidence is not only a very effective way of communicating your client's position, but they also show that you are prepared and ready to litigate the matter if it does not resolve. Do not hold back on presenting important pieces of evidence or information that will assist your case on the basis that you prefer to keep these matters "up your sleeve" for the trial. Mediation is the best opportunity to come to a fair and realistic resolution of the dispute, and you should always give it your "best shot".

TECHNIQUES OF PERSUASION

It is very helpful to prepare arguments, documents and cases to demonstrate the weaknesses of your opponent's case. These can be provided to the mediator during a private session, and used as "ammunition" to persuade the other side to come to a realistic settlement. The essence of persuasion is to raise doubts in the other side's mind concerning the strength of their case, whilst at the same time drawing their attention to the merits of your case. A mediator, who is perceived as neutral, can be a very effective weapon in presenting your case to the other side. The other party is far more likely to take notice of arguments presented by a mediator than the same arguments presented by the opposing party, who is perceived to have a self-interest. A mediator is usually a highly regarded and experienced practitioner. There is nothing wrong with using the mediator to put your side's arguments.

PREPARING FOR ARBITRATION

I believe that the key to successful arbitration is organising and structuring your evidence, and presenting a theme which will appeal to the arbitrator's sense of fairness and common sense.

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ORGANISE THE DOCUMENTS

The first place to start is to assemble your key documents in a ring binder or binders after the discovery process has been completed. It is helpful to commence with the documents comprising the contract, if relevant, and then incorporate the remaining relevant documents in chronological order, including such documents as correspondence, drawings, memoranda and site meeting minutes. Include only the essential documents and get rid of the other "junk". It is essentially a filtering process so that the essential documents to establish your case are compiled together. It is generally desirable to include as the last documents those documents that relate to the damages claim, if relevant. The folder of documents will eventually comprise your arbitration book, which will be indexed and paginated and proffered to the arbitrator during the arbitration hearing as containing the exhibits that your client wishes to introduce. It saves a great deal of time in an arbitration to have all your relevant documents assembled in a ring binder, rather than to seek to have the documents tendered individually at the hearing. In addition, documents contained in a ring binder can be more readily accessed by witnesses and Counsel during the hearing than referring to individual exhibits. In addition, documents such as letters arranged in chronological order have a greater impact in setting the context of the dispute. Make certain that prior to the arbitration hearing, there are at least four copies of the arbitration book, one each for the arbitrator, your side, the other side, and a "witness" copy which can be referred to by witnesses during the hearing. If the arbitration book includes plans or drawings, reduced copies can be made to fit into the folder.

ARBITRATION AIDS

There are a number of important aids that can readily be prepared to maximise the impact of your client's case in the arbitration. For example, it is extremely useful to provide the arbitrator with a chronology of the key events that you will be relying upon. Such a document can be extremely persuasive, and can provide an overview of your case. It also helps you to organise your case and forces you to identify the important facts and events that will need to be established. Again, the key point to remember is to keep the chronology relevant and succinct. A chronology that laboriously incorporates every piece of correspondence passing between the parties, and refers to every conversation, is unlikely to have much persuasive impact.

In more complex cases, arbitrators are greatly assisted by aids such as a list and description of witnesses and key persons referred to in the evidence. For example:

Bill Smith — Construction Manager of ABC Pty Ltd between 1989 and 1996

Tom Brown — the Site Foreman on the project between July 1992 and September 1995

so that when witnesses or important personnel are referred to during the hearing, their role in the dispute can be readily appreciated by the arbitrator.

Give thought to what other visual aids will help visualise and dramatise your client's case. Interesting and relevant visual aids can have a very powerful impact which is more likely to be retained by the arbitrator. For example, in a recent arbitration which related to an engineering process, the applicant had prepared a large coloured plan of the equipment in question, which greatly assisted in explaining the technical issues. In another matter, where the dispute related to a claim for increased complexity of structural steelworks, a video of the redesigned columns, beams and trusses, which showed not only the extent of the increased complexity, but the size of the members and the increased difficulties of erection, made a very powerful impact. Studies on memory have shown that information received orally is unlikely to be recalled as readily as information that is received visually.

WITNESS STATEMENTS

It has increasingly become a practice for

arbitrators to mirror the procedure in the Commercial List and require the parties to exchange witness statements, or statements on affidavit, prior to the arbitration hearing. The preparation of good witness statements serves an important function, not only to persuade the arbitrator, but equally important to persuade the other side of the strength of your case and your client's grasp of the issues. The exchange of witness statements can often result in an early settlement of the dispute. In general terms, parties are reluctant to settle a dispute unless they are able to fully assess their own case and the opposing case. The exchange of witness statements plays an important educative role. Indeed, it is consistently found in arbitrations that where witness statements have been directed and prepared, disputes are not only more likely to be resolved, but to be so at an earlier stage with significant savings in legal costs. Witness statements should be simple, interesting and tell a story in the language of the maker of the statement. When preparing witness statements, generally try to include some personal background of the witness in the body of the statement, so that the witness is made more human! I find this is far better than "dry" standard curriculum vitaes prepared for employment purposes and attached as an exhibit to the statement. The statement should generally try to use the language of the witness, rather than the lawyer preparing the statement. I often dictate a witness statement with the witness in front of me so that I am using the language of the witness as much as possible. Stick to the facts, and avoid the temptation to argue your case through the mouth of the witness. Make sure that the statement is prepared in admissible form. Generalised and sweeping assertions and hearsay statements are usually objected to, and can result in large portions of statements being struck out by the arbitrator. Unless the witness is an expert, avoid opinions. It is usually helpful to annexe documents referred to in the statement as attachments to the statement itself. Although, in complex cases, when any common documents are referred to by various witnesses, the witness statement can simply refer to the relevant page in the arbitration book.

Ensure that your witnesses actually read their witness statements before the Arbitration hearing. It is remarkable to note the number of times that a witness adopts a witness statement that has not been read or has only been read in a very cursory fashion. My usual practise is to actually read the statement with the witness in order to be sure that the witness agrees with its contents and that there are no alterations or amendments to be made.

PREPARE WITNESSES

There is nothing wrong with witnesses being prepared before the arbitration, rather than just a brief discussion on the morning of the hearing. Witnesses often have very little idea of what will happen at the hearing and what is required of their role as a witness. Explain the sort of questions that a witness will be asked in examination-in-chief, and the sort of questions that may be expected in cross-examination. When I was a Junior to a successful commercial silk in a large Supreme Court matter, he actually had me conduct mock cross-examinations to prepare witnesses for the hearing.

Ensure that your witnesses actually read their witness statements before the arbitration hearing. It is remarkable to note the number of times that a witness adopts a witness statement that has not been read.

Witnesses need to be told some basic things such as:

- Listen to the question and answer the question you are asked.
- Look towards the arbitrator when answering a question, as the arbitrator is the person who needs to be persuaded.
- Do not take cross-examination personally or get involved in arguments with the cross-examiner.
- The function of taking objections to questions is the role of the cross-examiner, not the witness.
- Do not be afraid to disagree with a proposition put by a cross-examiner.
- Above all — tell the truth! There is no worse witness than a witness whose credibility is successfully challenged.

These are all fairly simple propositions and probably go without saying to most practitioners. However, they need to be reinforced with many witnesses. You will find that time spent in preparing witnesses will be well rewarded by a more confident and impressive witness presentation. Incidentally, in selecting the order of witnesses, do not forget the well-known research that we generally remember best the first and last things that we hear. Therefore, generally reserve your best witnesses for first and last. Try to call witnesses in some sort of logical order so that a cohesive and compelling story is gradually built up.

SOME IMPORTANT THINGS TO REMEMBER WHEN PARTICIPATING IN MEDIATIONS AND ARBITRATIONS

As I have sought to emphasise, thorough advanced preparation is the key to success in mediation and arbitration. Preparation requires not only presenting and understanding the strengths of your case, but also understanding and dealing with the weaknesses of your case and the strengths of the opposing case. Do not wait to be taken by surprise during the hearing. Actually sit down and write out the kind of arguments that you expect may be made against your case; then prepare credible responses in advance.

In both mediations and arbitrations, develop and use a theme to present your case. It has been said that good advocates are good tellers of stories. Your story should be told with enthusiasm, confidence and sincerity.

Your theme should be credible and make common sense. Avoid the temptation to advance every single claim or assertion, no matter how improbable or unlikely that the contention will be accepted. In many cases, parties lose the compelling impact of strong and persuasive points by also seeking to rely upon a range of weak points, on the basis of a philosophy that seems to prevail amongst some barristers these days that "no stone should be left unturned".

The difference between mediation and arbitration is that in mediation, the purpose of your presentation is to persuade the opposing side of the genuineness and common sense of your position, whereas in arbitration, your aim is to persuade the arbitrator. However, the key point to be emphasised is that both processes deal with the art of persuasion, and the art of persuasion revolves usually around common sense and sincerity. There is no point in putting forward a case or a theme to the other party or an arbitrator that lacks credibility and would not be accepted by *you* if you happened to be the other party or the arbitrator.

Finally, avoid the temptation towards hostility, anger or aggression. Instead, be non-hostile, reasonable, but firm. This will help you achieve the most successful results in both mediation and arbitration.

Endangered Books

Julian Burnside

THE Ibex is an endangered species of wild mountain goat. Its name has been adopted as the imprint of the Heritage Book Group, whose aim is to preserve endangered books.

Ibex is the brainchild of Pip and Julian Smibert. Their ordinary work has nothing to do with books. But books are their passion. With their own savings, a small mailing list and absurd optimism, they have begun publishing beautiful facsimile editions of books so long out of print as to be nearly extinct.

The books they publish are not available in shops. Anyone lucky enough to be on their mailing list receives advance notice of the next intended publication, and the print-run is adjusted according to the orders received. By this means, the price of the books is kept to $25.00 per volume which, on any view, is extraordinarily good value.

They have so far republished three volumes: *A Cruise in an Opium Clipper* by Captain Lindsay Anderson, *Among Typhoons and Pirate Craft* by Captain Lindsay Anderson and (in a single volume) *Scintillae Juris* and *Meditations in the Tea Room* by Mr Justice Darling.

The two books by Captain Anderson are first-hand accounts of the opium trade along the coast of China in the second half of the 19th Century. In 1859, Lindsay Anderson joined the crew of the *Eamont* as Third Officer. The *Eamont* was a wonderful vessel. It was a topsail schooner built of mahogany. It had a main boom 110 feet long, which gave it great power, speed and grace. She carried nine 18 pound guns and a 68 pounder.

The opium trade was lawful at the time, but dangerous and immensely lucrative. At any time, the *Eamont* carried a fortune in opium, or in the gold and silver for which it had been exchanged. Attacks by pirate craft were not uncommon, and added to the usual hazards of sailing in poorly chartered seas.

Lindsay Anderson records the events of his voyages in a style that bears the unmistakable imprint of the age when Victoria was Queen and Empress of half of the world. He tells a story that can never be relived, from a vantage point that will never be regained.

Of more relevance to lawyers is a combined volume of *Scintillae Juris* and *Meditations in the Tea Room* by Mr Justice Darling.

Few people now remember Mr. Justice Darling (1849–1936). Yet he once was famous: as a brilliant, if precocious, barrister; as a popular member of the House of Commons; and as a witty and outspoken Judge, Lord Justice of Appeal and member of the Privy Council.

Scintillae Juris is a collection of observations and aphorisms about various aspects of the law and lawyer, as remarkable now for their insight and accuracy as when first published.

He was the trial Judge in the case of the poisoner Seddon. He presided over the appeals of Crippen and Sir Roger Casement.

In 1877 a little book called *Scintillae Juris* (legal sparks) was published anonymously. It was an open secret that it had been written by Charles John Darling, then in his third year at the Bar. It was immensely successful. Its sixth edition appeared in 1914 in the name of Mr Justice Darling. *Scintillae Juris* is a collection of observations and aphorisms about various aspects of the law and lawyer, as remarkable now for their insight and accuracy as when first published. Thus, remarking on Courts of Quarter Sessions:

> Counsel should, in all courts, use more of deference in proportion as the bench have less of learning.

And of examination in chief:

> As a rule never allow a witness to state that which he is most anxious to mention for it will surely be either slanderous or irrelevant.
>
> We always expect the honesty of those who are actuated by motives which would not influence ourselves.

Of witnesses:

> A professedly religious witness takes credit for so many virtues that he allows himself much licence in dealing with the truth.

Of cross-examination:

> Never torture a witness longer than he will wriggle in a lively fashion; for it is not the pain but the contortions of the victim which amuse lookers-on.

Of advocacy:

> It is a common practice to conclude speeches with a burst of indignation; but such a feeling concerning the wrongs of others is the shortest-lived of all the passions. I would rather touch last upon prejudice, for it endures like bronze, and is easily written on with the acid of epigram.

It is sobering to reflect that Darling wrote *Scintillae* whilst still a fledgling barrister, with little forensic experience. In truth, his great gift, both as barrister and judge, was his accurate perception of the springs of human behaviour.

Meditations in the Tea Room appeared in 1880. It is more contemplative than *Scintillae,* and less aphoristic. It is a collection of thoughts of a member of the House of Commons about government and society. It was published under the pseudonym MP. It was greeted by the Spectator on 20 February 1880 with a review that plainly assumes it was written by an experienced member of parliament. But Darling was then only 31, and did not enter Parliament for another eight years.

Darling's precocity, and later his tendency on the bench to exercise his wit whenever the opportunity arose, attracted both animosity and admiration. But whilst his controversial personality has faded from memory, the brilliance of his books remains undiminished.

Heritage Books have reprinted in one volume a facsimile edition of the sixth edition of *Scintillae Juris* and the fourth edition of *Meditations in the Tea Room,* which were published together as a single volume in 1914. It is a volume which contains the distilled observations of an acute mind, on subjects of interest to both lawyers and non-lawyers alike.

Anyone wanting more information about Heritage Books can contact them on 9690 1776.

Appointment of Her Majesty's Counsel

On 25 November 1997 the Governor in Council appointed as Her Majesty's Counsel the persons listed below in order of precedence:

1. Lyn Ross Boyes
2. Ian James Hardingham
3. Diana Bryant
4. Terence John Casey
5. Peter Charles Young
6. Ian Douglas Hill
7. Anthony George Southall
8. Charles Michael Scerri
9. Marilyn Louise Warren
10. John Willem De Wijn
11. Charles Gunst
12. Michael Warner Shand
13. Patrick Francis Tehan
14. David Samuel Levin
15. Kevin Harcourt Bell
16. Michael John Colbran

The new silks announced their appointment in Court on Tuesday 2 December 1997.

