VICTORIAN BAR NEWS

No. 104 AUTUMN 1998

THE OPENING OF DOUGLAS MENZIES CHAMBERS

Welcomes: Judge Robertson and Judge Wood

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

Sir Owen Dixon, by S.E.K. Hulme Q.C.

Opening of the 1998 Legal Year

The Role of the High Court as Foreseen by Founding Father Alfred Deakin

High Court Federal Court Notes

Female Genital Mutilation: Amendments to the Crimes Act

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Welcome Judge Wood

Opening of the 1998 Legal Year

1997 Family Law Bar Association, Christmas Party

Bar Sport: Yachting, Cricket and Royal Tennis

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for the year 1997/98
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Two Classes of Accused?

IN a delightful old film, recently revived on television, entitled "The Italian Job" there is caricatured a prison in which a wealthy master criminal leads a comfortable and pampered life behind bars quite different from that of his fellow prisoners, by reason of his capacity to do favours of a financial kind for those in whose custody he is kept.

We are a long way from having two classes of prisoner in Victoria — even with privatisation of gaols — but we may be well on the way to creating two classes of accused.

When the decision in *Dietrich* was handed down the Victorian Government acted promptly to give statutory effect to the principle underlying that decision.

Under s.360A of the *Crimes Act* 1958, the Court has power to order Victoria Legal Aid to provide assistance to an accused, where the Court is satisfied that it will be unable to ensure that the accused will receive a fair trial unless he or she is legally represented at the trial. On the making of such an order Victoria Legal Aid is required to provide legal representation.

In the days when the Legal Aid Commission was prepared to pay "something like" the "market rate" and to brief counsel of appropriate seniority, experience and skill, depending upon the nature of the charge and the complexity of the matter, there was a fair chance that a person whose representation was provided by legal aid would have representation comparable with that which could be obtained by an individual whose defence was privately funded.

It would seem that Victoria Legal Aid is now setting its own "market rate" without regard to the "market rate" prevailing in the private sector. One might wonder whether, having regard to the principles enunciated in *Dietrich*, the setting of such a "market rate" might constitute some sort of abuse of monopoly power. However, it would seem on the authorities that the principles in *Dietrich* are not concerned with the adequacy of funding or the quality of the legal aid provided but merely with the availability of legal representation.

Some of us were brought up on a philosophy that the legal profession owed a duty to the community to provide legal services to those who could not afford them. Many of us still adhere to that belief. Many of us have been involved in the foundation and running of free legal services,

and members of the Bar who did not need legal aid work have in the past taken such work out of a sense of duty.

The popular slogans "market economy", "user pays" and "competition before responsibility" have tended to weaken that sense of duty. There is an increasing reluctance amongst members of the Bar to permit themselves to be exploited as "professionals" by an economic regulatory system that requires us to be "competitive".

In an era when the prevailing political philosophy is "customer pays", and when practices which were designed to ensure that service to the client did not become subordinate to the pursuit of the almighty dollar are condemned as uncompetitive, any sense of *noblesse oblige* or professional duty tends to diminish rapidly. Equality of representation for the poor and for the rich has never been absolute. But any attempt at such equality may soon be a thing of the past.

While senior practitioners in the criminal field can obtain sufficient "private work", it would appear to be contrary to the ethical standards of our "competitive" society for them to act in legally aided matters for a relative pittance.

In some gesture towards equality the amendments to the *Crimes (Confiscation of Profits) Act* 1986 ensure that by means of a restraining order — particularly in the case of a person charged with drug trafficking or serious fraud — the assets of a person who might otherwise have been able to afford "private" representation are impounded. He cannot use his assets to engage private representation. If Victoria Legal Aid is ordered to give him assistance, the assets will, however, be charged in favour of Victoria Legal Aid.

VOLUNTEER LAWYERS REQUIRED

The Footscray Community Legal Centre is seeking assistance:

The Footscray Community Legal Centre runs two night services per week, on Tuesday and Thursday evenings from 7–8p.m.

We need solicitors (particularly on Thursday evenings) either weekly, fortnightly or monthly.

If you can help, please contact Marcus Williams or Carol McNair at the centre at 220 Nicholson Street, Footscray, phone: 9689 8444.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

In this issue the Attorney General refers to the establishment of the Victorian Civil and Administrative Tribunal which "will essentially be a 'one stop shop'" the membership of the Tribunal "will also enable a party to take a point of law on appeal to the Supreme Court (the Senior President of VCAT) who could deal with it immediately without delay".

The Living Legends Dinner

Describe a Legend and win a free dinner

In Honour of the Living Legends of the Bar, a dinner is to be held during 1998 to honour some of those practising barristers who have served this institution so well.

The first dinner is to be held on Friday 17 April 1998

Patron of the Dinner:	Hartog Berkeley Q.C.
Master of Ceremonies:	The Honourable Justice Jack Winneke President of the Court of Appeal
Location:	The Essoign Club
Time:	7.00 p.m. for 7.30 p.m.
Dress:	Lounge suit
Price:	$55 per person, $50 per person 10 years and under

Who is the most charismatic Legend? One free ticket to the entry which gives the best description. Entries in writing to Graeme P. Thompson, Clerk "F", before Friday 9 April 1998.

The proposal sounds fine in principle. Does the legislation (which we have not yet seen) represent a further inhibition on the powers of the Supreme Court?

CRIMINAL JUSTICE PRACTICES AND PROCEDURES

KPMG have been engaged in an exercise "to identify areas requiring improvement and recommend possible changes". The objectives to which this project is directed include "to minimise operational costs", "improve the quality and timeliness of information" and "streamline process flow".

The costs of the criminal justice system do need to be controlled and efficiency does need to be encouraged. A review of procedures that takes into account the questions of cost and efficiency is a "good thing". However, there is considerable concern that under the current philosophy "cost effectiveness" may be seen as the only criterion for measuring efficiency or viability. There are already those at the Bar who are troubled by the possibility that listing practices may have the effect of doing more than merely "encouraging" litigants to settle. Any review that talks about "streamlining process flow" or which talks of "legislative constraints which may no longer be necessary" tends to fill an old-fashioned lawyer with unease.

On the other hand, we cannot quarrel with a program that addresses "redundant and out-dated procedures which prevent services being delivered in a timely and cost-effective manner" or "incompatibility of support systems which can result in duplication of costs, data and effort."

Apparently Stage 1 of the project has already been completed, as has Stage 2. We hope that some summary of the recommendations contained in Stage 2 may be made available to members of the Bar shortly. This would be appear to be implicit in the Attorney's comments in this issue.

WHERE ARE WE GOING?

The Bar at the present time is torn between an adherence to professional standards — to the maintenance of a system which will protect the rights of the individual and under which individuals will receive equal treatment before the law — and pressures from outside the profession to convert the practice of law into a business.

Those of us who still regard ourselves as professionals, and who consider that we are not practising law just to make as many fast bucks as possible, find it hard to cope with the "competition" theme which is thrust on us from all sides, most recently from The Australian Competition and Consumer Commission, which seems to think that if a group of barristers have a view that they should not accept terms put to them by the Victorian WorkCover Authority they are engaging in some sort of restraint of trade.

It is time for our political masters and the community as a whole to decide whether they want an old-fashioned profession or a group of dollar-chasing businessmen who will measure their success in terms of income rather than in terms of meeting the clients' needs.

In a state where the will of the executive is sufficiently paramount there is, of course, no need for a profession concerned with the protection of the rights of the individual. However, in continental Europe between 1940 and 1944 the paramountcy of this will and the absence of a means of protecting the rights of the individual led to a major breakdown in society.

Our profession and our judicial system do have something to offer the community. How do we persuade the government of the day, of whatever political persuasion, of this fact? Too often they see only that the "will of the people", as embodied in the mandate given to the ruling party, is being frustrated by lawyers acting on behalf of dissident individuals.

IN DEFENCE OF THE ATTORNEY

We cannot refrain, in a column which has on occasion been highly critical of governmental action and of government-sponsored legislation, from stating that the attack upon the Attorney-General's integrity, based on her use of a credit card when absent on official business overseas, must rank amongst the more petty, irresponsible and plain nasty acts in politics.

The attack would seem manifestly unjustified, and it does little to advance the business of the State or to improve the administration of justice in Victoria. We would prefer that the legislators on the opposition benches devoted their energies to analysis and vocal criticism of legislation — such as that canvassed in the Summer issue — which appears to us to be eroding the rights of the individual, rather than to casting unjustified slurs on their opponents.

The Editors

Correspondence

Parliamentary Home Page

Dear Editor

Re: Parliament of Victoria on-line

YOUR readers may not be aware that the Parliament of Victoria has a home page, which is http://www.vicnet.net.au/vicnet/vicgov/parl/parlia.html. However, direct access can be obtained to documents through:

http://www.dms.dpc.vic.gov.au

This will give you a choice of Bills, Parliamentary Papers, Other Documents and Hansard.

Selecting Bills and then selecting the relevant Bill will give a choice of a copy of the Introduction Print and a Status Report. The Status Report gives information on the House where the Bill was introduced, the name of the Minister, the date of Introduction and the date of the Second Reading Speech. It further records progress through the Parliament and the date of Royal Assent. If the reader wishes to have access to the Second Reading Speech it can be accessed through the Hansard button. This contains a powerful searching tool for proceedings in both Houses.

The Hansard Report of a day's proceedings is normally posted on the Internet by 9.00 am the following morning. The Status of Bills reporting is regularly updated during the day.

I trust this information is of use to your readers.

Yours sincerely,

Bruce Chamberlain MLC
President of the Legislative Council

Legal Aid Progress Lags, but Real Advances Elsewhere

THE Bar Council continues to grapple with a wide range of issues. On some fronts, such as Legal Aid, there has been little progress. But I am pleased to report that real advances have been made in other areas.

LEGAL AID

Recently, the *Law Institute Journal* reported statements by the Chairman of VLA, Mr Geoffrey Masel, to the effect that the funding received by VLA is inadequate to meet its statutory objectives and responsibilities. The Legal Aid Community Consultative Committee commended Mr Masel for speaking out publicly about the inadequacy of legal aid funding. The Bar Council also commends Mr Masel for recognising, albeit belatedly, that Government funding of legal aid, especially State Government funding, is wholly inadequate.

It is worth expanding on the context in which Mr Masel made these statements. During 1996 and 1997, VLA imposed arbitrary fee ceilings and other restrictions in an attempt to operate within its budget. As VLA's 1997 Annual Report shows, these restrictions in fact generated an operating surplus for VLA for the year ended 30 June 1997 of $2.408 million. According to VLA's Managing Director, VLA also expects to post a surplus for the year ended 30 June 1998. However, the community is paying a heavy price for these surpluses. The availability, quality and effectiveness of government funded legal aid has been drastically reduced. No regard has been paid by Governments or by VLA to the long-term adverse impact that the legal aid cuts, and the consequent unavailability of legal representation, will have on the efficiency and overall cost of the court system.

Mr Masel was also reported as stating that if there is no increase in funding from either the State or the Commonwealth Government, further serious cuts in legal aid are inevitable. An analysis of VLA's accounts and public statements shows that the inadequacy of funding applies principally to the area of State legal aid matters, rather than Commonwealth matters. In 1997, VLA received Commonwealth grants totalling $34.306 million and State grants totalling $24.217 million. In November

1997, a new agreement was made between the Commonwealth and Victoria in relation to legal aid funding. It provides for Commonwealth grants totalling $31.5 million for the year ended 30 June 1998, of which $4.725 million can be expended on State legal aid matters. This is an exception to the general principle that Commonwealth grants are only to be expended on Commonwealth legal aid matters. Even with this exception, it is clear that State Government funding for State legal aid matters is grossly inadequate. Moreover, the exceptional payment of $4.725 million will reduce to $2.750 million in 1999 and will disappear in 2000. Accordingly, Mr Masel is right to have real concerns about the future funding needs of VLA for State law cases and he is equally right to urge the State Government to review its forward projections for VLA funding. For its part, the Bar Council will continue to urge Governments, and in particular the State Government, to increase legal aid funding.

In February 1998, the Bar made a supplementary written submission to the Senate Legal Aid and Constitutional Committee in relation to its inquiry into legal aid. Redlich Q.C. and my assistant, Jonathan Morrow, appeared before the Senate Committee to elaborate on that submission. Currently, the Bar Council is preparing further information for the Senate Committee which attempts to document the adverse consequences of the cuts in legal aid.

This exercise has drawn attention to the absence of statistical information concerning the impact of legal aid cuts. To address this information gap, I wrote to the Chief Justice of the High Court, the Chief Justice of the Federal Court, the Chief Justice of the Supreme Court of Victoria, the President of the Court of Appeal, the Chief Justice of the Family Court, the Chief Judge of the County Court and the Chief Magistrate urging each of them to establish systems that would gather hard information concerning the impact of legal aid cuts. I am pleased to report that both the Court of Appeal and the Family Court are implementing information systems that, in due course, should produce hard evidence concerning the impact of legal aid cuts. As well, the Law Society and the Family Law Practitioners Association of Queensland have commissioned a study of the impact of legal aid cuts in Queensland.

In my last Chairman's Cupboard, I said that the Bar Council was awaiting VLA's considered response to the Price Waterhouse Urwick Report on barristers' fees. Somewhat unexpectedly, VLA's response took the form of a copy of a memorandum which VLA's Managing Director distributed at a meeting of the Legal Aid Community Consultative Committee. The memorandum criticised a number of assumptions made by Price Waterhouse Urwick. It concluded by stating that the Board of VLA would consider the Price Waterhouse Urwick report at its next meeting and then would respond in detail to the Victorian Bar. No such response has been received from VLA. In these circumstances, the Bar Council and Price Waterhouse Urwick each responded in detail to VLA's memorandum and refuted the responses and criticisms which it contained.

Another legal aid issue which continues to simmer is VLA's proposal for the establishment of limited practitioner panels. Thus far, the selection criteria and performance standards advanced by VLA in relation to the proposal panels have been inappropriate and inconsistent with the

Rules of Conduct of the Victorian Bar. The Bar Council has pointed out these deficiencies to VLA.

CRIMINAL LAW REFORM

The Bar Council is preparing submissions to the State Government concerning the proposed Parliamentary Review of the Right to Silence and recently enacted Confiscation Act. The Bar Council will keep both these matters under close review because of their potentially adverse impact upon civil liberties and the administration of justice in Victoria.

CIVIL AND ADMINISTRATIVE TRIBUNAL

The Bar Council has recently made a submission to the State Government concerning the Victorian Civil and Administrative Tribunal Bill. The purpose of the Bill is to consolidate all Victorian civil and administrative tribunals in a single structure, headed by Mr Justice Kellam as President of the Tribunal. Aspects of the Bill are of concern and the Bar Council has taken these matters up with the Attorney-General. The Bar Council is grateful to the Attorney for providing an advance copy of the Bill and the opportunity of making submissions.

FINANCE

The Bar Council is continuing to develop a long-term financial plan for the Bar Council and Barristers' Chambers Limited. As mentioned in the last Chairman's Cupboard, a primary objective of the plan is to ensure that BCL has the funds necessary to continue to provide quality accommodation and facilities for its barrister tenants. The Bar Council hopes that the plan will be completed in the near future.

The other major issue is the proposed development of the new County Court on the corner of William and Lonsdale Streets. The Bar Council and BCL have had discussions with the Government concerning this development. The Government has agreed to keep us closely informed as the project proceeds towards the tendering stage. Our interest is that attractive opportunities may arise for the Bar to take chambers in the new County Court complex. The Government anticipates that the development should be completed around 2001.

LIBRARY

The Bar Council is proceeding with the renovation of the library on the 13th floor of Owen Dixon Chambers East. The renovation has combined the existing Richard Griffith Library and the Annexe into a single integrated library. When completed, the library will be vastly improved; amongst other things, there will be increased shelf space, improved lighting and furnishings. The executor of the estate of the late Neil Forsyth Q.C. has advised that a significant portion of Forsyth Q.C.'s library will be donated to the Bar. The Bar Council intends to name the new section of the library the Forsyth Reading Room.

RULES OF CONDUCT

In January 1998 copies of the Bar's revised Rules of Conduct were forwarded to each regulated practitioner of the Bar. The Rules came into effect on 2 February, 1998. I encourage barristers to study the rules in order to become familiar with the changes that have been made.

Due notice of the new rules was given to the Legal Practice Board and the Legal Ombudsman each of whom has indicated that there are certain rules which they wish to discuss further. The Legal Ombudsman can recommend to the Legal Practice Board that it disallow a practice rule on the grounds that the rule may impose an unreasonable cost on the public or that it may restrict competition and is not otherwise justified in the public interest. Representatives of the Bar Council have met with the Legal Ombudsman to discuss these issues and the discussions are continuing.

CONTINUING LEGAL EDUCATION

As foreshadowed in the last Bar News, the Bar Council has restructured the Readers' Course Committee and the Academic and Continuing Legal Education Committee into a single Legal Education Committee. Plans are being made at this time by the Legal Education Committee for the development of a fully resourced and structured CLE programme for barristers.

APPOINTMENTS

A number of recent appointments have been made by the State and Federal Governments. The Bar Council congratulates The Honourable Mr Justice Kellam on his appointment to the Supreme Court and His Honour Judge Robertson and His Honour Judge Anderson on their appointments to the County Court. It also congratulates The Honourable Justice Callinan and The Honourable Chief Justice Gleeson on their appointments to the High Court of Australia.

A number of other appointments are expected in the near future. In particular, there is likely to be an appointment to the Federal Court of Australia and, it is hoped, two appointments to the Family Court. The Family Court in Melbourne is desperately in need of additional Judges with courtroom experience. The Bar Council has written to the Federal Attorney-General urging him to make the expected appointments to the Family Court as soon as possible.

AUSTRALIAN BAR ASSOCIATION

At the February 1998 meeting of the ABA, I was elected Vice President on the understanding that in 1999 I will stand for election as President.

The ABA will conduct its Conference in London and Dublin between 5 and 10 July 1998. The theme is "Democracy and the Law" and speakers will concentrate on issues which are of interest to a practising barrister. Professionally, the conference will be an interesting and stimulating experience and the organisers have also allowed time for relaxation and fellowship. Copies of the conference brochure and registration form can be obtained from the Bar Council office.

Neil J. Young
Chairman

It Takes One to Know One

EVEN though it was only a few days before the first of April — the beginning of National Poetry Month — the last thing passengers must have been expecting when they boarded the 4 p.m. Metroliner from New York to Washington was iambic pentameter, but that's just what they got from a tall twenty-seven-year-old man named Andrew Carroll, who was giving away copies of *Early Poems* by W.B. Yeats. "You can't help but feel like some sort of weirdo", Carroll said, as he made his way down the aisle, dispensing thin, softcover volumes from a cardboard box. "One woman wanted to know if I was promoting a cult." A heavyset man in a gray flannel suit asked if he could get his book signed by the author. When he glanced at the cover and saw who the author was, he shook his head slowly and said, "I used to be an English major before I was corrupted by the law."

Colin Moynihan, "Free Verse", 73(9)
New Yorker 41 (21 April 1997)

VCAT and Project Pathfinder: Two Current Initiatives

IT is a priority of this Government to improve Victoria's justice system. I am pleased to be able to give a broad outline of two current initiatives undertaken to streamline existing structures.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL (VCAT)

In this coming session of Parliament, the Government will be introducing legislation which provides for the establishment of the following:

- the Victorian Civil and Administrative Tribunal (VCAT);
- the Business Licensing Authority (BLA); and,
- consequential amendments to legislation which provides for existing tribunals that will fall under the new regime.

The new package is designed to:

- reduce costs for businesses and individuals who use the tribunal system by improving the consistency of decision-making by tribunals;
- improve access to justice for Victorians in both metropolitan and rural areas by facilitating the introduction of new technology in tribunals;
- reduce delays for parties who appeal to the Supreme Court against a Tribunal decision.

In general terms, VCAT will operate as an umbrella tribunal, assuming the jurisdiction currently exercised by the Administrative Appeals Tribunal, Anti Discrimination Tribunal, Credit Tribunal, Domestic Building Tribunal, Estate Agents Disciplinary and Licensing Appeals Tribunal, Guardianship and Administration Board, Residential Tenancies Tribunal and the Small Claims Tribunal, as well as licensing, appeal and disciplinary functions of licensing bodies regulating prostitution service providers, travel agents and motor car traders.

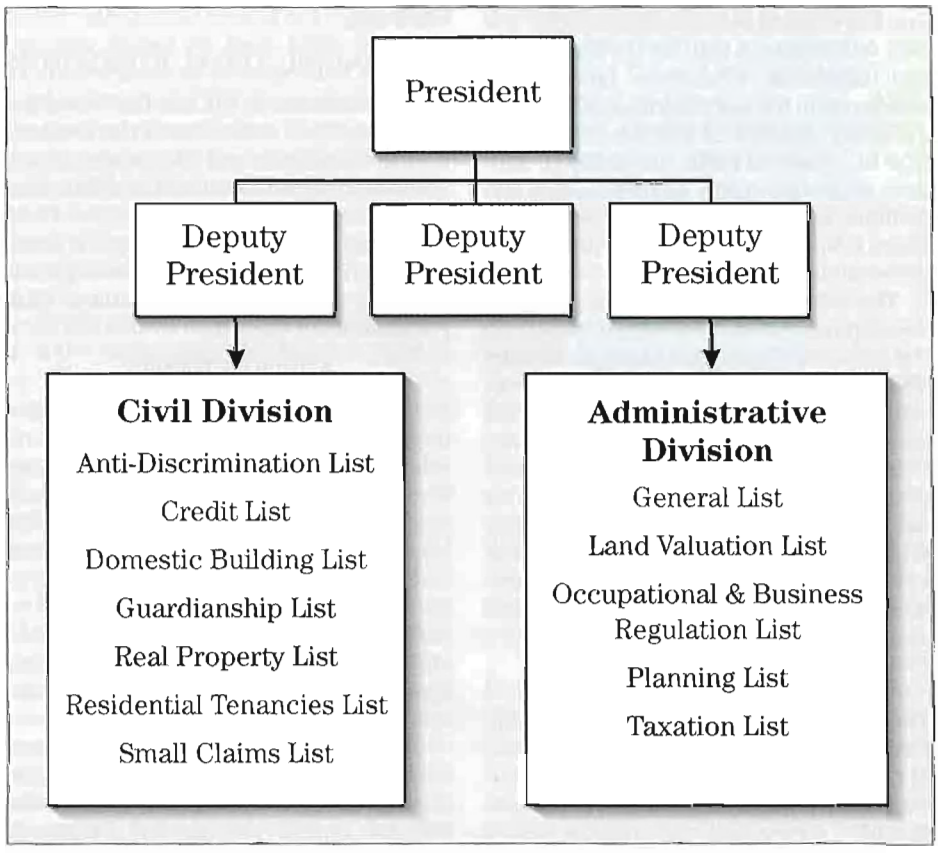
The structure of VCAT is pictured at right.

Within each division there will be a number of lists which will, generally speaking, correspond to the existing tribunals. For example, the Domestic Building List will perform all the functions of the Domestic Building Tribunal. The occupational business licensing functions of various tribunals and authorities will be transferred to the Business Licensing Authority. This means that the Travel Agents Licensing Authority, for example, which licenses travel agents and disciplines those who breach the conditions of their licences will be replaced by two separate bodies: the Business Licensing Authority for licences and the Occupational and Business Regulation List of VCAT for appeals and disciplinary matters.

VCAT will have a five-tiered hierarchy of members:

- a full-time Senior President (a Supreme Court judge)
- full-time Presidents (County Court judges)
- full-time Deputy Presidents
- Senior Members
- Ordinary Members with differing levels of experience and expertise.

In being a judicially assisted tribunal, VCAT will essentially be a "one stop shop". The Senior President and Presidents of VCAT will be able to exercise powers of the Supreme Court and County Court respectively, which will enable complex matters, such as Planning and Domestic Building dis-



putes which involve large sums of money, to be determined with the benefit of input from judicial members. This will also enable a party to take a point of law on appeal to the Supreme Court (the Senior President of the VCAT) who could deal with it immediately without delay.

The Business Licensing Authority (BLA) will assume the administrative functions carried out by the Credit Authority, Estate Agents Licensing Authority, Motor Car Traders Licensing Authority, Prostitution Control Board and the Travel Agents Licensing Authority. It is proposed that applications for business licenses will be made to and dealt with by the BLA.

The legislation will also establish a Rules Committee comprising the Senior President of VCAT, who will act as the Chairperson, the Presidents and a non-legal full-time member of VCAT nominated by the Senior President, a practising lawyer nominated by the Legal Practice Board, and two people nominated by the Attorney General.

The main functions of the Rules Committee will be the making of rules, the continuing education of VCAT members and authorisation of practice notes to govern VCAT's procedure. The presence of a non-legal member of VCAT (such as a planning expert) and two people to represent litigants on the Committee will ensure that rules and practice notes do not become overly legalistic. At the same time, experience in both courts and tribunals has shown that the input of practising lawyers in making rules of procedure is invaluable.

The establishment of VCAT will also see the introduction of more sophisticated technology such as electronic lodgment and video conferencing, which effectively means significant cost savings to businesses that are frequent litigants in tribunals or are located in regional Victoria.

It is proposed that both VCAT and the BLA will commence operation on 1 July 1998. VCAT will operate using statutory procedure as set out in the legislation under which VCAT will be created, and by January, 1999, it is proposed that VCAT adopt revised administrative processes.

