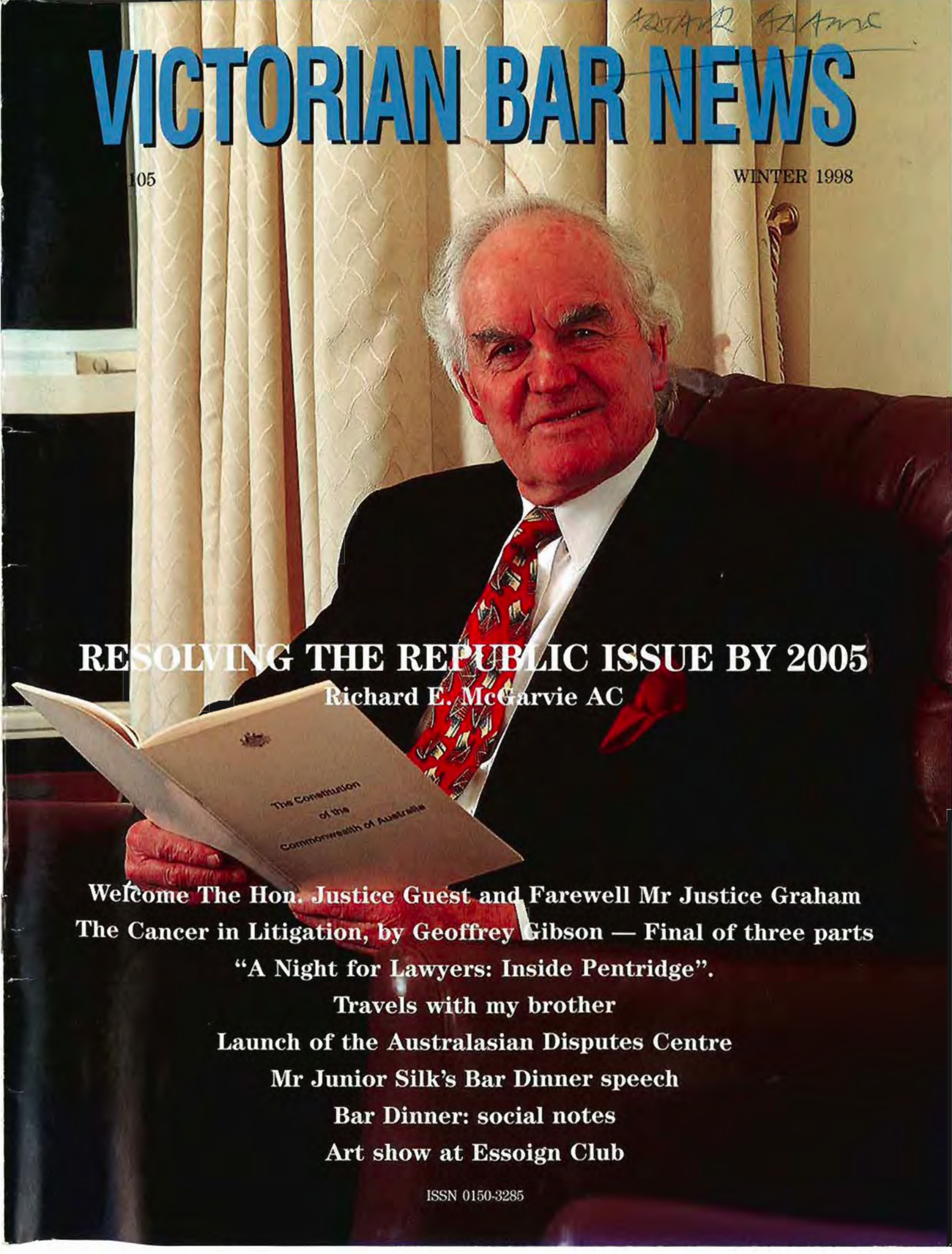
VICTORIAN BAR NEWS

105

WINTER 1998



RESOLVING THE REPUBLIC ISSUE BY 2005

Richard E. McGarvie AC

Welcome The Hon. Justice Guest and Farewell Mr Justice Graham

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

"A Night for Lawyers: Inside Pentridge".