The Bar warmly congratulates each of them on their appointment.

Name:	**Lyn Ross Boyes**
Date of Signing Bar Roll:	I April 1970
Areas of Practice:	Common Law, Accident Compensation, Mediation
Readers:	F. Davis, M. Brenton
Reaction on Appointment:	Apprehension
Reason for Applying:	Old Age

Name:	**Ian Hardingham**
Date of Signing Bar Roll:	29 May 1986
Areas of Practice:	Trusts, Equity, Wills and Probate, Property, Miscellaneous
Readers:	—
Reaction on Appointment:	Honoured
Reason for Applying:	The "now or never" factor together with the encouragement of others

Name:	**Diana Bryant**
Date of Signing Bar Roll:	29 November l990
Areas of Practice:	Family Law, De facto Disputes
Readers:	—
Reaction on Appointment:	Delighted and honoured
Reason for Applying:	Because I believe the Family Law Jurisdiction warrants recognition — and it seemed to be the right time — I hope I'm right

Name:	**Terence John Casey**
Date of Signing Bar Roll:	23 Novemher 1972
Areas of Practice:	Common Law
Readers:	David Cordy, Joseph McMahon, Richard Edmunds, Klaus Mueller, Sean Le Grand
Reaction on Appointment:	I checked the name on the envelope.
Reason for Applying:	A number of close friends at the Bar encouraged me to apply and I was encouraged by their support.

Name:	**Peter Charles Young**
Date of Signing Bar Roll:	1 October 1975
Areas of Practice:	Family Law, Racing Appeals Tribunal
Readers:	Fogarty, Serra
Reaction on Appointment:	Delighted . . . and proud to join my younger brother (Neil) as Silk
Reason for Applying:	The time was right . . . and the regular advice from colleagues that I should submit an application

Name:	**Ian Douglas Hill**
Date of Signing Bar Roll:	11 December 1975
Areas of Practice:	Criminal Law, Occupational Health & Safety
Readers:	Geoffrey Steward, Karo Gamoga (PNG), Warwick Walsh-Buckley, Graham Ashworth
Reaction on Appointment:	Honoured and delighted
Reason for Applying:	I hoped the time would be right

Name:	**Anthony Southall**
Date of Signing Bar Roll:	1976
Areas of Practice:	Commercial Litigation, Town Planning, Administrative Law, Trusts, Equity
Readers:	Leslie Simons, Michelle Quigley, Ian Freckleton, Michael Norbury, Tim Falkiner, James Samargis
Reaction on Appointment:	Shook
Reason for Applying:	It's time!

Name:	**Charles Scerri**
Date of Signing Bar Roll:	29 May 1986
Areas of Practice:	Commercial, Trade Practices, Contract, Tort (other than personal injury), Mining
Readers:	Peter Fox, Paul Norris, Caron Beaton-Wells
Reaction on Appointment:	Relief — Excitement — Anticipation
Reason for Applying:	Encouragement and support of friends, new challenge

Name:	**Marilyn Warren**
Date of Signing Bar Roll:	1985
Areas of Practice:	Commercial Law and Town Planning
Readers:	G. Beard, D.G. Loadman
Reaction on Appointment:	An immense sense of achievement
Reason for Applying:	—

Name:	**John de Wijn**
Date of Signing Bar Roll:	1984
Areas of Practice:	Revenue Law and Trusts
Readers:	None — they obviously could not pronounce my name — "de who"?
Reaction on Appointment:	Pleased and honoured, but had to take second place at home after my son, Andrew who had just won a photographic competition!
Reason for Applying:	—

Key to appointees (left to right from the rear):

1. Terence John Casey Q.C
2. Peter Charles Young Q.C
3. Kevin Harcourt Bell Q.C
4. Michael Warner Shand Q.C
5. Ian Douglas Hill Q.C.
6. Charles Gunst Q.C.
7. Lyn Ross Boyes Q.C.
8. Anthony George Southall Q.C.
9. John Willem De Wijn Q.C.
10. Ian James Hardingham Q.C
11. Patrick Francis Tehan Q.C
12. Charles Michael Scerri Q.C
13. Marilyn Louise Warren Q.C
14. David Samuel Levin Q.C.

Absent:
Michael Colbran Q.C.
Diana Bryant Q.C.

Name:	**Charles Gunst**
Date of Signing Bar Roll:	9 December 1976
Areas of Practice:	Administrative Law and Commercial Law
Readers:	Lucy Steiner, John Mazurkiewicz, Graham Friedman, Michael Sifris, Alex Telman
Reaction on Appointment:	The Wilde one: "There is only one thing in the world worse than being talked about, and that is not being talked about."
Reason for Applying:	The Mallory one: Because it was there.

Name:	**Michael Warner Shand**
Date of Signing Bar Roll:	9 October 1980
Areas of Practice:	General Commercial Litigation, Equity, Trusts and Insolvency
Readers:	Susan MacCallum, Matthew Stirling
Reaction on Appointment:	Delighted
Reason for Applying:	New challenges, less paperwork.

Name:	**Patrick Francis Tehan**
Date of Signing Bar Roll:	10 March 1977
Areas of Practice:	Crime in general, Criminal Appeal in particular
Readers:	Andrew Lyons, Bernadette Cosgrave, Chris Boyce, Trevor Wright
Reaction on Appointment:	Very pleased.
Reason for Applying:	Unbridled optimism.

Name:	**David Samuel Levin**
Date of Signing Bar Roll:	10 November 1977
Areas of Practice:	Commercial Law, Construction Disputes, Computer Contract and Copyright Problems
Readers:	Peter Freckleton, Jim Peters, Tim Seccull, Peter Sest, Sean Hardy, Michael Wise
Reaction on Appointment:	Delight and apprehension.
Reason for Applying:	After acting as sole junior for silks in the *Esso BHPP* v. *Gas and Fuel* arbitration, I felt that I had to avoid being a junior for the rest of my legal career.

Name:	**Kevin Harcourt Bell**
Date of Signing Bar Roll:	May 1985
Areas of Practice:	Administrative Constitutional and Industrial Law
Readers:	Anthony Lawrence, Richard Niall, Rambun Tjayo (Indonesia), Mark Perica, Iriato Subiakto (Indonesia) (with Bromberg), Peter Gray (with Cavanough Q.C.), Roz Germov.
Reaction on Appointment:	Ecstatic fright
Reason for Applying:	Sense of vocation

Name:	**Michael Colbran**
Date of Signing Bar Roll:	18 November 1982
Areas of Practice:	Commercial, Equity, Property
Readers:	William Southey, Ian Read, Ian Upjohn, Scott Wotherspoon, Joseph Carney, Trevor Poole, Richard Harris
Reaction on Appointment:	Honoured
Reason for Applying:	Many reasons

Nice Distinctions

OF all the words in the English language, few have a more varied career than *nice*. Its meaning has altered more often than that of most other words, and it has always borne several different meanings simultaneously. It was once a verbal chameleon, whose instability might have threatened its survival. It is now much overworked, and has sunk to the verbal equivalent of a food extender, or flavouring 101.

Currently, *nice* has two main meanings. The more common is *agreeable* (generally in a somewhat diluted sense). The other is *fine, narrow, subtle* as in a *nice question,* a *nice distinction.*

Nice originally meant *stupid.* It derives from the Latin *nescius* meaning ignorant. It is thus closely related to *nescient* (ignorant) and *nescience* (lack of knowledge, ignorance). Its progress from there to its two current meanings is a matter of conjecture. But the course of its progress can be charted by noting the 15 principal definitions given it in the OED, with the dates of the earliest and latest quotations supplied by the OED as illustrating those meanings:

1 foolish, stupid, senseless 1290 to 1560
2 wanton, loose-mannered, lascivious 1325 to 1606
  – (of dress) extravagant, flaunting 1430 to 1540
  – very trim, elegant or smart 11483 to 1540
3 strange, rare, uncommon 1430 to 1555
4 slothful, lazy, indolent 1440 to 1604
  – effeminate, unmanly 1573 to 1681
  – tender, delicate 1562 to 1710
  – over-refined, luxurious 1621 to 1720
5 coy, shy, affectedly modest 1400 to 1634
  – reluctant, unwilling 1560 to 1676
6 *to make it* ***nice*** to display reserve or reluctance; to make a scruple 1530 to 1677
7 fastidious, dainty, difficult to please in matters of food or cleanliness; refined 1551 to 1782
  – particular, precise, strict 1584 to 1861
  – fastidious in matters of literary taste 1628 to 1770
  – precise of strict in matters of reputation or conduct; punctilious, scrupulous, sensitive 1647 to 1887
  – refined, cultured 1603 to 1874
8 requiring or involving great precision, accuracy or minuteness 1513 to 1840
9 not obvious or readily apprehended; difficult to decide 1513 to 1885
  – minute, subtle 1561 to 1870
  – precise, exact, fine 1710 to 1867
10 slender, thin 1590 to 1604
  – unimportant, trivial 1592 to 1601
11 critical, doubtful, full of danger or uncertainty 1596 to 1682
  – delicate, needing tactful handling 1617 to 1777
12 entering minutely into detail, attentive, close 1589 to 1864
  – (of the senses) able to distinguish or discriminate in a high degree 1586 to 1873
  – (of judgment) finely discriminative 1597 to 1845
  – delicate or skilful in manipulation 1711 to 1807
13 minutely or carefully accurate 1599 to 1875
14 (of food) dainty, appetizing (especially of a cup of tea!) 1712 to 1974
15 agreeable, a source of pleasure or satisfaction 1796 to 1975.

It is interesting to consider how many senses of the word were current in Shakespeare's time. So far as we know, his plays were written between 1592 and 1605. During that time, quotations from the OED suggest that *nice* was being used in all of the meanings set out above other than 1, 3, 14 and 15. According to the quotations given by the OED, Shakespeare used the word in each of senses 2, 6, 10, 11 and 13.

Perhaps because the word was such a chameleon when he was writing, Shakespeare used it sparingly. In total, he used *nice* in 24 of his 42 plays, where it appears 33 times. This is no mean feat, since it might be thought difficult to use a word at all which simultaneously meant *wanton, lascivious, scrupulous, trivial* and *minutely accurate!* By comparison, Wilde used *nice* 15 times in *A Woman of No Importance*. That play was written in 1893, by which time the meaning of *nice* had stabilised to the two that are currently understood. In this simple comparison, there is a point to be made in the argument between the conservatives and the language libertarians.

One of the main philosophical divisions in that happy group which dabbles in language concerns tolerance of change. The conservatives and the libertarians wage war with lexicographers and each other about whether words should be allowed to change meaning and whether dictionaries should dignify ignorant change by recording it. H.W. Fowler was the most vocal of conservatives, constantly tending the wounds of words injured by the press and the uneducated, and lighting candles for the victims. The Macquarie Dictionary is sometimes attacked as a haven for the libertarians, as it notes without censure the most ignorant misuse alongside the original meaning. See, for example, its note in the recently published 3rd edition in the entry for *fulsome*: "the shift in meaning of this word from 'offensive to good taste' to 'lavish, unstinted' offends some writers but seems to have gained acceptance with the majority". Nicely put.

Shakespeare' s relatively sparing use of

nice illustrates the point that a word whose meaning is ambiguous is likely to be shunned by those who would make their meaning clear. This is probably the most powerful argument of the language conservatives: if change is tolerated without restraint or censure, the stock of useful words is diminished. As words are used in a sense not previously recognised, it becomes more difficult to use the word with any confidence that your meaning will be received intact. Despite the Macquarie's comforting verdict, I would hesitate to use *fulsome* for any purpose, except to be ironic or mischievous; likewise *vagary*, which is now often used to mean *vagueness;* and *disinterested*, which is wrongly used to mean *uninterested.* There are many other words that cannot now be used with confidence, because it is likely that their meaning will be confused with that of another because of repeated misuse. Examples are *alternate* (thought to mean *alternative*); *emotive* (thought to mean *emotional*); *decimate* (thought to mean *destroy*); *congenial* (thought to mean *genial*); *exponential* (thought to mean *rapid*); *dimension* thought to refer to size, scale, or some other ill-defined characteristic); and exotic (thought to refer to anything unusual).

The Macquarie Dictionary is an admirable record of the current state of our language. Whether you find the current state of the language satisfactory or not is a matter of taste; whether you consider the Macquarie's approach to lexicography right or not is likewise a matter of taste. Whether you venture an opinion about these things in public depends on your willingness to provoke others to heated argument. If anyone asks your opinion of the Macquarie, it is quite safe to say "Nice work" (if they don't get it).

Have a nice day.

Julian Burnside

Verbatim

The Gatling Gun Approach

NSW Court of Appeal

Coram: Powell and Beazley JA; Waddell AJA
Blayney Abattoirs Pty Ltd & Ors v. *State of NSW & Anor*
18 July 1996
R.J. Ellicott Q.C. and M. Cockburn for appellants
K. Mason Q.C. S.G. and F.L. Wright Q.C. for respondents

Powell JA, after detailing the large variety of grounds said by the Appellants to support their contention that an insurance instrument was invalid and of no effect said:

I confess that whenever, whether as a trial Judge or an appellate Judge, I have, in the past, encountered submissions which, as do those which I have set out above, reflect what I might call "the Gatling gun approach" I have, more often than not, succumbed to a mood of black despair — one is not to know whether such submissions are the result of a sudden rush of blood to the head, or of a perfervid imagination, on the part of counsel, or whether they merely reflect counsel's lack of confidence in any of his submissions and of his Micawber-like belief that, if all the submissions are advanced, there is a possibility that one might strike home. Be all that as it may, it will be necessary, later, to return to consider these various submissions.

Eventually, the appeal was dismissed.

Doctors appointment

Compensation Court of NSW

Coram: Burke CCJ
Van Trinh Pham v. *Fondfield Pty Ltd*
13 September 1995
A.R. Reoch for worker
J.A. Gracie for employer

The worker called a fellow employee who gave short evidence about the worker's accident. There was no cross-examination. His Honour asked some questions, and this interchange then took place:

His Honour: He is finished, I'm finished, you'd finished, but I've asked and do you want to ask anything more?