PROJECT PATHFINDER

Project Pathfinder is a current initiative which seeks to improve administrative practices and procedures that support the operation of the criminal justice system in Victoria.

The Government has engaged external consultants KPMG, who have worked closely with a project team comprising staff from Business Improvements, seconded staff from police, courts and corrections and the Counsel for Justice Process Reform to identify areas requiring improvement and recommend possible changes.

The object behind this initiative was to address the need for service improvement with specific objectives to:

- minimise operational costs;
- improve the quality and timeliness of information; and,
- streamline process flow;

whilst retaining the integrity and independence of the justice system.

Project Pathfinder, a current initiative to improve administrative practices

Preparation of the report has involved wide consultation including discussions with the judiciary, the legal profession and staff members from the Department of Justice.

The project has, unarguably, an extremely wide scope in examining all aspects of the administration of criminal justice. The focus is not on the way in which investigations are conducted or sentences are determined but rather on current practices and procedures which support the role of the police, courts and corrections. Specific issues include:

- redundant and dated procedures which prevent services being delivered in a timely and cost-effective manner;
- incompatibility of support systems which can result in duplication of costs, data and effort;
- legislative constraints which may no longer be necessary;
- inconsistent definitions which make it costly and difficult to share data between systems and to provide operational management and executive information in a timely manner; and,
- a high level of inaccuracy within the data.

The Project is divided into three stages. Stage One (Diagnosis) involved the identification of problems in the system. Stage Two (Design) contains recommendations to progressively implement a number of administrative practices and procedural improvements, and has recently been approved for public release.

The recommendations made are broad and range from more timely and informed legal aid assessments, and increased judicial supervision of lists and management of cases, to coordinated processes for the management and transportation of prisoners. The report has also strongly recommended that the criminal justice system provide facilities for electronic exchange of information.

Prior to any decision as to further implementation of the project, the Government has taken the opportunity to circulate the report in its draft form to ensure that finalisation of the recommendations is based upon the best possible information. Only when the consultative stage is completed will the Government consider the recommendations made.

The above reforms, encompassing the civil and criminal justice system, will ensure that both the public and the business community, including people living and working in country Victoria, will benefit from improved services which are accessible, efficient and cost effective. I look forward to your interest and support.

Jan Wade MP
Attorney General

Judge Robertson

HIS Honour Judge Ian Campbell Robertson may have been born in New Zealand but his Scottish ancestry has always bubbled through to the surface.

His modest-sized chambers on the 10th floor of Owen Dixon East were scattered with history books of Scotland, decorated in the deep greens of a Scottish landscape and chilled to a temperature at which meat is usually frozen and where only a Scot could survive.

His Honour was born in Palmerston North, New Zealand in 1942. After leaving school he began as a law clerk in the firm headed by his father, Robertson, Brent & Hoggitt of Dunedin. He studied law at night at the University of Otago. He did well academically and demonstrated his capacity for humour and theatre by writing, singlehandedly, the *University Revue* each year. After graduating he travelled and spent time at Lloyds, learning the madness of the insurance industry. More importantly, back in New Zealand, he learnt the basics of advocacy working in an environment where there was no independent bar.

In 1970 he came to Australia after marrying Sylvia Ramsay. The marriage united two legal families for Sylvia's father, the late Wallace Ramsay, was at the time the Secretary for Justice of New South Wales. However, the style of Sydney did not suit the young couple and they determined to make their home in Melbourne.

He began work as an employee solicitor at Mallesons and later worked at Pavey Wilson Cohen & Carter. In February 1972 he signed the Bar Roll.

After a short period of general work His Honour developed an extensive practice in common law and, in particular, personal injury litigation. He occupied one end of the Bar table for many years in both the Supreme and County Court circuits in Mildura and Geelong. Such was the volume of briefs he was required to read, analyse and prepare for trial, he designed a one-page form which, upon completion, gave him instantly everything anyone needed to know about the case.

He developed a reputation as an excellent cross-examiner. This quality was made manifest in many a medical negligence case, an area in which he specialised during his latter years at the Bar. His style was a pleasure to observe. Short and precise questions led many a witness to confess that they had indeed erred or to feign some instant illness or madness in the hope the cross-examination would come to an end! Throughout these ordeals, His Honour always remained courteous and of good humour.

Judge Robertson

Above all His Honour's success was a result of the preparation he put into his cross-examinations. Not only would he read and reread his brief, he would search textbooks and materials relating to the area of expertise of the witness he was required to challenge. No stone was left unturned. One eminent engineer met his match when His Honour, having studied textbooks in the laws of physics, obtained the witness's agreement that Newton's Laws of Motion formed the basis of his opinion. Unfortunately for the expert, His Honour by then knew and understood those laws better than the witness, and when the witness was unable to recite each of the relevant principles, he left court with his opinion shattered.

With a vast range of medical and pharmaceutical knowledge, "Dr Robertson" as he was sometimes affectionately known on the 10th floor, was kind to those who sought his advice. He diagnosed many an ailment

of his colleagues, suggested the way in which the treatment should be managed and warned of the side-effects of prescribed drugs and the terrible complications of surgical solutions. It is rumoured that at least one member of the 10th floor has had to visit a doctor for the first time in a decade since His Honour's appointment.

In 1996 His Honour took silk and was quickly sought after as a leader in common law trials. At his welcome he noted that he would miss the life of the Bar from which he had obtained much satisfaction. He understood, having seen an amalgam system at first hand, the importance and strength of a separate bar. His words "we must ever be thankful to the founding members of our Bar for building it on such firm foundations — its cornerstone has always been, and I am confident always will be, integrity" seem apt in times when some have difficulty in understanding the advantages of an independent bar.

Apart from his work His Honour maintained a keen interest in travel, particularly overseas. He travelled frequently, visiting Hong Kong almost every year and Scotland on a number of occasions. There, on the Isle of Skye, he was able to locate the crofts from where his family had migrated to New Zealand, and met distant relatives who still were working some of the original holdings.

He was generous with travel advice to any who sought information. He would plan, on their behalf, exciting and particularly low-cost trips, seemingly having at his fingertips all the available options, packages and deals. Travel agents feared his attendance at their offices, knowing their commissions would be cut to the bone. Travel and lunching go hand in hand and in the latter activity His Honour was no shrinking violet. Bergerac's of King Street has mourned the loss of its most regular customer where one chef had the unenviable task of preparing an almost continuous supply of profiteroles.

Away from the Bar His Honour is a committed family man who spends a great deal of time with his children. Many was the occasion when he sacrificed pursuit of his own entertainment to assist them to fulfil their goals and interests. Some might have thought that to carry back from London a suitcase full of Mini Minor car parts for his son's car might have been taking his loyalty too far, but nothing was too much trouble.

Whilst His Honour was not one who spent much time networking or promoting his profile, he was a popular figure at the Bar. Always of good humour, courteous and polite and with a genuine interest in the welfare of his fellow citizens, he will be sadly missed in the corridors of Owen Dixon.

The qualities that His Honour demonstrated daily at the Bar will serve him well on the Bench. Litigants and lawyers will leave the Court knowing they have had a good hearing with a fair and just result. For the advocates, thorough preparation will be rewarded.

The Bar wishes His Honour a long and satisfying career.

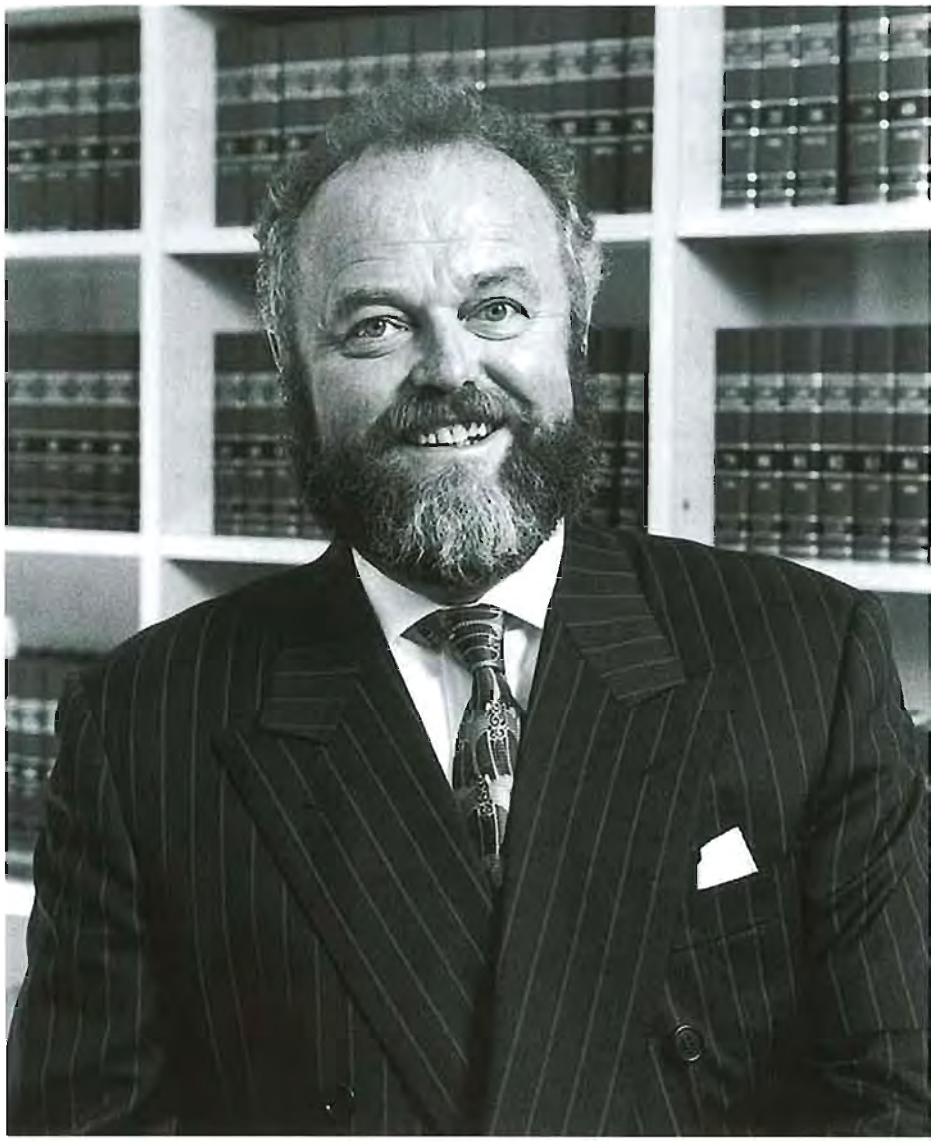
Judge Wood

TIM Deneys Wood was born in 1947. After studying law at the University of Melbourne he graduated in 1969, thereafter doing his articles at Boothby and Boothby. He later took a position as a legal commission officer with the Royal Australian Navy where he held appointments as the command legal officer, the fleet legal officer and assistant director of naval legal services. For some time he served on HMS Melbourne.

His Honour was admitted as a barrister and solicitor of the Supreme Court of Victoria on 2 April 1970. He signed the Bar Roll on 8 August 1974 and read with John Winneke, now president of the Victorian Court of Appeal.

In his early years at the Bar, His Honour's practice involved a wide range of work including criminal and common law. In later years His Honour's practice has been principally commercial, particularly building cases. The State Bank Case, a complex arbitration relating to the spire case at the Arts Centre, and a lengthy case in Canberra concerning the Silverton building are some of the cases in which he was involved. His Honour took silk on 29 November 1994.

For many years His Honour had chambers in Four Courts Chambers close to Michael Adams Q.C., now Chief Magistrate of Victoria. Some say that these chambers would have remained unremarkable, were it not for the fact that Michael Adams allowed his pet dog to attend and sometimes run conferences! His Honour got on well with the dog, but the now Chief Magistrate still complains His Honour was, from time to time excessively strict with the creature; His Honour would not permit the dog to join some of the legendary client lunches!



Judge Wood

His Honour is a member of the naval reserve has extensive naval service. He has been awarded a reserve force decoration. His Honour's connection with the Navy has involved him in many court martial cases including a piracy court martial in Sydney where Tom Hughes Q.C. and Philip Rice, later of the Supreme Court of the Northern Territory, also appeared. His Honour served as a Judge Advocate and as a Defence Force Magistrate. He now holds the rank of Commander in the defence force.

Not surprisingly, His Honour's is also a keen yachtsman. Together with Judge Stewart Campbell of the County Court, His Honour has an interest in a yacht moored at the Royal Victoria Yacht Club. Notwithstanding His Honour's many years of service to the Royal Australian Navy it has not prevented the occasional boating mishap. Some of his sailing colleagues have been so unkind as to suggest that His Honour's experience at courts martial has left him with a desire to "relive them, particularly those concerned with grounding". Of course His Honour's misadventures in yachting have never resulted in a court martial. His defence when boating mishaps have occurred has been that the wind and the tide were the culprits and it had nothing to do with his navigational skills!

His Honour has been closely associated with the life of the Bar. He has been a longtime supporter of the Essoign Club where he served as vice chairman for two years and chairman for 18 months. He has been one of the Bars leading practitioners. His Honour is renowned for his unpretentious charm, good humour and generosity. The Victorian Bar congratulates His Honour on his appointment and wishes him many fulfilling years as a judge.

Judge Forrest A.O.

The following eulogy was delivered by His Honour Judge Nixon on 29 December 1997 at the funeral of His Honour, the late James Forrest. It is published with Judge Nixon's permission.

THE life of His Honour James Herbert Forrest has in one way or another touched all of us who are present in St Peters church this morning as well as touching the lives of many in the wider community. Jim Forrest was a remarkable man who made an indelible imprint on the lives of so many people.

He was devoted to his family. He was a wonderful and loving husband to his wife Bebe and a marvellous and loving father to his sons, Jack, Terry and Jim, and to his daughter Mary. Jim loved his grandchildren dearly.

Throughout his life he was steadfast and resolute in his faith and devoted to his church. The strength of his faith stood him in great stead throughout the whole of his life, and in recent years when he has so often battled poor health his faith has proved a great solace for him. To my knowledge it was a rare day indeed if Jim commenced the day's activities without first attending mass. Jim lived his life according to those Christian principles — they were his lifeline — principles which no doubt he learned initially at home and later in his formative years at Xavier College and which were developed, enlarged and embraced throughout the whole of his life — those priceless Christian principles were at the forefront of all that Jim did and said in his lifetime.

Jim served his country well in time of war. In 1941 he enlisted in the RAAF and was posted to 100 Squadron. He trained and qualified as a pilot, attained the rank of flying officer and flew 86 strikes during the war. Having been a passenger in Jim Forrest's motor car in peacetime it never ceased to amaze me that he qualified as a pilot let alone survived without any major incident at the controls of an aeroplane in wartime.

Jim, of course, was not a perfect man. His major defect so far as I was concerned, and this may be a plus for some here today, was that he barracked for Collingwood. He was fanatical about his beloved magpies and I suppose I can forgive him that one indiscretion. His second-last winner on the track was even named Saverio while his

Judge Forrest

fearsome dobermans bore such names as Thompson, Leeter, Regan and Lu Lu. For years he was infatuated with racing pigeons. There was a loft to house these birds in what would normally be one's rear garden. I know of only two persons who have raced pigeons — one opened the batting for Australia and indeed captained the Australian XI — the other was a stalwart on the back flank for the Xavier College 1st XVIII.

Jim was very much a man of the people. Racing is often referred to as the sport of kings but Jim Forrest knew the industry which he loved so much and understood so well at all levels. He was in every sense of the phrase a grass roots racing man. He enjoyed his racing "hands on". His interest in the turf was nurtured during his school days and developed per medium of his legendary association and longstanding friendship with the late Basil Charles Conaghan. He was often to be found in Basil Conaghan's lounge room opposite the Caulfield Racecourse sipping a quiet ale — Bebe quickly learned the meaning of the word "conference" when as a barrister Jim would tell her he was "in conference".

In more recent years Kevin McKay has trained the Forrest horses and, as has been the position throughout his life, a strong bond was forged between owner and trainer. Loyalty to his friends was a feature of Jim's life. Loyalty is a reciprocal virtue and Kevin trained Jim's horse Tuo Monova which won the last race at Pakenham only a few hours before Jim's death.

Upon his discharge from the RAAF he completed his law course at the University of Melbourne where he was fortunate enough to meet Bebe and he was admitted to practice in December 1947. Jim signed the Bar Roll in July 1948. Throughout his 18 years at the Bar Jim was in great demand as a barrister dividing his time in the main between crime and common law and his practice between Melbourne and Ballarat. He developed a very sizeable circuit practice, particularly in Ballarat where he seemed to know all and sundry. He also regularly appeared for the stewards in racing appeals before the VRC committee. Like everybody else who appeared for the stewards Jim could boast that he never lost an appeal. He was indeed the consummate barrister.

On 29 January 1964 at the age of 46 years Jim was appointed a Judge of the County Court, a Judge of the Court of Mines and a Chairman of General Sessions. As a judge in all jurisdictions and as chairman of the youth parole board for many years between 1970 and 1985, which was a task dear to his heart, Jim acquired a well-earned reputation for firmness, compassion, humanity and humour. Such characteristics made Jim a wonderful County Court judge and I venture to say that he had no peer as a judge of the County Court. His chambers at the Court had to be seen to be believed. Only Jim could possibly find any document yet unfailingly he could immediately produce the required document either from one of the various piles which sat precariously on his desk or from his unique floor-level filing system — each morning papers relevant to the days activities were strategically

deposited on the floor in a line from the door of his chambers to his desk. As a judge he had an uncanny ability to persuade a jury that it deserved a mid-afternoon break, particularly if Jim had a horse running in the 3.20 p.m. race at Kyneton or Murtoa. He could then be seen relaxing in a chair in his chambers with what appeared to be a Victoria Bitter can held to his ear. Indeed — to all intents and purposes it was such a can but on closer inspection one found that there was a radio inside a can which merely bore the Victoria Bitter label. That can and the day's form guide took pride of place on Jim's desk. He rarely, if ever, missed hearing a race in which one of his horses was competing.

Juries loved him — he had them eating out of his hand — he spoke their language. With justification Jim prided himself on the clarity of his charges to juries as he had worked long and hard to keep matters at hand as simple as humanly possible. While I was still a barrister, my wife Elizabeth was selected on a jury and Jim was the presiding judge. When she arrived home at about 11.00 p.m., after deliberating for hours following a one-day trial, she was ecstatic about Jim's charge describing it as being as clear as a bell. When I enquired whether the accused had been convicted or acquitted on the one count of assault which he had faced, she replied "We couldn't agree — the retrial's tomorrow before another judge and jury."

The door of Jim's chambers remained open at all times and he was always willing to help or support his colleagues and he provided a ready source of advice for the many judges who sought it. In his twenty-one years as a judge none of his decisions was ever overturned on appeal. That fact in itself is testament to his great ability and judgment. Jim retired as a county court judge in 1985. When the Racing Appeal Tribunal was created in 1983 and commenced in 1984 he was an automatic choice to be chairman of that tribunal and it was a great privilege for me, together with Bruce Menab, to be deputy chairman of that tribunal. Jim retired in 1989 as chairman of the tribunal. In 1968, four years after his appointment to the County Court, Jim had conducted a royal commission in the State of Western Australia to determine whether that State should set up its own TAB. The government chose the ideal man for such a task.

In 1985 Jim was appointed an Officer in the General Order of Australia for services to the law and to racing. That award was indeed well deserved.

Finally, one of my colleagues on the county court on the occasion of Jim's retirement in 1985 wrote of him in these terms:

> If you take qualities like down-to-earth judgment of people of all sorts and affairs and things of all sorts, an innate and unfailing sense of fairness and justice, a very lenient and merciful approach to his fellow men; great dignity combined with an earthy common touch — you can find any of those in numbers of people. It is not often you find them all in one person as you do with James Herbert Forrest and in such ample measure.

Jim — you were a fine and courageous man. We are all fortunate to have known you. I was indeed fortunate to have served on the County Court with Jim Forrest albeit for only four years before he retired.

Rest In Peace — Jim.

Rupert Balfe Q.C.

THE late Rupert Balfe Q.C. — admitted to the Bar 1961, Queen's Counsel 1981 — was a colourful member of a common law era of counsel sadly being diminished over the years. Rupert was thoroughly capable in many areas including family law and criminal matters, as well as his beloved negligence claims for which he gained an admirable reputation.

His advocacy was a combination of flair, determination, stubbornness and a capacity to win over a jury with a disarming smile.

Such was his affinity with and knowledge of Pakistan that he became the honorary Pakistan consul in Melbourne for some years. Who would ever forget the annual celebration of Pakistan National Day in Seabrook Chambers presided over by the consul with lavish hospitality, including liquor quite alien to the national Muslim culture? On another occasion the visiting Pakistan hockey team was entertained by the consul, being somewhat bemused by the consumption of liquor by their appointed representative and his friends.

Rupert's expeditions to the mountains fishing for trout were an annual feature of his life, and to see him dressed in all and more of the necessary accoutrements of an expert trout fisherman was to see a highly expert fisherman plying his sport.

Rupert was an expert skier and each snow season saw him travel to the most difficult ski slopes and join in the après ski entertainment.

He was a most accomplished hockey player, so much so that lawyers who have played this game over the years, including such veterans as Finlay McNabb and Arthur Pearce, gathered in great numbers shortly before his death at the Essoign Club at lunch to honour him. Readers will well remember the photograph in the last edition featuring him and Finlay McNabb.

In his early days Rupert was a commissioned officer in an Artillery Regiment in the Citizen Military Forces in particular enjoying the pleasures of the officers' mess as well as occasionally inspecting the lines.

Few people knew of his background as a Latin scholar but verification appeared in the Australian Law News in February 1997 when he corrected an earlier misquote by another lawyer of Julius Caesar's writing on the Gallic Wars.

Above all he was a great raconteur and he was fond of reminiscing about past cases, so much so that a rule was introduced during the extended luncheons of counsel at the nearby restaurants surrounding Owen Dixon Chambers such that when he embarked upon such stories the wine waiter would be summoned and a premium bottle of red consumed by his fellow diners at his expense. This became known amongst his colleagues as "the Balfe rule".

Rupert Balfe Q.C.

Balfe Q.C. had a wide circle of friends. He was known around most of the circuit towns of Victoria.

When news of the onset of the fatal disease of motor neurone syndrome became apparent to the Bar his courage in accepting his unfortunate lot became an inspiration to all who knew him. Not once was he given to any self pity but life continued as it was right until the end. Those who knew him valued more than anything else that complete stoicism and courage in the face of what he knew to be his ultimate fate.

Above all else he was a devoted husband and father to Di Balfe, his wife, and his four children of whom he was extremely proud. Michael Balfe who inherited his father's talents as a skier, amongst others, and his daughters Annie (Boo), Lisa, a secretary still in Owen Dixon, and Katie, his youngest.

Bruce C. McA. Knappett

BRUCE Campbell McArthur Knappett, affectionately known as "Bluey Knappett", signed the Bar Roll on 10 November 1967. He read with John Bland. His name was removed from the Roll at his own request on 22 April 1971.

Those who knew him during his time at the Bar describe him as "a lovely man, reserved and never brazen". After leaving the bar Bruce took an active interest in matters theatrical For a time he wrote theatre reviews for the *Bulletin* magazine.

Bruce Knappett died on 6 January 1998.

Roger F. Shipton

ROGER Francis Shipton O.A.M. signed the Bar Roll on 15 February 1979. He read with Michael Dowling. His name was removed from the Roll at his own request on 25 July 1994. During his time at the Bar he was also a member of Federal Parliament. He had an active interest in industrial law which he combined with his life as a politician. "Always polite and courteous" were hallmarks of his character. Roger had a varied and fulfilled life and his time at the Bar was part of this.

Roger Shipton died on 23 January 1998.

Stephen J. Winter

STEPHEN James Winter signed the Bar Roll on 30 November 1989. He read with Peter McDermott. His name was removed from the Roll at this own request in March 1995.

During his time at the Bar Stephen was a member of the Australian Army Legal Corps. His practice was largely criminal with some common law. After leaving the Bar he worked as a solicitor in the Northern Territory for Aboriginal Legal Aid. He later became a Deputy Coroner in the Territory.

Stephen Winter died on Christmas Day, 1997.

Patrick Kearney

PATRICK Hogan Kearney signed the Bar Roll on 14 September 1978. He read with Dyson Hore-Lacy. His name was removed from the Roll of Counsel at his own request on 23 October 1986. Patrick's time at the Bar followed many successful years in practice as a solicitor. Always one to enjoy a good Irish joke, he practised the law with honour and a sense of fun.

Patrick Kearney died on 1 March 1998.

The Opening of Douglas Menzies Chambers

On 3 February 1998 Douglas Menzies Chambers was formally opened by the Rt Hon. Sir Ninian Stephen KG PC. Mr A.J. Myers Q.C., opened the ceremony.

"SIR Ninian Stephen, Lady Stephen, Mr and Mrs Money, Mr Ian Menzies and Miss Allison Menzies, distinguished guests, I welcome you on behalf of the Board of BCL. It is a special pleasure to welcome Catherine Money, a daughter of Sir Douglas Menzies, Ian Menzies, his son, and Allison, a granddaughter. Two of the Menzies daughters, Joan and Fran, who live interstate, had wished to come today but haven't been able to do so.