Travels with my brother

Launch of the Australasian Disputes Centre

Mr Junior Silk's Bar Dinner speech

Bar Dinner: social notes

Art show at Essoign Club

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Essoign Club art show

Mr Junior Silk's Bar dinner speech

Bar Cricket first and second XI results

Cover:
Richard McGarvie AC, whose article "Resolving the Republic Issue by 2005" appears at page 18 and following.

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A lawyer's picnic

THE dispute between Patrick Stevedores and the Waterside Workers' Union was not resolved outside Court. Therefore it went to Court. It went to the Federal Court. It went to the Full Federal Court. It went to the High Court. The dispute was complex. It was characterised as an apparent diversion between corporate law and industrial law. So much so that it engaged the High Court for many days before a decision was handed down. But what was the underlying thread of comment made by the media and by politicians? IT'S JUST A LAWYERS' PICNIC.

Politicians are regularly seen on the ABC mouthing the usual remarks such as "The only people who will benefit from this dispute are the lawyers." "It will only fill the pockets of lawyers". "It's just a lawyers' picnic." Indeed every time there is a large and complicated dispute it is categorised as being only for the benefit of lawyers, and no one else.

The continual repetition of these comments is tiresome and sick-making, especially when made by politicians. For after all it is the politicians who are responsible for drafting and passing the legislation which forms the basis of many legal disputes. The press seems to forget that there is *a dispute which must be resolved by reference to the law.* Attempts to resolve it otherwise will have been exhausted prior to it "getting into the hands of grubby and greedy lawyers". The legal profession was not responsible for the passing of such masterly pieces of legislation such as the Transport Accident Act and the Accident Compensation Act. Anybody trying to find his way about any piece of Commonwealth legislation will know how clear, concise and easy it is to understand and follow.

It seems to be forgotten that the law in general is not easy to apply, and solving peoples' disputes is not simple. The assumption is that if you remove lawyers and the law then some sort of crude commonsense will prevail and everything will be "All right Jack". Of course, those who criticise lawyers publicly will quickly run to them if somebody says something nasty, or of the slightest defamatory nature.

And what exactly is a picnic? Is being a barrister just part of the lawyers' picnic. The Oxford dictionary defines "picnic" as "a pleasure outing including an informal outdoor meal". Colloquially "it is something readily or easily accomplished". The media therefore seems to roll up both meanings. Lawyers are making a meal out of the law and solving disputes, which is something readily or easily accomplished.

Try telling the majority of the Victorian Bar that its life is a picnic. Try telling the experienced criminal barrister who has seen his income and practice decimated by the strictures imposed by the Legal Aid Commission. Try telling the common lawyers who have been asked to work for less than the award rates by the Victorian WorkCover Authority. Try telling the thirty or so per cent of the Bar who are earning less than $30,000 a year. Try telling the very junior barristers about the outdoor feast of which they are a part.

What has become clear in Australian society is that the professional classes have become disenfranchised. No party can be seen to support doctors, dentists and in particular lawyers. The number of their votes is so small that they are open game for cheap reform. Deregulation of the professions is the micro-economic catch cry. This means that in the dental profession the semi-qualified will be sticking their hands down your throats. By all means allow non-qualified lawyers to appear in Court on behalf of others. Let them see how easy it is. Let them find out that even the most minor neighbourhood dispute is fraught with difficulty.

On a brighter note, it was good to see Michael Rozenes Q.C. give an excellent speech at the recent Readers' Course dinner. Despite difficult times at the Bar this intake was well over fifty in number. During the course of his speech he quoted from a speech of Ian Barker Q.C. in honour of Mr Justice Gummow in May 1996. In dealing with the present criticisms of the law, Rozenes quoted Barker as follows:

There is a notion abroad that legal principles are really impediments to social progress, that legal protections ought not exist for the very wicked. It seems to me that the measure of a civilised society is the extent to which it is prepared to accord procedural rights to the vilest of its members, and I think the fight is not about whether we should be popular, it's about whether we should be securing the rights which people have now — even if they don't know they have them. You see, the legal profession generally has never been loved, either here or anywhere else as far as I can see, and it is instructive to look at some of those who have publicly disliked it.