Mr Reoch: Can he be excused your Honour?
His Honour: Mmm.
Mr Reoch: Can he be excused?
His Honour: Sure everybody can go home. I feel a bit like that myself.
Mr Gracie: I've got a doctor at 2.30 p.m. if that helps your Honour.
His Honour: Does this mean you're feeling a bit sick?
Indecipherable comment.

Timely Reminder

District Court of Western Australia

Coram: Yeats DCJ
30 April 1997
K. Tavener for the Crown
T. Percy for the accused

Yeats, DCJ: It would appear that this trial can end now tomorrow. I would not have thought that either of you would be more than an hour. Maybe you will.
Mr Percy: I am not sure. The last time I was in front of your Honour I think I was about a day but it was a much longer trial than this. I hate to remind you.
Yeats, DCJ: And I do not want to remind you of the success you had in that trial, Mr. Percy.
Mr Percy: I think an hour will see me out.

Not Grim Enough for Greene

Supreme Court of Victoria, Court of Appeal

Coram: Winneke P., Brooking and Kenny JJA
29 October 1997
Leric v. *Thomas Cooke Australia Pty. Ltd.*
M. Clarke for the appellant
R. Greenberger for the respondent

Brooking JA: The only doubt I have about this appeal is whether the narrative of events in Nigeria resembles more a novel by Graeme Greene or one by Evelyn Waugh. On the whole I think that the tale, lacking the grimness of a Greene tragedy, is more reminiscent of Waugh.

Past It

Supreme Court of Victoria

6 November 1997
Coram: McDonald J
Prentice v. *Bett*
C. Harrison for plaintiff
J. Burnside Q.C. and C. Macaulay for defendants

Burnside Q.C.: These events first became relevant to you in the middle of 1995, didn't they?
— Those events were very relevant on the day because Maxwell Smart was very much in vogue in those days, mobile telephones were very scarce and the circumstances were most unusual and very hilarious. I'll never forget it. In fact, it's a story you could tell at any party really.
Burnside Q.C.: You must go to some pretty wild parties, Mr Collard?
—I used to. I don't any more. I'm past that.

Socking It to Them

Record of Interview held on 29 August 1986

— Right. What sort of knife was it, can you recall?
— Yeh, it was a black-handled silver blade, it had a picture of an eagle on it.
— Right, and when you put it in your pocket, how did you put it in your pocket?
— I wrapped it in a sock.
— Right. Where did you get the sock from?
— From my pants.
— Right. Whereabouts in your pants was your sock?
— My undies.
— Right — why was the sock in your undies?
— Cos I went out to a party and that, you know, looks better if you've got a big dick on you.

Deceased Separately Represented

Extract from instructions contained in Brief

We have been unable to interview the deceased because of his separate representation and accordingly limited information only in available to us. The following has been drawn from various sources: [There follow the name, date of birth, place of birth and other details relating to the deceased].

Small Town Embarrassment

Queensland Court of Appeal

24 August 1994
The Queen v. *Fagan*
Applicant in person

Applicant: I have dreamed this case, I have slept it, I have ate it for the last three and a half years and I am extremely disappointed. I, as I said before, I am not a wealthy man, I am not a gambler, but I would be prepared to gamble that if I was able to get the retrial that I would win it, but the problem is getting it.
McPherson JA: That may be so. I would not be confident about it simply because it is all chancey, that is the trouble.
Applicant: It is, I realise that.
McPherson JA: And it cannot help being chancey, but I think that you should stop eating yourself away with it and try to look at the rest of your life free of it.
Applicant: Your Honour, it is very easy to say, but before this came up I was then aged about 57, 58 years of age. I have never had any convictions of any kind in my life and I think in today's society with so many pressures, that is quite an achievement and I am quite proud of it. And now, to be stricken with this at this age of life, as I said before, Your Honour, it hurts.
McPherson JA: I can understand that.
Applicant: And when I contacted the Criminal Justice Commission, the senior investigator there told me precisely what you told me. He said there is nothing more you can do about it, just go on living your life as if it never happened. Now that is a very glib statement to make, but in a town like Longreach, a small town like Longreach where men are men and women appreciate it, a charge of this nature is a very, very embarrassing charge.

The Gamble of Litigation

These are reported to be Solicitors' Diary Notes:
9.30 a.m. Advised claims manager matter is about to run before Judge Y. Told him our counsel Mr Z recommends we accept offer of 460,000 all inclusive. Repeated that judge overly generous. Asked for his instructions.

He said "just because we don't have a good judge therefore we should settle?" Decent offer of compromise. Wants to run the matter.

1.15 p.m. Further conversation with claims officer. He wants to run it through.

Told about proceedings that have taken place. Told what judge indicated he felt the plaintiff's case was worth. That is, fairly substantial economic loss claim. Told judge questioned the jurisdictional limit — $250,000.00. Not sure what that means. I'm worried this indicates he will give her a sizeable sum.

Told him judge is looking at 35 per cent of a most extreme case if plaintiff's case is successful.

Asked what he wanted to do. Told me he will "eat his shoes and file" if judge awards 35 per cent. He said he would appeal decision if judges give her economic loss component.
3.30 p.m. Judge: Has taken into consideration state of the plaintiff's health and her caring for children.

Amount of verdict: $182,780.99

Mr Z asked for a stay.
4.50 p.m. Final conversation with claims officer: Asked if he was sitting down and he should have his shoes and file on the table. He said wait and I'll get the file. I said bad result and went through judgment. Said I won't give all details and will forward a letter tomorrow.

He said "I have to go".

Three Zeros

Federal Court of Australia

Coram: Finkelstein J
17 October 1997
Glacken for applicant, requesting extension of time to conduct a meeting of creditors.

Glacken: (After making submissions) I have made three points. Each of them alone may not be so strong, but as a totality, they give a reason to grant the application.
Finkelstein J: Mr. Glacken, how much is three times zero?

For Information Only

Supreme Court of Victoria

Coram: Beach J
6 November 1997

J. Karkar: (Objecting to affidavit being tended by Merralls) I object to paragraph 5 of it, Your Honour, on the grounds of relevance. It appears on page 505.
Beach J: Yes, what's the relevance of that, Mr. Merralls?

Mr Merralls: The short answer to that, Your Honour, is that I don't know. I will just see if my learned friend [Harding] can tell me. It is only general information. It is the sort of information that — my learned friend [Karkar] may not be familiar with the equitable jurisdiction of this Court — but in cases involving construction of wills and trust deeds, information of this kind is often provided simply for the information of the Court.
Beach J: Allright, well we'll accept it on that footing.

Fruitful Adjournment

Supreme Court of Victoria

Coram: Senior Master Mahoney
28 August 1996
Wardell, applying to adjourn a winding-up petition of a supermarket, which sells, *inter alia*, fruit:

Wardell: Master, I am simply saying that the last adjournment bore fruit and another adjournment may bear more fruit.
Mahoney: Ms. Wardell, I am not convinced you *have* any fruit.

High Court's Legislative Jurisdiction

Extract from the preface to *Disciplinary Tribunal* Second Edition by J.R.S. Forbes:

The law is stated as at 1 January 1996 with some later additions during correction of proofs. By way of disclaimer which should now appear in all legal texts the writer accepts no responsibility for sudden or unpredictable changes to the law which the High Court, in its legislative jurisdiction, may see fit to make.

The Meaning of Queen

Supreme Court of Victoria

Coram: Hedigan J
10 October 1997
Kathryn Watt v. *General Television Corporation P/L & Ors.*
W. Houghton Q.C. & M. Harvey for the plaintiff
J. Ruskin Q.C. for the defendants

Plaintiff's application to strike out defendant's alternative *Polly Peck* imputations arising from an allegedly defamatory broadcast. The alternative meanings were that the plaintiff was:
(a) vulgar;
(b) selfishly demanding;
(c) spoilt.
Mr Ruskin: We say the words "selfishly demanding" and "spoilt" must be read in context, in close juxtaposition with a reference in the program to the expression "cycling queen". "Queen" in this context means "Diva". By that word, Your Honour, I am not referring to our . . . I'm sorry, my clerk, who is incidentally selfishly demanding and only very occasionally, vulgar.
His Honour: (sympathetically) Hmm.
Mr. Ruskin: It could mean she is the queen in the sense that she is the greatest champion; but it could mean like any queen or any diva she is selfish, she is demanding and she is spoilt because queens are spoilt. They have everything. They have castles . . . The expression in the broadcast "going to hang shit on" imputes no more than that the plaintiff is a spoilt and selfish queen insisting on participating in the Olympic event in place of Tyler-Sharman and that queenlike, she should complain in a spoilt, royal way about her rejection . . .

You can draw reasonable inferences about a feud being re-ignited when Watt announced she had withdrawn from the world titles after being told to attend Mr Walsh's training camp. Queens are not answerable to trainers . . . Further, Your Honour, the defendants' meanings get force from the whole factual situation . . . that situation is, if I may with respect, use the clear word of Callaway JA in the recently reported case of *Grey* . . . epexegetical.
His Honour: Yes, well of course I understand that.

Memo to Counsel

In a memorandum to counsel received in a brief:

Would counsel please read the luminous brief and contact her solicitor.

A Load of Old Verbatim

Compiled by Julian Burnside

Lord Mansfield: If that be the law, I'll go home and burn my books.
Lord Ashburton: My Lord, you had better go home and read them.

Bacon V.C: This case bristles with simplicity. The facts are admitted; the law is plain, and yet it has taken seven days to try — one day longer than God Almighty required to make the world.

Lord Sandwich: You will die either on the gallows or of the pox.
Samuel Foot: That must depend on whether I embrace your Lordship's principles or your mistress . . .

Judge Jeffries: (At a trial during the Bloody Assizes, pointing with his cane) There is a rogue at the end of my cane.
The accused: Which end, My Lord?

The accused: As God is my judge, I am innocent.
Birkett J: He isn't; I am, and you're not.

A chaplain asked Henry Hawkins (later Lord Brampton) what he had thought of the sermon.
Hawkins: It was a divine sermon, for it was like the peace of God, which passeth all understanding. And like His mercy, it seemed to endure forever.

Neville Heath was convicted of the murder of a young woman in 1946, and sentenced to hang. He had been charged at the same time with the murder of another young woman in similar circumstances, but the charge was not proceeded with. As he was about to be led to the gallows, he asked the prison governor for a whisky. As it was being got, he corrected himself: "You might make it a double".

Sir John Latham was driving in St Kilda Road when he was stopped by a policeman.
Policeman: What is your name?
Latham: John Latham.
Policeman: *You* wouldn't be that same John Latham that is a barrister, would you now?
Latham: Yes. I am that same man.
Policeman: *You* wouldn't be that same John Latham that is the Attorney-General for the Commonwealth of Australia, would you?
Latham: Yes, I am he.
Policeman: Well you won't be able to plead ignorance of the law then, will you.

The plaintiff complained that one consequence of the defendant's negligence was that she, the plaintiff, suffered from double vision. The case was being tried by Rigby Swift J. Arthur Ward, a very busy barrister, was for the defendant.
Rigby Swift J: Tell me more about this double vision. Does it mean you see two of everything?
Plaintiff: Yes, My Lord.

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W.H. Upjohn KC was a good, but long-winded, barrister. It is said that he could take a day to say what most might cover in an hour. He was to appear in the Privy Council during World War I, and the solicitor who had instructed in the earlier stages of the case was given leave to return from France to instruct in the Privy Council. He replied by letter:

I am now on military duty engaged upon the task of shifting manure. I prefer that duty to that of instructing Mr. Upjohn for fourteen days in the Privy Council.

At the start of the 19th century, Lord Eldon was Lord Chancellor. He was notoriously slow in delivering judgments. (He began one judgment with the words "Having had doubts upon this case for 20 years, there can be no use in taking more time to consider upon it": *Earl of Radnor* v. *Shafto* (1805) 11 Ves. 448). His first Vice Chancellor, Sir Thomas Plumer, was noted for his proloxity. The following verse was penned at the time:

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Their source, 'twixt good and evil, brings
A difficulty nice;
The first from Eldon's Virtue springs
The latter from his Vice.

F.E. Smith, later Lord Birkenhead, was a brilliant but sometimes offensive barrister. He appeared one day for a tramway company sued for damages for injuries caused to a boy who had been run over. The plaintiff's counsel explained that the boy had gone blind as a result of the accident.

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After a long wrangle with "F.E." on a point of procedure:
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(The technique illustrated in these last two passages is not recommended for any barrister who is not F.E. Smith).

Curran was once pleading a case before a very facetious judge, who was occasionally rather irritable. Any noise while he was charging a jury annoyed him very much. On such an occasion he was interrupted by the braying of an ass, and turned to the sheriff, ordering him to stop that noise. Curran observed, "May it please Your Honour, it is merely an echo!"

In one of the county courts of Northern New York, a witness in a case of an assault was being cross-examined by junior counsel.
Counsel: How far were you, sir, from the parties when the alleged assault took place?
Witness: Four feet five inches and a half.
Counsel: Ah! How came you to be so very exact in all this?
Witness: Because I expected that some confounded fool would as likely as not ask me, and so I went and measured it.

Signing Off

Supreme Court Practice Court
14 August 1997

Gillard J. suggested rewording the order for authentication by a Judge.
Gillard J: . . . and signed by a Judge pursuant to Order 60.04(1) of the Rules of Court.
Wikrama: I was hoping your Honour could sign the order.
Gillard J: Mr Wikrama, I'm a Judge. I can sign it.

The Wheels of Choice for Movers and Shakers

TWO recent issues of *Vanity Fair* magazine demonstrate that stretch limos and sporty European roadsters are passé, vans are in.