"Sir Ninian will open this building although it has been opened in a way for quite a long time. Sir Ninian is here not because of the distinctions he has achieved in many fields of endeavour, but because he was a colleague at the Bar with D.I. Menzies and, for almost three years, I think, a colleague on the High Court. BCL has named chambers after members of the Bar who have become Judges of the High Court and thus has Owen Dixon Chambers, Latham, Isaacs, Aickin and now Douglas Menzies Chambers. The choice of Douglas Menzies as the name for these chambers, even after twenty-five years (almost) since Sir Douglas Menzies died, was universally popular. His popularity and good humour is remembered by so many, not simply those who met him, but in a communal way by the Bar in general.

"A few years ago this building, then known as Four Courts Chambers, was practically unoccupied. Barristers' Chambers Limited has refurbished it at the modest cost of about $3,000,000. It is now home for BCL and for other Bar activities and there are about ninety Barristers occupying the building. A few years ago it was practically vacant and we could get no-one to come here. The company paid for this work out of cash reserves, without borrowing a penny. The Board is proud of what it has done at modest cost.

Alan Myers addresses the opening celebrations.

"The function of BCL is to provide accommodation for those barristers who desire it; formerly it was for all barristers by compulsion, on favourable terms and at modest cost. This enables those who are coming to the Bar to do so at less cost than they would otherwise incur and those who are called to other places to do so on a month's notice and without the burden of getting rid of an oppressive tenancy. We believe, also, that organising chambers in this way promotes a collegiate bond between barristers and it enhances the ability of barristers to perform their professional obligations. We have common libraries and we can meet and speak with each other about professional matters. The ethical standards of the Bar tend to be reinforced when everyone is living together rather than in lots of different places. BCL is committed to do its best to continue to provide accommodation for those barristers who desire it.

"We wish today to thank the many who were associated with this work, both the planning and execution of the work. I can see many of them here and I shan't mention them by name. After Sir Ninian has opened the refurbished chambers there will be a small celebration, which everybody is invited to stay for, and anyone who would like to look through the building can do so freely as he or she wishes."

Sir Ninian Stephen then addressed the audience:

"Mr Neil Young, Chairman of the Bar Council, Mr Alan Myers, BCL Chairman, and, particularly, the members standing here today, long familiar faces to me, and members of the Bar, distinguished guests.

"First of all, it is absolutely true that Victoria has by far the best arrangements for accommodation for barristers. That thought occurred to me only today in Canberra in the High Court over lunch talking to Sydney members of that court. They deplored the arrangements in Sydney where barristers have to spend very large sums indeed in order to secure chambers. I think we in Victoria started on the right basis and it's wonderful to see that this basis is continuing.

"It is a very special honour to have been asked to declare open these Douglas Menzies Chambers, named in memory of Sir Douglas who was undoubtedly one of the most distinguished past members of the Victorian Bar.

"His career, beginning as Supreme Court prize winner and then continuing as leader of the Junior Bar, then as an outstanding silk and finally as one of the great judges of the High Court, was recounted in detail by Sir Harry Gibbs at a special sitting shortly after Sir Douglas' death and is printed in the Commonwealth Law Reports.[1] My own first memory of Douglas Menzies was as a very revered silk in the early 1950s — revered partly because he possessed, to the incredulity of young juniors, not only a room of his own in old Selbourne Chambers on the first floor but also that rare animal, a secretary. And this in the professional world when two or three juniors used to share crowded chambers, if they were lucky to get any at all. Even more awe-inspiring than a large room of one's own was his possession of a secretary, which was a rare phenomenon at a time when most opinions and pleadings were sent to solicitors in their pristine handwritten form and were, if not the better, at least the shorter for that.

Robert Pahor and Patrick Ong from Spowers Architects, and Geoff Bartlett of BCL.

"Sir Douglas was never an occupant of Owen Dixon Chambers. By the time of the move of the Bar there in June 1961 he had long gone to the High Court, to which he was appointed straight from the Bar in June 1958 at the age of only 50. Today, in Canberra, we are reminded that until Ian Callinan's appointment to the High Court, which took effect at midnight last night, Sir Douglas was the last but one direct appointment from the practising Bar to the High Court.[2]

"I had a couple of junior briefs to Sir Douglas in the 1950s. I remember them as being rewarding — in both senses of the word! He had an immense constitutional and commercial practice and, I suppose, that he, Dick Eggleston and Bill Coppel were then the outstanding leaders of the Bar in those fields. It was a very small Bar by today's standards. There were less than two hundred barristers in active practice when I signed the Bar Roll in 1952.

"It was after I went on the High Court in 1972 that I saw a great deal of Sir Douglas Menzies and my respect for him as a great lawyer and advocate grew into a deep affection for him as a human being. The High Court was, of course, a very different place from what it is now. We had no great Court House of our own, we were truly an itinerant court. We had leased premises in Sydney and Melbourne, constantly disputing with the Victorian Government as to whether we were paying enough rent. We borrowed chambers and a court room from the Supreme Courts in other States, and we visited them on circuit a good deal more frequently than now occurs. Ironically, the one capital city that we had no sittings in, and were relieved to have none, was Canberra.

"Sir Douglas was an immensely sociable man and because of his frequent visits to the States he had friends in the law throughout Australia. He combined great learning and a very agile mind with an evenness of temper and enormous self-confidence. All this, seasoned with his impish sense of humour, I think, made him a delightful judge, both to appear before and to sit on the Bench with. As counsel, one could always look to him for a calming interjection or a joke that, on the Bench, would ease the tension that some other members of the Bench of that period were prone to generate.

"One of his favourite stories has particular relevance to this occasion today, it seems to me. It was the story of an old barrister who functioned best with a water glass always to hand, his instructing law clerk's main task being to ensure that his jug was filled with what looked like water, but in fact was gin. The gin was purchased, according to Sir Douglas, from just across the road in the old Four Courts Hotel which then, and long afterwards, occupied this very site. And there came again, according to Sir Douglas, the dreadful day when the old barrister hurried into Court a bit late. He found, apparently, all in order. The law clerk, who was a nervous newcomer, had, as instructed, a full water glass. The old Barrister rose to open, took a good sip of his glass, reeled back and cried in anguish "My God, it *is* water!"

1. (1973–74) 130 CLR.
2. Sir Keith Aickin was the other: Ed.

Sir Ninian Stephen opens the Chambers.

Rick Ladbury, Neil Young and Alan Myers.

Sir Ninian with relatives of Douglas Menzies: Ian and Alison Menzies and Catherine Money.

"Sir Douglas' sense of humour, I know, would have been tickled by the notion that this building, once the site of the Four Courts Hotel, is now to bear his name.

"It was a very sad day for all of us on the High Court when Douglas Menzies died. But he would have thought the circumstances of his death fitting. He dearly loved good company and especially the company of barristers. It was at the Annual Dinner of the Bar Association of New South Wales, in the Bar Common Room, surrounded by the company he loved that suddenly, I am sure a glass in hand, he collapsed. He didn't recover consciousness and died a day or so later. With his death all the Judges of the High Court felt that there died too some of that very special sense of comradeship which his happy spirit had engendered. To name after him this home of members of the Bar, an institution which he held very dear, would I think have been the memorial he would most have cherished.

Sir Ninian unveils the plaque as Alan Myers looks on.

"I am delighted to name this building, the name that it's had for some time now, in his honour, Douglas Menzies Chambers, and to unveil the plaque."

Sir Ninian Stephen then unveiled the plaque.

A Man of his Word

IN John O'Keeffe's *Recollections* (1826) is an anecdote of Sir Toby Butler, a favour lawyer, whose powers of oratory were great but needed stimulating. "A client, very solicitous about the success of his cause, requested Sir Toby not to drink his accustomed bottle that morning. He went to the Court, pleaded, and gained a verdict. The client met him exulting in the success of his advice; when, to his astonishment, Sir Toby assured him that if he had *not* taken his bottle, he should have lost the cause. 'But your promise, Sir Toby?' — 'I kept it faithfully and honourably, I did not *drink* a drop — I poured my bottle of claret into a wheaten loaf and *ate* it. So I had my bottle, you your verdict and I am a man of my word.'"

The Cancer in Litigation

By Geoffrey Gibson

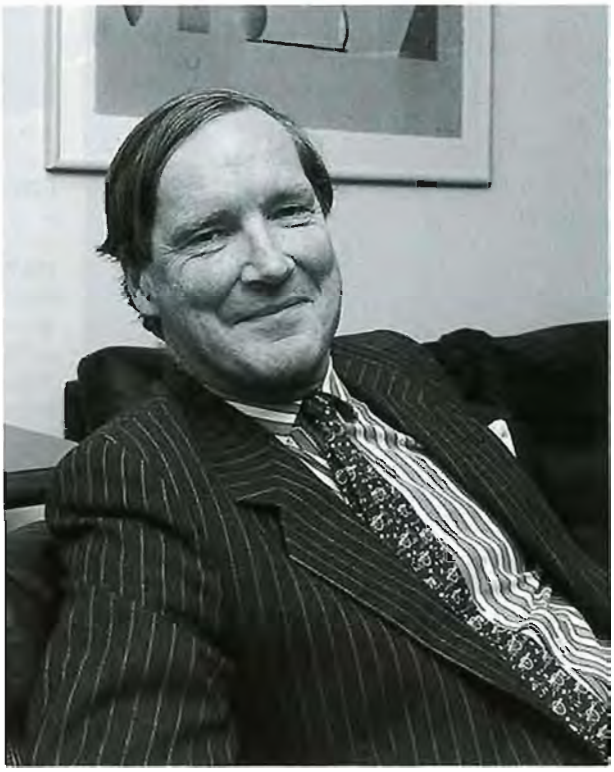
Geoffrey Gibson, a former member of the Bar and now a litigation partner at Blake Dawson Waldron, has, like many of us, become disillusioned with the way in which litigation operates today: lengthy trials, mountains of paper, excessive costs, and an inability to focus on the true issues.
This is the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

II THE ILLNESS: CAUSES AND SYMPTOMS

THE following, not necessarily in any order, seem to me to be some of the main factors behind the problems that lawyers and litigants have to confront in modern civil litigation.

(1) Washed Out With Black Rain

We have too much law. This is agreed. We have too much black letter law. This is obvious. We have been saturated by it. We also get it in the neck at the other end. When the legislators despair that their mountains of law have not been adequate to cover every contingency, they give some bureaucrat a wide power to plug up the holes by making decisions and exercising discretions. Letting civil servants decide the rights of citizens looks dangerous to common lawyers, and it does not sit well with our idea of the rule of law. One result is a lot of attacks in the courts on the bureaucrats. Just look at the enormous amount of court time devoted to hearing attacks against the Australian Broadcasting Tribunal by entrepreneurs with access to other people's money, like Mr Alan Bond or Mr Christopher Skase, who are trying to acquire or protect a licence to participate in a heavily regulated market. Look at the attacks on the corporate regulators and the Australian Tax Office. Sometimes you could be forgiven for thinking that it is the judges running these government departments rather than the civil service. This is one of the sources of the growing antagonism of the executive arm of government to the courts. It is also a symptom of what goes wrong when you have too much law.



It is absurd for a nation of less than twenty million, a population about that of greater New York or Tokyo, to have three levels of government, three sorts of law makers, and any number of levels of courts and tribunals. The very number of the laws means that they will be more complex. This is one aspect of the snowball effect that is corroding our system. Judges do, I think, acknowledge that *Part A Statements* in takeovers are incomprehensible to most people. It is idle to pretend that tax laws can be assimilated by any except a very monastic few, generally the sort of person you would not be all that thrilled to sit beside on a trip to London, even if we had the Concorde on that route.

Although the judges complain as much as anyone else about the quantum and quality of the laws they have to administer, my view is that they too are culprits in generating law at such a rate of change, and doing so in a way that makes it harder to follow and apply the law. I will come back to this.

The complexity of these laws leads to a loss of faith and hope in those who have to practise with them and apply them at trial level. They are so difficult that the ordinary lawyer is afraid to go near a lot of them. It is one thing to perform a minuet in a Serbonian bog; it requires altogether a different caste of mind to perform one in a minefield. But the drift to closer specialisation brings its own problems.

(2) The Flight From the Law

The High Court has become the subject of political controversy because of its attitude to its own law-making powers, and because of the policy decisions it has been taking in the exercise of those powers. But it also has had a major impact with its decisions on the common law. The rationalisation of negligence, and the sustained dalliance with the doctrine of proximity, has not produced that much litigation, although the Court is certainly not discouraging it. The greater readiness of the Court to intervene in the workings of government in the name of procedural fairness or some other rubric of administrative law has led to plenty of litigation. There are signs that this is slowing. In 1986 the High Court overturned a decision of a minister on an issue involving uranium mining and the Aborigines. In 1997 the Court had the chance to consider whether part of the Gulf of Carpenteria in which a mining company was interested should be regarded as part

of the national estate. It avoided policy issues and determined the case on dry grounds of statutory interpretation.

Equity in Business

It is in the increasing imposition of duties of good faith and good conscience in commercial dealings that the High Court has had a marked effect. Until recently the common law had been reluctant to introduce doctrines of equity into commercial matters. Their intrusion has now been embraced by the High Court. The principal vehicles have been equitable estoppel, unconscionable conduct, relief from forfeiture, and fiduciary duties. The issues that arise from asking whether someone has done something that is against conscience are obviously wider than dry issues like whether the parties have in fact agreed or whether they have given consideration. They are also issues that make the result more unpredictable, and depend upon the personal outlook of the particular judge. They increase the lottery element in litigation. The CEO of a public company or the head of a government department who is involved in a dispute wants some sort of assessment of prospects before embarking on expensive litigation. It is hard enough to predict the outcome of a witness action involving competing legal claims. It gets that much harder if the issue may fall to be determined by whatever the judge thinks is a fair thing.

Some decisions in particular got up the noses of business. In one the Court found that the purchaser of an uncompleted house had acquired an equitable lien — a right against property to secure a debt that arose automatically by implication of equity — even though the relevant contract (a building contract) could not have been enforced by a court in equity. The possibility of lending against an asset that may be the subject of an invisible and as yet unknown security unsettles lenders. Another case held that a bank may have an obligation to warn a customer of the risks of entering into a guarantee. The court reached this conclusion by concluding that the difference in bargaining power and commercial nous of the parties was such as to make it obvious to the bank that it was dealing with someone suffering from a disability.

This case (*Amadio*) spawned a minor industry of resisting applications for summary judgment on bank loans by a combination of bank manager verbals and self-serving statements of personal deprivation that sounded more like a plea than a submission. When farmers got burnt in foreign currency loans, their lawyers did not blush to sue banks on the premise that one businessman who knows more about the business than another may be legally obliged to advise the other that one may well end up worse off at the end of the deal. This sort of notion can give rise to problems in an economic system that is supposed to be based on competition. In another case the Court held that equity would hold the parties to a contract when the law said there was none.

Each of these decisions was plainly justifiable on the merits and, on the view of the Justices, the law. At the same time that the courts were discarding the offensive assumption, and the appalling insult to women, that a mere housewife could not be expected to understand something as tricky as a guarantee, they were stretching the outside of the envelope to give relief to others in need. So what — everyone likes to see a win for the little Aussie battler, and who cares if someone like a bank takes the odd knock?

Well, and I acknowledge that this does sound silly, the banks may care. Banks have executives who have to answer to others, as well as shareholders. And you would have to be naive to believe that the costs of these indulgences do not get passed down to the person in the street, including the plaintiffs and their friends. The judges get very cross when other people are profligate with shareholders' funds.

Two other developments have made it hard to have a simple fight about contracts. If you had not gone to the trouble to put something in a contract, you could not complain about it, because the judges thought they would be looking for trouble if they let the parties go outside the terms of their own prescription. We lost a lot of this hard edge when the judges said we could look at the "factual matrix", and the hardening of the rules against the judges putting in terms into the contract came too late. Well, if it was not in the contract, at least a party had to have given a binding promise for some consideration before being taken to court on it. All that went west with s. 52. It is rare now to see a complaint that someone in business has welched on a deal without seeing a pleading of estoppel and s. 52 — you can usually forget the old fallbacks of negligent misstatement and collateral warranty — and it is as common now, as it once was heretical, to see estoppel alleged upfront in the statement of claim.

I am not presently talking about whether these new laws are good or bad. Whether or not you agree with these decisions, their effect is plainly to increase the uncertainty of commercial litigation. Hard cases make bad law when they complicate the law. Equity complicates commercial cases not so much because of the discretion in the remedy but in the width of the criteria of liability. And this is before you try to explain to your client why more than a century after the Judicature Act a litigant is still subject to two separate systems of law that may conflict, as a consequence of a division in the councils of the King that goes back to the time of the Black Death or thereabouts.

Discovery Run Riot

Another departure from the old law is just as serious in the way we practise litigation. The old rule was, and, as they used to say, a very salutary rule too, that you could not persuade the court to order more discovery merely on your say so. The rule was that "it cannot be shown by a contentious affidavit that the discovery made is insufficient". There was a rule that enabled the court to order a party to give evidence of a particular class of documents, but the arguments about discovery did not take too much time.

The process of discovery has now become life threatening. Rarely are attempts made to limit discovery. The reverse tends to be the case. Each time a document or a class of documents is discovered, other documents may be called in question. You are told the new document leads to a chain of inquiry. A paper chase starts. These quests can turn into something like Royal Commissions. They are justified on the footing that the lawyers doing the complaining have to do their best for their client, and they are frequently accompanied by an accusation that the lawyers on the other side are breaching their duties to the court. In the hands of a litigant with a deep pocket, the weapon of discovery is very ominous. So also it is in the hands of a zealot or a crank, particularly those who are devoted to conspiracy theories. In other fields the exercises would be called witchhunts.

The problem has got so bad in Victoria that the primary trial court, the County Court, has *de facto* abolished general discovery. Good on it. Discovery is a major problem because of its potential for delay, frustration, expense and abuse of power. Since discovery involves an invasion of rights — what the surgeons call an *invasive procedure* — it used to be closely watched. This is not now generally the case, and this factor alone deters a lot of people from going to law. The rule prohibiting extraneous use of the material is difficult to enforce. There is no doubt that

in some cases discovery is not only useful but determinative, and that people have been able to uncover, and prove, and get compensation for, substantial wrongs that would not have surfaced without discovery. But we have to ask if the price is not too high. It is not much good putting a Rolls Royce in the window if most people cannot even afford a Holden.

(3) The Fall of Experience

One result of the increasing amount of law, the increasing difficulty of the law and the increasing rate of change is that it is harder to stay afloat without specialising. It is almost a kiss of death to describe yourself as a general practitioner. The work that used to sustain general practitioners has largely dried up. The fact that a lot of the legal change is being driven by the judges, or governments that have bureaucrats with their own agendas and parliamentary counsel with their own styles, does not make it any easier for the sole practitioner to keep up. Particular areas develop their own tribunals, language, customs, and bars. Law reports proliferate, at a brutal level of expense.

Sir Owen Dixon gave this advice to law students at Melbourne University in 1953:

> To be a good lawyer is difficult. To master the law is impossible. But I should have thought that the first rule of conduct for counsel, the first and paramount ethical rule, was to do his best to acquire such a knowledge of the law that he really knows what he is doing when he stands between his client and the court or advises for or against entering the temple of justice. It happens to be a duty the fulfilment of which will serve the self-interest of counsel more than any other. The chief objection to it is that it means hard work for a long time. It is harder work than in London because counsel here do not specialise.

I believe that barristers now work as hard, at least when they are starting, as they did then. But specialisation has arrived. Perhaps it is not the same as in England, but it has now spread over wider areas. There are still some — like Tom Hughes Q.C. and Neil McPhee Q.C. — equally at home before the High Court or a jury, but it is hard to see their like surviving.

Specialisation can have worrying results, particularly if it begins as early in the career as it now appears to do. History suggests that it is rare for specialisation in a profession to result in a lowering of prices or a quicker service. The contrary is the case, and there are also the problems of snobbery that any hierarchy brings. Forty years ago, leaders of the equity bar in Victoria, the Whisperers, fought workers compensation and murder cases. Now they would be worried about being sued for negligence, even allowing for their continued immunity from suit.

In the big firms of solicitors, you have some who understand what a relevant interest may be for the Takeovers Code, some who know what a collateral security is for the purposes of stamp duty, some who can find their way through structured financing in cross-border leases, and a whole lot who have never set foot in and never want to set foot in a court. They tend to move in packs, they get edgy when they are separated, and it is often hard to see who may have the directing mind and who may be accountable for the delivery of an acceptable level of professional service. They are also very expensive, taken as a group or *à seul*. And some of them, despite all of the resources and advantages of their firms, still insist on adding a barrister's opinion to their own, just to spread around the risk, and the cost, and then they wonder why some members of the bar and bench still look down on them.

The result is that it is more difficult to find a unifying ethic running through the practice of the law. There is also a loss of confidence. When the subject of income tax arises, a lot of lawyers get the same faraway look in their eyes as witnesses do. In the big cases, there is so much emphasis on preparation that a lot of the junior bar appear to do little else but prepare, and enjoy some skirmishing before the judge in charge of their chosen division of practice. Most believe, deep down, that the prospect of Mutually Assured Destruction means that the odds are significantly against the case ever being fought through to judgment. We are at risk of bringing to the inner bar a generation of barristers who have hardly fought a case. A sensibly managed trial then gets harder to get. You cannot have a trial run by people who do not know how to run a trial, and who look like they may be disconcerted by having to get their hands dirty and take on a witness — heavens, there may not even be a witness statement, or a proof of evidence. At this rate the system is in peril of looking irrelevant to its practitioners, as well as to its consumers.

All of this is predicated on the continuing division between barristers and solicitors, something that the bigger litigants are finding it harder to understand or tolerate. A case that a big corporation is in could well involve corporate counsel, with an assistant, the partner of a big firm, with at least one assistant, and, say, two counsel — six lawyers, at least four more than the ordinary CEO would think should be enough.

(4) The Loss of Nerve (and the Retreat to Paranoia)

It is common for people to get jumpy when too much is going on around them. Too much pressure can lead to a nervous breakdown. It is not surprising that lawyers get anxious when the rate of change and the way that new law is made is such that they do not know whether they have caught up. It is even more worrying when they think that they have lost the capacity to predict the sorts of change that may be about, or to understand them when they happen. They find it hard to get a firm footing in principle. The besetting weakness — whether from a government announcement that legislation will be introduced retrospectively, or a decision of the High Court that rejects everything it has said on the subject since it was created — is the lack of bedrock. Nothing is sacred. That is, after all, a post-modernist fact.

The loss of nerve is made worse by the fear of failure, either through being successfully sued, or even colourably sued, for professional negligence, or by being overturned on appeal, or just making a fool of yourself. It runs from the litigant through to the top of the courts. The litigant wants a level of assurance that cannot be got. The temptation is there to throw lawyers and money at a problem. The solicitor worries about leaving something out. When it comes to discovery, it may be safer to put everything in. Nice judgments about materiality or relevance may be said to be wrong. A sense of discrimination may get you hurt. It is better to be safe than sorry. Similarly, with counsel, in preparation, it would be safer to read everything in sight; you cannot afford to leave it to the solicitors. When the inexperienced barrister comes to cross-examine, the lack of experience often means there is a lack of judgment or nerve about where to start or where to stop. This lack of judgment is a major reason for the excessive time taken for both criminal and civil trials.

Then the judges get worried about those above them. There are good reasons why judges should take care to ensure that they do not prolong the trials of the litigants and their witnesses. This is particularly so with criminal trials where the interests of the victim, the accused, and the jury, have to be considered. You cannot blame judges at first instance being worried about dissection on appeal; the task of County Court judges directing a jury in a criminal trial

and then directing themselves on sentence must be as unrewarding as you can get, given the constant mass of authority that bears down on them, not always with the one voice.

But care is one thing; paranoia is something else. I do not know why seasoned lawyers who have done their best to apply their minds to a problem should be in the slightest bit perturbed by the possibility that some other lawyers may reach a different conclusion. Law is in the end a numbers game where the winner is the one standing in the right place when the music stops. Some judges appear to prefer making their judgments appeal proof rather than having the honesty to subject their convictions to the test. Differences of opinion between lawyers — people brought up to practise as adversaries — are neither surprising nor unhealthy. As Henry James is reported to have said, a man can only give what he has; the rest belongs to the madness that is art. Besides, someone who sits there for a long time and never provokes effective contradiction may be at risk of being thought to be boring, not to say timid.

People who are intent on looking after themselves are not best placed to look after others. Someone who is in something for himself is the very opposite of a fiduciary. The essence of a profession is a commitment to apply the knowledge that you have for the service of others. A profession that discourages the service of others has a fundamental problem. However it has arisen, what the Americans call the CYA Syndrome (the Cover Your Ass Syndrome) is being destructive at all levels of our system of litigation.