Rozenes continued:

I found it instructive to look at the treatment of the German legal profession by the National Socialists in an article by an historian called Kenneth Willig called "The Bar and the

Third Reich". Some of the things I read I find eerily echoed, in an entirely innocent way, in the writings of some contemporary journalists in Australia. The German Bar, the advocates, were subjected to enormous pressure and control. I'll read part of the article: "For all the pressures and controls exerted on the Bar, lawyers never seem to overcome the inherent hostility of the Nazis to their profession. As late as 1942 after the reorganisation of the Justice Ministry, Martin Bormann was complaining about the continued objectivity of lawyers and even submitted a list of offending lawyers who had been punished for statements made during defence arguments. Hitler himself certainly left no doubt as to his personal feelings both before and after his 1942 public tirade against the legal profession and revelled in calling lawyers "traitors, idiots and absolute cretins". "The lawyer's profession', he said, 'is essentially unclean for the lawyer is entitled to lie to the Court. The lawyer looks after the underworld with as much love as owners of shoots take care of their game during the closed season. There will always be some lawyer who will jiggle with the facts until the moment comes when he finds extenuating circumstances".

Perhaps the most galling to the Fuhrer was the failure of the German Bar to completely disassociate itself from the traditions of the Normandig Reichstadt. "The lawyer doesn't consider the practical repercussions of the application of the law. He persists in seeing each case in itself. They cannot understand that in exceptional times new laws are valid." Well, the Fuhrer said: "Let the profession be purified, let it be employed in public service. Just as there is a public prosecutor, let there be only public defenders." Consequently, by the end of the Third Reich the Nazis had solved their problem of how to handle the German lawyer. There were no longer any servants of justice — just servants of the State.

So why do we worry about the criticism we now receive? If people didn't want barristers to act for them we wouldn't have a Bar. What we should be doing is saying "You do not realise how erosive it is of our ordinary rights to say, well, that person is so bad that he doesn't deserve to have any rights at all" — which is the prevailing climate of thought. Should we not be saying how erosive it is of our rights that so-called victims of crime take part in the trial process? It is very difficult to articulate these things publicly because people don't like lawyers and matters of legal principle are always for someone else, because most people go through life resolutely believing they will never be arrested.

Let me stop by reading something else. You have probably all read or seen Robert Bolt's play, "A Man For All Seasons" about Sir Thomas More. There was a dialogue between More and his prospective son-in-law, Roper. It went this way. Roper said "So now you give the devil benefit of law", and More said "Yes, what would you do, cut a great road through the law to go after the devil?" Roper said, "I'd cut down every law in England to do that." And More said, "Oh, and when the last law was down and the devil turned round on you, where would you hide Roper, the law all being flat? This country's planted thick with laws from coast to coast. Man's laws not God's and if you cut them down, and you are just the man to do it, do you really think you can stand upright in the winds that blow then? Yes, I'd give the devil the benefit of law — for my own safety's sake."

It ought to be compulsory reading at the Bar's education course.

The Bar Dinner was again a resounding success. Michael Colbran gave an excellent speech in short time. One must assume that the whole thing will soldier on.

Because of strictures of time we were unable to include in this Edition a welcome to Justice Heather Carter of the Family Court, and Judge Anderson of the County Court, which will be rectified in the next *Bar News*.

The Editors

Battling for the justice system

IT is the blessing and the curse of an independent Bar to be fighting a continuous battle on behalf of the justice system. If this was true in years gone by, it is truer than ever today. The extent to which members of the judiciary are able to prosecute the interests of their courts is notoriously limited; the extent to which the Federal Attorney-General and other politicians are willing to accept responsibility for the integrity of our system of law and courts is, apparently, fast diminishing. Members of the public show most interest in questions of legal aid or common law rights when those issues touch them personally.

As I reflect on the past year, it seems that the preoccupations of this Bar Council have resembled those of many Bar Councils before it. Readers of this column will know that legal aid funding has dominated the Council's agenda, together with initiatives to do away with the adversarial system, initiatives to enforce "competition" in the legal profession, and attempts by statutory authorities to retain barristers as employees. *Plus ça change.* This Bar Council has won many victories in each of these areas, but it would be foolish to anticipate an overnight change of heart by government policy-makers in Victoria or elsewhere in Australia. There is no immediate prospect of relief from the current crisis, identified months ago by then Chief Justice Sir Gerard Brennan, that has settled into so many parts of the justice system.