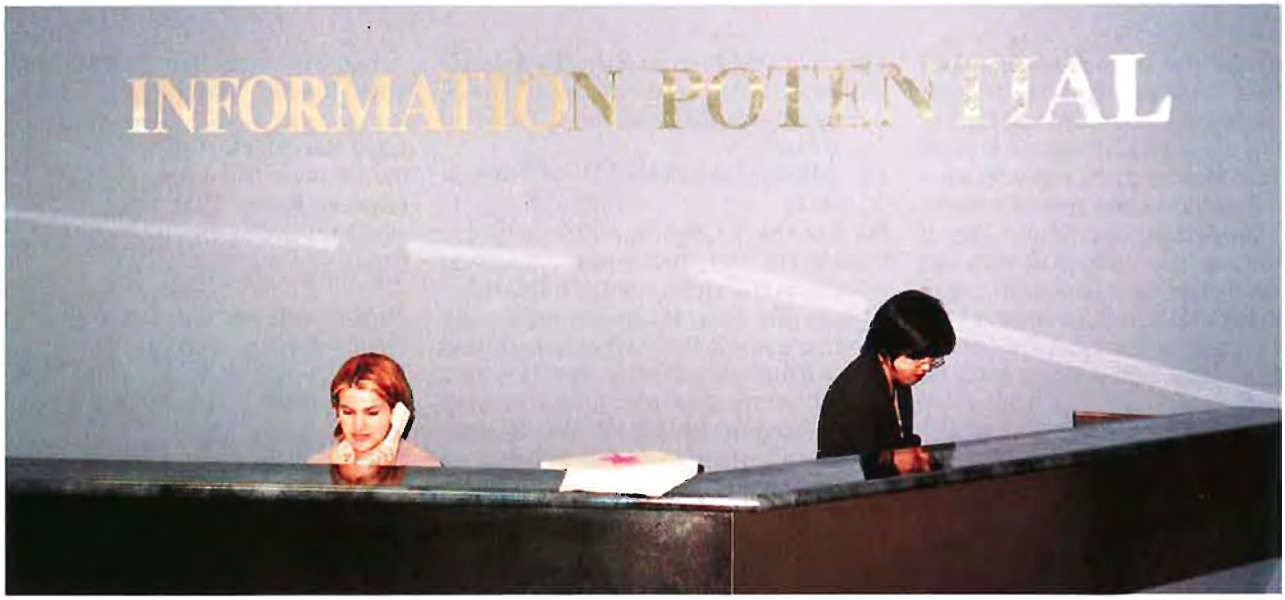
Jennet Conant ("Don't mess with Steve Brill", August 1997) notes that the founder of Court TV and *The American Lawyer*, Steve Brill now prefers a chauffeured Chevy Suburban to get about in.

In the same issue Cathy Horan ("Mel on Wheels") informs us that "at 6.45, Gibson's driver, Dave Goodman, pulls up in a green Chevy Suburban, and Mel climbs into the passenger seat for the 90-minute ride to Burbank."

In the September issue Jennet Conant (again) in "The Ghost and Mr. Giuliani" notes that the Mayor of New York (and one-time high profile District Attorney), Rudy Giuliani gets around the city in the "ice-cream truck", a white Chevy Suburban with blacked-out windows.

Is *Vanity Fair* angling for more extensive advertising by GM in its pages?

Will Gillard J. dispose of his current wheels (*101 Vic BN* 15 at 16, Winter 1997) at a sacrificial price (to a deserving member of the junior Bar) in order to acquire a more fashionable mode of transport?



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Witness: Four feet five inches and a half.
Counsel: Ah! How came you to be so very exact in all this?
Witness: Because I expected that some confounded fool would as likely as not ask me, and so I went and measured it.

Signing Off

Supreme Court Practice Court

14 August 1997

Gillard J. suggested rewording the order for authentication by a Judge.
Gillard J: . . . and signed by a Judge pursuant to Order 60.04(1) of the Rules of Court.
Wikrama: I was hoping your Honour could sign the order.
Gillard J: Mr Wikrama, I'm a Judge. I can sign it.

The Wheels of Choice for Movers and Shakers

TWO recent issues of *Vanity Fair* magazine demonstrate that stretch limos and sporty European roadsters are passé, vans are in.

Jennet Conant ("Don't mess with Steve Brill", August 1997) notes that the founder of Court TV and *The American Lawyer*, Steve Brill now prefers a chauffeured Chevy Suburban to get about in.

In the same issue Cathy Horan ("Mel on Wheels") informs us that "at 6.45, Gibson's driver, Dave Goodman, pulls up in a green Chevy Suburban, and Mel climbs into the passenger seat for the 90-minute ride to Burbank."

In the September issue Jennet Conant (again) in "The Ghost and Mr. Giuliani" notes that the Mayor of New York (and one-time high profile District Attorney), Rudy Giuliani gets around the city in the "ice-cream truck", a white Chevy Suburban with blacked-out windows.

Is *Vanity Fair* angling for more extensive advertising by GM in its pages?

Will Gillard J. dispose of his current wheels (*101 Vic BN* 15 at 16, Winter 1997) at a sacrificial price (to a deserving member of the junior Bar) in order to acquire a more fashionable mode of transport?

The Mr Junior Speech: Correspondence Describing "the Tradition"

By Bryan Keon-Cohen Q.C.

IN my speech to the Bar Dinner last June, I said:

"In order to research the source and nature of the Mr Junior speech tradition, I wrote to the Chairman (they were all men) of each of the Bars in Australia, the United Kingdom and Ireland. I delivered some penetrating questions, and received some interesting replies . . . As best I can ascertain, there is no precedent anywhere for our Victorian tradition — a speech by "Mr Junior" to an annual dinner of the entire bar."[1]

This correspondence is published below. My letter (omitting formal parts) was as follows:

Annual Dinner, Victorian Bar

Speech by "Mr Junior"

I write to seek your assistance, being the provision of information concerning the tradition of "Junior Silk".

For my sins, I currently occupy the position of "Mr Junior Silk" in Victoria. This follows the appointment of Queens Counsel for the State of Victoria last November and means that I am the most junior, by reference to admission to practice, of that group.

Amongst other things, I am thus required to deliver a speech to the annual Victorian Bar dinner next June. This speech was initially given by "Mr/Ms Junior" being the most junior counsel — again by reference to date of admission to practice — who had signed the Bar roll in any given year. About ten years ago, however, the baton was handed to Mr/Ms Junior Silk for a given year. The speech, in recent times at least, tends to be a series of (hopefully) humorous anecdotes about the Bar's honoured guests invited to the dinner, being members of the Bar who have been appointed during the prior twelve months to the judiciary or other high office, who have received honours or awards, or the like.

I am now preparing my speech and am interested to learn whether your Bar has a similar tradition, and if so, its source and requirements. May I therefore ask :

- Does your Bar have a tradition or informal arrangement whereby the most junior of the Queens Counsel appointees in any given year, or the most junior member of counsel to have signed the Bar roll that year, is nominated as "Mr/Ms Junior" or "Mr/Ms Junior Silk"?
- Is that "Junior" required to deliver a speech to your annual bar dinner or perform similar functions?
- If yes to either of the above, what is the source of this tradition, how long has it been in operation at your Bar, and are there any other aspects worth recording?

I should be grateful for any assistance you might offer — preferably within the next week or so. The only material quid pro quo I can think of is to offer you a copy of my speech, should you be interested.

Thanking you in anticipation,

Yours sincerely,
B.A. KEON-COHEN

The following replies were received:

N.T. Bar Association

Dear Bryan

Re: Annual Dinner — Victorian Bar

You have my sympathy.

The Northern Territory Bar Association is a small group of people and we only have appointments of Queens Counsel occasionally. This means that the tradition of the "Junior Silk" in Victoria does not apply in the Northern Territory. I have been present at Bar Association dinners in Canberra and in Queensland where the tradition applies and know that it can be a daunting experience for the "Junior Silk".

Congratulations on your appointment as one of Her Majesty's Counsel in Victoria. I wish you all the best for your speech and the future.

I would be interested in receiving a copy of the speech in due course.

Yours sincerely,
TREVOR RILEY Q.C.

Tasmanian Bar Association

Dear Sir,

Mr Juniors Speech

I refer to your letter 11 April 1997 addressed to Mr G. Pickard, the former secretary of the Tasmanian Bar Association. I have intercepted it and may be able to provide you with some comments.

Firstly, congratulations on your recent appointment as Queens Counsel, but perhaps commiserations that the task of Mr Junior falls to you.

The Tasmanian Bar is not a large one. We do not have sufficient personnel to appoint a "Junior Silk". However, traditionally, there is a speech which has been given at the annual Bar Convention by the most junior practitioner admitted in point of time and present at the convention.

About five years ago, it was decided that some of the speeches which had been given in the past did not fit an important criterion. They were not funny. In fact, when members of the Association looked back on the institution of Mr Junior's speeches they could remember only a few that fitted that criterion.

In order to alleviate the problem, it was decided to request a practitioner with a little more aplomb to take on the role of Mr Junior. This was first done by Roger Jennings Q.C., who was once Solicitor General for Tasmania. It was such a success that, with one exception, which proved the

1. (1997) *Bar News* (Winter ed.) 42–49 @ 43–44.

rule, the practice has been adopted ever since.

The Mr Junior's speech has been part of the traditions of our Association, certainly since it was forced in 1963. Prior to then, due to the "parochialism" for which that state is renowned there was a Southern Bar Association and a Northern Bar Association. I expect that both of those institutions also had a similar speech.

The purpose of the speech is to propose a toast to Her Majesty's judges, to which the Chief Justice or most senior puisne judge then responds.

I hope this is of some assistance to you.

I would be grateful if you would forward a copy of your speech in due course.

Yours sincerely,
MICHAEL O'FARRELL
President

The Western Australian Bar Association (Inc.)

Dear Keon-Cohen,

"Mr Junior Speech"

Thank you for your facsimile of 11 April 1997.

In responding to the queries you have raised, I must advise that the position in Western Australia is somewhat confused by the historical development of the profession in this State, which was, until 1963, entirely an amalgam profession. Even though the WA Bar has been in existence for more than 30 years now, and has flourished (presently having more that 120 members), there remains a close association between the Bar and the Law Society, and some degree or fusion between the functions held by those respective bodies. All members of the WA Bar Association are, pursuant to our constitution, required to be members of the WA Law Society.

The Law Society

Dealing firstly with the social functions held by the Law Society, by reason of the historical traditions to which I have referred, it is in fact the Law Society that holds an annual dinner to mark the occasion of the visit to Perth of the High Court. For as long as I can remember it has traditionally been the role of the most recently appointed Silk to propose the after dinner speech, which generally takes the form of a toast to the Court.

The Law Society does not hold functions at which the appointment of members to positions of prominence is formally recognized by a speech.

The Bar Association

The WA Bar Association holds approximately two dinners per year other than the annual dinner. At the dinners other than the annual dinner, it is the practice to provide an after dinner speaker who will make mention of any appointments of members of the Association to the Bench or to Silk since the last dinner. Generally that speech takes the form of a series of anecdotes verging on a "roast". When I commenced at the Bar in 1988, that speaker was generally referred to as "Mr Junior", apparently because the tradition was to the effect that the speaker would be the most recently admitted member of the Association. However, that tradition has been basically honoured only in the breach over the last nine years. To take the most recent example at our most recent dinner the after dinner speaker was Mr E.M. Heenan Q.C., a former President of the Association and a Senior Silk.

Best wishes with the preparation of your speech. I sincerely hope that my commitments will permit me to attend the Victorian Bar dinner to hear it delivered. If not, I would be most grateful for the provision of a copy in due course.

Yours sincerely
WAYNE MARTIN Q.C.
President
WA Bar Association

The NSW Bar Association

Dear Bryan,

I thank you for your letter of 11 April 1997. In accordance with the highest traditions of the Bar in answering interrogatories, I provide the following answers:

1. No.
2. No.
3. Does not arise.

At our Bench and Bar Dinner there are two speeches: a toast to the guest of honour by a silk (sometimes called "Mr Senior") and a seconding of that toast by a junior (sometimes called "Mr Junior"). There is not, and has not within my memory, been any practice under which "Mr Junior" is the most junior silk. Indeed, both the silk and the junior are selected by the incumbent president, normally on the basis of their perceived ability to make a witty after dinner speech.

At ABA dinners in Canberra every February, the practice has again been that the President of the Australian Bar Association selects the person who he or she believes will be the best after dinner speaker among the new silks. There is, at ABA dinners, a practice of appointing the most junior silk to move the loyal toast.

I hope this is of assistance. I look forward to hearing your speech in June but I would, in any event, if you regard this letter as a sufficient answer to your questions, love to receive a printed copy of it.

Best wishes,
DAVID BENNETT
President

The Faculty of Advocates: Edinburgh

Dear Bryan,

Thank you for your letter dated 11 April 1997. There is no practice at the Scottish Bar of the most junior silk being required to speak at Bar dinners. The only equivalent tradition is that which existed in your jurisdiction until ten years ago. There is a practice that the "Boots of the Bar" is required to speak at Bar dinners on occasions. This was a tradition which was adhered to diligently until about eight years ago. The Scottish Bar was extremely small at that time and there was a tradition that when a member became engaged to be married, a dinner was organised in his or her honour. At that dinner, the member, his or her former master and the Boots of the Bar were required to make speeches. All of the speeches were expected to be humorous and the audience was particularly merciless if that was not the case! I do not want to discourage you in the performance of your duties but I am sure that the Victorian Bar will not be as critical as the Faculty of Advocates. Even if they were, I am confident that you will fulfil your duty with distinction and a sense of humour.

With the increase in the size of the Bar, it has not always been possible to secure the attendance of the Boots of the Bar at dinners, which are now even more formal and tend to be organized in honour of members who have been appointed Lords of Appeal in Ordinary, Lord Chancellor, Foreign Secretary, Leader of the Opposition or equivalent High Public Office. At such dinners, the Boots of the Bar is not called upon to speak. However, at less formal gatherings, the tradition is observed.

Yours sincerely,
ANDREW R. HARDIE Q.C.

The Irish Bar, Dublin

Re: Annual Dinner, Victorian Bar
Speech by "Mr Junior"

Dear Mr Keon-Cohen,

Thank you for yours of the 11 April, and

apologies for the delay in replying. I was away when same arrived.

The first point to make is that we do not really have at the Irish Bar an Annual Dinner of the sort that you describe. However, there are a number of traditions which place a burden upon the most junior member present, which I might outline :

(a) There is no tradition of "Junior Silk" but there is tradition that both on the Circuits, and for the Courts in Dublin, the most junior barrister has a general ceremonial function whenever a formal social occasion takes place. However, happily from that person's point of view, it rarely involves making a speech, humorous or otherwise. So far as anyone can tell, this tradition goes back to time immemorial.