The Lawyers and the Courts

In truth some of these fears appear to be irrational, and therefore to come within the popular understanding of the word *paranoid*. Barristers are still immune from suit in respect of what they do in court. If that immunity is to be retained so that counsel can discharge their obligations to the court, the court should be vigilant to see that the consideration is returned, in full, and that counsel does act in the interests of the court. A lot of counsel are yet to give a proper return on our investment in them. They do have to try to make the system work, *even if the client may not like it, even if the client may get the wrong idea, and even if the client may want to sue the barrister*. Then counsel will not waste time with dud points, but make the point they should, and sit down. It can take some courage to do something that is professionally proper and effective in terms of advocacy, but may not look as showy or aggressive or as downright nasty as the client would like. But that is what barristers are supposed to do. For reasons I will come to, it is in my view vital that we maintain an independent Bar, but there is no point in it if its members are not prepared to stand on their judgment, and do their bit for the rest. Sir Owen Dixon thought that counsel who bring their learning, and firmness of mind, and who maintain the very high tradition of honour and independence makes "a greater contribution to justice than the judge himself". Or, as the Court of Criminal Appeal said in *Grimwade*, it is the responsibility of all counsel to co-operate with the court and each other so far as is necessary "to ensure that the system of justice is not betrayed: if the present adversary system of litigation is to survive, it demands no less".

Solicitors, on the other hand, have even less to fear in the trial process. Like other professionals, they are getting sued almost daily for big sums — the deductible for the big national firms is now half a million dollars for each claim — but the big claim is unlikely to come from what solicitors do in presenting a case through competent counsel. They will at the top end be acting for people who are increasingly worried about the utility of litigation, or at the bottom end for people who cannot afford it. Either way there is no reason why either the solicitors or counsel should not be able to deal with the problems of fear that are besetting our litigation.

The current monolith also provokes a nasty streak of aggression in some lawyers (in which term I include judges). You do not have to be aggressive to be firm. You do not have to be rude to be tough. A lot of lawyers do not seem to understand this. They think that being macho is somehow helpful for something other than their own egos. It is possible to fight a case hard and still swap pleasantries with the other side. By and large barristers are better at this, and better at settling, although in a structured setting like a mediation they may not be at their settling best. The late Neil Forsyth Q.C. used to say that he thought he had failed his clients if he had to go to court with them. It is to be hoped that those on either side of the profession who feel the need to posture are still able to remain alert to see any reasonable chance of getting their client out of the dispute — something they rarely want to be in — on the best terms possible. Courtesy is, after all, a precursor to the rules of war. In one sense, I suppose, lawyers have always sold themselves to the highest bidder. That is the main reason they are distrusted. But getting stuck into people for the sake of it is something else. The tough guy who wants to take the part of the bully boy prostitutes his profession.

(5) The False Charms of Modernity

It is hard at this point in this century to deny the claims of modernity. The rules of the court have to change with the times, as does the law of evidence. But the rules of procedure and evidence developed by the common law do for better or for worse represent the efforts of a millennium to secure due process and a sensible trial. It may or may not be impertinent to say that we know better than all those old judges, but we would want to be confident that the changes introduced are in fact making the system work better. If we are out of control, we need to see whether this comes from external circumstances, or if our problems are self-inflicted.

I have referred to the problem of discovery. This problem was made possible by the invention of the photocopying machine. Its use was encouraged by a ludicrously large premium put on it for the purposes of having costs fixed by the court. Bulk-billing became the order of the day. Now it is just a matter of time before the greens bring a class action against the whole legal profession.

It seems impossible now to have any sort of case that does not involve rafts and trolleys of documents, most of which will never be looked at. Bright young lawyers spend days sweating over the collation of papers for the multiple Court Books — the office looks like a war room — and then go home in a state of nervous exhaustion wondering why they need a tertiary degree to become a paper-hanger. Discovery and the preoccupation with Court Books and the like are two of the biggest problems affecting our litigation. They make cases longer and more expensive. They are also problems that can be directly attacked by those with the power.

Witness statements. Someone, now on the bench, once remarked drily that although counsel were not supposed to write unsworn statements for the accused in criminal trials, it was only a matter of time before some unlettered felon delivered an address to the jury that was so moving and articulate that those in court would rise as one crying "Author! Author!". Well, rightly or wrongly, time has caught up with unsworn statements in criminal trials. It is also time to have a good look at them in civil cases. They are supposed to save time. Experience suggests that they do the

reverse. They certainly take a lot of time and ingenuity and money to prepare. Does it really reflect well on the system, and look good for litigants, that before going into a witness box, the witness has to spend hours, days, or weeks with a team of lawyers to make sure that the statement — some would say script — that issues forth with all the grace of a tortured camel has just the right inflection on what is said, and leaves out what is best left alone?

Would it not be better to proceed on the footing that used to be followed, at least by convention, that matters not in controversy can be led, but otherwise it is better to hear the version from the mouth of and in the words of the witness? It is not a good idea to let the lawyers give the evidence — that is taking the notion of mouthpiece too far. Litigants correctly suspect that there is a fair bit of gamesmanship in litigation, but it is not a good idea to suggest that part of the package involves flirting with candour. Some of the massive reconstructions based on discovered documents are breathtakingly remote from reality.

The concentration on discovery, and preparation of Court Books, and witness statements, also serves to increase rather than diminish the ambit of matters in issue. This is not surprising. If you allow two hostile powers enough time to arm themselves to the hilt, the range of war and the level of collateral damage will be correspondingly increased. Instead of a trial of two competing versions presided over by an umpire, there is something more like an inquisition, or total war beyond centralised control. We appear to have lost the ability to put on a simple trial. Nor does dispensing with the laws of evidence shorten things. On the contrary a lot of those rules were made to discourage diversion and encourage attention to matters properly in issue. They were made not just in an attempt to get a fair trial, but to get a trial that works.

Then there are the computers that enable those who can afford it to claim some mastery of the vast mountains of paper and information — an achievement that may be beyond the jury, or the judge. Someone once complained that the judgments of Sir Garfield Barwick looked like they had been dictated. If so, it was nothing. Then came the word processor. You can usually tell where a judgment has been altered or reconstructed. We knew we were in for trouble when the Justices of the High Court announced they would prefer that their judgments had a more scholarly air. Now we get a massive edifice with downloaded footnotes.

The courts of appeal produce longer and more learned judgments. The problem is that the length and learning of the judgments does not always make them easier for those down the line to follow or apply. It would be interesting to know how many judges now subject themselves to the intellectual discipline of writing out their opinion by hand. Perhaps the problem goes back to the days when the bar broke ranks, and started to produce typewritten opinions. The next step was for counsel to give their doubts as well as their opinion, and then just give their doubts instead. Previously you could have gotten a handwritten "yes" from Sir Owen Dixon, or the legendary advice of F.E. Smith, "Sue, the damages will be enormous". No, the streamlining of the modern age has not yet made litigation quicker or cheaper. What has it done, and *cui bono*? Where are the satisfied customers?

(6) The Decline of Moderation

Crusaders on High

The problem here, I fear, starts at the top. There is general agreement in the Australian legal profession that the best lawyer and greatest judge this country has produced was Sir Owen Dixon. This is a view held throughout the English speaking legal world. Sir Owen Dixon had two pole stars as a Justice of the High Court. In constitutional matters, he thought "a close adherence to legal reasoning was the only way to maintain the confidence of all parties in federal conflicts — there was no other safe guide to judicial decisions in great conflicts than a strict and complete legalism". In common law cases, he believed that there should be a firm adherence to the doctrine of precedent for the sake of attaining uniformity, consistency and certainty. The judges had to apply the rules where they were not plainly unreasonable and inconvenient to all cases that may arise. They were not allowed to abandon principle in the name of justice or social necessity or social convenience. In providing a warning against the doctrine preached by the disciples of liberation, presumably represented by Lord Denning, Sir Owen referred (in Greek) to Aristotle's observation to the effect that "the effort to be wiser than the laws is what is prohibited by the codes that are extolled". He observed of the sporadic occurrence of the alternative view that "the emotion of joy which it will arouse and has aroused in some will be counterpoised, we may be sure, by the despondent displeasure of others".

Given the pre-eminence universally accorded to Sir Owen, it should come as no surprise to those of his successors who have departed from if not rejected his advice that their efforts to be wiser than the laws may cause a loss of confidence in all parties in federal conflicts, and "the despondent displeasure" of the losers of any sort of case, and all those who believe that Sir Owen was right.

In a case whose name instantly passed into the language of this country (*Mabo*), Justices Deane and Gaudron acknowledged that they had used emotive language. They said they had used unrestrained language to describe the dispossession of Australian Aborigines in order to demonstrate why 150 years of real property law could not impart legitimacy to two central propositions of the property law of this country. Their Honours went on to record the assistance they had derived not just from the parties, but from the many scholars who had written in the areas in which their judgment "had necessarily ventured". Their Honours said that the dispossession constituted "the darkest aspect of the history of this nation" and that "the nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, these past injustices".

An acknowledged emotiveness, a calculated want of restraint, a rewriting of history and the law, an absolute prediction of the future, and some categorical moral imperatives. Now, whatever else may be said of these observations, they self-evidently do not represent judicial moderation. There are some people who do not share these views of history, or the moral imperatives that are said to be carried by it. We have come a long way from the notion that the judges are there to determine a dispute between the parties according to law, rather than to make a law for everyone else that accords with their own view of the world.

You may contrast with these observations of Justices Deane and Gaudron the following remarks of Lord Devlin (made to the LSE in 1975, some time after his Lordship had retired from the Bench in 1964):

> The judges are the keepers of the law and the qualities they need for that task are not those of the creative lawmaker. The creative lawmaker is the squire of the social reformer and the quality they both need is enthusiasm. But enthusiasm is rarely consistent with impartiality and never with the appearance of it.

Lord Devlin was obviously aligned with the Australian judges who were his contemporaries when he was on the Bench. This attitude is now quite out of fashion. At least the former approach had the virtue of rec-

ognising one proposition which I hope would command general assent: Judges are supposed to finish fights, not start them.

It must be hard for judges to expect to retain the faith and confidence of people and governments if they appear not to be behaving like judges. In 1994 the Justices of the High Court discovered in the Constitution a freedom that had to be implied so that the common law of defamation had been radically altered since 1 January 1901, even though that constitutional implication and consequent change in the law had entirely escaped the attention in the intervening 93 years of Justices like Griffiths, Isaacs, Starke, Dixon, Fullagar, Kitto, Menzies, Windeyer, Jacobs, and Aickin. A different High Court abolished this doctrine at its first opportunity in 1997. What are the public or government to make of this? What does Mr Theophanous think? He got torpedoed by a doctrine especially framed for politicians in his case (although Mr Murdoch's newspaper did not need it because it was a classic case of fair comment), and then he reads later that the torpedo should never have been fired.

The Rise of the Zealot

If these big decisions of the High Court show a lack of moderation, how is that affecting the course of litigation in this country? It is not that these examples may cause other judges, in the words of Justice Cardozo, to become "a knight errant, roaming at will in pursuit of his own ideal of beauty or goodness", but the course taken by the High Court may encourage a belief that elevation to the bench, particularly an appellate court, brings some licence to right wrongs. You begin to understand why Lord Denning worried good judges. I am an unashamed admirer, not to say shameless fan, of Lord Denning, but it does look to be the case that he did not set a good example for the rest. It looks like the system cannot withstand the impact of too many agitators. The problem then is that the other *wunderkinder* want their time in the sun too. When they are allowed to get too frisky at the top, it is harder to maintain discipline in the lower ranks.

The judgments get longer, particularly from the appeal courts, and more innovative, and the law gets harder, not easier, to follow. It is common now to find judges giving indexes to long judgments. This was not the case twenty years ago. So far as I can recall the litigants did not feel let down or deprived. On the contrary, I think they were better off. What you hear lawyers say all the time is that their clients just want a decision. That is after all what the judges are there to give. The clients would prefer that they won, and they expect the judge to be fair and sensible, but otherwise all they want is for the dispute to be over so they can get on with their lives. Whoever else these long juristic exegeses are prepared for, it is not the litigants. Of course, the law may achieve some edification, the profession may be respectful, and the academics grateful, but if these are benefits, they have to be measured against the costs.

There is also a problem about the immoderate habits of law reporters (read: law publishers). A lot of material gets reported that should not be reported. You get decisions that contain no refinement of principle and material no one has bothered to edit out. The reports normally come in threes.

A related problem is that good judges instinctively know when they have said enough. They do enough to decide the case, and no more. They do not seek to make more trouble for themselves or others than they have to. They also seek to look after the most important person in the court — the loser. They do not enjoy, and seek to avoid, attracting the attention of the press. Judicial restraint should be the order of the day.

There is now a growing tendency for some judges to seek to cover the field in an area of their interest, to express opinions across a wide field with a view to stimulating discussion, and to express themselves with a literary flair that may well be very wounding to those on the receiving end. Some judges like to cut loose every now and then and give the world the benefit of their views on one or other of their *bêtes noires* (even if the *bête noire* is merely the refusal of the law to fall into line with their own views). Some public figures have a rule of never going to court because they cannot afford the risk of getting a backhander that is unanswerable.

One of the reasons for the decline in judicial restraint is that judges have felt the need to make up for the lost time for the generation or so that followed World War II. They were then too submissive to government. There was a reaction against this supine attitude and also a reaction against the legal literalism and narrow formalism of Lord Simonds. The call to arms was heard just as loudly in England. The judges saw an appalling political vacuum arising from one party, that was not universally loved, being in government for eighteen years. The result for many judges was that judicial activism became the order of the day and judicial self-restraint a term of reproach.

Lawyers Who Should Know Better

Litigants and their lawyers also show a lack of moderation in making big cases bigger. I think it was Lord Diplock who once remarked that most cases turn on one point; some, a very few, have two points; but most turn on one. Lawyers recognise the leaders among their peers by their ability to get to the point and express it in words of one syllable, so that the rest of us cannot see how we missed it. When I did my articles I was involved in a case of a divorce that was granted on a second supplementary cross petition drawn, sworn and filed that morning. Sir John Barry was appalled at the amount of paper — about four inches high — and said he was making the *decree nisi* to free the parties from the depredations of their lawyers. At about the same time I unearthed the file of my firm for the Australian banks in the *Bank Nationalisation Case*, both in the High Court and in the Privy Council. This was probably the biggest case in the history of this nation. I was amazed then that the file stood almost as high as me. Today you would be lucky to find a city building that could hold it. The paperwork is on any view out of control. So is the scattergun approach taken by many pleaders. The rules for pleading are not followed. The tendency is for the real allegation to appear, and only at the last moment, in the particulars, and you get no joinder of issue on it. In any event the other side is likely to deny everything, and the complainant is too timid to discard a weak point for fear that someone else may think better of it.

Then there is the want of moderation of counsel in court. I have referred to the problems that come from a lack of experience in examining witnesses. Sir John Starke used to say that he sat down with some relief if his case after his cross-examination was no worse off than before. The advocates we most admire are those who know when to stop, and when not to start. It is an exercise in judgment. The counsel of prudence now seems to be that if in doubt you should go for it. Some civil and criminal trials are now disfigured by behaviour of counsel that can only be characterised as manic. In *Grimwade* counsel for the prosecution read about 2780 pages of transcript of the first trial over 31 sitting days. Counsel for one accused addressed for over 34 days. The wonder is that each member of the jury did not go stark raving mad.

It is up to trial judges to stop this madness. If the appellate judges believe the system is grotesque or unmanageable, they must give trial judges the courage and

power to do something about it. The most powerful court in the western world customarily fixes rigid time limits — usually 30 minutes — for counsel appearing in cases — and it only takes the hard cases — that affect the lives of ten times the number of people that live in this country. The reason is both good and sufficient: the system cannot work unless this restraint is imposed.

I think that the problem at the moment is that trial judges think that they will not be supported — on the contrary, they will undermined — if they impose limits on counsel. This cannot be right. The procedural laws are there to protect an orderly trial. Immoderate behaviour of counsel is going to affect not only those immediately offended or afflicted, but the working of the courts as a whole. It is absurd if we have got to the point where wrongheaded views of natural justice (procedural fairness) means that it is a licence for chaos, rather than a prescription for a fair and sensible hearing. If you try too hard to be fair, you will wind up with the opposite. You can have too much fairness. The system can only tolerate so much; so can the parties. Trial judges must long to make the same plea that Churchill made to Roosevelt: "Give us the tools and we will finish the job". It is sufficient for some in Victoria to recall how Justices Crockett and Starke used to be able to run trials, civil or criminal.

Then there is the multiplication of parties. If you can afford it, the tactic is to make big cases bigger by dragging in more parties. Two things follow. First, the pressure increases on each party to settle because of the risks posed by the litigation as a whole. It is common for professional advisers or directors to be joined. Even if the claim against them is weak, they can be truthfully told that it will cost them more to fight the case and win it than to make a modest contribution now. Secondly, the case may get so big that the probabilities against its being fought through to judgment increase the bargaining power of the party with the weaker case, because sooner or later the court may have to say that it just cannot deal with this sort of colossus. The litigants and their lawyers have then engineered the result that Gibbon said was the fate of the Roman empire, namely, that it collapsed under the weight of its own stupendous fabric. Another epithet is sabotage.

Finally, the one party showing a lack of moderation in at least some jurisdictions is the government. The costs upon litigants exacted by government as the price of justice are getting near, if not above, the costs charged by the lawyers. This is justified as a user-pays policy. The effect of the policy is to put litigation out of reach of the needy and out of bounds for those who object to paying for something twice, particularly to a government.

Witness's Retort

GEORGE Jeffreys, Lord Jeffreys of Wern (1648–89), was notorious for his injustice and cruelty. As counsel, before he was made Chief Justice and Chancellor, he received some rebuffs from witnesses whom he was trying to bully.

. . . But one of the best retorts this ferocious tyrant ever received was from a lady. Jeffrey's wife had been confined a very short time after her marriage, which excited much ridicule when it became known. Her husband was shortly after this unfortunate occurrence examining a fair witness, who gave her evidence with tolerable sharpness. He said, "Madam, you are very quick in your answers," "Quick as I am, Sir George, I am not so quick as your lady."

Sir Owen Dixon

S.E.K. Hulme Q.C.

AT the risk of trespassing on your patience I would like, without warrant, to say a little more. I would like to speak to you of Sir Owen Dixon, a judge of the High Court from 4 February 1929 to 17 April 1952, and its Chief Justice from 18 April 1952 to 13 April 1964. I do so for several reasons. One is that this year has seen the twentieth anniversary of his death, on 7 July 1972. It is important to help keep alive an awareness of one of Australia's greatest sons. Another is that people like you often do know something of him, and wish to and ought to know more. And another is that a few days ago I came across a letter written by him, courteous and quirky and entirely typical, which brought back many memories of him.

There was in the *Australian Law Journal* two or three months ago a note of the anniversary. The comment was made, that at any rate in New South Wales, Dixon's judgments are not cited very often. Mildly surprised, I counted in that particular issue (admittedly not a sufficiently large sample) the number of references to judgments of all High Court judges there have ever been, and of Dixon separately. For all High Court judges, the total was 42. For Dixon, the total was 20. Fractionally under half of all the references to judgments of judges of the High Court, were to judgments of Dixon. This is being forgotten with a vengeance! It probably is true that Dixon's judgments are not cited in that very considerable court, the New South Wales Court of Appeal, and indeed in New South Wales generally, as much as one would expect. This has long been true. Dixon has never been given quite the position in New South Wales that he would have commanded had he gone to Fort Street. When he is, that might be a small and not altogether unimportant sign of a national maturity. He belongs to the common-law world, and that includes New South Wales.

I first saw Dixon in March 1948, when as a very new law student I went down town from my University college in Melbourne to look at the High Court hearing the Bank Nationalisation Case. During a law course at Melbourne his judgments inevitably played a prominent part. As an articled clerk I was fortunate enough to be sent to attend his swearing-in as Chief Justice, on 21 April 1952. His appointment was honoured by a cable from Justice Felix Frankfurter of the Supreme Court of the United States, saying simply "Law is enhanced". After my return from three years at Oxford I went to the Bar at the end of 1956. From that time I was fortunate enough to see Dixon regularly, both while appearing before the court, and also socially, principally in a club he much frequented for lunch.

For most judges, appointment to the High Court brings lustre. In the case of Dixon, said Barwick, "His lustre was shed upon this Court."

We all knew of course that he was a great judge. Just how his fame had spread had been brought home to me right back in the 1950s, when my Oxford tutor Dr J.H.C. Morris told me that Dixon was the greatest judge in the English-speaking world. On Dixon's retirement in 1964 the Prime Minister Sir Robert Menzies Q.C. spoke of testimony to similar effect from two Lords Chancellor of England and from Justice Frankfurter. Menzies spoke truly when he said how proud we were of Dixon, and how we felt "occasionally that some of the glory rubs off on us". On Dixon's death in 1972 Barwick spoke of him as "the most outstanding lawyer this country has produced". He added more, when he spoke of his recognition in America and in England as "the greatest judicial lawyer of his time in the English-speaking world". Oxford had given him its Doctorate of Civil Law, *honoris causa*; Harvard its Doctorate of Laws, *honoris causa*; and Yale its Howland Prize. For most judges, appointment to the High Court brings lustre. In the case of Dixon, said Barwick, "His lustre was shed upon this Court."

Indeed he had been much more than merely a great judge. In 1940 he was appointed Chairman of the Central Wool Committee, in charge of the implementation of the Wool Agreement between Australia and England, the foundation of the Australian wool industry for the whole of the war. Between 1940 and 1942 his very great administrative skills saw him made a member of the Australian Shipping Control Board, the Marine War Risks Insurance Board, the Commonwealth Marine Salvage Board, and the Allied Consultative Shipping Council in Australia. From 1942 until 1944 he took leave from the High Court and became the Australian Minister of State in Washington. In 1950 he was chosen by the United Nations Organization to mediate in the dispute between India and Pakistan over Kashmir. A solution to this problem finally eluded him as it has all others, but to this day his memory and the memory of his efforts in seeking a solution remain one of fine honour in both those bitterly contending countries.

That was the public, the great, the distinguished Dixon. I wish to speak more personally.

There was of course the utter integrity. I appeared in front of him on an application for security for costs in relation to an unimportant piece of litigation from Western Australia. Something to do, if I now recall it accurately, with a sheep shearer's marriage. The sum involved was about £250 ($500). I thought what a funny system it was that devoted the talent of one of the all-time judges to my application. Rather like employing Don Bradman to oil a bat for me to bat with. Dixon did not think it at all inappropriate. It was part of his job as judge. Every case, every application of any kind that came before him got his utter attention, got the benefit of the entire ability which fortune had given him.

I remember next the courtesy, the happiness, at times the sheer fun of a court run by Dixon. At the start of proceedings the court itself would be silent for a time, as counsel for the appellant swung into his opening. Somewhere into the opening, about ten minutes usually, there would be a cough. "Mr Thomson, is the issue really this, . . .?" I remember saintly Louis Voumard Q.C. turning to me on such an occasion, and saying untypically, "Jesus he's a master." Lou and I had worked on the matter for days. Dixon had identified and formulated the very difficult issue better, after ten minutes. From then on he might interfere little. He might interfere a lot. Not, however, interference by way of arguing against counsel (who is *not* paid to admit to the court that his argument is wrong); more like (especially if counsel were young) an invitation to look into the

problem together with Dixon, noticing weaknesses, noticing strengths, till both were satisfied that all relevant aspects of the issue had been looked at. That left counsel free to stress his points as he *is* paid to do, and would see him thanked for his assistance. "Thank you Mr Green, that has been most helpful." And left to Dixon and the court the responsibility of decision, without the comfort of counsel having effectually been forced to surrender.

I am reminded in this regard of a question Dixon would put to young lawyers, "Who is the most important person in the court?" Various answers were of course given, usually "You Sir". With that put to one side, other possibilities were examined. The judge; the barrister; the solicitor; the appellant; the respondent; on a hot day the Court Crier, who could open the windows to let in some air. Dixon had one steadfast and illuminating answer: The litigant who is going to lose. One of these parties who have brought this case to the court is going to lose. That person must leave the court satisfied with the system in which he has lost; satisfied that his counsel and his case had fair treatment and every chance. With Dixon presiding he saw that happen in front of his very eyes. Every possible point had been noticed and considered. Counsel likewise left the court satisfied. Each point he had discerned had been looked at; indeed, during argument he had somehow discerned some points he hadn't noticed previously, and he had pointed those out too. Win or lose — he didn't know which yet — he had had a good day. Arguing to Dixon wasn't all that hard, after all. Rather fun really. He had argued rather better today than he usually did. His tentative little joke had gone down well. And Dixon had thanked him as if he meant it. Must tell Peggy about that tonight. Hope I come here again soon. Dixon's answer to his own question was a very wise one, and not every judge has wit enough to heed it.

And even young counsel really did learn to essay a tentative joke in Dixon's court. Dixon had no need to pursue his own dignity. It was simply there, undoubted and unchallenged. Laughter was frequent, jokes were welcome, and Dixon contributed his share. His laugh was unique; not a giggle, not a cackle, but certainly high pitched, and containing elements of both: "Heh-heh-heh". When he contributed a joke or made some devastating comment (as he often enough did) it would end in this explosion of a laugh.

One or two very senior Supreme Court judges (Sir Charles Lowe, Sir Charles Gavan Duffy) addressed him as Dixon. So I suppose did Menzies. Probably the other High Court judges did the same, *ex officio* as it were. To the rest of humanity he was "Sir Owen". In his late years perhaps Lady Dixon, Alice Brooksbank whom he married in 1920, was the only person in the world who called him "Owen".