The root of the problem lies in the fact that State and Federal governments throughout Australia (to a greater or lesser extent, depending on the government in question) no longer regard the administration of justice as a core function of government. It has apparently become a luxury item, for which the user must pay. In this way, the funding of the justice system is going the way of health and education. Two examples illustrate the point. The diminishing value which governments place upon the principle of equal access to justice for all citizens is reflected in the cuts to legal aid. The second example is the increasing tendency for governments to increase court fees to such an extent that they become a barrier to access to the justice system.

There is also an astonishing degree of antagonism currently being shown towards the judiciary and the legal profession: we are not just any cartel, we are *the* cartel. Even newspapers such as the *The Australian Financial Review* carry columns that regularly indulge themselves in extreme and ill-informed abuse of lawyers and the legal system. A common allegation is that the independent Bars of Australia serve their own interests. The best response to this allegation was made by the architect of the Law Council of Australia, and one of the great members and supporters of the Victorian Bar, Sir John Latham. In a paper entitled "Law and the Citizen" (1949), his Honour stated:

> The legal profession need make no apology for being concerned with its own interests. The legal profession is the profession upon which the citizens depend for the purpose of obtaining justice, for the purpose of defending their rights, and of redressing their wrongs. The existence of a competent and independent legal profession is of the greatest value to the community.

Part of the role of the Bar Council is to advance the interests of a strong and independent legal profession. In so doing it is advancing the democratic rights of all citizens.

One of the curiosities of life at the Victorian Bar is the opportunity to observe that while some policy-makers recognise the value of an independent legal profession and many policy-makers show their willingness to tap into the unique legal resources of an independent Bar, at the next moment they are all capable of turning a deaf ear to the Bar's views concerning the administration of justice. As always, the Bar Council has made itself available to policy-makers to make a responsible contribution to new developments which impact on the justice system. I suspect — although I do not hope — that issues of so-called "self-interest" like legal aid, the rights of criminal defendants and merits of the adversarial system will continue to challenge the next Bar Council, and that it will be required to build upon the hard work of its predecessors.

However, even while the Bar Council continued its efforts to increase legal aid funding, to protect common law rights, to protect the independence of counsel, and to ensure that the Bar retains its competitive edge, it has been faced with a range of new challenges that have tested its flexibility. We have been required to adapt rapidly to the new regulatory environment: the Bar has instituted new regulatory protocols, and new practice rules. The Bar Council has formulated a five-year financial plan which will ensure the security of the Bar in a rapidly changing market for legal services. We have instituted a new continuing legal education program, and we have opened new facilities (Douglas Menzies Chambers, the library, the mediation centre). We have maintained strong and productive lines of communication with other Bars and professional associations in Australia and overseas, with the courts, with Federal and State politicians of all parties, with academia, with law students, and with the print and electronic media. And, most importantly, we have taken on a greater degree of public responsibility for the administration of justice — a degree of responsibility which, in simpler times, a Bar Council would not have been called upon to accept. This Bar Council has acted on an increasingly wide range of issues, defending the operational independence of the Auditor-General, defending the judiciary, opposing attempts to increase court fees and the closure of community courts.

At the Readers' Dinner a few weeks ago, Michael Rozenes Q.C. reminded the readers that Hitler paved the way for his dictatorship, and for the Holocaust, by attacking the independence of lawyers and the judicial system. The form of totalitarianism represented by the Nazi Party was most triumphant when lawyers were most compliant. We, as lawyers, must always try to remember that independent advocates and institutions like the Bar are bastions of individual liberty and the rule of law. The passage of the Legal Practice Act has not altered the fact that the Bar continues to have public, as well as professional, obligations and responsibilities. The force of Sir Owen Dixon's statement that "the Bar occupies an essential part in the administration of justice" is as great as ever. Just as a barrister's first obligation is to his or her client, so the Bar Council's first obligation must be to serve the community: and just as the community must value the legal profession, the legal profession can only justify its existence by reference to its ability, as a whole, to champion the rights of the community and its constituent individuals. I strongly suspect that, in the future, circumstances will continue to require Bar Councils to speak out on matters which, although not affecting the interests of barristers directly, nevertheless impact upon the integrity of the justice system, and upon the community: that is, upon the conscience of the Bar.