(b) The Honourable Society of the King's Inns is the Inn of Court for Ireland. It elects Benchers of the Inn in much the same way as the London Inns do, and has both Judicial Benchers (being all Judges of the Superior Courts of Ireland) and a roughly equivalent number of Bar Benchers elected from time to time when vacancies arise. Benchers rank among themselves for all occasions in the King's Inns in order of their seniority as a Bencher. In other words, they rank from the date upon which they first became a Bencher. Dining at Commons still continues at King's Inns, and the tradition is that the Junior Bencher of the night has to act as minder for the evening, including such onerous duties as pouring coffee for his, or her, more senior colleagues. Again, it does not, happily, involve making a speech.

(c) We do retain the tradition that, on the last day of each legal term, the order of seniority is reversed so that the most Junior Barrister has right of precedence for any matters in Court where seniority is the determining factor for the order in which procedures are followed.

(d) On one or two occasions where major functions have been organised by the Bar, the tradition has been followed in the sense that the most Junior Barrister has been asked to make a speech along with (say) the Chairman of the Bar or other senior persons. However, this is not rigorously followed in all cases, and seems to be a reflection of a desire to give a young Barrister a role in these matters with some deference to the long-standing tradition of imposing upon the Juniors in some or other category for menial tasks.

I hope that the above is of some assistance.

Yours sincerely,
FRANK CLARKE, S.C.

The General Council of the Bar, London

Dear Keon-Cohen,

Thank you for your letter of 11 April. We do not have any matching tradition not least because we do not have an annual dinner of the entire Bar of England and Wales which is now almost 9000 strong. We do have a similar tradition in that as you are probably aware England and Wales are divided into six circuits, and each circuit has both a leader, a senior silk, and a junior, a junior but not necessarily the most junior junior. I can only speak with authority about my own circuit, the South Eastern Circuit. I was its junior some 25 years ago. As such I was required to make a speech at the Circuit's annual dinner in response to the speech made by the leader. It was without question the most terrifying experience of my life at the Bar! I am sure that the other circuits have similar traditions.

Best of luck with your speech.

Yours sincerely,
ROBERT OWEN Q.C.
Chairman

Although not all of the Australian Bars replied, I stand by my statement: to the best of my knowledge, there is no "tradition" precisely equivalent to our Bar Dinner Mr Junior Speech – save for the imposition of terror!

With the Compliments of His Honour Judge Spence

What a pity that lovely lady didn't confide her case to me . . . in my pleading I would have made her husband out to be a real scoundrel . . .

Opening of Land Rights: Sea Rights Exhibition

Contemporary Art of the First Australians

Essoign Club 4 December 1997–10 February 1998.

AUSTRALIAN Aboriginal art has had a high profile in the art world for some years. It has become instantly recognisable — dot and circle dreaming paintings in synthetic polymer paint on canvas have become part of the Australian contemporary art scene.

Lately, traditional concepts of Aboriginal art have been challenged by emerging artists who happen to be Aboriginal by descent, rather than Aboriginal artists painting traditional Aboriginal art.

This development is sharpening appreciation and broadening acceptance. It is an emerging school of art — naive, genuine, and invariably painterly, created with joy and reflecting an increasing awareness of its place in the art world.

Exhibiting artists include:

Kathleen Petyarre, Award winner of the 1996 Telstra National Aboriginal and Torres Strait Islander Award
Abie Loy
Violet Petyarre
Rita Pwerle
Barney Ellaga
Willie Gudabi (1916–1996)
Djambu Barra Barra
Amy Jirwulurr Johnson
Lily Nungarrayi Hargraves
Lorna Napurrurla Fencer.

Included in this exhibition is Tiwi art from Milikapiti, Melville Island in the Northern Territory. Tiwi art is derived from the ceremonial body-painting and ornate decoration applied to funerary poles, *Yimawiilini* bark-baskets and associated ritual objects made for the *pukamani* ceremony.

Curated by Beverly Knight, Alcaston Gallery, 2 Collins Street, Melbourne, in conjunction with Gallerie Australis, Adelaide. Co-ordinated by Trish Anderson, Art Broker, Adelaide.

Looking for Tactile Values 1.

Looking for Tactile Values 2.

Patrick Tehan, David Brustman and friend.

Tim Wood Q.C. as he then was.

A first for List A: An On-Line Law Library for Members

THE members of List A find that they are able to research the law with greater speed than ever before as they now have access to a central computer law library. The computer hardware is located in the clerk's office and consists of a file server and four modems. At this stage, four people can access the library at any one time but this number can be increased by installing extra modems when the need arises.

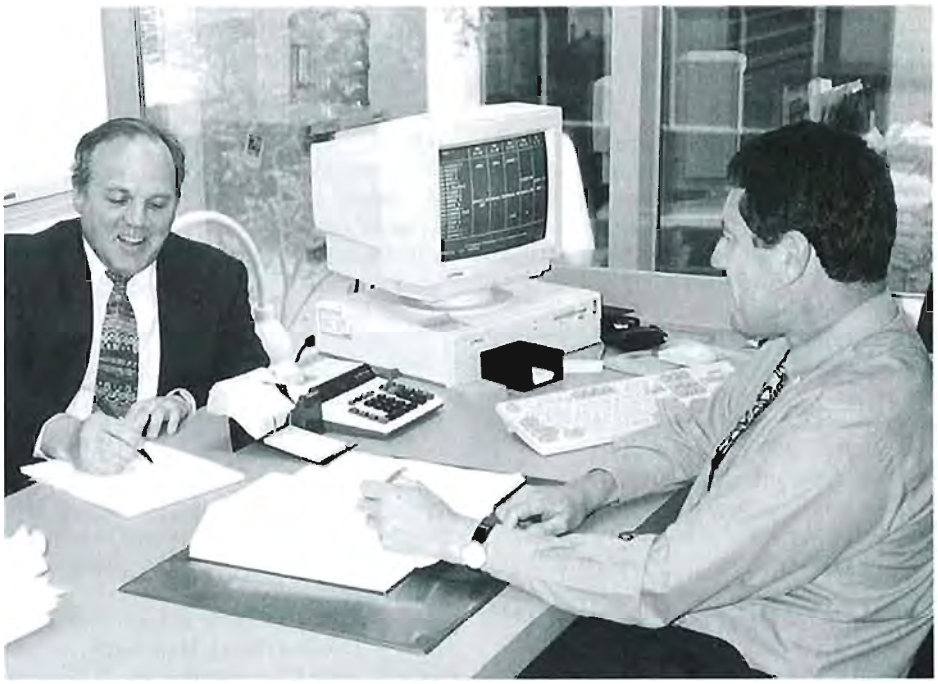
The main areas of law practised on List A are commercial, taxation, corporate law, town planning and industrial law, and the research databases cover most of these areas.

The system is easy to use. The members of the list, by using a phone line, simply dial into the computer from their chambers, from home or indeed from any location so long as they have a computer, a modem and a telephone line. It does not matter whether their computer is a PC or an Apple Macintosh as either can access the database.

Michael Tippett, the executive director of Barristers' Clerking Services P/L and the clerk to List A, in considering what other services he could offer the members of his list, came up with the idea of a central and remote legal database. Any such system though, had to be cost effective, easily accessible and simple to use. The concept in functional and technical terms was evaluated over a period of time and a decision was made after considering all the options available. The system agreed upon was eventually installed and came on line in March 1996.

What we now have, says Tippett, "is a quick, convenient and state of the art computer system that is easily accessible by members of the list. The barristers see the system as an efficient and cost-saving alternative in accessing the most relevant case law. Speed and efficiency of research are the major benefits of the system. No other clerking service has a database as complete and comprehensive as ours."

Michael Tippett also acts as the systems administrator and provides advice should any of the barristers experience problems or need any assistance in using the databases.



Michael Tippett, (right) Clerk for List A, with Brian Parsons of Information Potential Pty Ltd, who supplied the hardware, software, and systems integration for the members' on-line library system

The computer runs on Windows NT and Citrix Winframe, and any member wishing to use the system can install the necessary client software which is easy to do and is free of charge. They are then set up as a user and given a username and password.

Searches made on the databases can be many and varied depending on the criteria used. The results of the searches are prompt as the users access the computer hard disk rather than a CD-Rom. This improves the performance and reliability of the system.

The legal databases available on the computer include:

Law Book Company —
- Laws of Australia
- Australian Legal Monthly Digest
- Australian Case Citator
- Australian Digest
- Federal Cases
- Federal Case Citator
- Current Judgments

Pink Ribbon —
- Case Base

CCH —
- Corporations Law

Aust Tax Practice —
- Australian Tax Law

Aunty Abhas —
- Commonwealth, NSW and Victorian Acts, Regulations and Annotations

Over half the members of List A are connected to and are using the system.

Maurice Phipps, who was the chairman of the list at the time the computer system was contemplated, was keen to support the concept as he regarded it as being an innovative and worthwhile project. "It offers significant benefits to the list as a whole and because of the financial benefits to the list it is very cost beneficial for members. I am connected to the system and use it regularly."

Peter Almond has been using the system since March this year. Peter was initially attracted to the system because of its ease of use and because it did not require sophisticated computer skills. "It has become my first reference point for any le-

Maurice Phipps

Jeanette Richards

Peter Almond

gal research. Access is reliable, prompt and the system is portable. Research can be done outside chambers and outside conventional working hours."

Jenny Richards sees it as the way research practices are going and will go in the future and wants to keep up to date with these trends. "It is imperative that the Bar as an organisation is seen to be keeping up with new practices and advancements in technology. This is one way barristers can demonstrate their willingness to move with the times. It is a system that is worthwhile, efficient and produces reliable search results within seconds."

The costs of the computer databases are shared by all members of List A whether they use the system or not. The costs are treated as a company expense and each member pays in proportion to their income. In other words, the higher their income the bigger their share of the costs. The figures show that no one pays over $500 per year for the use of the system.

The computer hardware can support other concepts such as an intranet connection for the members of the list. This possibility has also been considered by the list committee.

The experience of List A over the last few years has shown that easy and reliable access by barristers to electronic information for research purposes is not only worthwhile but also expected on today's electronic market. And List A goes all the way in providing such a research tool to its members by way of a productive state of the art-legal research system.

Spooner Exhibition

THE exhibition, The Law and other Matters, comprising 64 works by cartoonist John Spooner, opened at The Essoign Club at the Owen Dixon Chambers in mid-October, and closed in the first week of December.

The exhibition included drawings, cartoons, prints and paintings. The cartoons (utilising variously pen, ink and watercolour) were drawn from works appearing in *The Age* and *Quadrant* magazine over the last ten years.

A group of studies from the courtroom formed the core of the exhibition.

The studies were initially sketched by Spooner in pencil in his notebook and were recently used as the reference for creating the oil paintings and monoprints.

While these are not Spooner's first monoprints, the works are a recent development in his handling of the medium.

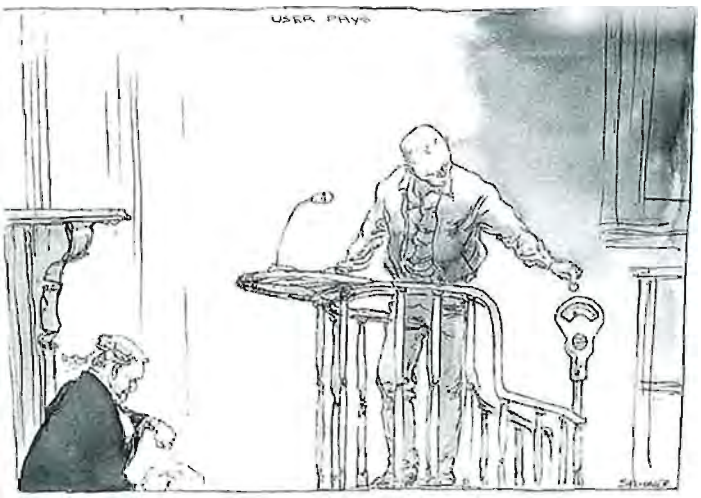
Chrysalis Publishing curated the exhibition. John Spooner worked with printer Andrew Gunnell at the Chrysalis studio in Fitzroy.

Retribution (watercolour)

The law is . . . (watercolour)

Musical ethics (pen and ink)

Jan Wade (watercolour, pen & ink)



User Pays (watercolour, pen & ink)

Born not made (watercolour)

Gordon Lewis' winning entry in Spring *Bar News* competition

THINGS have certainly progressed in the Solomon Islands during the past decade! Since the Ian Meckiff School of fast bowling was opened at the indoor nets in Honiara in 1992 and Dougald Haines became the Shire Clerk, cricket has gone ahead in leaps and bounds.

Each morning the youthful members of the SICA (the Solomon Islands Cricket Academy) sit in their small amphitheatre adjacent to the local police station, while would-be fast bowlers are encouraged to make the bent elbow syndrome a thing of the past.

To ensure that the dreaded virus of illegal fast bowling is banished from the Solomon Islands forever, the so-called Haines by-law was introduced in 1996 to prevent even the spectators bending their elbows at cricket matches.

Anyone bending an elbow at a cricket match will be convicted, prosecuted and arrested and generally given a hard time in that order.

The concept of "conviction before prosecution" has proved to be a tidy and efficient process, minimising legal costs, allowing Courtrooms to be converted into Casinos and enabling unwanted Magistrates to take earlier retirement.

Elbow-bending bar

Once a person has been convicted of bending the elbow, as part of the investigation process, his arm is used for the purpose of demonstrating to the fledgling cricketers of the Solomon Islanders what is and is not permitted. After the investigation the convicted person is normally admitted to the Honiara Hospital, a complaint laughingly referred to by local cricket lovers as "a Meckiff elbow".

Gordon Lewis

Editor's Note: The Solomon Islanders have acknowledged their indebtedness to Victoria.

Enter new competition

What you have to do to win

Readers are invited to:

- provide a caption for the photograph.
- provide a short (and apocryphal) explanation as to the circumstances in the photograph 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 West by Friday, 27 February 1998.

James Isles receives Montblanc prizes for his winning Winter *Bar News* competition entry

James Isles receiving his Mont Blanc ballpoint pen and leather notebook from Pen City proprietors, Tony Jones and John di Blasi.