Laughter was welcome because the work of a judge was, Dixon more than once remarked, hard and unrewarding. The work had a single aim: to decide correctly according to law; and in doing so to develop the law in the manner of the common law. Nothing was allowed to interfere with that. Counsel for a Government asked that a constitutional case be decided by a certain date, for some reason of convenience to the Government. Dixon was not going to have his court put on a timetable for that or any other case, for that or any other government. He heard counsel out silently, and without looking to inquire what his brethren might think of the application said tersely: "It is more important that this case be decided correctly, than that it be decided soon. The court is adjourned." There was abundant steel there on the rare occasion indeed that it was needed.

Outside the Court he was regarded by almost all who had contact with him as a person somewhat apart from the rest of us. He was a person of such enormous distinction, and had been for so long, had been a High Court judge for so long, had left the Bar so young, so long ago, that very few people indeed felt in any sense his equal.

Indeed one could not talk to him without sensing that this was someone different to anyone one had ever met. One or two very senior Supreme Court judges (Sir Charles Lowe, Sir Charles Gavan Duffy) addressed him as Dixon. So I suppose did Menzies. Probably the other High Court judges did the same, *ex officio* as it were. To the rest of humanity he was "Sir Owen". In his late years perhaps Lady Dixon, Alice Brooksbank whom he married in 1920, was the only person in the world who called him "Owen".

That sounds forbidding. In fact he was the opposite. In his retirement speech he said "I believe in young everything." He certainly did when having lunch. At one of his clubs there was what was called the Judges' Table, and he knew that if he lunched at that Club he was in danger of being made to lunch there. "I'm paid to work with judges, not to lunch with them—

heh-heh-heh." A particular annoyance was the tendency of some of the judges who lunched there to seek a very authoritative kerbside view on whatever problem was currently troubling them. One judge opened a conversation: "I had a point arise in front of me this morning, Sir Owen, that would interest you." Dixon looked at him sardonically and said, "I doubt it — heh-heh -heh." He resumed his lunch in peace.

For such reasons he usually lunched elsewhere, amid graziers and doctors and others of the manifold members he knew. And here he would gather to himself the young, sitting spellbound while the great man talked — with his habitual happy slander — of events and people in Australia and overseas. One felt that one was being given an insight into things that otherwise one would never have known. And one was. An encyclopaedia of inside information as to events in Australia was lost when Dixon died.

Whether one had lunched with him or not, any barrister having coffee after lunch was likely to find the Chief Justice alongside him saying "Can I offer you a ride back?" If you accepted — you usually did — he would pass on to chat to others, and you kept your eye open and followed him out when he left a few minutes later. He had never learned to drive a car himself, and in Melbourne was driven in a great black Armstrong-Siddeley which had been bought for the Prime Minister (Menzies), who then decided that he preferred to keep the Buick he had been driven in for some years. Dixon took the big car but never much liked its grandeur. Conversation and laughter continued until the car reached the Court. There everyone got out. Even if it were raining, the car was not sent on the further hundred yards or so to Owen Dixon Chambers. The car was provided by the Australian taxpayers to drive the Chief Justice of Australia, not to let him give rides to friends. Distance did not matter. There was no such concept as that of reasonable honesty. Integrity was an absolute.

In 1963 Dixon was admitted to the Order of Merit, the Order of 24 persons admission to which flows from the personal nomination of the Monarch."[1] Like many another I wrote to offer my congratulations. No doubt I said something to the effect that not only I but the whole of the Victorian Bar was very proud of him. Punctually I received the letter I have here. In listening to it please remember that at the time it was founded, the Order of Merit was intended to have an emphasis toward political and military distinction, an emphasis which has changed over the years.

My Dear Hulme,

I am compelled by a very slight injury to my hand to answer you in type.

Note that apart from the injury he would have written by hand. He would have too. To everyone who had written. But I was not to be concerned. The injury was "very slight".

I am very grateful for your letter. Whatever views you or the Bar generally or any section of the Bar may have formed, the truth is that the O.M. was intended for other attainments, and that you will see somewhere or other if you read widely enough.

You will notice the careful distinctions drawn in the first part of the second sentence, and in the later part of that sentence the assumption that my life will include reading sufficiently wide for the kind of esoteric knowledge involved.

I have read comments in The Times about every appointment to the Order for some years. I do not remember seeing one approved.

With kindest regards,

Yours sincerely,
(Owen Dixon)

Quirky indeed. Typical indeed. Could a new recipient of one of the world's great awards express more firmly his confident belief that he would soon be reading in The Times of his own appointment, and finding it likewise disapproved? And perhaps be looking forward to doing so ?

It is time to cease. I have trespassed on your hospitality, but in a good cause. The law in Australia has not had another such a man, before or since. In all its life Australia has had but few. We forget such men at our peril.

1. Seven Australians have been appointed to the Order of Merit: Samuel Alexander, philosopher; Gilbert Murray, classical scholar; Sir Macfarlane Burnet and Lord Florey, medical scientists; Sir Owen Dixon, jurist; Sir Sidney Nolan, painter and Dame Joan Sutherland, singer.

Paddy Punts on Army Disorders

IRELAND has been so enthralled by the nature of compo claims that Paddy Power bookmakers offered a series of zany bets on what the next compo claim would be.

Soldiers have claimed for deafness due to inadequate earmuffs on firing ranges, sunburn while serving on UN duty in South Lebanon and food poisoning following an off-duty barbecue. Military bandsmen are suing for hearing loss caused by the music they play.

The bookmakers offered odds of 10/1 on the prospect of soldiers suing for blindness caused by the glare of over-shiny boots, 5/1 on travel sickness when they are being moved to Lebanon, and 20/1 for sore throats due to singing marching songs.

They also offered 20/1 for fatigue claims due to getting up too early in the morning and 25/1 for compensation for money lost at an army day out at the races. The best odds were 500/1 for the army winning a collective best actor Oscar.

Already the butt of a string of jokes, angry soldiers complained about the bets and a truce was called with the bookies agreeing to donate £1,000 to the Army Benevolent Fund. The bets were also withdrawn after 24 hours

Paddy Power's managing director Stewart Kenny said they had taken in just £8 in bets before the shutters came down. "We are famous for our cheeky bets. We offered bets on the Pope joining Glasgow Rangers and when he injured his leg three months later we gave the money back because we felt his transfer fee would plummet.

"Even though the army bets were great fun for most people, they have caused offence to members of the defence forces and that had not been intended. We got calls from people seeking compensation who felt we might undermine their claim."

John Lucey, general secretary of PDFORRA, the soldier's representative body, said the bets trivialised a serious issue and were "extremely disappointing and embarrassing".

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Opening of the 1998 Legal Year

Melbourne Synagogue

Norman Rosenbaum and Goldberg J.

Hampel J and Douglas Salek.

THE 1998 legal year opened on 2 February. Another year. More challenges.

Some of those present at St Paul's, St. Patrick's and the Melbourne Synagogue would have felt invigorated at the prospect of an exciting year. Others may have not, particularly those who practise common law. Twenty years ago it would have been unthinkable that a conservative government would abolish the common law rights of injured workers. But it has.

To add insult to injury the Government's Workcare Authority decided that paying its barristers (and solicitors) the government-approved court scales was too much. Taking a leaf out of the legal aid handbook it unilaterally decided that all should take a twenty per cent cut. An air of uncertainty has been added by the removal of Transport Accident Commission cases from private firms and the setting up of TAC Law, the TAC's centralised law unit.

Of course it would not only be the common lawyers sitting in the pews with glum forebodings — spare a thought for the criminal Bar. They have seen legal aid slashed to ridiculous levels. They have seen their incomes going down for years.

Even the commercial Bar has a touch of the glooms. Where are all the monster cases? Pyramid and Estate Mortgage have resolved — whither to now? Nobody wants to have a good take-over brawl. The days of a Friday six-pack of directions in the Commercial List are a distant memory.

The Chief Justice with Rabbi and Mrs Moscovitz.

St Paul's Cathedral

St Patrick's Cathedral

But these are crass ruminations on the opening of the legal year. One should think of higher things. Of the Bar providing the high standards of a profession to assist the poor, the injured, the defamed, and uphold that strange notion — justice.

But still the gnawing spectre of micro-economic reform remains. If the Bar is not part of a profession, but merely some industry, why pursue these noble aims? After all it is just a question of dollars and cents.

The former Warden of Trinity College, the Reverend Evan Burge's sermon at St Paul's is reprinted hereafter. His words seem light years away from the relentless intrusion of government into the legal profession.

A Sermon for the Opening of the Legal Year

2 February 1998

Reverend Dr Evan Burge, former warden of Trinity College

ON this day, 2 February, the Church remembers that the Lord Jesus was presented in the temple by his mother in fulfilment of the law. It is a happy coincidence that this year this commemoration also marks the beginning of the legal year. We have heard in the second reading the words of the same Lord Jesus in his adulthood, *I came not to abolish the law but to fulfil it.*

St Paul had problems with the law, holy and admirable though it was. Once he had thought that a conscientious and dedicated attempt to fulfil its righteous and manifold demands would bring salvation — approval in the eyes of God and a sense of wholeness and well-being in himself. His experience was one we all know well and he gave it classic expression: *The good that I would I do not, and the evil that I would not, that I do. Who will deliver me?*

Moreover, the law, so admirable in what it prescribed, sometimes had the paradoxical effect of enticing people to disobey it. The prohibition *Thou shalt not covet,* St Paul found, made covetousness seem more attractive than ever. Such an undesired effect still confronts legislators who are concerned that the law should embody high ideals of community behaviour. What restrains some people actually encourages others. Many of us are puzzled, for example, about whether it is truly beneficial to prohibit the use of drugs like cannabis and even drugs of serious addiction like heroin, even though we would prefer to live, and to bring up our children, in a society entirely free of such substances. Only a few days ago thieves broke into my son's house and a mobile phone and computer were taken. Many such thefts are the result of addiction to drugs, and their high cost when they have to be bought from law-breakers and exploiters of the weakness of others. How many users of illegal substances are attracted to trying them simply *because* they are illegal?

I confess my perplexity about this and many other matters where the law, which by trying to regulate human behaviour seems at first to solve problems, has paradoxical effects both for good and for ill. There is an interesting development in Plato's *Republic* where Socrates is portrayed as exploring the nature of true justice by building up a picture of an ideal community. At first people live in a simple and natural way, caring for one another as a society of friends. There is no need for law. Friendship is enough. Then growing prosperity brings wealth and increasing luxury. The citizens discover all manner of needs they did not have before. Human nature being what it is, wealth begets covetousness and greed, and in some people the lust for power. The developing state, even Plato's ideal state, soon requires laws, courts, a police force and an army. If the community is to survive, justice, with all its apparatus of laws and the means of their promulgation and enforcement, is essential. The work many of you are doing in this community, a community many times more luxurious than Plato ever envisaged, is essential.

The principle of a divinely given law of justice by which all human laws must be judged is . . . as important today when we legislate . . . as it was in the days of Sophocles or seven centuries earlier in the days of Moses.

As well as of St Paul and Plato, I think of two great passages from Greek literature and two from the Bible — those we have heard read this morning. The first from Greek literature is from Herodotus. When the Persian king Xerxes had reviewed his vast forces before crossing into Europe to invade Greece, he asked an exiled Spartan king, Demaratus, if the Greeks, confronted with so great a host, would surrender or offer battle and oppose his coming. In reply, Demaratus contrasts the freedom of the Greeks with the servitude of the Persian king's subjects and, speaking of the Greeks, continues: *Free they are, but not wholly free; for their master is law, whom they fear much more than your subjects fear you.* To such an attitude Greece owed its freedom, and to it we still owe much that is best in our own civilisation. To those of you who are guardians of this tradition the rest of us can only express our gratitude.

Meeting in this cathedral, we are also reminded that there is a higher law than the codes of even the wisest human legislators. In Sophocles' tragedy *Antigone,* the heroine defies the edict of the tyrant Creon, who has forbidden the body of Antigone's brother to be buried, because he was a traitor who attacked the city. In a famous scene Creon asks Antigone: *Did you know that an edict had forbidden this?* Antigone replies. *I knew it — could I help it? It was public.* The confrontation continues: *And did you indeed dare to transgress that law? — Yes; for it was not Zeus that published* that *edict. Not such are the laws set among mortals by the Justice who dwells with the immortal gods. Nor did I deem that your decrees were of such force that you, a mortal, could override the unwritten and unfailing statutes of heaven. The life of these laws is not of today or yesterday, but for all time.*

The principle of a divinely given law of justice by which all human laws must be judged is fundamental in the Hebrew Bible. It is as important today when we legislate, for instance about taxation or land rights, or when an international court considers war crimes, as it was in the days of Sophocles or seven centuries earlier in the days of Moses. We should still hear the voice of Moses speaking to us as he spoke once to Israel: *Now, Israel, listen to the statutes and laws which I am teaching you and obey them, then you will live . . . You must*

observe them carefully, and thereby you will display your wisdom and understanding to other peoples . . . They will say, What great nation is there whose statutes and laws are so just, *as is all this law which I am setting before you this day?* Will the other peoples of the earth continue to say of Australia that we are a wise and understanding nation and that the laws of this country are just?

The Lord Jesus said that he came not to abolish the law but to fulfil it. That is to say, he expected of his followers not outward conformity to the letter of the law's demands but a deeper righteousness.

The Lord Jesus said that he came not to abolish the law but to fulfil it. That is to say, he expected of his followers not outward conformity to the letter of the law's demands but a deeper righteousness. The spirit of the law gives life, and this includes the motives and inner disposition of anyone who has dealings with another person, and especially with the poor and the dispossessed. The Church cannot be faithful to its Lord by remaining aloof from the political questions that determine whether we are a wise and understanding nation and whether our laws are truly just.

The fulfilment of God's law is the law of love — love of God and love of our neighbour as ourselves. For nations, even companies, it is, however, often almost impossible to act with love. St Paul, struggling with the very real difficulties we have of living and dealing with other people with a care not for ourselves but for the others, cried out, *Who will deliver me?* He found his answer in a saviour and deliverer — a God who would accept him despite his inevitable failures, as he will accept us too. This world is imperfect. When we cannot act with love, the highest way, we must seek God's help to act in the next best way, that is, as well as we can, with justice. Let us seek to do our best in the difficult and ambiguous circumstances in which we continually find ourselves, knowing that even then we are at best *unprofitable servants.* There is no need to despair. God is merciful as well as just, a saviour as well as a judge.

In my more romantic moments at Trinity College I would think that those intelligent and often idealistic students, who could surprise me even after twenty years with their talent, generosity and mutual friendship and support — I would think that they should be able to regulate their own lives and live happily and constructively together. After all, we were a community of only 250 rather similar people. It was an unrealistic idea. We had to promulgate expected standards of conduct and impose punishments, including sometimes sending students down. Whenever this occurred, I would hear ringing in my mind the words of the Book of Common Prayer, a treasure that we are in such danger of losing: *God, who desireth not the death of a sinner but rather that he should turn from his wickedness and live . . .* I will not go down in the history of the College as a strong disciplinarian. For those of you who are concerned with sentencing, it must often cause some anguish how to balance justice and mercy, punishment and reform.

It is fitting that we begin this year of the practice and administration of law in this community of Victoria by gathering for prayer, acknowledging that there is only One who truly judges. Let us praise him for his righteousness and mercy, and humbly seek his guidance for the responsibilities that lie ahead of each of us this year.

The Breakfast — Chapter House, St Paul's Cathedral

Role of the High Court as Foreseen by the Founding Father Alfred Deakin

Tabitha Ponnambalam

TODAY, much unjustified and uninformed criticism is being levelled at the High Court for performing the role Alfred Deakin, a prominent and distinguished Australian with immense foresight and wisdom, intended and foresaw it playing nearly one hundred years ago

Deakin was Australia's first Attorney General and later its Prime Minister. As long ago as 1902, he saw the High Court as being the final authority on the interpretation of the Constitution. He also realised that the Constitution would need to be adaptable and elastic so that it could be interpreted to reflect circumstances and times which would of necessity be vastly different from those existing at the time of its drafting.

The High Court of Australia was very deliberately given a prominent role in the Australian democracy. It was set up to be the third arm of government, and the last word on the interpretation of the Australian Constitution. The Constitution is the compact made between the Australian people and the government on the formation of the Commonwealth. It stipulates the powers granted to the government by the people of Australia.

During the constitutional conventions that occurred in the latter part of the last century, the founding fathers of the Australian Commonwealth studied the workings and the operation of the American Constitution and the role of its Supreme Court. They were fully cognisant of the role played by the American Supreme Court in interpreting the American Constitution, and at least some founding fathers intended the High Court of Australia to play the role it now does in contemporary Australia.

The constitutional conventions and the deliberations that occurred are, obviously, not part of the Commonwealth Parliamentary debates. However, early in the life of the new federation, on 18 March 1902, Alfred Deakin introduced into the Commonwealth Parliament a bill for the Judiciary Act. The Act sets out more particularly the High Court's jurisdiction and powers. It was necessary because there are only ten sections in the Constitution dealing with the tenure of the judges and the powers of the Court.

In his speech introducing the bill Deakin discussed in great detail the role he foresaw the High Court playing in the newly established federation.

Deakin saw the High Court as the organ of national life which had to preserve the union by transfusing it with "the fresh blood of the living present".

Firstly, Deakin saw the High Court as the guardian of the Constitution, and therefore as an integral part of the Federal Constitution. In fact, he said: "[t]he High Court, in its sphere, and the Parliament, in its sphere, are both expressions of the union of the Australian people. That union cannot be completed on the judicial side without the establishment of this court any more than on the political side it could have been completed, or even commenced, without this Parliament."[1]

Secondly, Deakin noted that the Australian Constitution introduced a new state of affairs in which the High Court was to be given "a most potent voice".[2] It was to determine the powers of the Commonwealth, the powers of the States and the validity of the legislation enacted by any of the Australian Parliaments. Further, that the High Court's most important function was to interpret the Constitution, which of necessity was written in general terms because it was to be an instrument not to be easily altered, but at the same time was required to remain in force for many years. Acknowledging that it would apply under circumstances differing widely from then existing, Deakin understood fully the importance of the role the High Court was to play in interpreting the Constitution. He noted: "[o]ur Constitution must depend largely for the exact form and shape which it will hereafter take upon the interpretations accorded to its various provisions. This court is created to undertake that interpretation."[3]

Although Deakin did state that "our written Constitution, large and elastic as it is, is necessarily limited by the ideas and circumstances which obtained in the year 1900." He goes on to discuss, in detail, the experience of the American Supreme Court in interpreting the American Constitution which had been in existence for over one hundred years. Pointing out how difficult it was to amend the American Constitution, which is also true of the Australian Constitution, although not to the same extent. Deakin noted that the American Constitution might have become "a dead letter"[4] and "a heavy burden"[5] but for the Supreme Court which had "the courage to take that instrument, drawn in the eighteenth century, and read it in the light of the nineteenth century, so as to relieve the intolerable pressure that was being put upon it by the changed circumstances of the time".[6] Recognising that "[p]recisely the same situation must arise in Australia"[7] Deakin saw the High Court as the organ of national life which had to preserve the union by transfusing it with "the fresh blood of the living present".[8]

Thirdly, the High Court has been given a very broad mandate in the important sphere of developing the common law. The High Court has the power to hear appeals in respect of all cases from the State Supreme Courts; this does not occur under the American system. The US Supreme Court hears appeals from the State Supreme Courts only if there is a federal question involved.

According to Deakin "[t]he High Court will be an appellate tribunal for all cases judicable in the State Courts, and for all cases judicable in the Federal Courts. Its power of appeal covers the whole vast range of possible litigation in Australia. Nothing Federal or State is excluded from it."[9]

In other words, the Australian High Court is also the final appellate court and final authority in respect of all common law cases. English common law jurisprudence throughout the centuries has relied on the judiciary to move the law forward in order to make it, and keep it, relevant to the needs of the contemporary society. To again quote Deakin "[o]f course, a great part of the English Constitution consists of Judge-made law. Many of our most fundamental principles and liberties are founded directly upon judicial decisions."[10]

Thus, the High Court is receiving much criticism for doing that which common law courts throughout the world, be it in the United Kingdom, Canada, USA, India, Pakistan, Zambia, Kenya among other nations, have been doing for centuries of recorded common law jurisprudence.

Fourthly, Deakin saw the relationship between the High Court and the Parliament as one of "mutual association and dependence in the accomplishment of a common task".[11] Neither was to be subservient to the other, but instead each was supreme in its own sphere. The Parliament and the High Court each had its own function within its sphere of authority and influence. However, the responsibility of interpreting the Constitution was that of the High Court. And the Constitution was, by its very nature, an evolving instrument which had to be adapted to reflect the present times and circumstances.

Finally, in complete agreement with Deakin, and as he so aptly put it so many years ago, "[t]he people did not err in giving the High Court the prominence which it has in the Constitution."[12]

Footnotes

1. Commonwealth Parliamentary Debates dated 18 March, 1902 at p. 10964.
2. ibid at p. 10965.
3. ibid at p. 10965.
4. ibid at p. 10967.
5. ibid at p. 10967.
6. ibid at p. 10967.
7. ibid at p. 10967.
8. ibid at p. 10967.
9. ibid at p. 10979.
10. ibid at p. 10983.
11. ibid at p. 10967.
12. ibid at p. 10981.

A Lawyer to the Last

FROM Sir Walter Scott's journal for 26 June, 1826, this note of a story told him by Lord Chief Baron: "A Master in Chancery was on his death-bed — a very wealthy man. Some occasion of great urgency occurred in which it was necessary to make an affidavit, and the attorney, missing one or two other Masters, whom he inquired after, ventured to ask if Mr _____ would be able to receive the deposition. The proposal seemed to give him momentary strength; his clerk was sent for, and the oath was taken in due form, the Master was lifted up in bed, and with difficulty subscribed the paper; as he sank down again, he made a signal to his clerk — 'Wallace' — 'Sir?' — 'Your ear — lower — lower. Have you got the half-crown?' He was dead before morning."

Verbatim

Getting in First

Supreme Court of Victoria

11 December 1997
Jim Carrey v. *ACP Publishing Pty Ltd*
Coram: Hedigan J.
Wilson Q.C. and Walker for Plaintiff
Sher Q.C. and Wheelahan for Defendant

This was the hearing of a pleading summons in this defamation action in which the defendant had pleaded that the plaintiff had developed a comedy skit which involves him talking out of his backside as a particular of justification of the imputation that the plaintiff in his personal life was lewd, crude and disgusting.
His Honour: In any event you know it is an allegation that somewhere it involves him talking out of his backside. I wonder how he does that?
Mr Wilson: He might be a ventriloquist. I have heard certain members of our profession do that on a regular basis, Your Honour.
His Honour: You said it, not me, Mr Wilson.
Mr Wilson: I didn't want to give Your Honour the opportunity to get in first.

Cook Book

County Court of Victoria

20 August 1997
Victor Attard v. *Ford Motor Company of Australia Ltd and HIM Winterthur Workers Compensation (Vic) Ltd*
Coram: Judge Dove
Jordan for Plaintiff
Jens for Defendant

Jens: This is the defendant's Cook Book.
Judge: Things are spicing up in this case.
Jordan: I'll have one with the lot Your Honour.

The Reasonable Man

County Court WorkCover List

6 February 1998
Uder v. *Labourtino Pty Ltd*
Coram: Judge G. D. Lewis
Zahara for Plaintiff
Denis Smith for Defendant

Zahara makes application for an adjournment.
Smith for Defendant: No reasonable person could oppose that application.
His Honour: But what's your attitude Mr Smith?

First Hearing

Supreme Court of Victoria

UTSA Pty Ltd v. *UTA Australia Pty Ltd*
Coram: Chernov J.

Hayes Q.C. cross-examining witness as to when he first heard of a particular settlement offer.
His Honour: That is in about October? . . . If you tell me that it was — I don't know the date. I know that it was shortly after Gerry Hayes had been approached.
Mr Hayes: Gerry Hayes? It sounds like a horrible combination.
His Honour: I was going to say you have really delighted Mr Hayes with that? . . . Better than Peter Nash.
Mr Hayes: After Mr Efron said this to you, you discussed it with Sean Buckley? . . . I beg your pardon? Could you repeat that. I can't repeat the joke.
His Honour: I think it was Mr Smith's joke, actually.
Mr Hayes: Was it?

Hayes on Toast or Vegemite

Supreme Court of Victoria

20 January 1998
UTSA Pty Ltd v. *UTA Australia Pty Ltd*
Hayes Q.C. cross-examining Ms Witter.

"If Sean Buckley wrote that down, and you said he was writing down what you said he heard, then he can't have been faithfully recording what you heard? . . . That is one of the reasons that the Affidavit is different from the initial draft. I object to the word 'bribe' and the reason that Mr Korman and Mr Buckley were laughing was because Mr Korman stated that he had Hayes on toast.

"A delicious prospect? . . . I prefer Vegemite."

1997 Family Christmas C

Diana Bryant Q.C., Gary Glover and Margaret Mandelert.

Graeme Thompson, Judith Lord and Paul Guest Q.C.

Gunilla Hedberg, Richard Ingleby and Rosie Tremayne.

Law Bar Association, ocktail Party

THE 1997 Christmas Family Law Bar Association Party was as well attended and popular as in previous years. The venue was, as in 1995 and 1996, The Australia Club.

Our Chairman, Paul Guest, Q.C., welcomed our honoured guests including the Chief Justice of the Family Court of Australia, and the Honourable Justice Burton, a visitor from South Australia.

The balmy weather made it possible for the guests to enjoy the terrace and the view over William Street. The excellent wines and fine cuisine, selected by the Committee, combined to make the evening most enjoyable.