There have been many highlights in the life of the Bar in recent months. It has been a particularly successful year for the Bar in terms of judicial appointments. Since the last issue of *Bar News* was printed, the Bar Council has welcomed Justice Paul Guest and Justice Heather Carter to the Family Court of Australia. The annual Bar Dinner was also particularly successful this year: it was attended by 368 people (73 of whom were women), and offered the Bar an opportunity to have as its guest one of Australia's most distinguished jurists, Sir Gerard Brennan, immediately following his retirement from the office of Chief Justice of Australia.

These were happy moments, but the task is not complete. It is no simple matter to maintain the Bar's core values and at the same time ensure that the Bar is fully equipped to change with changing times. It remains to be seen whether the efforts of this Bar Council have been successful in this respect, but there are some encouraging signs. Despite the "revolution from above" brought about by the Legal Practice Act, our membership base is strong. Members of the Bar have supported the Bar's five-year plan, though the introduction of the plan necessitated subscription increases. A few weeks ago the Bar invited a record number of readers to sign the Bar roll. These new barristers come from diverse ethnic backgrounds, and nearly one-third of them are women. At the Bar Dinner, Sir Gerard Brennan passed comment on the extent to which the Victorian Bar has provided a career path for young lawyers which is challenging but highly accessible; indeed, in comparison with other Australian Bars, uniquely accessible. It seems clear that the Bar is continuing to attract the best lawyers from all areas of professional practice. This is perhaps the most encouraging sign of all.

Lastly, I want to thank the members of the Bar Council, and the Bar generally, for their support.

Neil J. Young
Chairman

Statutory privilege for sexual assault victims enacted

DURING the Autumn session, Parliament has enacted legislation creating a statutory privilege, belonging to sexual assault victims, protecting their counselling and medical records from disclosure in legal proceedings. I would like to take this opportunity to give members a summary of this legislation.

The Department of Justice is also in the process of assessing applicants for the Magistracy. I would like to inform you about the new process being developed.

EVIDENCE (CONFIDENTIAL COMMUNICATIONS) AMENDMENT ACT

The practice by counsel of subpoenaing the counselling notes and medical files of sexual assault victims has become more frequent in recent times and has led to calls for legislative intervention.

The Victorian legislation is based upon the model in New South Wales which was based upon Canadian legislation. In 1996, the Victorian Community Council Against Violence also convened a forum, which was widely attended, that developed a legislative proposal to protect counsellors, notes from being improperly used in sexual offence matters. This was also taken into account.

Prior to this legislation, when a party issued a subpoena for the production of documents, they would usually be brought to the court and placed in its custody. The court would then determine any objections to the subpoena itself or the production of documents referred to in the subpoena. The court would determine whether to grant permission to a party to inspect the documents. Even where there was no objection to inspection, the documents remained under the control of the court and the court could refuse inspection for good reason, such as where the document contains irrelevant material of a private nature. Where there was an objection, the court could not permit inspection unless there is a valid reason.

Unfortunately, this process was not as strictly enforced as intended. Access to counselling and medical files which contained irrelevant and highly sensitive information about the victim was often granted.

As a consequence of the uncertainty and fear about whether the content of these files may be revealed in court proceedings, counsellors and victims were less candid in sessions thus reducing the effectiveness of the counselling in assisting the victim. Victims were discouraged from reporting crimes fearing their personal matters discussed in counselling will be available to the defendant for use in the court process.

This is not to say that counselling and medical files may never be relevant. The aim of the legislation is to ensure the relevance of sensitive information is fully considered prior to its disclosure by the court.

This legislation requires the court to be satisfied that the following criteria are met before it grants leave to a party to inspect the documents or for evidence to be adduced:

- the evidence has substantial probative value to a fact in issue in the proceeding;
- other evidence of equal or greater probative value is not available; and
- the public interest in protecting the confidential relationship is substantially outweighed by that of admitting into evidence something of substantial probative value.

This is to be decided by the court on the basis of the individual circumstances of each case.

Victims, counsellors and medical practitioners are able to make submissions to the court.