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

Media Management

IN his address to the Australian Legal Convention (September 1997), the Chief Justice of Australia expressed criticism of the increasing use of publicity by trial lawyers to advance their clients' cases in the media. Several days prior to the CJ's address a well-known practitioner in high-profile tort litigation had encouraged such use of the media as a legitimate tool available to lawyers.

In a recent article in the *New Yorker*, Jeffrey Toobin ("Spinning Timothy McVeigh", 19 May 1997) considered this issue eliciting the following letter from David P. Atkins of Bridgeport, Connecticut, which was published in the June 9 issue:

Lawyer v. *Client*

Jeffrey Toobin aptly cites Robert L. Shapiro's 1993 article "Using the Media to Your Advantage" as an indication of the growing trend towards "aggressive media management" by criminal-defense lawyers. The question of whether such strategies ultimately benefit the client or the lawyer is partly answered in that article by Shapiro's own account of his activities. Shapiro refers to his defense of Marlon Brando's son Christian in a murder prosecution. Because Brando's bail was posted "late in the day", Shapiro explains, it looked like he would be unable to keep a commitment to give advance notice of the exact release time to reporters "camped outside the County jail". Shapiro's solution "Even though . . . [Christian] could have been released any time that night, I fulfilled my promise and co-ordinated with the Sheriff's Department a release at 11:00am the following day." That is, Shapiro arranged for his own client to spend an extra night in jail. Whether the client agreed that his case was enhanced by this particular method of spin management, Shapiro does not say.

The Elation of the Bar None Team Turned to Deflation

IN the middle of October, 1997, a team that had been promoted as the new wave of Australian hockey geared up for the game of the year. All hope rode on the shoulders of this brave team, trained to peak levels of fitness previously only dreamed of in such circles. They strode out to meet the team that had become their arch foe on the field of dreams. Despite a valiant attempt, however, the team once again failed to capitalise on its hidden strengths, which remained hidden, and on its past flashes of brilliance, which flashed past all too quickly and were gone.

The Australian Men's Hockey team versus Germany, Champions' Trophy in Adelaide? No !! — the Bar None Hockey team versus the Law Institute of Victoria, State Hockey Centre, Melbourne.

Two men and a dog — actually one man and a dog — turned up to support the efforts of the Bar None team in the 14th annual match against the Law Institute. The team, without Burchardt and A. Tinney, who traded on the excuses of injury and a hospitalised wife respectively, put in a creditable performance early on, to easily score the first goal of the match (Hawkins on a pass from M. Tinney, in turn receiving from a free hit sent on its way by Sexton). Support from the bench was sorely missed — not only were Coldrey and Wodak JJ. unavailable, but the team had only one interchange. Burke and Wraith were solid in defence, and Lynch in goals forced the solicitors to score a number of their goals in — dare I say it — a manner more attributable to luck than skill. Wood and M. Tinney combined in the fight for control of the centre with the firm of McNab & McNab, and the remaining team members worked hard to build up and capitalise on forward moves.

The elation of the Bar None team at its early good start turned to deflation when the Law Institute found a goalkeeper for the second half. It was also at about this time that the Bar team began to regret allowing the young and skilful son of Lynch to make up the previously depleted numbers on the Institute team. An opportunistic goal by Brear from a right cross to the goal mouth late in the second half brought the Bar back to a final score-line of 6–2.

Tom Lynch — goalie alone with his shadows at this stage of the match.

Mark Dreyfus after ball with LIV player on his left side.

LIV about to swing, Meryl Sexton intercepts again with close Bar support. Tom Lynch stepping in to take any shot and reduce angles for shot at goal.

LIV shoots for goal. Players await umpires' decision.

The umpires. Left to right, Paul Morris and Craig Miller.

Colin Bourke, Captain Bar None team presenting Cup to Ken Starke for LIV team with a short speech.

The Bar None team continues to pursue its non-discriminatory selection policy, including amongst its number not only a Family Court Registrar and two brand new Readers, but also two women — unlike the Institute team. An Honourable Mention goes to M. Tinney who took the supreme risk of playing the game in his usual full-on style, sans mouthguard, just two days before his wedding; fortunately the only breakage was his stick in the dying minutes of the match.

Congratulations on another fun effort by the Bar team: Burke (Acting Captain), Gordon, Lynch, L. Wraith, Wood, Sexton, Riddell, Hawking, Dreyfus, Brear, M. Tinney and Sharpley. Thanks once again to Brear for organising the Bar team, the practice match with RMIT, the umpires and the big game. The umpires decided that Alastair McNab (LIV) was Player of the Match.

Meryl Sexton

FOOTNOTE: A timely suggestion by Wodak J. — that a perpetual "Player of the Match" award be instituted in honour of Balfe Q.C., a driving force in initiating, organising, coaching, captaining and playing in the annual Bar v. LIV matches — was well received by all.

Sexton attempting to obtain property by deception, fraudulently misrepresenting that the Bar had won the match and the trophy, aided and abetted by Dreyfuss (half hidden), and Hawking unfortunately witnessed by Starke, Captain of the LIV team (left). The barman saw nothing, nothing at all.

Farewell Rupert Balfe

RUPERT Balfe retired from active practice in November this year. A stalwart of the common law Bar, he was also a stalwart of the Bar hockey team.

On Thursday 20 November 1997, members, and former members of the hockey team and others gathered to farewell Rupert in the Essoign Club. Amongst the guests was Michael Craig, former Olympic hockey captain.

The occasion was not only a farewell to Rupert but an acknowledgment of the vital role he has played in bar hockey. That vital role is perpetually remembered by the creation of the J. Rupert Balfe Q.C. Player of the Year Award. That award was presented for the first time at the lunch in honour of Rupert.

The principal speech was given by His Honour Judge Wodak. His Honour's comments are set out below.

(Left) Rupert Balfe Q.C. with Finlay McNab (right) (of McNab, McNab & Starke) accepting the J. Rupert Balfe Q.C. Award for the Player of the Match — a salver and medal on behalf of the winner — Alastair McNab.

On 3 October 1984, the Astroturf Stadium at Royal Park was the venue for the first joust between hockey playing members of the two branches of the profession.

Those taking part were:
representing the Law Institute: Finlay McNab, Andrew Tulloch, Ken Starke, Michael Tinney, Alastair McNab, John Lesser, Ian McNab, Ian Cloak, Doug Fordham, Meryl Sexton, Philip Stewart and John Morgan;
representing the Bar: Rupert Balfe, Graeme Powell, Andrew Tinney, Tom Lynch, Tom Wodak, Zanda Senghpa, Peter O'Day, Stephen Blewett, Gordon Smith, Andrew Alston, Peter Almond, Peter Reardon, Peter Burke, John Bryson, Richard Brear, and Ganasan Narianasamy.

Despite unrelenting rain, the Bar was triumphant, 4 to 2, and became the first holder of the Scales of Justice Cup, designed by Judge Crossley, better known for his judicious support of St Kilda Football team, a malady shared with His Worship Mr Philip Goldberg, a sometime player in the Bar hockey team and Coach's Assistant to Stan Alves.

In 1985, the Solicitors exacted a horrible revenge, winning 5 to 1, and taking possession of the Scales of Justice Cup. Fortunately, the then Director of Public Prosecutions, now Coldrey J played for the Bar, and detected cheating by the Solicitors. An investigation into the tactics of the Solicitors was commenced, and now, 13 years later, it is believed that several persons are continuing to assist the investigators in their enquiries.

The Solicitors repeated their wins in 1986 and 1987, and it is thought, in hindsight, that the better side won on each occasion. Yet again, the Solicitors won in 1988, but narrowly. Meryl Sexton, now playing for the Bar was subjected to what the offender admitted was a crude tackle. The DPP was moved to describe it as an indecent assault. Sources close to the investigators say that several umpires are assisting them in their enquiries.

In 1989, stung by a stirring pre-match oration by its captain coach in which he intimated that the losses in the previous four years constituted touting by the barristers, the Bar rose to the occasion to inflict a 4 to 1 loss on the Solicitors. The Scales of Justice Cup then returned to Owen Dixon Chambers.

Nineteen-ninety was a busy year. In March, there was the triangular tournament between the Bar, the Law Institute and a NSW team being a Wolf Blass blend of barristers and solicitors. The Bar defeated NSW and the Law Institute, and tied with the Law Institute in the final. In October, a 6–6 draw saw the Cup remain in ODC.

In 1991, the Bar and the Solicitors staged another draw, 3–3. In 1992, the Solicitors won, by the only goal scored, and the Cup, which had settled in comfortably, made its way to the Law Institute, where it remained in 1993 and 1994, with the Solicitors winning in each year.

Not to be denied, the Bar triumphed in 1995, for which it paid heavily with a 1 to 5 loss in 1996, before losing again 2–6 this year.

A pleasing feature of the annual hockey matches has been the participation of female and male hockey players in both teams. Affirmative action has been part of hockey for a long time.

Information now to hand suggests that a denial should be made of the rumours sweeping the legal profession that the Bar has commissioned the drafting of new rules for these matches which would impose severe goal penalties on solicitors for the indictable offences of being in possession of excessive skill, running with the ball at excessive speed (trafficking) and undue athleticism.

We are here today because we have had some involvement in the matches I have briefly described or for related reasons.

All of us are here, therefore, mainly because of the efforts on one man, who played an important part in the concept of this annual contest, and in gathering together the Bar team. Having done that, he then led and coached the Bar team, and as

a player, showed the way with his skilful stickwork and clever tactics.

That man is, of course, J Rupert Balfe Q.C., a man of many parts. Rupert is and has been well known for his prowess in hockey over several decades, especially with Old Scotch. He has represented the State at hockey, and played successfully at very high standards, in powerful company. Rupert is also known for other reasons, which include his keen interest in and knowledge of matters relating to the subcontinent. His command of the history of these lands is vast, and his understanding of the culture is reflected, for example, in a business he has conducted for many years, Joruba Rugs and in his many trips to Pakistan.

Between 1989 and 1993, he was Honorary Consul for Pakistan in Victoria. Rupert has also been an avid skier, and a fly fisherman.

It is hard to believe that he has managed to conduct an extremely busy practice as senior counsel in addition to his many and varied other activities.

Let me return to hockey, for that is what we are all here for today. Rupert's contribution to the competition for the Scales of Justice Cup is a signal one, and it was thought that this should be acknowledged today.

Why I should be the person to perform the task which I am undertaking is not clear, at least to me. I have of course known Rupert as a hockey player, and as a lawyer for a great many years. Being opposed to him, one always appreciated that one has an opponent who will contest hard. Getting up early is very necessary when Balfe Q.C. is on the other side.

Having been led by Rupert has been a privilege, and as a junior, it is a comfort to know that Rupert is there to protect one from the nasties on the other side.

Rupert's recent appearances in my Court has provided courtesy and assistance in the presentation of the case which is much appreciated.

I am honoured then to announce, on behalf of all those here today, and those who would have liked to be here, but were unable to attend, that a trophy has been struck, to be awarded to the Player of the Match, each year. That trophy will be named in honour of J Rupert Balfe Q.C., as a tribute to his contribution to this contest.

I have been asked to announce that the first winner of the J Rupert Balfe Q.C. Player of the Match Trophy is Alastair McNab, who unfortunately cannot be here.

I would also like to make a presentation to Rupert on behalf of all those who have participated in these matches, and to say thankyou for all that you have done. All of us wish you well for the future.

May I thank Richard Brear, who, as always, has worked tirelessly in organising today's function.

Richard Brear Reflects on the Influence of Rupert Balfe

Bar v. *L.I.V.* Annual Hockey Match — 1984 to present. J. Rupert Balfe Q.C. Player of the Match Award

THE Victorian Bar (Bar None) Hockey Team has been playing the Law Institute of Victoria (L.I.V.) Team since 1984.

From 1984 to 1995 Rupert Balfe Q.C. has been our highly inspirational, tactical, motivational and encouraging captain and coach; and much more — to all of us and the Victorian hockey community — on and off the field.

The other day I recalled the occasion of Rupert teaching me, an articled law clerk, how to play as a winger during a spare moment in proceedings in the County Court. (The Judge was out.) I appreciated his coaching as I had just started playing hockey. I have no doubt Rupert would have considered using the corridor for practice if a hockey stick and ball were available!

In late September 1997 I received a letter from His Honour Tom Wodak who wrote, in part, "those whose memories go back far enough will recall the role he played in the origins of what is now the tradition of these hockey matches, and in particular, in getting together and leading the Bar team.

"I think it would be a worthy gesture for there to be a trophy created, in his name, for which the Bar and L.I.V. could compete annually."

His Honour's suggestion was put to the teams and it was decided that the J. Rupert Balfe Q.C. *Award for Player of the Match* be created. His Honour was asked to make the announcement of this Award at a luncheon of the Essoign Club on 20 November 1997 at the Essoign Club.

Philip Burchardt, present Bar None Captain welcomed us — about 35 past and present players from both teams — and announced that there were many apologies. I received about 25 apologies and was informed that if it had not been for their case work they would have made it.

One of the Bar None Players who could not make it was Roger Young. Roger wrote to me on 11 November 1997. Roger said, in part, "I have appreciated Rupert Balfe Q.C.'s contribution to the Bar None Hockey Team during the times that I have played with the team. His passion was infectious and helped us greatly in our *David* v. *Goliath* battles at which we were occasionally successful. The cohesion and dedication of the team owed a lot to Rupert's work and enthusiasm . . . My vote is Rupert is awarded the trophy."

Rupert was most helpful to me every year in which I have organised the Bar team. His advice, support, secretarial assistance, computer team lists and critical "have we got enough players . . ." type questions made matters much easier for me. I appreciated the role of captain much more when, in 1966, for the first time I was asked to captain the RMIT Metro 4 West team. As captain you are expected to place players in positions, announce tactics, give pep talks, represent and be gracious for the team in win and loss situations and do every-thing else, as Rupert has done as well as being the coach.

The luncheon was a most memorable occasion and I thank all present including Essoign Club members taking part in the occasion; Essoign Club staff; and Secretary John De Koning for expediting matters; and everyone who could not make it for their support and contribution. I think one day each month should be a rostered day off for all courts to allow for special occasions to happen.

Thanks Rupert, for making our past hockey matches and this occasion most memorable.

On behalf of both teams,
Richard Brear

The Editors regret to advise that Rupert Balfe passed away on 8 December 1997. An obituary notice will follow in the Autumn 1998 edition of *Bar News*.