John Salamanca, Nora Hartnett, Peter Young Q.C. and John Udorovic Q.C.

Clarinda Molyneux Q.C., Justice Morgan and Nora Hartnett.

Graham Devries, Chief Justice Nicholson, Justice Dessau and Richard Ingleby.

Michael Watt Q.C., Mirella Trevisiol and Mark Hebblewhite.

Jo Fogarty and Kirsty MacMillan.

Peter Young Q.C. and Diana Bryant Q.C.

Paul Guest Q.C., Justice Barton and David Brown.

Comedy Talent Scout Seeks Funny Barristers

TONY McGinn, chief executive of Austereo MCM Entertainment, a division of the Village Roadshow Ltd group, expanded on the background to the company's advertisement in this issue of *Victorian Bar News* (at page 30), in a recent interview.

Describing the search for comedy material from barristers as "a personal initiative", McGinn said that "a lot of legal people, and especially barristers, can be extremely entertaining, sharp, and quick-witted. It's their trade, I suppose," he said.

He instanced the UK lawyers Geoffrey Roberston *(Hypothetical)* and Clive Anderson (host of *Talk Back,* initially on Channel 4, and now on BBC 1 as *Clive Anderson's Talk Back).* Characterising Anderson as "very, very fast and sharp-witted," he said "there was almost a dual between him and his high-profile guests, who would try to out-do him"

Asked what he wanted Victorian barristers interested in contributing comedy as actors or writers to do, as a first step, he said: "I'd like them to get in touch with me, to meet with them, and find out how far their ideas are formed, and maybe help them to develop them. But they don't necessarily have to have specific ideas themselves, as they may be able to contribute to our existing programs."

Tony McGinn, chief executive of Austereo MCM Entertainment.

Television was not the only medium — radio was a great medium to develop comedy talents. The *Monty Python Show's* all-star cast was an obvious example (John Cleese, Eric Idle, Michael Palin, Terry Jones, Terry Gilliam, and Graham Chapman all starred in it).

He said Austereo MCM is a major supplier of national radio programs, producing over 1,000 hours a year. Some comedy was serialised, e.g. in two-minute segments a day, comprising short, satirical, fictitious parodies.

McGinn said he expected that most barristers would want to contribute anonymously, and this was understood, and would be respected.

He said that their talent may not be acting, but writing. What he wanted was "their passions and ideas on the law, but in a way that would interest the hypothetical man in the street named Jones, with a brick veneer house, a Commodore car, a dog, and 2.3 kids."

High Court and Federal Court Notes

These case notes were supplied by Thomas Hurley of the Victorian, New South Wales and ACT Bars and the Editor of Victorian Administrative Reports

February 1998
Suggested Title:

CLAIMS MADE POLICIES

FC 97/47 Insurance – liability insurance – "claims made" policy – whether insured may rely on claim made outside period of policy where notice of facts given during currency of policy.

IN *Newcastle City Council* v. *GIO General Ltd* (2 December 1997) the appellant was liable for supervising the construction of buildings in the City of Newcastle. Following an earthquake in December 1989 allegations were made that it had negligently supervised the construction of buildings that collapsed during the earthquake. Until December 1991 the appellant was insured with the respondent under a "claims made" professional indemnity policy. Before December 1991 the appellant informed the insurer of the allegations being made against it but did not claim under the policy until after it had expired. By s40(1) the *Insurance Contracts Act* 1984 (Cth) provides that the section applies to a contract of liability insurance, the effect of which is to exclude the insurer's liability by reason that notice of a claim against the insured is not given to the insurer before the expiration of the period of insurance. By s40(3) the Act provides that where the insured gave notice in writing to the insurer of facts that might give rise to a claim during the period of cover the insurer is not relieved of liability by reason only that the claim was made after the period of cover expired. Primary judges in the NSW Supreme Court declared the respondent liable by reason of s40(3). This conclusion was set aside by the NSW Court of Appeal. The appellant's appeal to the High Court was allowed: Brennan CJ; Toohey, Gaudron, Gummow JJ jointly; McHugh J. The High Court concluded the policy was once covered by s40(1) of the *Insurance Contracts Act* and therefore s40(3) operated in favour of the insured. The *Insurance Contracts Act* was enacted following a report by the Australian Law Reform Commission. The High Court considered when it was permissible to have regard to extraneous material such as the ALRC report and the explanatory memorandum for the bill to enable the purpose of the subsequent Act to be ascertained.

Suggested Title:

WHETHER SPOUSE DISCRIMINATORY

Migration – whether definition of "spouse" as person of opposite sex discriminatory.

In *Rohner* v. *Scanlan* (QG 57/97, 7 November 1997) Lehane J concluded the definition for the *Migration Regulations* of the term "spouse" as involving a relationship with a person of the opposite sex was not invalid as being discriminatory within the meaning of the *Sex Discrimination Act* 1984 (Cth). Consideration of the construction of migration regulations and the broad nature of the migration regulation-making power.

Industrial law – registered organisations – election inquiry – notice of defective nomination

In *Australian Electoral Commission* v. *Hickson* (NG 701/97, 5 November 1997) the *Workplace Relations Act* 1996 (Cth) provides for registered organisations to have rules and by s197(1)(c) provides that where the returning officer conducting an election finds a nomination to be defective the officer shall notify the person of the defect before rejecting the nomination. The relevant rules required a person be nominated by 10 financial members of the organisation. The Full Court considered whether it was permissible for a person to be nominated by nominators who were unfinancial at the time of nomination but subsequently became financial. The Full Court concluded the rules only enabled relief to be granted where the defect related to the candidate.

Trade practices – contravention – appropriate orders

In *ACCC* v. *Office Link (Aust) Pty Ltd* (WAG 89/97, 21 November 1997) by s80 *Trade Practices Act* 1974 (Cth) the Federal Court is given power to grant injunctions in such terms as the court determines to be appropriate where it is established that the person has contravened the *TP Act*. Carr J considered the circumstances in which the court would order implementation of a compliance program. He declined to grant the orders as sought by the parties because the orders were not limited to the provisions in respect of which the contravention was established.

Corporations – takeover provisions – power of ASC to modify operation of takeover provisions.

In *Otter Gold Mines Ltd* v. *ASC* (VG 117/97, 5 November 1997) the Full Court considered the exercise by the ASC of the power to modify the operation of the takeover provisions of the *Corporations Law*, including s618, given by s730 of *Corporations Law*. The Full Court concluded that it was not relevant for the AAT, conducting a full merits review, to consider whether one of the parties had been denied natural justice before the ASC. Decision of AAT set aside and matter remitted.

Immigration – "usual occupation"

In *Minister for Immigration and Multicultural Affairs* v. *Ye Hu* (NG 229/97, 7 November 1997) a Full Court dismissed an appeal by the Minister from a decision of a primary judge who had concluded that the "usual occupation" of a person was not determined solely by reference to the catalogue of duties performed by that person within the period of time specified in the *Migration Regulations*. Consideration by the Court of the distinc-

tion between "usual occupation" and "job" or "position" and whether ascertainment of "usual position" is a question of fact or law.

Industrial law – termination of employment – implied term of trust

In *Raffoul* v. *Blood Transfusion Service of the Australian Red Cross Society* (VI 4347/95, 10 November 1997) Gray J considered whether there was an implied term in the contract of employment of a medical scientist that the employer would not, without reasonable cause, conduct itself so as to destroy the relationship of trust between it and the employee.

Migration – application remitted from High Court

In *Durairajasingham* v. *Minister for Immigration* (NG 993/96, 11 November 1997) Davies J determined a matter remitted to the Federal Court from the High Court subject to the limited grounds of review available to the Federal Court in s476(1) *Migration Act*.

Sales tax – exemptions – "adaptors"

In *Dick Smith Electronics P/L* v. *C of T* (NG 359/97, 14 November 1997) a Full Court considered the definition of the term "adaptors" as appearing in the schedule to the *Sales Tax (Exemptions and Classifications) Act* 1992 (Cth).

Migration – refugees – official documents – whether RRT obliged to seek evidence of authenticity

In *Balwir Singh* v. *Minister for Immigration* (SG 39/97, 14 November 1997) an applicant for refugee status tendered a pro forma document which purported to indicate the applicant was liable to arrest on return to India. The Full Court concluded the RRT had not erred in deciding this document was not authentic. The Full Court concluded the reasoning of the Tribunal, based on the material before it, "was a logical and reasonable response on the facts of the case" and no ground of review under Part 8 *Migration Act* was made out.

Customs tariff – whether calibration strips for photometers are "accessories" or "parts"

In *Chief Executive Officer of Customs* v. *Boehringer Mannheim Australia P/L* (NG 354/97, 17 November 1997) Lehane J considered whether calibration strips for photometers are "accessories" or "parts" of the photometers and the function of strips.

Practice – champerty

In *Penale P/L* v. *McLernon Group* (WAG 98/97, 17 November 1997) French J considered what was required before an action be dismissed on the grounds that it was champertous.

Corporations – directions to liquidator

In *Re Parker* (SG 3018/97, 20 November 1997) Mansfield J considered the circumstances where the court will determine questions at the request of a liquidator under s511 of *Corporations Law*. Mansfield J considered the operation of the phrase "mutual credits, debts or other mutual dealings" within s533C *Corporations Law*.

Public service – disciplinary inquiry – natural justice

In *Rose* v. *Bridges* (ACTG 37/97, 21 November 1997) Finn J considered the operation of the rules of natural justice where a public service disciplinary body

was required to determine allegations against a public servant but had no statutory power to compel witnesses to submit to cross-examination.

Health – decision to list toys on register of therapeutic goods

In *Minister for Health and Family Services* v. *Bullivant's Natural Health Products Pty Ltd* (QG 192/96, 25 November 1997) Merkel J dismissed an appeal by the Minister against the decision of the AAT to list two robot-shaped therapeutic tablets under the *Therapeutic Goods Act* 1989 (Cth). He concluded the AAT had not erred in the construction of the relevant regulation which provided that labelling of goods was unacceptable where the goods could be mistaken by children as animals, robots, cartoon characters or other similar objects. He found the decision of the AAT that the goods should be listed as their presentation was not likely to have the challenged effect was valid.

Discrimination – public service superannuation scheme

In *Australian Education Union* v. *HREOC* (TG 13/97, 25 November 1997) Merkel J set aside a decision of the HREOC whereby it dismissed a complaint that the State of Tasmania discriminated against female employees in the provision of superannuation services contrary to s22 of the *Sex Discrimination Act* 1984 (Cth). Merkel J found the HREOC had erred in not concluding the provision of superannuation could be a "service".

Aviation – civil liability claim – limitation period

In *Magnus* v. *South Pacific Air Motive Pty Ltd* (NG 194/97, 27 November 1997) Wilcox J considered how the limitation period found in the *Civil Aviation (Carriers' Liability) Act* 1959 was to be applied in respect of persons who suffered physical injury and delayed psychological injury in, or after, an aeroplane accident. He concluded claims brought two years after the accident were barred insofar as they relied upon physical injury and psychological injury sustained as a result of a physical injury but not otherwise.

March 1998
Suggested Title:

FISH POLICY VALID

Fisheries — validity of policy.

In P.W. *Adams Pty Lid* v. *Australian Fisheries Management Authority* (NG 217/97, 23 January 1998) Branson J concluded that a decision by the AAT that the relevant policy of the respondent concerning fish management was valid and further the AAT did not err in law by considering the economic efficiency of the policy generally and failing to address its impact on the applicant.

Federal Court — procedure — costs — flying a gross sun.

In *Canvas Graphics P/L* v. *Kodak (Australasia) P/L (SG 45/94,* 23 January 1998) O'Loughlin J considered the operation of *Federal Court Rules* 062 r4(1)(c) authorising payment of costs by way of a fixed sum in lieu of taxed costs.

Mutual recognition — legal profession — fees for admission.

In *The Legal Practice Board (WA)* v. *Boroky SING 97/97,* 23 January 1998) by s40(1) the *Mutual Recognition (Western Australia) Act* 1995 (WA) authorises a "local registration authority" to impose fees on applicants for admission which are not greater than fees applicable for registration otherwise. The AAT ordered the applicant reconsider the request of solicitors for admission in Western Australia. In doing this the AAT considered that the fee to be charged to the applicant not exceed the reasonable administrative costs of admitting the applicant. R.D. Nicholson J concluded that the power given by s40 was unfettered and permitted a fee resulting from general calculation regardless of the administrative work performed in the particular instance or fees fixed outside the State.

Income tax — deductions — legal costs.

In *Schokker* v. *C of* T (WAG 83/97, 23 January 1998) R.D. Nicholson J considered when expenses incurred by a taxpayer in allegedly preserving employment conditions by contesting allegations by the Commissioner that he had breached secrecy provisions were allowable as deductions from income tax. Appeal against decision of AAT to dismiss claims for deductions itself dismissed.

Industrial law — whether police officers employees.

In *Karl Conrad* v. *Victoria Police* (Marshall J.; VI 2244R/96, 22 January 1998) and *Ward* v. *Commissioner of Police (WA)* (Moore J; WI 1137/96, 14 January 1998) the Federal Court considered the legal basis upon which a police officer and an Aboriginal police aide were appointed. Marshall J in the *Conrad* case concluded that the applicant held a statutory office and was not an "employee" for the *Workplace Relations Act* 1996 (Cth). Moore J in *Ward's* case concluded the applicant was a person whose termination of employment was regulated within s170EA(1) of the *Industrial Relations Act* 1988 (Cth).

Practice — security for costs — representative proceedings.

In *Woodhouse* v. *McPhee* (VG 3237/97, 24 December 1997) Merkel J considered the basis upon which an application for security for costs should be made where the applicant brought proceedings as a representative under Part IVA of the *Federal Court of Australia Act* 1976 (Cth). He observed the power to award costs was limited by s43(1A) of that Act which granted represented persons a general immunity from paying costs. Merkel J considered the inter-relationship of s43(1A) and s33ZG(c)(v) which provided that nothing in Part IVA affected the law relating to security for costs. Application for security for costs dismissed.

Corporations — winding up — liquidators.

In *Pace* v. *Antleres P/L (in liq)* (NG 131/94, 12 January 1998) Lindgren J considered the duties of liquidators under the Corporations Law to bring solvent companies out of liquidation within a reasonable time. Lindgren J also considered the entitlement of liquidators to the "costs and expenses of the winding up". He considered who was liable to pay income tax and additional tax where the liquidator failed to do so and whether liquidators were entitled to remuneration where the authority to receive it was based on an invalid approval by "creditors".

Corporations law — information obtained by ASC for use by receiver in action against auditors.

In *Boys* v. *ASC* (WAG 71/97, 8 January 1998) the ASC made available to the receiver of a company information obtained by the ASC investigating the company. The receiver and his solicitor were appointed as consultants to the ASC without charge. A Full Court concluded that the ASC had not acted improperly, was not in conflict of interest and was not biased in making the information available. The ASC made available to the receiver of a company,

appointed by the trustee for debenture-holders, information obtained by the ASC in its investigation of the company. The receiver obtained the information for use in the civil action against the auditors of the company. A Full Court concluded the ASC had not acted improperly, was not in conflict of interest and was not biased in making the information available or appointing the receiver and his solicitors as consultants.

Discrimination — army recruit infected with HIV virus.

In *Commonwealth* v. *HREOC* (QG 197/96, 13 January 1998) a Full Court concluded the HREOC had erred in the way it considered whether the dismissal from the army reserve of a recruit infected with HIV virus could be authorised by s15(4) of the *Disability Discrimination Act* 1992 (Cth) as being required because an HIV infected soldier would not be able to carry out the inherent requirements of the particular employment.

Migration — review of Tribunal decisions — substantial justice.

In *Sun Zhan Qui* v. *Minister for Immigration* (NG 398/97, 23 December 1997) a Full Court approved and applied the decision in *Eshetu* v. *Minister for Immigration* (1997) 71 FCR 300. The majority found that the RRT had, in rejecting an application for refugee status, failed to observe proper procedures tantamount to natural justice. The RRT had decided the applicant was not entitled to refugee status where the applicant had in his possession negatives of the Tiananmen Massacre. The Court further concluded the RRT had erred in causing inadequate inquiries to be made of the applicant's address. The Court further considered whether the decision was affected by a form of bias.

Suggested Title:

PRIVATE DAMAGES FOR OMISSION TO PERFORM PUBLIC STATUTORY DUTY: WHETHER DOCTRINE OF GENERAL RELIANCE EXISTS

96/57 Negligence — duty of care — statutory body — whether statutory body possessing statutory powers liable where damage caused by failure to exercise powers — mandamus — escape of fire.

In *Pyrenees Shire Council* v. *Day* (23 January 1998) the appellant was the municipal body for an area in rural Victoria. In 1988 it was advised by firefighters called to a domestic fire that the chimney in a shop/dwelling within the municipality was defective. The appellant sent a notice under s695(1A) *Local Government Act* 1958 (Vic) to the "owner and occupier" of the premises requiring the chimney to be made good. The appellant took no follow up action. The tenant of the premises (T) did not inform the owner of the premises (N) of the notice. The tenant (T) sold the business and assigned the lease to S. In 1990 a second fire destroyed the premises and damaged abutting premises owned by D. The owner of the premises (N), the occupier of the premises (S) and the neighbour (D) each successfully sued the former tenant (T). The neighbour (D) succeeded in its action against the appellant municipality but claims against the appellant municipality by the owner (N) and the occupier (S) failed. The parties appealed to the Court of Appeal (Vic). This Court concluded by reference to the doctrine of "general reliance" that the appellant municipality owed a duty to the owner of the adjoining premises (D) but not to the tenant (S) as it was in occupation of the premises with the defective chimney. As the tenant (S) could have inspected the chimney at any time it did not rely on the appellant municipality to perform its duties. The municipality appealed to the High Court against the judgment against it in favour of the neighbour(D). The tenant (S) appealed against its failure to obtain judgment against the municipality. The appeal to the High Court by the municipality was dismissed by all five members of the High Court. The appeal by the tenant (S) was allowed by majority: Brennan CJ, Gummow, Kirby JJ; contra Toohey J; McHugh J. The High Court considered the basis on which a duty of care arose. Brennan CJ concluded damages could be awarded for private loss following a failure to exercise public statutory duty where the decision not to exercise the duty was irrational. Toohey J and McHugh J generally concluded the doctrine of "general reliance" applied and rendered the appellant municipality liable to the adjoining owner (D) but not liable to the tenant/occupier (S). In their judgments Gummow J and Kirby J doubted or criticised the existence of the doctrine of "general reliance" and found the municipality liable to both the adjoining owner (D) and the tenant/occupier (S) by reference to a general duty of care. Appeal by appellant municipality dismissed; appeal by occupier/tenant (S) allowed and judgment entered for it.

61/96 Criminal law — evidence — admissions — admission by suspect to undercover police or police informer after suspect declines to answer formal police questions.

In *R* v. *Swaffield; Pavic* v. *R* (20 January 1998) the High Court considered when admissions by accused will be admitted where those admissions have been made to undercover police, or police informers, after the suspect has declined to participate in a formal police interview. In *Swaffield* the accused admitted to an undercover Queensland police officer investigating drug offences that he had committed an arson. Swaffield had earlier declined to participate in a formal interview. In *Pavic* the accused admitted to a friend who had been "wired" by the Victorian Police that he was involved in a murder after he also declined to respond in a formal police interview. The High Court considered the operation of "unfairness" discretion and the "public policy" discretion by which courts may reject unfairly obtained evidence. All five members of the High Court concluded the confession in *Swaffield* should have been excluded principally on the basis of ensuring that police did not adopt tactics designed simply to frustrate appropriate limits on their inquisitorial functions. The Court concluded by majority that the confession in *Pavic* had been properly admitted: Brennan CJ; Toohey, Gaudron, Gummow JJ jointly; contra Kirby J.

97/49 Criminal law (Q) — sexual offences — maintaining sexual relationship with a child.

In *KBT* v *The Queen (9* December 1997) by s229B(1) the *Criminal Code (Q)* creates an offence of maintaining a sexual relationship with a child. S229B(1A) provided that a person shall not be convicted of the offence without proof of an act constituting an offence of a sexual nature between the accused and the child on three or more occasions during the course of the alleged relationship notwithstanding that the evidence did not disclose the dates or circumstances of the occasion. The appellant was convicted of the offence created by s229B(1) of the Code on evidence alleging a general course of misconduct with a minor. His appeal to the Court of Criminal Appeal (Q) was dismissed in part on the basis that no complaint against the evidence had been made at trial. His appeal to the High Court was allowed: Brennan CJ, Toohey, Gaudron, Gummow JJ jointly; sim Kirby J. The High Court concluded that the direction to the jury failed to alert them to

the requirement that they find there had been three occasions constituting offences of a sexual nature. The High Court observed that failure to take a point at trial will not necessarily lead to the conclusion on appeal that no substantial miscarriage of justice has actually occurred where the point is valid. Appeal allowed.

41/97 Criminal law — evidence — cross-examination — suggestion to complainant that evidence is "payback" — whether cross-examination of accused permissible to prove absence of "payback".

In *Palmer* v. *Q* (20 January 1998) the appellant was charged with sexual assault on a young woman. He denied the charges. Counsel for the appellant in cross-examining the complainant suggested that her evidence was "some sort of payback". The prosecutor cross-examined the appellant and obtained the concession that the appellant knew of no basis for a "payback". The appellant was convicted. His appeal to the Court of Appeal (Vic.) failed. His appeal to the High Court was allowed: Brennan CJ, Gaudron, Gummow JJ jointly; McHugh J; Kirby J. The High Court considered when it is proper to cross-examine an accused as to his knowledge of why a complainant or prosecution witness would lie. The Court observed such cross examination may cause confusion in the minds of the jury that because the accused has no knowledge of why a complainant or witness is lying, the complainant or witness is ipso facto a truthful witness. The Court observed evidence of the opinion of the accused is irrelevant and may lead to a reversal of the burden of proof by requiring an accused to establish a motive for the complainant or witness to lie. Observations in *R* v. *E* (1996) 39 NSWLR 450 approved. The Court also concluded that the conviction was unsafe. The appellant was a process server. Evidence was given of where he said he had been serving process at the time of the alleged offences. The High Court concluded this evidence was sufficient to create a doubt that the appellant had an alibi. Appeal allowed. Acquittal entered.

171/96 Stamp duty — deed establishing discretionary trust — value of property conveyed — whether trustee's right to exoneration constitutes beneficial interest in trust assets.

In *Chief Commissioner of Stamp Duties (NSW)* v. *Buckle* (23 January 1998) the High Court considered whether a supplemental deed conveyed property to trustees holding property under a former deed within the *Stamp Duties Act* 1920 (NSW) or merely conveyed the beneficial interest in remainder of beneficiaries where liabilities attaching to the property had to be taken into account in identifying the unencumbered value of the property conveyed. The Court accepted that a trustee has a first charge on the assets vested to secure the trustee's right to reimbursement and exoneration. The Court concluded this right was not a right which was created over the interests of beneficiaries to encumber those interests within the *Stamp Duties Act.*

97/48 Admiralty — proceedings *in rem* — when one ship a "surrogate" for another.

In *Laemthong International Lines Co. Ltd* v. *BPS Shipping* (9 December 1997) the High Court concluded that the provisions of s3(6) of the *Admiralty Act* 1988 (Cth) which defines one ship as being a "surrogate" ship for the purposes of that Act, did not control the definition of the term "ship" in the provisions of s19 creating the right to proceed *in rem:* Brennan CJ; Toohey J; Gaudron, Gummow, Kirby J jointly. The High Court accepted that it could have regard to the report of the Australian Law Reform Commission on which the two provisions were based.

Notice of Proclamation

THE *Evidence (Audio Visual and Audio Linking) Act* 1997 is to come into operation by proclamation on 22 December 1997. The proclamation is published in the *Government Gazette* dated 18 December 1997. The Act provides that in suitable cases persons may appear before the court by video or audio links, rather than being required to appear physically. It will enable access to court services at less cost and inconvenience to parties, particularly where a witness resides at a location distant from the hearing venue. The use of this technology will be subject to the court's ability to control the transmission and the discretion of the courts to order that the person physically appear if appropriate in the interests of justice.

Café Pazzo

WERE you knocking around the law in the early 1970s?

Can you remember Bert Newton's New Faces? Can you remember Rob McLelland? Can you remember prawn cocktail, beef wellington and bomb alaska complete with sparkler? Can you remember dancing to a three-piece combo? If you can answer all these questions, then you would have dined at some time at the old St James Tavern in the AMP Square.

The St James Tavern was one of the few licensed restaurants with a bit of class operating in the legal district. It opened in 1969 when the AMP building caused a controversy for its twisted iron piece of sculpture. Now of course it is better known for its age and the ferocity of its wind tunnels. This along with the old Lazar's was one of the places where a young solicitor could take a young lady for an upmarket meal.

Melbourne in 1998 is a far different place to Melbourne in 1973. After the departure of Mr McLelland who as everyone knows, was a singer, and a judge on Bert Newton's New Faces, the restaurant went into desuetude. There were changes of ownership, the food went down, the band stopped playing and generally it became an archaic and outdated restaurant.

But now it has been transformed into Café Pazzo. Café Pazzo is a 1998 type establishment. That's not to say that it is one of those noisy bistro nonsense type places. But it is a restaurant of the gourmet pizza/pasta variety with excellent specials thrown in. It is moderately priced and one can have a quick lunch there; however, the environment is such that you could have a large lunch for it has a good range of wine and beverages.