The Government considers that the legislation strikes an appropriate balance between protecting confidential communications between the victim and doctor and ensuring the court has before it all appropriate and relevant evidence relating the case.

ASSESSING APPLICANTS FOR THE MAGISTRACY

Members of Bar may be aware that interviews for vacancies for the Magistracy are taking place.

During 1993, I established an Advisory Committee on Magistrate and Tribunal member appointments to independently assess and recommend to me suitable applicants. The Committee comprises of two representatives who are nominated by the Bar Council and Law Institute, Chief Parliamentary Counsel, the Victorian Government Solicitor and senior officers within the Department of Justice.

The role of the Committee is to assess applications to short list for interview, undertake confidential referee checks and interview applicants to determine suitability. The Committee meets several times to discuss and assess applications to ensure that no high quality candidates are overlooked.

Once interviews are completed, the Committee makes recommendations to me to add the names of suitable applicants to an existing pool. When vacancies arise, I recommend an appointment to Cabinet for consideration and approval from that pool. The appointee is then submitted to the Governor in Council for approval.

We have found that knowledge of the functions, responsibilities and terms and conditions of appointment as a Magistrate have not been as well known to appointees as expected. Therefore, on this occasion it is proposed to give those on the short list the opportunity of attending an orientation day so that they will have a better understanding of the position and will be able to obtain any additional information they require.

Jan Wade M.P.
Attorney-General

Legal Profession Tribunal: publication of orders

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

Name of practitioner: Paul Jens (the "legal practitioner").

1) Tribunal Findings and the Nature of the Offence
   a) Findings
      The Tribunal's finding was that the conduct of the practitioner was conduct that fell short of the standard of diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner and therefore amounted to "unsatisfactory conduct" within the meaning of section 137 of the Act.
   b) Nature of Offence
      The conduct complained of was that the practitioner, during the course of his leader's final address to the trial Judge, forwarded to the defendant a formal plaintiff's offer of settlement without any authority of the plaintiff to do so.

      In relation to this complaint the Tribunal said that "there was no suggestion that there was a wilful failure of the practitioner to conduct himself as required, it was simply a case where Junior Counsel had the bright idea that by acting very quickly before the end of the address he might wring out of the TAC some extra money for his client by way of costs as between solicitor and client. As a matter of judgement Counsel was confident that the defendant TAC would reject the offer. In performing this smart move at a very late stage with great dispatch he overlooked his fundamental obligation to seek the consent of his lay client, and as a matter of judgement he underestimated the effect upon the TAC and its lawyers of the persuasive address by the practitioner's leader."
2) The orders of the Tribunal were as follows:
   a) The legal practitioner is reprimanded.
   b) The legal practitioner shall refund to the complainant on or before 20 May 1998 the amount of his relevant basic brief fee being the sum of $2,250.00.
   c) The legal practitioner on or before 22 June 1998 shall pay to The Victorian Bar Incorporated its costs of and incidental to these proceedings which are agreed and fixed at $5,680.00.
3) As at the date of publication no notice of appeal against the orders of the Tribunal has been lodged. The time for service of such notice having expired.

Name of practitioner: Timothy Sephton (the "legal practitioner").

1) Tribunal Findings and the Nature of the Offence
   That the legal practitioner was guilty of misconduct as defined in section 137 of the *Legal Practice Act* 1996 in that on two occasions he was, by reason of intoxication with alcohol, incapable of properly discharging his professional responsibilities to his client.
2) The orders of the Tribunal were as follows:
   a) The practising certificate of the legal practitioner be cancelled.
   b) During the period from 22 April 1998 to 1 January 2000 the legal practitioner may not apply for any practising certificate under the Act.
   c) The legal practitioner be referred to the Supreme Court for the court to determine whether the practitioner's name should be struck off the roll of practitioners.
   d) The Registrar shall take all necessary steps to effect the reference to the Supreme Court and shall forward to the Attorney-General a copy of the Tribunal's reasons for these orders under cover of a letter referring to the last two paragraphs of its reasons.
   e) On the next occasion, if any, when the legal practitioner applies for any practising certificate he shall forward to the body to which he applies a copy of this order of the Tribunal and a copy of the Tribunal's reasons.
   f) The legal practitioner shall pay to The Victorian Bar Incorporated its costs of and incidental to this application as itemised in the schedule being Exhibit X and fixed at $8,439.00.
   g) Stay until 24 August 1998 the order for costs save and except as to the amount of $367.00 being the witnesses fees of three police officers.
3) As at the date of publication no notice of appeal against the orders of the Tribunal has been lodged. The time for service of such notice having expired.