Lines of Fire

By Peter Ryan
Clarion Editions, 1997
pp. 255
$24.95 RRP Paperback

MODERN literature, in the true sense of the term "literature", is a relatively rare commodity. There are many modern novels with exciting plots. There are even more with an adequate supply of sexual incidents described in riveting detail.

It is seldom, however, that one picks up a book like Peter Ryan's *Lines of Fire* in which the sheer beauty of the written word is, of itself, sufficient to compel the reader to linger.

Peter Ryan is at the present time Secretary to the Board of Examiners. At a time before most members of the Bar were born he was a teenage coast watcher in New Guinea. He has been soldier, journalist, publisher and columnist. From 1962 to 1988 he was Managing Director of Melbourne University Press.

Perhaps his most recent claim to fame (or notoriety) is to be found in his articles expressing criticisms of the work of the late Professor Manning Clark.

Lines of Fire is a collection of pieces culled from Peter's earlier writing and ranges from an extract from his fascinating wartime story "Thea Drive My Feet" to articles on Owen Dixon (which contains a new insight into the Tait case), Paul Hasluck, McMahon Ball, A.D. Hope and others. It also includes three articles on Manning Clark.

The work is interesting not only because of the subject matter but also because of the insights it gives into the author.

It shows an impatience with cant, a non-acceptance of the fact that life must be as complicated as we make it today, an intolerance (which the reviewer shares) with the current education system and a desire to get back to basics.

Ryan's philosophy comes through in the book but the book is not dominated by that philosophy. What the book provides is an insight into a number of different aspects of Australian literary history and of the Australian character captured in a form which caused the eye and mind to linger.

The power of Ryan's prose is illustrated by the following:

From "A Giant Among Frightened Men" (*The Age* 1984)

As Australians we have no cause to love Churchill. He exploited and abused our armed forces; he lied to our Prime Minister, John Curtin; he declined to pay us even the courtesy of a visit. Personally, I think I should have found him hateful, with his outsized ego, his infantile tantrums, his self-centred harshness. But, a stubborn left-over from the reign of Queen Victoria, he towers gigantic over the mean and stunted landscape of a later age.

From "The Magic in the Pudding" (*Nation* 1972)

No more than two hundred yards past the concrete maze that forms the entrance to Tullamarine Airport is a little green oasis of grass and trees. There, amongst the torrent of cars that swish past and beneath the howl of the jet engines, on many days sits a fox. He is a superb fox, the very mould and model of his breed, so splendid with red coat and bushy tail that he might just that minute have bounded from the pages of Beatrix Potter.

From "Memories" (*The Age* 8 October 1988)

I wish that, in younger days, I had taken keener interest in my family's past; in all the talk around the hugely crowded Sunday's tea-table at my Grandfather's house; in what I now discern to have been the ever-so-faintly raffish stories of my Grandmother; in my Aunt's hush references to older Great-Uncle A . . . "who drank, my dear".

From "Short Sight, Shout Vision" (*The Australian* 2 February 1971) (describing the day he first wore glasses out of doors)

The plane trees — they were not, it seemed, simply huge indistinct balls of beautiful green. One could actually see the individual leaves and twigs. I could read the destinations boards' of tram cars, and see the wires strung between the telegraph poles.

From "Survival of the Feathered" (*The Age* 29 November 1986)

A great gum tree blown down rendered roofless a respectable, hardworking family of possums which had long been well-known local identities.

From "'Hasluck: The Private Man" (*Quadrant* March 1993)

The mysterious mark of Papua New Guinea remained indelible upon Hasluck, as it does on everyone who has been once seduced by her.

From "The Foreign Legion" (*Quadrant* 1996) — (Professor Dale Trendell is showing the Queen around the grounds of the Australian National University).

He paused to indicate the blind, sloping fortress stone wall upon which stands the library.

"You'll notice the Wren influence, Ma'am?" inquired the artless Trendell.

"What! Sir Christopher?"

"No, no, Ma'am! P.C."

The book is analogous to, but cannot be categorised as, a collection of essays.

It is rather a collection of insights which any person interested in Australian literature or Australian history will want to revisit. It is a book for dipping into and would make a perfect holiday companion over a number of years.

Gerard Nash

Misleading or Deceptive Conduct: Issues and Trends

Editor C. Lockhart
The Federation Press, 1996
pp. i–xx, 1–312
Hardback

SOME think this area of law has got out of control. In the preface to this book, the editor says he is aware of over 1500 reported decisions on it. A selective summary of the cases covers 48 pages in the 1997 edition of *Miller*. Misleading or deceptive conduct is pleaded as an alternative cause of action in nearly every commercial proceeding. One silk recently remarked that it is only a matter of time before it is recognised as a defence to murder.

This collection of essays grew from papers delivered at a conference organised by the Centre for Commercial and Resources Law in WA in 1994. The essays are separated into two parts. Part A covers the things that can constitute misleading and deceptive conduct and related issues. Subjects include the 'victim's' level of care, representations as to the future, section 995 of the *Corporations Law*, comparative advertising and the US duty to negotiate in good faith. Part B deals with the remedies available once it has been established. There are essays about Conflict of Laws issues, causation and assessment of damages. A final essay (by Justice French of the Federal Court) discusses future directions.

Overall, the book is very interesting. I found the discussion of the US cases about duty to negotiate in good faith enjoyable and thought-provoking. In Australia, the experience is that allegations of a failure to negotiate in good faith often go nowhere. The essay about extraterritorial application of the Australian Federal and State legislation is comprehensive, and offers guidance about a lot of difficult issues. The papers about causation and assessment of damages cover areas one is always having trouble with in trying to plead and sustain misleading or deceptive conduct cases.

I thought at times the essays could have been more sceptical. Overall, section 52

and its state replicas no doubt encourage business morality. As Chief Justice Malcolm points out in his introductory essay, this accords with a modern judicial trend towards enforcing fairness that has a lot to support it. I nevertheless wonder whether more consideration should have been given to the fact that it is now almost obligatory to plead that everything is misleading and deceptive, and to the way a section 52 argument can protract a case that is really about breach of contract or something else, and will ultimately be decided on that latter ground. Even the "Future Directions" essay at the end seemed to proceed uncritically on the assumption that misleading and deceptive conduct actions are a good thing, and the more we have of them the better. Whether that is true or not, this area is obviously going to continue to explode in importance. It may accordingly be a good idea to glance through this book.

Michael Gronow

A Guide to the *Evidence Act 1995* (Cwlth)

By J. D. Heydon
Butterworths, 1995
pp. i–vii, 1–211

THE author of this text will be well known to most barristers as the author of *Cross on Evidence* (4th Australian Edition and looseleaf).

As noted by the author in the preface to this commentary, the *Evidence Act 1995* (Cwlth) is the result of eight years work by the Australian Law Reform Commission from 1979 to 1987 and further eight years work since that time. The Act provides for significant changes to the laws of evidence in Australia.

This book is one of a number of recent publications on the Act and is certainly a very practical and user-friendly guide to the Act. The author states the purpose of the book is to provide "an elementary account of the structure of the Act in relation to its background", and whilst it adequately performs this function it also provides sufficient detail and general comment to be of great assistance to practitioners in general and barristers in particular.

The first part of the book is a general commentary of the Act which deals with the background of the Act, adducing evidence, the admissibility of evidence, proof, and finally miscellaneous issues. The remainder of the book is a reprint of the Act and its regulations (including the *Evidence [Transitional Provisions and Consequential Amendments] Act 1995*).

Commentary in the first third of the book is detailed with frequent cross references to Cross, relevant case law and references to the Australian Law Reform Commission Report and the Bill. The book is adequately supplemented by a detailed index.

This book will be particularly useful to those barristers practising who require a quick reference to the Act and have an interest or requirement for background to the relevant provisions of the Act.

James Mighell

Australian Insolvency & Bankruptcy Law (2nd edn)

by R. Tomasic and K. Whitford
Butterworths, 1997
pp.v–xviii, Table of Cases xix–xxxvi, Table of Statutes xxxvii–liv, 1–510, Bibliography 511–516, Index 517–522

AUSTRALIAN Insolvency & Bankruptcy Law (second edition) is a revision and extension of Australian Corporate Insolvency Law published in 1993. The principle change in the second edition is to incorporate a new part devoted to personal bankruptcy. There are also changes resulting from recent developments in the case law and the various statutory regimes touching upon insolvency such as those arising from the enactment of the *Corporate Law Reform Act* 1992.

This book does not seek to be as authoritative as for instance the *Australian Bankruptcy Law & Practice* by McDonald Henry & Meek (which is after all published in two volumes with regular updates). However, it does provide access to and guidance through various materials relevant to insolvency. Accordingly, there are chapters dealing with receivers and controllers of corporate entities (Chapters 2, 3 and 4) and the liquidation of companies (particularly Chapters 7–10 and 12).

In addition there are chapters dealing with corporate arrangements and reconstructions, voluntary administration, the proof and ranking of creditors claims and a miscellaneous chapter dealing with matters such as examinations and insolvent trading (Chapter 13). This chapter contains a useful examination of director's liability for insolvent trading under both section 592 of the *Corporations Law* and the "new provisions" introduced by the *Corporate Law Reform Act* and now contained in sections 588G to 588ZB of the *Corporations Law*. In addition there is discussion of the new and potentially significant liability imposed upon company directors by section 222AOB of the *Income Tax Assessment Act* (directors liability for unremitted tax).

The bankruptcy chapters (Chapters 14, 15 and 16) include a chapter devoted to alternatives to bankruptcy (i.e. arrangements without sequestration pursuant to the *Bankruptcy Act* Parts IX and X).

Australian Insolvency & Bankruptcy Law is a most useful "one stop shop" in relation to insolvency law in Australia. The book, although necessarily general, provides a practitioner with a detailed overview of both the statutory provisions and case law. By reference to the cases cited the reader can easily establish the basis for further research, however, for practical purposes, the book is sufficiently detailed to answer all of the more routine insolvency questions. This book is a most useful resource for practitioners, both legal and accounting, concerned with insolvency issues.

P.W. Lithgow

Insurance Legislation Manual (3rd edn)

by David St Leger Kelly and Michael L. Ball
Butterworths, 1995
pp. i–xvi, 1–221

THE *Insurance Legislation Manual* is an annotated work of the two major pieces of insurance legislation in Australia: the *Insurance Contracts Act* 1984 and the *Insurance (Agents and Brokers) Act* 1984. Also included in this publication are reproductions of the Insurance Contracts Regulations and the Insurance (Agents and Brokers) Regulations in their entirety.

This is the third edition of Kelly and Ball's book. Its release comes in the wake of extensive amendments made by the *Insurance Laws Amendment Act* 1994 to both the *Insurance Contracts Act* 1984 and the *Insurance (Agents and Brokers) Act* 1984, as well as to the Insurance (Agents and Brokers) Regulations.

The authors' annotations are easy to follow and their clear commentary is hard to fault. Reference is made not only to reported cases but also to unreported ones, with a few of the more important judgments being discussed at quite some length. There

are also references to the various reports of the Australian Law Reform Commission, as well as to other legislation, in particular the *Trade Practices Act* 1974 and its State and Territory equivalents.

One special feature of this publication is that throughout the annotations there are a number of cross-references to a text book on insurance law, *Principles of Insurance Law in Australia and New Zealand* (Butterworths, 1991). Not surprisingly, this textbook is also written by the authors of *Insurance Legislation Manual*! Nevertheless, for those who have ready access to a copy of the 1991 textbook, this might *be* an adequate reason to prefer the *Insurance Legislation Manual* to the other annotated works on the market, including *The Annotated Insurance Contracts Act* by Peter Mann and Candace Lewis (The Law Book Company, 1994) and *The Phillips Fox Annotated Australian Insurance Law Statutes* by Geoff Masel and Michael Gill (Legal Books, 1993).

Anna Ziaras

Bringing Human Rights to Life

by Peter Bailey
The Federation Press, 1993
pp. i–xi, 1–270
Price: $25.00 (Paperback)

BRINGING Human Rights to Life is a legal book. It is also a collection of stories. Within these stories the author presents a range of local and international incidents and situations that highlight how people's human rights have been and can be infringed. At the end of each story is a thoughtful discussion of the legal issues involved in the particular case.

The author, Peter Bailey, is a lecturer in human rights law at the Australian National University. He describes human rights as "statements of the standards of behaviour we should be able to expect between individuals and groups." Four broad categories of human rights are examined in this context. The first — group rights — is concerned with the rights of indigenous persons and minorities, and with the right to self-determination. Stories about the Aboriginal community of Noonkanbah, the Penan forest people of Sarawak, the Maori of Orakei, and the struggle for self determination in Bangladesh, East Timor and Lithuania are presented in this part of the book.

The second category of human rights involves stories about 'life' problems. Within this category are issues of euthanasia in relation to seriously ill infants, adults who are unable to make their own choices (the famous American case of Karen Quinlan is described in this context) and persons who are able to decide for themselves. Dr. Kevorkian and of the practice of 'active' euthanasia in the Netherlands are mentioned here. (This book was written prior to the enactment of the Northern Territory's euthanasia legislation, the *Rights of the Terminally Ill Act.*)

The third category of stories involves racial and sex discrimination and the rights of children. The last section looks at liberty and security for individuals in the context of personal rights to liberty and security in times of emergency, the right to work, the right to protest and the right not to be subjected to torture or degrading forms of treatment.

Finally, the author describes ways that persons can advance their human rights and makes some concluding observations about the status of human rights.

Bringing Human Rights to Life is one of those rare books involving the discussion of legal issues that is actually enjoyable to read. This is partly due to the format of the work, which centres around its short stories. The majority of the credit must, however, be given to the author's style, with his clear language and his attempts to keep the commentary unbiased, especially where controversial issues like euthanasia are involved. The only complaint I can make of this work (and it is a very minor one) is that I found the frequent footnotes to be somewhat distracting. While recognising the importance of references and the assistance gained by the author's advice on further reading, I think the book could have done without definitions of quadriplegic and a moot case.