What has remained from the old St James Tavern is the spectre of the speckled walls and ceiling. To anybody who goes to Café Pazzo this will bring back memories. In the 1960s there was a vogue to blast walls and ceilings with a cement like substance that formed stalactite like bubbles. This can be seen in many flats which were built during this period.

When I lunched at Café Pazzo I began with the chicken caesar salad. Priced at $9.90, this on an ordinary day would constitute a full meal. It was very well put together. There are ample strips of grilled chicken with the traditional caesar salad base which had a good dressing. My companion had the octopus salad and he remarked, how tender the sea creature was. This was also priced at $9.90.

My main course was veal involtini. These were very small and delicate veal rolls filled with a swiss cheese and wrapped in pancetta with a nice element of basil. They were served with an Italian bean and tomato sauce. The vegetables were acceptable. The meal worked well and showed that there had been a great deal of thought and preparation in the dish. Again the price was not expensive at $13.50. The other meal that I observed was the lamb glazed with a crispy bacon and pine nut sauce. This looked well on the plate and I was informed tasted just the same.

There is fish of the day and you can get a good porterhouse grilled to your liking with a sauce. There is a chicken parmigiana and some calamari. If you want something simpler there are pasta dishes ranging from pumpkin agnelloti to gnocchi and penne and even a decent lasagna. There is a range of traditional and gourmet pizzas. I must say that years as a student attending Carlton pizzerias have caused me to have a liking for the "traditional pizza". This means an Australian pizza particularly the capriciosa. As for gourmet pizzas, the rise of the tandoori is notable in establishments of this nature. Having not tasted the Café Pazzo version, I can only hope that it is done in a somewhat better manner than other places in Melbourne. But there is a smoked

salmon, a marinara and a prosciutto pizza lurking amongst the gourmet menu.

Prices are not high, ranging from $7.00 for a small up to $10.50 for a large.

The service was quick and attentive. A Long Gully cabernet sauvignon went down rather well. Wines on the whole were not expensive.

The Café runs to breakfast and also serves focaccia. At the moment breakfast specials include two eggs with bacon or ham on toast with coffee and orange juice for $5.00. The focaccias are very good value at $4.00.

The Café also has a licensed area where you do not have to consume food. It is opening on Friday nights and should attract the floating solicitor/barrister/insurance type clientele which inhabits the building.

The owners face a dilemma as to the decor. It still retains that solid 1970s air. I like this feeling. However a decision must be made. Should they remove the speckled concrete? They are definitely going to improve the paintings and general decorations on the wall. It should be noted that there are proper tablecloths, proper chairs and a real feeling of a proper restaurant.

Overall Café Pazzo is a welcome addition to those who want the in-between lunch. There is no doubt that because of the economic climate the lunching section of the bar has had to lower its sights somewhat. This restaurant fits the mid range. For those who wish to eat light or heavy it also fits the bill. Once it becomes better known undoubtedly this will become a popular lunching and drinking spot and a welcome addition to this end of the city.

Paul Elliott

CAFÉ PAZZO
Restaurant Bar
Fully Licensed
AMP Square, Shop 15/121 William Street, Melbourne
Telephone: 9629 7485
Open — Breakfast and lunch and Friday nights.

Female Genital Mutilation: Amendments to the Crimes Act

Julian Burnside

THE Crimes Act has been amended to make it an offence to perform female genital mutilation. The amendments raise interesting questions about the nature of law in a multicultural society.

The amendments provide a definition as follows:

> "female genital mutilation" means all or any of the following —
> (a) infibulation;
> (b) the excision or mutilation of the whole or a part of the clitoris;
> (c) the excision or mutilation of the whole or a part of the labia minora or labia majora;
> (d) any procedure to narrow or close the vaginal opening; the sealing or suturing together of the labia minora or labia majora;
> (e) the removal of the clitoral hood;
> (f) "injury" includes unconsciousness, hysteria, pain and any substantial impairment of bodily function;

The amending Act (No. 46/1996, assented to 26 November 1996) adds the following sections to the Crimes Act 1958:

32. Offence to perform female genital mutilation

(1) A person must not perform female genital mutilation on a child.
Penalty: Level 4 imprisonment.
(2) A person must not perform on a person other than a child any type of female genital mutilation referred to in paragraphs (a) to (e) of the definition of female genital mutilation.
Penalty: Level 4 imprisonment.

33. Offence to take a person from the State with the intention of having prohibited female genital mutilation performed

(1) A person must not take another person from the State, or arrange for another person to be taken from the State, with the intention of having prohibited female genital mutilation performed on the other person.
Penalty: Level 4 imprisonment.
(2) In proceedings for an offence under sub-section (1), proof that —
(a) the defendant took the person, or arranged for the person to be taken from the State; and
(b) the person was subjected, while outside the State, to prohibited female genital mutilation —
is, in the absence of proof to the contrary, proof that the defendant took the person or arranged for the person to be taken from the State with the intention of having prohibited female genital mutilation performed on the person.

34. Consent not a defence to a charge under sections 32 or 33

It is not a defence to a charge brought under section 32 or 33 to prove that the person on whom the act which is the subject of the charge was performed, or the parents or guardian of that person, consented to the performance of that act.

34A. Exceptions to offences under section 32

(1) It is not an offence against section 32 if the performance of the female genital mutilation is by a surgical operation which is —
(a) necessary for the health of the person on whom it is performed and which is performed by a medical practitioner; or
(b) is performed on a person in labour or who has just given birth, and for medical purposes or the relief of physical symptoms connected with that labour or birth, and which is performed by a medical practitioner or a midwife; or
(c) is a sexual reassignment procedure which is performed by a medical practitioner.
(2) For the purposes of sub-section (1)(a), in determining whether an operation is necessary for the health of a person, the only matters to be taken into account are those relevant to the medical welfare or the relief of physical symptoms of the person.
(3) The burden of proving that the performance of the female genital mutilation did not occur in any of the circumstances set out in sub-section (1) lies with the prosecution.

Are these amendments an example of good lawmaking? Is the Victorian Parliament to be congratulated for acting swiftly to outlaw a form of barbaric behaviour, or is it to be criticised for an act of cultural imperialism? In my view, the amendments cannot automatically be regarded as good laws merely because most members of white Australian society deplore female genital mutilation.

FEMALE GENITAL MUTILATION

Various forms of FGM are still widely practised in different parts of the world. As the definition in the Crimes Act suggests, the range of activity comprehended under the all-embracing title of FGM is wide. The commonest form is so-called female circumcision: incision or removal of the clitoral hood.

Almost as common is clitoridectomy: removal of the clitoris, and sometimes removal of parts of the labia.

The most drastic form of FGM is infibulation. This involves excision of the clitoris and labia, followed by suturing of the vulva so as to leave only a tiny opening to allow menstruation and micturition. At marriage, the opening is enlarged by cutting the scar tissue. In some cases, this is done by the woman's mother, sometimes by her husband. After childbirth, the vulva is infibulated again.

It is easy, and for us perhaps obvious, to condemn such practices. It is sobering to

learn that FGM is widely practised in 40 countries around the world, including 27 African countries. It is not a Muslim religious practice, although some of the cultures which practise it are Muslim. Female circumcision is practised by some Australian Aboriginal groups.

Infibulation is the least common form of FGM. It is confined principally to Somalia, Ethiopia, Mali and Sudan. In those countries, as many as 85% of women are infibulated. In Somalia it is approved by 83% of women and 88% of men. Somali women who approve the practice are reported as saying that they would feel unclean and socially unacceptable if they were not infibulated in accordance with their cultural tradition.

The practice of FGM, and infibulation in particular, came into prominence in Victoria in late 1993. Two girls were seen by a solicitor who suspected that they were victims of child abuse. In addition to the evidence of child abuse, she learned that they had been infibulated. She notified Community Services Victoria. CSV took the view that infibulation did not itself constitute child abuse, and did not by itself warrant a care and protection order. Doctors who had already examined the children took the same view. An organisation concerned with child welfare intervened in the case. As a result of the case, CSV altered its policy. Evidence of FGM is now regarded as sufficient to justify an application for a care order. The Family Law Council has recently issued a discussion paper which adopts a provisional conclusion that FGM ought to constitute an unlawful assault.

The debate in Victoria flared during 1994, then was overtaken by other issues. However, in November 1996, the Crimes Act was amended with little fanfare. All forms of FGM are now illegal in Victoria. A striking feature of the amending legislation is that it does not make criminal any other form of consensual body mutilation. It does not make criminal the entrenched practice of male genital mutilation by circumcision.

Africans who come to Australia bring with them their culture, including the practice of FGM. Is it right that we say to them: "We are a multicultural society, but only to a certain point."? Will not the ethical relativists among them say "But we only do it to ourselves, who approve it, and not to you who disapprove"? And the absolutists will respond: "There are some things which are not to be condoned by reference to any cultural justification". So are the battle lines of principle drawn.

I do not think it is easy to decide between the rival positions. A person seeking to persuade me to the absolutist view will say: "What if it were your daughter?" and of course that prospect appals me. But is that the right test? There is no suggestion that a culturally orthodox Somali will be concerned to infibulate my daughter. But his daughter will feel unclean if she is prevented by law from being infibulated.

Some people brush this aside as a mere quibble. They insist that it is easy, indeed essential, to condemn FGM in Australia. After all, if they come here they must accept our laws.

Let me tease the problem out. The most widely practised form of FGM involves a minimal incision of the clitoral hood, with or without removal. Is this to be tolerated? If not, how do we distinguish it from the widespread practice of male circumcision? That practice is culturally important to Jews, and until recently it was habitual in many societies, including our own.

Australian Aborigines slit the urethra along the inferior surface of the penis as an initiation at puberty. The initiate does not consent: in fact, he is hunted down before the procedure is performed. If he escapes, so much the better for him. It is not evident that those who criticise FGM among Somalis are equally critical of subcision amongst Aborigines. Interference with Aboriginal culture is not as popular as it once was. On the contrary, the Aborigines have suffered more white cultural imperialism than can be justified, and we should go no further.

I do not know how many Dayaks there are in Australia. Dayak males insert a 4 cm pin through the glans of the penis. It is done voluntarily, and for the purpose of enhancing the sexual pleasure of their partner. I can only think of three things to be said in favour of the practice. First, it is culturally valued, and therefore valuable, at least to Dayaks. Second, it is apparently altruistic. Third, since the Dayaks still survive, it is apparently not as debilitating as it sounds.

It is difficult to identify any rational principle to justify a law which targets a form of behaviour but outlaws just one manifestation of that behaviour.

Now a larger question emerges. The debate so far has concentrated on genital mutilation. Other forms of body mutilation are common and are deeply entrenched in many cultures.

Deforming the skull is practised on all continents other than Australia. By constant application of pressure on the skulls of infants, the skull shape is grossly and permanently deformed. This is taken as a mark of social prestige amongst those who practise it.

Perforation of the lips and tongue is a widespread practice. Some Australian Aborigines draw blood from cuts along the underside of the tongue as an initiation rite. Gross stretching of the lips is a famous mark of the Ubangi.

Perforation of the ear for decorative purposes is almost universal, but attracts little attention. We do not think it barbaric, since we do it ourselves. More recently in Australia, other forms of body piercing have become popular: it is common to see pierced tongues, lips, nostrils, eyebrows and nipples. Stretching of the ear-lobe is common, except among Europeans. Insertion of decorative objects through the nose is widespread in South America and Micronesia.

Decoration of the skin by scarring or tattoo is known worldwide. The decorative raised scars on the Aboriginal chest have much in common with the ritual duelling scars which marked the German aristocracy until Bismarck's time.

Chipping, filing or removing teeth for ornamental purposes is widespread. In Indonesia, they file low relief designs on the surface of the teeth for decoration. Other cultures drill holes in the teeth and embed precious stones in them.

All these practices involve pain, sometimes extreme pain. Speaking for myself, the thought of having the teeth drilled and filed, without anaesthetic, for ornamental purposes makes a swift circumcision look pretty tame.

Should it be unlawful to do any of these things in Australia? Should it be legally effective to consent to the procedures involved, in exercise of cultural tradition? We might condemn the practices as "not our type of thing"; we might say that those who would live in our land must adopt our cultural horizons; but in so doing, we must recognise that, at its foundations, this lofty moral stance rests on an implied assertion of cultural superiority: our cultural framework, which condemns the practice, is superior to yours which condones it.

Since cultural imperialism is no longer politically correct, we might cast about for another way to justify the instinctive desire to ban genital mutilation. One argument might be characterised as "the greater good" argument. This is, that the existence in society of brutal behaviour is itself a brutalising influence. Thus, the victim is not just the immediate participant, who has consented, but society at large which does not consent.

This argument is an attractive one for two reasons. First, it sidesteps the problems that beset all victimless crimes.

Victimless crimes involve behaviour that is consensual, and which raises no complaint from those immediately involved. Those who would punish it run into the criticism that they are intruding unwarrantably into private affairs. By introducing society itself as a notional victim, the criticism is avoided.

Secondly, it provides a respectable way to deflect a charge of cultural imperialism. Instead of considering the inherent legitimacy of particular cultural traditions, it concentrates attention on protecting the hypothetical weak and sensitive in our midst. As a virtuous aim, this ranks close to patriotism and motherhood, so it attracts little scrutiny.

The "greater good" argument deserves closer attention. It rests on some unstated premises. First, that the behaviour complained of is in fact a brutalising influence. This is just cultural superiority in disguise. Ask the Somalis if they think female circumcision is brutal or brutalising, and they will tell you it is not.

Until a generation ago, Aboriginal children were removed from their parents to avoid the brutalising influence of their traditional ways, and to give them the benefit of a white upbringing. The horrors of that policy are still coming to light. Such a policy, once considered benign, would not be tolerated today. What is to be regarded as a brutalising influence is therefore obviously relative; and values shift according to time and circumstances.

Second, the "greater good" argument assumes that the benefit of avoiding the remote brutalising effect outweighs the detriment to the group whose cultural traditions are peremptorily banned. This is presumably an implied call on the felicific calculus of the utilitarians. A faint and remote benefit to the many amounts to a greater quantity than an immediate and direct restriction on the few. In this context, it is significant that the "greater good" argument is generally used in relation to measures against minorities: for example, banning homosexual acts in private between consenting adults, or cultural practices amongst African migrants.

Although ethical relativism has obvious difficulties, there are equally difficulties with the absolutist view in a society which proclaims itself multicultural. Where two cultures come together, and each has conflicting cultural values, the absolutist view leads directly to the subordination of one culture by the other. The absolutist view has, by definition, no mechanism for adjusting between inconsistent sets of cultural values, since the absolutists in each culture would insist on the correctness of their own views to the exclusion of others.

I do not support, or approve of, mutilation generally or genital mutilation in particular. However, I suggest that disapproval, however vehement, does not automatically mean the practice should be prohibited. As I have tried to show, the problem has no easy answer. The amendments to the Crimes Act betray no analysis at all of the ethical and cultural issues involved. It is not apparent that the Victorian Parliament considered any of the questions discussed above. If it did, it has shown itself to be a group of sexist cultural supremacists, a description most of its members would not willingly accept.

In my view, it is a mistake to argue about FGM as if it were a single form of behaviour which can be banned or condoned. By treating it as a single form of behaviour, the argument starts from the premise that ritual nicking of the clitoral hood is indistinguishable, ethically, culturally and medically, from infibulation. That is a nonsense. If the debate is to achieve an informed result, FGM must be recognised as a continuum of behaviour which, at one extreme, cannot be distinguished from other accepted, culturally-based forms of behaviour; and which, at the other extreme, goes beyond anything which our culture is prepared to accept. Then the true debate will emerge — namely, where do we choose to draw the line, and how do we justify that choice.

Copyright and Plain English

CAROLINE Sparke found the following on the Website on the Internet. As a result it is rumoured that her drafting style has changed significantly.

Legal Stuff

Yeah, we know. You hate legal stuff. But we need to put this on here anyway. Basically this entire CD is Copyright 1995 by Microsoft Corporation. All rights reserved. Demos and sample media clips are copyright by the respective companies and developers. Please refer to the documentation and help files accompanying all sample for more information on copyrights.

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The Video for Windows runtime is FREE, FREE, FREE! No royalties and you can ship it with your app without having to ask permission from your Mother, Microsoft or Major League Baseball. (This comes up a lot so we thought we would nip it in the bud.)

Unbuttoned

IN Polson's *Law and Lawyers* (1840) are some references to the learned but eccentric Mr Serjeant Hill, known as "Serjeant Labyrinth" for the circuitousness of his arguments:

"Once, in the midst of his argument, which was so frequently perplexed with parentheses as to excite the laughter of the court, Lord Mansfield interrupted him with 'Mr Serjeant, Mr Serjeant.' The serjeant was rather deaf, and the words were repeated without effect. At length the counsel sitting beside him told him that Lord Mansfield spoke to him. This drew his attention to the bench, and Lord Mansfield, in his blandest tones, addressed him, 'Mr Serjeant, the court hopes your cold is better.'

"In some of the serjeant's abstracted moods he had forgotten to button up the front of his breeches. This was observed by some counsel near him during an argument of some very abstruse point of black letter, in which he was engaged, who whispered to him 'your breeches are unbuttoned.' The serjeant, thinking it some hint in connection with the case, adopted it without consideration, and, in unaltered tone of voice, exclaimed, 'My Lords, the plaintiff's breeches were unbuttoned.' Nor was he aware of the inappropriateness of the introduction until informed by the same person

Strange Beginnings

THE 23 April 1884 issue of the *Trade Marks Journal* included a note that Burroughs, Wellcome & Company, Snow Hill Buildings, Holborn Viaduct, London, E.C. . . . had been registered as proprietor of the trade name *Tabloid,* for use in connection with Chemical substances not included in Class I, used in Medicine and Pharmacy. The word was an invented one, derived from *tablet,* with the familiar *-oid* suffix. It was used to describe and label tablets which were relatively small, and contained a concentrated dose of the relevant drug.

The new format was popular, and the word quickly came to be understood outside its field of origin. It came to be used by others, and Burroughs Wellcome sued. The Court of Appeal held that the word had acquired a secondary meaning outside pharmacology. Byrne J said: "The word *Tabloid* has become so well-known in consequence of the use of it by the Plaintiff firm in connection with their compressed drugs that I think it has acquired a secondary sense in which it has been used and may legitimately be used so long as it does not interfere with their trade rights. I think the word has been so applied generally with reference to the notion of a compressed form or dose of anything." (see *re Burroughs Wellcome & Co's Trade Mark,* (1904) 21 RPC 217)).

Meanwhile, in 1894, the Harmsworth brothers (Alfred and Harold, later Lord Northcliffe and Lord Rothermere respectively) bought a failing newspaper, the *London Evening News*, and revised its contents by ensuring that news items were short and easily digested. They then established the *Daily Mail*, which was first published on 4 May 1896. It was advertised as "The penny newspaper for one halfpenny" and "The busy man's daily journal". Its style was short and to the point. What it lacked in depth, it made up in brevity. It became very successful. The style of newspaper pioneered by the Harmsworth brothers was quite soon referred to as "tabloid news".

Tabloid has no current use other than in connection with the style of journalism pioneered by the Harmsworth brothers. It is used to describe the format of a newspaper, as well as the style of journalism generally found in those newspapers. It is also used to describe television and radio journalism which is superficial or sensational. Strangely, its true signification today is the opposite of what was originally intended, since the news dosage in tabloid journalism is not only not concentrated, but diluted to almost homeopathic levels.

I imagine that, if the word were used today to refer to a tablet, people would think it an odd misuse of the word. By a curious symmetry, Alfred Harmsworth's first venture into journalism was a small gossip sheet which carried innocuous items of social news. It was called Tit Bits. He probably did not realise just how close he had come to the late 20th century meaning of tabloid journalism.

Among other consciously invented words, *serendipity* has also lodged firmly in our language. The Arab name for the island now called Sri Lanka was *Serendib,* apparently a corruption of the Sanskrit *Simhaladvipa* ("Dwelling-Place-of-Lions Island"). Horace Walpole was much impressed by a story about three princes who lived on the island, and whose adventures were largely guided by luck. It was called The *Three Princes of Serendip.* He coined the expression *serendipity* as a noun for the idea of lucky accident and chance discovery. Although the word was not much used for 150 years, it was rediscovered in the early 20th century, and is now in common use.

It took 150 years for *serendipity* to find its place in the sun, which illustrates what haphazard forces shape our language. It serves almost the same function as *haphazard,* which has a much longer history. Strictly, *haphazard* is an example of pleonasm: the two elements of the word have the same meaning. *Hap* is a Middle English word meaning *chance* or *luck.* It does not survive on its own, but is found in compounds such as *mishap* and *happenstance,* and (in an altered sense) in *happen.*

For centuries, Arab women used powdered antimony to colour their eyelids. The powder was called *al kohl,* and was produced by a process of sublimation, the process of vaporising a compound solid then condensing the vapour to precipitate the desired powder. Many substances can be produced by sublimation, but when Western alchemists discovered the process of sublimation, they used an anglicised form of the Arab *al kohl* to describe the result: hence, *alcohol of sulphur,* for sulphur powder produced by sublimation, *alcohol martis,* for reduced iron. By extension, *alcohol* came to mean the essence of a thing, or the product of sublimation or distillation. During the 18th century, it came to refer principally to rectified spirits produced by distillation. Although *kohl* is still understood in its original sense as powder for colouring eyelids, *alcohol* has moved on.

Petard is a curious word for several reasons: it is almost exclusively used in the context of a single quotation; and its meaning is not generally known. (This second feature may not much distinguish it). The quotation in which it is best known, and most often used, is from Shakespeare (*Hamlet* Act 3 scene iv): "For 'tis sport to have the engineer hoist on his own petard".

A *petard* was a box which was filled with gunpowder and placed against a door or wall. When the charge was ignited, the charge would generally blow a hole in the adjacent surface. Limpet mines do a similar job. However, it was an unreliable device, and it often happened that the device fired prematurely, or with unpredicted force. The engineer who was arming the petard would thus be blown into the air ("hoist") causing merriment among the uncaring. (Nowadays, witnesses to such an event would receive grief counselling and compensation; and playwrights would not dare make sport of it). Engineers were not so well regarded in Shakespeare's time. Nor, it seems, was the device itself. *Petard* is a French word. It means *a fart.*

Of course, it is not unusual for impolite words to creep unnoticed into polite speech. If we forget their origins, we can easily miss their sting. Few people would hesitate before using such words as *bumf, snafu, berk,* and *poppycock.*

Bumf is short for bum-fodder; *berk* is rhyming slang for *Berkshire hunt* (scil. cunt); *snafu* is an acronym for *Situation Normal: All Fucked Up; poppycock* comes from the Dutch *pappekak,* literally *soft shit.* Unless your companions know the true meaning of these words, you can use them in the most polite society and get away scot-free.

Calendar is another word which has an interesting history — and the idea it currently signifies has an equally interesting history.

Until 46 BC, the Roman year was divided into lunar months: that is, months of 28 days. In that year, Julius Caesar sought advice from an astronomer, Sosigenes, about reform of the calendar. Sosigenes advised Caesar to abandon the lunar calendar and to adopt a solar calendar, recognising a year of 365¼ days. (The accuracy of astronomical observations in pre-Christian times is startling, considering the difficulties later encountered by Galileo and others when they advocated the Copernican view of the world.)

The Romans recognised three important days in each month. The middle day of each month was named the *iudes* (the word is the root of *divide).* The ninth day before the *iudes* was the *nones.* The first day was the *kalends.*

The *iudes* of a month is familiar to us as the *ides*: specifically the *ides of March,* of which Julius Caesar was warned (see *Julius Caesar I* ii 17); but each month had its *ides.* When the Roman calendar was reformed in 46 BC, two months were added and the number of days in each month was adjusted, to bring the cycle of months into closer agreement with the equinoxes. As a result, the ides of a month became either the 13th or the 15th.

The first day of each month was the *kalends.* The *kalends* was an important day, because on that day, by convention, bills were due for payment. Not surprisingly, merchants would compile lists of accounts due for payment on the kalends of a given month, and the list was called a *calendarium.*

In Old French, *calendier* meant a list or register. In English, it retains that sense. Thus we have the Court calendar, the calendar of Saints, the calendar of prisoners at the assizes, and so on. This meaning is subordinated the primary meaning, namely, the system according to which the year is divided into months and days; and by extension, a document recording that division for one or more years.

Julian Burnside

Six Degrees of Separation

"AS Barristers we sometimes get to see into people's lives. We open a door and get a confidential peep inside." So it is with the Black Comedy "Six Degrees of Separation". A play which can easily be described as 'the thinking person's comedy', it exposes the details of lives people thought otherwise confidential.

The play focuses on one individual so driven by his imagination of the glamorous lives of the wealthy that he infiltrates their lives, speaking as if he knows them, using information given to him by a besotted friend. In the process, he creates tragedy. He also forces some of the "filthy rich and pretentious" he has deceived into taking a good look at themselves — and not liking what they see.

Darren Mort, a member of the Victorian Bar, is producing the play at a season at 'Chapel off Chapel' in May of this year. He spoke with *Bar News.*

Darren says the play should appeal to a lot of Barristers because it gives a look at the insides of people's lives which is similar to the look we get at our client's lives. Barristers should also appreciate the intelligent humour in the play. The play explores the nature of the con artists — not only the main character, but some of the ones who are ostensibly wealthy and respectable.

Darren described the play as being very similar to the film. The production is quite involving, as it uses the audience as "extras" — much of the dialogue is directed at the audience and they are treated as participants in the action.

Based on the notion that everyone on the planet is separated by a trail of only six people, Darren found some parallel in his life. He gives an example of having appeared for a client in Court and later discovering some link — the "six degrees" syndrome.

The play is being staged in conjunction with wine tasting, classical music and an art exhibition called "A degree of isolation". The exhibition is being presented by John Nolan and in conjunction with the Schizophrenia Fellowship of Victoria, who have also donated a painting. The proceeds of the preview night will be donated to the Schizophrenia Fellowship.

Darren Mort has had a long acting career. He has studied at the Victorian College of the Arts, has done acting workshops, amateur and semi-professional plays and musicals. He has done some modelling and has had a very high-flying TV career — he has had roles in "Neighbours" and "Chances" (with or without clothing, we wonder?), done voice-over work and advertising. Centrepiece Productions is a springboard for professional actors and for professional community theatre.

The details are contained in the flyer reproduced on this page. Darren Mort can be reached on extension 8854 for any more details. Three nights are already booked out, so get in fast.

The Bar Christmas Party

THIS function has been revived and made free, which is a good thing. Its abolition was a depressing thing — the notion that there should be no Christmas cheer at the Bar; that people go to *so many* functions at Christmas that they can't be bothered fraternising further with fellow barristers. This idea of continuous parties rampaging through the whole of December is a myth, at least to the Editors, but perhaps on second thoughts we don't get many invites.

The annual Christmas party is a good idea. But it needs a little reorganising. More publicity is necessary. More thought as to its format is needed. Is the foyer in Owen Dixon West the best place? Should Santa Clause appear with gifts for all?

Whatever the future holds, as the pictures on these pages testify, those who attended had an enjoyable time. It was good to see former member of the Bar Mick Dodson present. Unfortunately nobody behaved badly — this must be remedied next year!!!

Anthony Robard-Bean, Mark Goldblatt.

Mark Dean, Robert Richter Q.C. and Michael Dodson.

Rowan Downing and Barbara Walsh.

Anthony Krohn.

Patrick Tehan Q.C. and John Saunders.

David Brustman.

Anthony Krohn's Winning Entry in Summer Competition

This is a member — a virile member — of the Antiquarian Stone Masons Society happily testing recent work on a certain temple of Justice. Or so he told the police . . . Legal Aid not granted.

Anthony Krohn

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

Enter new competition

Explain the origins of the categorisation adopted by Ludlows in its advertisement and the criteria for determining appropriate dress.

Q.C. Attire made specially to order on an individual basis.

Gowns Q.C.

Heavyweight silk	$750.00
Lightweight 100% silk	$700.00
Artificial silk	$650.00
Rosette heavy weight 100% silk	$135.00

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 above.

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, 1 May 1998.

Wigs and Gowns: The Regatta

Judge Frank Lewis and son Justin with the trophy.

Judge Tim Wood eulogizes.

Howard Fox Q.C. makes a point.

THE tenth Bar Regatta was conducted by the Wigs and Gowns Squadron, from the Royal Yacht Club of Victoria, on Monday, 22 December 1997.

As always it was well attended and a stunning success.

The traditions of the Squadron were maintained, namely:

1. All sailors, those who enjoy boats, and all others who enjoy a party were made welcome.
2. The conduct of the Regatta including the outcome of the race was in the absolute discretion of the Commodore, His Honour Judge Tim Wood.
3. Any participant who treated the event seriously was to have been disqualified. Happily no-one needed to be disqualified.

With this tradition in mind the fleet of approximately 10 yachts was sent off from the end of the Royal's jetty at or about midday. The wind, stronger than was really necessary, blew at approximately 30 knots from the south-west. The smallest boat in the fleet, a traditional open fishing dory, skippered by His Honour Judge Frank Lewis and crewed by his son Justin, gained the admiration of the fleet for heading off in the conditions.

Rattray and Mighell, with others, crossed the line first in the Couta boat Pearl, but were obviously not entitled to first prize having won it two years previously. It would be improper to allow them to become conceited. It can be reported that all boats and crews survived and returned to the Royal Yacht Club for the trophy presentation. The Commodore Judge Wood had no limitation in awarding the following trophies:

1. First (and the Thoesen Trophy) to Judge Frank Lewis if only for his sense of adventure.
2. Second to Mr Justice Eames and crew in a 25-foot keel boat.
3. Third to James Mighell and crew.

This decision was met with the acclamation of all present.

Over lunch and following the best democratic traditions of the Squadron the Commodore, Judge Wood and the Captain of Boats, Ken Liversidge, tendered their resignations and Peter Rattray was immediately elected as the new Commodore with James Mighell as the Captain of Boats. A toast was made and it was decided the Squadron would be in good hands.

We look forward to the next Regatta. As usual all are welcome.

Ken Liversidge

Judge Tim Wood presents.

Bar 1st XI v. Law Institute 1st XI

Barristers First Eleven. (L to R) Back row: Geoff Chancellor, Tony Phillips, Rob Williams, Bill Gillard and David Neal.
Front row: Rowan Skinner, Denis Gibson, Chris Connor, Tony Southall and Neville Keyton.

THE Albert Ground as usual was in an immaculate condition for the Bar's annual cricket match against the Law Institute played a few days before Christmas 1997. The pitch was flat and true, and the out-field was smooth and fast.

As has been the norm, the solicitors drew on the impenetrable depth of their cricketing talent to easily defeat the ever-hopeful barristers.

The Bar's skipper decided that his side should take the field first. Rowan Skinner clean bowled one of the solicitors' openers for a "duck" in his second over. Teaming up with his "old" bowling partner, Tony Phillips, they gave the Bar a potent "new ball" attack. Only a dozen runs were scored from their first 10 overs. (Let the Sydney Bar beware!)

However, a second wicket partnership of 136 put the Law Institute in a winning position. Brett Lodding (District Firsts player) went on to make a fine century before he was expertly stumped by Tony Southall QC from one of Chris Connor's "legbreaks".

Geoff Chancellor was also economical with the ball for the Bar, but the solicitors amassed 4/210 off their 40 overs.

The Bar's openers David Neal and Denis Gibson began the barristers' innings at a brisk pace. Their run rate was almost four times that of their counterparts! Gibson's sojourn was brought to an end by the only leg-before-wicket decision of the day. Then Lachlan Wraith played a cameo innings until he was out caught whilst striving for one boundary too many.

After Lachlan's dismissal, the Bar's middle order imploded under the pressure of the run chase, although Tony Southall was moved to dissent, stoutly maintaining that his run out was due only to his partner's bad call. The combined total of these next six batsmen was only 12 runs, with the Institute's captain, Bob Carpenter and that man Lodding being the culprits with the ball.

A slight rejuvenation saw the Bar struggle to reach 101. David Neal top-scored with a polished 38 and the Honourable Mr Justice Gillard remaining not out — invincible and invulnerable as ever!

Solicitors captain, Bob Carpenter, left, and barristers captain, Chris Connor, toss the coin.

Barristers Second Eleven bowling. Solicitor, Huan Walker, LBW bowled Steve Mathews.

Bar 2nd XI: Success v. LIV

SUCCESS has eluded members of the Victorian Bar Cricket 2nd XI since its first win in 1986.

1997 augured ominously with a dearth of known talent but several new faces keenly offering for selection, in these competitive times. With difficulty a full XI was finally mustered.

When the toss was lost, the Bar took to the field in pleasant conditions on 22 December last.

A steady attack took an edge off the LIV, who stumbled with numbers. Scoring was blunted by accurate bowling and contained to 7/123 off 35 overs. Notable contributions with the ball came from Paul Graham whose slow mediums yielded 3/4 off 3 and Steve Mathews whose fizzing straight slows yielded 2/29 off 8.

A well-deserved nourishing lunch of open sandwiches and fresh fruit followed.

With the Bar supplying three subs (including a keeper) to the LIV, the Bar set out to chase the modest score. The openers posted 26 before a customary collapse occurred.

Andrew Dickenson (36 ret) then featured in two 40-run partnerships with Paul Graham (25) and Jim Shaw (29 ret) to bring the Bar to the line; others lifted the score to 6/151 c.c. As Andrew Dickenson also opened the bowling and kept for the solicitors until he batted, his success was laudable.

Good clean hitting for the Bar was a refreshing sight.

Professional umpires presided over the day's domination over the Bar. The team enjoyed a seldom-attained success against the ever-pleasant but uncompromising LIV team. The win was executed and acknowledged with grace despite the adage of one long-suffering member of the Bar who upon being approached to sub by the Captain replied "Don't give the bastards anything . . ." (Despite this, he later fielded!)

When engraved, the annual trophy "The Grafter's Goblet" will be displayed in the Essoign Club, for the year. May the 1st XI be inspired and the mega firms be reminded of this result.

T.R.

Second Eleven. Barrister Tony Radford bowling.

Box Trophy Report

ON 23 December 1997 the annual J.B. Box Trophy was played at the Royal Melbourne Tennis Club between the bar and bench against the solicitors. Unlike last year, we had a very good attendance of barristers. The Box Trophy was generously donated by Mr Justice Kellam who was able to play this year.

Mark Derham Q.C. takes a turn in the kitchen.

Mr Justice Kellam signing the bill.

The bar was represented by Mr Justice Kellam, S.E.K. Hulme Q.C., Kaufman Q.C., Mark Derham Q.C., Tony Pagone Q.C., James Guest and John Lewisohn.

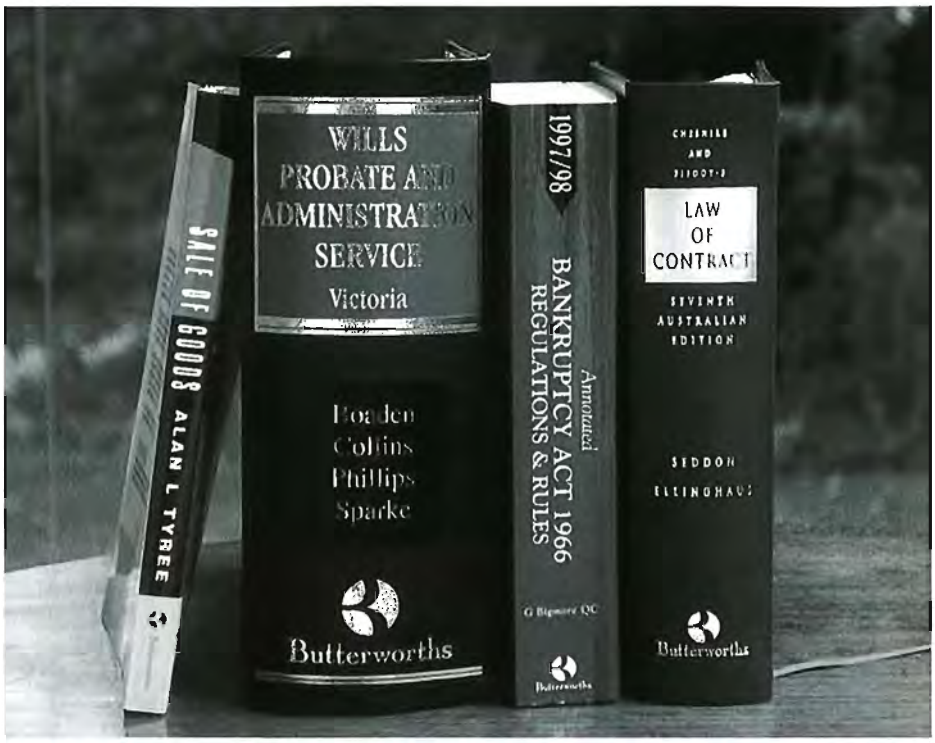
Unfortunately the solicitors were again successful, this time defeating the Bar and Bench by 6 games to 4. Successful for the bar were Derham, Pagone and Lewisohn. Mark Derham combined with James Guest to win one of the doubles matches.

After the match the teams partook an excellent meal and wines to end a very pleasant day. As the photos show Mr Justice Kellam, in of his more sombre moments, signing the bar chit and our resident chef Monsieur Derham concentrating upon the more difficult task of cooking.

John Kaufman

Sale of Goods

By Alan L. Tyree
Butterworths 1997
pp. i–viii Table of Cases ix–xxi, Table of Statutes xxiii–xxvi, 1–270, Index 271–276



THE exchange of commodities has for thousands of years been an essential part of the everyday organisation of society. The process of barter and exchange has refined and developed into the global economy and the law has similarly refined itself over the centuries. Mr Tyree's work explores the modern Australian law relevant to the sale of goods. *Sale of Goods* is concise. It does not purport to be an encyclopaedic analysis of the law, but rather aims to fill the gap between the good comprehensive reference works already available and more generalised commercial law texts that only provide limited material directly relevant to the law of the sale of goods.

Despite the deliberately concise treatment of the law relevant to the sale of goods, the author is to be commended on the excellent standard of exposition and coverage contained in the text. While it is true the text does not purport to cover specialist areas such as the interaction of consumer credit legislation with sale of goods transactions, the author has clearly outlined all the major areas relevant to the sale of goods transactions at a domestic and international level.

In general the text is broken down into useful chapters which enable the reader to find the relevant law. As appropriate, the applicable statutory provisions are set out at the beginning of a section and when referred to cases are noted, digested and referenced in the body of the text. This allows the reader ease of reference without the need to refer to footnotes or consult separate references to understand the text.

The text deals with all major issues such as obligations of the buyer (to make payment, take delivery, etc. — Chapters 16–18) and seller (to provide good title, quality, quantity, etc. — Chapters 11–15) and their remedies together with chapters on more specific sub-topics such as the Romalpa clauses (Chapter 8), the position of third parties (Chapters 22 and 23) and the consumer protection aspects incorporated by the *Trade Practices Act* 1974 (Chapters 30 and 32) into some sale of goods transactions.

In addition Part 7 of *Sale of Goods* (being Chapters 24–29) deals with export sales and includes chapters on FOB and CIF Contracts, Financing International Sales and the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention).

This work provides an excellent introduction to the law relating to the sale of goods. It combines the virtues of brevity and accuracy with a good depth of coverage without becoming overwhelmed with nice distinctions, curious anomalies or idiosyncratic variations in the law. This book is an excellent starting point for those seeking guidance to the law (and if necessary the basis for further research). *Sale of Goods* is sure to be of use to students and practitioners when confronted with problems relating to sale of goods transactions.

P.W. Lithgow

Wills Probate and Administration Service Victoria

General Editor: Richard Boaden
By Ken Collins, Richard Phillips and Carolyn Sparke
Butterworths as a loose leaf service

IN the opening to his preface Boaden observes:

The change from executor to a trustee comes, if it all, like a thief in the night, silently and usually without being able to be witnessed. Only in hindsight can the event be seen to have occurred.

This work concentrates on the period before that metamorphosis occurs, and is concerned with the making of a will, the administration of estates, and contesting the administration and family maintenance provisions. The book also includes a section on estate planning.

Whilst the work is in loose-leaf form, unlike many recent loose-leaf series, it is a first edition. At the time of publication a few sections are in the process of completion and will be supplied by the publisher.

It relation to the grant of probate as the administration of estates in Victoria, for many years Griffith's *Probate Law and Practice* was the practitioners' bible. That book was first published in 1965 and annotated the *Administration and Probate Act* 1958 and the *Probate Duty Act* 1962. Problems associated with the probate duty have largely fallen away. The book presently under review, without a doubt will be its successor. It has been carefully researched by the authors, who are experienced practitioners in the field.

As an example of the use of the book, I looked up in the index executors commission under the heading "Commission". I was referred to section 65 of the *Administration and Probate Act.* Rather than there be a lengthy annotation under section 65 of the Act, I was there referred to a detailed discussion in a separate section of

the book. The discussion, under the heading "Executors Commission", commented upon the executor's right to commission, when commission would be awarded, the procedure for applying for an award of commission and the amount and calculation of commission. I found this a very helpful way of annotating the Act, which has enabled the authors to discuss the topic without being strictly confined by the words of a particular section. I was also interested to observe under "Estate Administration", a passage on the executor's year, of which only passing reference has been made in other texts.

The present book also contains a considerable number of forms and precedents. To give an example of the type of forms that are contained in this service, there is a form of the "section 1091 statement" under the Corporations Law, which will enable an executor or representatives to deal with shares, debentures or other interests in a company, without the need for them to obtain a grant in the jurisdiction where same are registered.

The book also contains a very detailed section on Testator's Family Maintenance. Included in that section is a reference to the relevant legislation in all of the Australian states, New Zealand and United Kingdom which makes for easy research. The authors examine the concept of the moral duty owed by the deceased in the light of *Singer* v. *Berghouse* (1994) 181 CLR 201 and conclude that the Victorian Courts will continue to look at the testator's moral obligations to make provision. Frequently, in family provision disputes, one is faced with the problem of a farming property that has been left to an adult son to the exclusion of the daughter. I was interested to see that the authors deal with this as a separate topic in which they provide a number of recent Victorian decisions. Unreported decisions are very important and the authors refer to a number of unreported decisions, which it is to be noted, are not necessarily confined to Victoria. At the end of the section the authors provide a number of precedents in Family Maintenance Provisions including draft forms of affidavits, terms of settlement and an affidavit in support of an application for approval of compromise together with a form of order.

The *Wills Act* has been amended and the Family Maintenance Provisions have been altered from making proper and adequate provision for a specified class of persons to making such provision for a person to whom the testator is responsible. I have been informed by the authors that a further section is under preparation and is expected for release in April 1998, which will provide a commentary upon the amendments to family provision legislation as well as to the *Wills Act* generally. However, it is to be appreciated the learning relating to adequacy and proper provision, the moral duty and the like will continue to apply under the new legislation.

In their commentary on the *Wills Act,* the authors provide annotations to the present *Wills Act* and a discussion of formalities, testamentary capacity and the like, property and election, beneficiaries, the construction of wills, gifts and legacies, limitation commissions and perpetuities, survivorship and conflict of laws. There is even a section on the testator's body and burial matters, which occasionally cause painful moments between the executors appointed by a will and the members of the deceased's family.

I read with interest the section of the book what is concerned with estate planning. There included is a discussion of income taxation treatment of deceased estates and the CGT.

For anyone practising within this jurisdiction, I would regard that this service is an essential addition to the library. It is well written and clearly indexed. The book contains reference to a considerable number of cases, both reported and unreported, and succeeding services would promise to maintain the high standard of reference. Indeed it would seem difficult to imagine advising upon an estate problem or acting in an estate matter without recourse to this commentary.

John V. Kaufman

Annotated Bankruptcy Act 1966, Regulations and Rules

Garry Bigmore Q.C.
1997/8 edition
Butterworths, Sydney, 1997
pp. i–xxii, 1–778
paperback $66.00

THIS remains the best and easiest to use edition of Australian Bankruptcy Legislation. It now incorporates the recent amendments to the Act, Rules and Regulations. Though not as extensive as those in McDonald, Henry and Meek, the annotations are more up-to-date and easy to follow. Because it is in one bound volume, it is convenient to take to court or to meetings. The relatively modest price means it is cheaper to buy one every year than to update a loose-leaf service.

I have two gripes. One I aired in a review of the previous edition: some of the entries in the index refer to paragraphs in the text which I could not locate. The highest paragraph number I found is 90,445. Yet the index sends me off to hunt for paragraphs like 92,500 and 93,300. Very frustrating, especially if I am in a hurry! My second gripe (which may be related) is that the paragraph numbers do not follow through the book in ascending numerical order. For example, paragraph 54,165 comes after paragraph 90,445.

Whether the problems are the result of sloppy adaptation from the loose-leaf version, gremlins in someone's computer, or a desire to keep the reader on his or her toes, I cannot say. I wish they would be fixed. They detract from what is otherwise a good and useful book.

Michael Gronow

Cheshire and Fifoot's Law of Contract

By N.C. Sneddon and M.P. Ellinghaus
Seventh Australian Edition
pp. i–I xxiii, 1–939 (including index)

THE first English edition by Cheshire and Fifoot was published in 1945. J.G. Starke Q.C. and P.F.P. Higgins produced the first Australian Edition in 1966.

This edition of Cheshire and Fifoot's was published in 1997. In their preface, the authors say that the book has been completely reorganised with a view to making the law of contract as accessible as possible.

Part 1 of the book contains an overview of contract law intended by the authors for use by contracting parties, non-legal professionals, legal professionals in need of a short account of modern Australian contract law and students. An example of this early treatment is found in the passage dealing with traditional elements of liability for beach of contract. In order to succeed in a claim for liability the claimant must show the contract was made with the party and that it was breached. The reader is then referred to other sections in the book which deal with the matter in detail such as formation of contracts, breach and construction, excuses (i.e., that a party is excused of the obligation to perform the contract), termination and entitlement to a remedy.

In part 2, which is concerned with the formation of a contract, the authors refer to estoppel. They observe the importance of *Waltons Stores* in transforming the law of contract in relation, *inter alia*, to the negotiation of the contract and law of the formation. Whilst under this heading of estoppel they refer to *Hoyts Pty Ltd* v. *Spencer*; I would have thought this was less a question of estoppel rather than the exposition of rule that a collateral contract cannot contradict the terms of the principal contract. The comment of the authors is that the rule in *Hoyts* v. *Spencer* should be changed upon the basis of the more expansive approach given to estoppel.

In relation to offer and acceptance, the authors consider a more flexible approach to what they described as the battle of forms, which they describe it as a ". . . pedantic or mirror approach to acceptance". However, they do conclude that Australian Courts will probably follow the traditional approach, which is to match forms and which has the advantage of ease of application. This section contains a useful consideration of the tender process with reference to the Canadian and New Zealand cases.

The authors have commented upon the recognition of a partial dissolution by the High Court both the dicta in the *Amadio* case and in *Vadasz* v. *Pioneer Concrete (SA) Pty Ltd.* Since publication the High Court has further considered the need to do equity in *Maguire* v. *Makasonis* (1997) 71 ALJR 781, 793–794 where the complaining party has received a benefit under the contract. It would be interesting to read the authors' comments upon this decision, particularly in relation to unconscionability.

A matter that has been difficult is whether it is sufficient if the weaker party is advised to seek independent advice. The English authorities suggest that the other party need do no more; see *Massey* v. *Midland Bank pic* [1995] 1 AllER 929, *Banco Exterior International* v. *Mann* [1995] AllER 936.

This may not be the position in Australia; see *Teachers Health Investments Pty Ltd* v. *Wynne* (1996) NSWConvR 55, 785. The authors, whilst considering the importance of independent advice, do not refer to those English authorities.

I found that the headings were informative because it was possible to go to a particular section of the book and pick out the passages that were relevant to my inquiry. Further, the book does not attempt to recapitulate passages but refers the reader to the particular paragraph in the book where a detailed discussion is provided.

John V. Kaufman

Conference Update

15–19 April 1998: Melbourne. 18th Annual Congress of the Australian and New Zealand Association of Psychiatry, Psychology and Law. Contact: ANZAPPL Congress Organiser, Tel: (03) 9550 1479, Fax: (03) 9550 1499.

1–5 May 1998: Auckland. 8th Conference of the Inter-Pacific Bar Association. Contact: Convention Management, Auckland. Tel: 64 9 529 4114, Fax: 64 9 520 0718.

7–10 May 1998: Cairns. First Australian 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.

21–22 May 1998: Sydney. Insolvency-Practitioners Association of Australia-National Annual Conference. Contact: Verity Gibson. Tel: (02) 9327 2558.

22–25 May 1998: Vienna. 4th Transnational Criminal Seminar. Contact: International Bar Association, 271 Regent Street, London, W1R7PA, England. Tel: 0011 44 171 629 1206, Fax: 0015 44 171 409 0456.

23–30 May 1998: Taipai. 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: International Bar Association, 271 Regent Street, London, W1R7PA, England. Tel: 0011 44 171 629 1206, Fax: 0015 44 171 409 0456.

11–13 June 1998: Barcelona. 15th Annual Seminar on International Financial Law. Contact: International Bar Association, 271 Regent Street, London, W1R7PA, England. Tel: 0011 44 171 629 1206, Fax: 0015 44 171 409 0456.

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, email: helix@thehub.com.au

13–18 September 1998: Vancouver. International Bar Association Biennial Conference. Contact: International Bar Association, 271 Regent Street, London, W1R7PA, England. Tel: 0011 44 171 629 1206, Fax: 0015 44 171 409 0456.

26 September–2 October 1998: Heron Island (Great Barrier Reef). Pacific Rim 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

24–28 October 1998: Hobart. 8th National Family Law Conference of Family Law Section of the Law Council of Australia. Contact: Tel: (03) 6234 1424, Fax: (03) 6234 4464.

6–9 November 1998: Noosa. The Engineer & the Law. Contact: Karen Prior. Tel: (07) 3839 6233, Fax: (07) 3358 4196. PO Box 843, New Farm, Qld. 4005, e-mail: helix@thehub.com.au

9–6 January 1999: Cortina D'Ampezzo, Italy — Europe Pacific Law Conference. Contact: Karen Prior. Tel: (07) 38396233 Fax: (07) 33584196, PO Box 843 New Farm, Qld 4005, e-mail: helix@thehub.com.au

3–9 April 1999 (Easter week): Shanghai/Beijing, China. East West 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