Anna Ziaras

Limitation of Actions Handbook Victoria

by Kathryn Rees and Mercia Chapman
Butterworths, 1997
pp. i–xix, 1–110, 111–123 tables, 125–132 precedents, 133–137 index
Paperback

WANT to know whether you have missed that crucial deadline? The useful tables at the back of this handbook are likely to give you the answer you need — quickly and easily. No matter which areas of practice interest the reader, this handbook is likely to provide the relevant information, and it does a very good job of providing information right across the board.

Since the question of whether time continues to run during vacation was determined in *Prideaux* v. *Webber* (1661) 1 Lev 31; 83 ER 282, the questions of limitation continue to vex the courts and continue to be an ever-present reality in many of the statements of claim and defences we draw today. (And for those who are interested, sections 23(2) and 28(5) of the *Limitation of Actions Act 1958*, and the decision in CE *Heath Underwriting and Insurance (Australia) Pty Ltd* v. *Daraway Constructions Pty Ltd* (SC (Vici per Batt J, 3 August *1995,* unrep) allow the running of time to be interrupted in certain circumstances.)

This useful handbook provides an overview of the law of Limitation of Actions, as well as an annotated *Limitation of Actions Act 1958*. The overview has a very practical style, introducing enough of an academic element to give readers a good idea of the nature of the bar created by the limitation period and some feeling for the policy and history behind the rule. Of itself the overview answers many of the regular issues which arise in questions of limitations — how to calculate the time period, when the time period starts to run and when the cause of action accrues. The overview is relatively short, but informative, and appropriate for a "handbook" of this style.

The handbook makes some useful comments about pleading a limitation period, which are supported by the precedents also contained in the handbook. The handbook adapts some of the precedents from the Court Forms Precedents and Pleadings to the particular context of the book. It provides precedents for pleading defences under the *Limitation of Actions Act* and of laches, as well as summonses (and associated affidavits in support) to strike out a statement of claim on the basis of being statute barred, and for extending the limitations period in personal injuries matters.

The overview even contains a short paragraph on negligence claims against practitioners — this a practical handbook indeed!

The primary feature of the handbook is the annotated Act. The annotations are comprehensive and up-to-date, citing many recent Victorian Supreme Court and High

Court decisions (including unreported authorities where appropriate). Almost every section in the Act is annotated, and the annotations are largely detailed. The book does not slip into the trap of simply restating the meaning of the section and calling that "an annotation". An excellent feature of the annotations to the Act is the discussion of section 23A. The handbook sets out not only the current text and comprehensive annotation of that section, but sets out the wording of that section prior to 1983 and an equally comprehensive set of annotations of the old section. As the authors point out, there are still cases today which involve the old wording of that section, and the authors have given it due consideration.

Another useful feature of the handbook is the provision of "ready reckoner" tables, arranged alphabetically by cause of action, which give a short description of the limitation periods, legislation and relevant cases applying to various causes of action. These tables have the potential to become well-thumbed references.

In order to present a complete "package" of the legislation, the handbook also provides an annotated *Choice of Law (Limitation Periods) Act 1993*. It explains the history of that legislation, being to override the decision in *McKain* v. *R.W. Miller & Co (SA) Pty Ltd* (1991) 1 74CER1 which "upheld the international law principle that limitation provisions are procedural, at least where they affect the remedy only". The tables referred to in the previous paragraph set out limitation periods applying both to Victorian and Federal proceedings, further rounding out the "completeness" of the book.

The handbook provides a useful source of information which cuts across many areas of law and which will find a valuable place on many practitioner's bookshelves.

Carolyn Sparke

Fermat 's Last Theorem: Unlocking the Secret of an Ancient Mathematical Problem

by Amir C. Aczel
Four Walls Eight Windows, 1996
147 pages incl. notes and index
Hardcover $29.95

Fermat's Last Theorem: the Story of a Riddle that Confounded the World's Greatest Minds for 358 Years

by Simon Singh
Fourth Estate, 1997
362 pages incl. appendices, bibliography and index
Hardcover $29.95

IN 1962 the *New York Times Book Review* printed a review by the science writer Martin Gardner of Eric Temple Bell's posthumously published *The Last Problem* (Simon & Schuster, 1961).

The following year a then ten-year-old Cambridge schoolboy was drawn to Bell's book (and the problem therein) after discovering the book in his local library.

In 1995 that ten-year-old schoolboy, by now a forty-two-year-old graduate of Oxford University who had taken out a PhD from Cambridge and was a professor at Princeton University in New Jersey, published his proof and solution of the problem that had been brought to his attention thirty-two years earlier and had first been formulated by Pierre de Fermat in or about the year 1637. After Fermat's death in 1665 his son Clément-Samuel published (in 1670) a special edition of the *Arithmetica*, a book by the third century AD Greek mathematician Diophantus of Alexandria. Of the thirteen books (according to Singh; Aczel puts it at fifteen) that made up Diophantus' *Arithmetica* only six survived through to the Renaissance when a Latin translation by Bachet was published in 1621. Fermat's own copy of Bachet's 1621 translation together with his own annotations and marginal jottings was republished by Fermat's son as a special edition: *Diophantus' Arithmetica containing observations by P. de Fermat.* Thus it is that the subtitle of Singh's book should strictly refer to the riddle that confounded the world's greatest minds for 325 years (since it was widely published in 1670) rather than 358 years (since it was first formulated by Fermat père in 1637).

The problem, as first formulated by Fermat, is deceptively simple. We are all familiar with Pythagoras' theorem: for a right-angled triangle, the square on the hypotenuse is equal to the sum of the squares on the other two sides, or symbolically: $x^2 + y^2 = z^2$.

There exists an infinity of Pythagorean triples or whole number or integer solutions to the Pythagoras equation, two of the more commonly known being $3^2 + 4^2 = 5^2$ (or 9 + 16 = 25) and $5^2 + 12^2 = 13^2$ (or 25 + 144 = 169). Fermat contemplated the equations $x^3 + y^3 = z^3$ and $x^4 + y^4 = z^4$ and concluded that there were no whole number or integer solutions. In general he concluded that the equation $x^n + y^n = z^n$ had no integer solution for n of value greater than two. In an enigmatic marginal note in his copy of Bachet's translation of Diophantus' *Arithmetica* he wrote "I have a truly marvellous demonstration of this proposition which this margin is too narrow to contain." Thus was born Fermat's Last Theorem. Since Fermat made this annotation in 1637 no one has discovered Fermat's "marvellous demonstration" in his writings or reduplicated or formulated an independent proof of Fermat's proposition.

No one, that is, until the one-time ten-year-old Cambridge schoolboy Andrew Wiles accomplished the feat in 1995 and was awarded (27 June 1997) the Wolfskehl Prize for solving the problem of Fermat's Last Theorem. It was not for lack of trying. In the intervening 325 years many eminent mathematicians (and many ambitious "amateurs" attracted by the seeming simplicity of the problem and the prestige associated with determining a solution to or refutation of a problem that had confounded the professionals) sought in vain to rediscover Fermat's "marvellous demonstration".

These two books are then the story and history of Fermat's Last Theorem leading up to the success of Andrew Wiles in 1995. They differ significantly. Aczel confines himself more narrowly to FLT and includes a reference to the bickering over the credit due for the Taniyama-Shimura conjecture (one of many small but necessary steps making up part of Wiles's proof) where two French mathematicians, the first actively and the second passively, promoted the second as deserving the credit for the necessary Taniyama-Shimura conjecture: "It was a wise professor who said the reason academic politics are so sordid is that the stakes are so low" (Lasson, "Scholarship Amok", *103 Harvard LR* 926 at 949). Taniyama, Shimura and the second French mathematician are but footnotes to the history of the successful cracking of Fermat's Last Theorem by Wiles.

Singh's history of Fermat's Last Theorem more closely follows Bell's 1961 *The Last Problem* where "Bell permitted himself to wander into all sorts of [interesting] historical by-ways that fascinated him, though they are largely irrelevant to his story." (Gardner, *New York Times*

Book Review, 4 February 1962). Singh overlooks the bickering over the Taniyama-Shimura conjecture while describing some interesting and fascinating by-ways in the history of the mathematics not strictly relevant to the story of Fermat's Last Theorem. Singh's book is perhaps best described as a history of mathematics with particular reference to Fermat's Last Theorem.

Wiles's 1995 achievement will relieve maths departments at universities world wide from managing the countless unsolicited papers seeking to prove (or disprove) Fermat's Last Theorem. Someone once sent to Augustin-Louis Cauchy, the great eighteenth-century French mathematician, a paper in which he tried to show that $x^3 + y^3 + z^3 = t^3$ had no solution in integers (and thus disproving the Euler conjecture which has some similarity to Fermat's Last Theorem). Cauchy returned the manuscript, Bell tells us, with no comment save the note: $3^3 + 4^3 + 5^3 = 6^3$ [or 27 + 64 + 125 = 216]. Euler's conjecture was to be disproved but not by Cauchy's unknown correspondent nor till nearly two centuries later in 1966. Every mathematics department in the world probably has its cupboard of purported proofs from amateurs. While most institutions ignore these amateur proofs, other recipients have dealt with them in more imaginative ways. The science writer Martin Gardner recalls a friend who would send back a note explaining that he was not competent to examine the proof. Instead he would provide them with the name and address of an expert in the field who could help — and include such details of the last amateur to send him a proof. Another of Gardner's friends would respond: "I have a remarkable refutation of your attempted proof, but unfortunately this page is not large enough to contain it."

These two books illustrate the frustrations of the scientific life. Wiles had in mid-1993, prematurely announced his solution at a Cambridge conference only to be forced to announce further nearing year's end that a subtle error had rendered his 1993 "proof' insufficiently rigorous. It would take Wiles nearly a year to overcome this obstacle and with a further six months checking and verification by referees his final proof was published in May 1995.

Of contemporary interest is the recently published (and highly acclaimed) novel based on the short life of Evariste Galois: *The French Mathematician* by Australian Tom Petsinis (Penguin 1997) whose Galois group theory was another essential step utilised by Wiles.

A disappointment of reading the two books together is the contradictions between the two: Aczel has it that Cauchy's arrogance and carelessness was responsible for the non-recognition of the contributions of Galois and the Norwegian Niels Henrik Abel until long after their deaths (at early ages) and notes that Wiles was to avail himself of the contributions of both in arriving at his successful 1995 proof of Fermat's Last Theorem. According to Singh, Cauchy encouraged Galois and extolled his brilliance to other mathematicians. The only reference to Abel in Singh's book is a passing reference to his death at twenty-seven as an illustration of the fact that in general, it is when young that mathematicians achieve their great advances. There are further direct contradictions between the two books.

Of interest to the lawyer-reader is the role played by lawyers. Fermat, who was responsible for much maths besides Fermat's Last Theorem, was a middle-ranking jurist who dabbled in maths as a hobby — "dabbled" is perhaps an understatement here given all that the Fermat achieved and he is known today only as a mathematician. Similarly, some of those who failed in their efforts to crack Fermat's Last Theorem but nonetheless contributed to Number Theory were lawyers. Perhaps it is lack of work that pushes lawyers into such hobbies — just like today; or maybe in times past the law was one the chosen professions for those sufficiently wealthy not to need paid employment and thus free to indulge themselves.

Esther Lewin and Brien Briefless

With the Compliments of His Honour Judge Spence

The Public Prosecutor has just said some most unpleasant things about you . . . try to cry or at least squeeze out a tear or two . . . that always makes a good impresssion . . .

Conference Update

3–10 January 1998: Aspen, Colorado. Australian Lawyers Conference. Contact: Ron Bowrey, Tel: (02) 9692 9022. Fax: (02) 9660 3446.

11–17 January 1998: Cortina D'Ampezzo, Italy. Europe-Pacific Medico-Legal and Industrial Law Conference. Contact: Karen Prior. Tel: (07) 3254 1696, Fax: (07) 3358 4196.

17–23 January 1998: Cortina D'Ampezzo, Italy. Europe-Pacific Business Law, Business Management and Accountancy Conference. Contact: Karen Prio. Tel: (07) 3254 1696, Fax: (07) 3358 4196.

11–13 February 1998: Halifax. Family Law Seminar, National Judicial Institute (Canada). Contact: AIJA Secretariat. Tel: (03) 9347 6600, Fax: (03) 9347 2980.

16–18 February 1998: London. International Wealth Transfer Techniques Seminar. Contact: IBA.*

15–20 March 1998: Capetown. Energy and Resources Law 98–13th Biennial Conference on Petroleum, Minerals, Energy & Resources Law. Contact: IBA.*

18–20 March 1998: Montreal. Criminal Law Procedure and Evidence Seminar, National Judicial Institute (Canada). Contact: AIJA Secretariat. Tel: (03) 9347 6600, Fax: (03) 9347 2980.

20–22 March 1998: Gold Coast. 1998 ASC Corporate Forum. Contact: Mary Doolan, Australian Securities Commission. Tel: (07) 3867 4769, Fax: (07) 3867 4725.

29 March–1 April 1998: Manila. Asia Pacific Regional Conference. Contact: IBA.*

7–10 May 1998: Cairns. First Australasian Natural Resources Law and Policy Conference. Contact: Anne Vince. Tel: (067) 72 8753.

11–15 May 1998: Marrakech, Morocco. International Association for Insurance Law World Conference. Contact: AILA National Secretariat. Tel: (03) 9898 9221, Fax: (03) 9890 6310.

22–25 May 1998: Vienna. 4th Alleged Transnational Criminal Seminar. Contact: IBA.*

23–30 May 1998: Taipei. 68th Conference of the International Law Association. Contact: Peter Nygh. Tel: (02) 9230 4111, Fax: (02) 9233 7022.

4–5 June 1998: Gold Coast. 15th Annual Banking Law and Practice Conference. Contact: Tel: (02) 9437 9040, Fax: (02) 9437 9041.

8–10 June 1998: Hong Kong. IBA Human Rights Institute Meeting. Contact: IBA.*

11–13 June 1998: Barcelona. 15th Annual Seminar on International Financial Law. Contact: IBA.*

29 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

5–10 July 1998: London and Dublin. Australian Bar Association Conference. Contact: Daniel O'Connor. Tel: (07) 3236 2477, Fax: (07) 3236 1180.

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

13–18 September 1998: Vancouver. International Bar Association Biennial Conference. Contact: IBA.

*Contact details for IBA are International Bar Association, 271 Regent Street, London, W1R 7PA, England. Tel: 0011 44 171 629 1206, Fax: 0015 44 171 409 0456.