Female genital mutilation: the Attorney replies

Dear Mr Nash,

I refer to the article on female genital mutilation by Julian Burnside Q.C. in the Autumn Edition of the *Bar News*.

I would like to clarify a few issues regarding the Government's amendments to the Crimes Act which specifically define practices that comprise female genital mutilation.

Mr Burnside states that "The amendments to the Crimes Act betray no analysis at all of the ethical and cultural issues involved". This is not the case. The complex cultural issues in relation to female genital mutilation were thoroughly considered in drafting the legislation.

In November 1994 I asked a working group of the Victoria Women's Council and the Ecumenical Migration Centre to undertake extensive consultation with affected communities about female circumcision and related procedures. I attended one of the forums at the Centre and met with individuals with expertise in the area. The working group was also asked to advise on the education needs of the communities.

A key finding of the consultations was that although some women of the affected communities were not in favour of the proposed legislation, many other women supported the introduction of legislation to prohibit female genital mutilation because it would reduce the harm suffered by young women in the both short and long term.

The working group provided me with a number of options based on research into interstate and overseas initiatives, including advice from the consultant for the World Health Organisation on female genital mutilation who visited Victoria at that time. The Act has adopted one of these options modified on advice from the affected communities and the World Health Consultant.

Female genital mutilation is a violation of the human rights of women and children. It is not unusual for girls and women who have undergone the more extensive procedures to develop serious medical problems. It is a practice which is contrary to the United Nations' Declaration on Violence against Women and the United Nations' Convention on the Rights of a Child. Australia is a signatory to both agreements.

In the article Mr Burnside argues that female genital mutilation "must be recognised as a continuum of behaviour", and not "a single form of behaviour which can be banned or condoned".

While the Government considered a number of options, we were persuaded by the World Health Organisation advice that legislation should set an unequivocal standard that all forms of female genital mutilation are inappropriate. Our amendments to the Crimes Act conforms with this advice.

The Government believes that education together with legislation is the best approach to eradicating the practice. As one aspect of the Victorian Government's education strategy, the Office of Women's Affairs has developed an information pamphlet on female genital mutilation for professionals and service providers who have immediate responsibilities for affected communities. The pamphlet has been developed in consultation with relevant agencies and reflects a whole-of-government approach including information on:

- clarifying what female genital mutilation is;
- communities which practise female genital mutilation and the reasons for the practice;
- the psychological and physical health effects of female genital mutilation;
- the health needs of women and girls who have undergone the practice;
- legal provisions in Victoria;
- education and support services;
- Protective Services and Community Policing responses; and
- contact points for help on the appropriate intervention or clarification of the law.

This pamphlet can be obtained by calling the Office of Women's Affairs on 9651 0530.

While Mr Burnside may not agree with the position the Government has adopted, he had no reason to assume that the position was reached without any analysis, consideration of the options or consultation with the relevant ethnic communities. He could have obtained information by making a telephone call to my office or the policy or women's affairs sections of the Department of Justice.

Yours sincerely

Jan Wade M.P.
Attorney-General

Sir Owen as motorist

Dear Sirs,

MAY I add a tailpiece to the interesting excerpt from S.E.K. Hulme's 1992 after-dinner speech about Sir Owen Dixon which was published in the Autumn issue?

The large black Armstrong-Siddeley to which S.E.K. refers was not bought for R.G. Menzies but was brought to Australia as part of the fleet of cars for the retinue of the Royal visit of 1954. There were four Armstrong-Siddeleys. After the tour they joined the Commonwealth car service, two in Melbourne and two in Sydney. As S.E.K. says, one (or, rather two) was (were) offered to Menzies but he preferred to keep the large old Buick of which he was rather fond. Dixon accepted the use of one of the Melbourne cars and one in Sydney and they remained his official cars until his retirement early in 1964. At Menzies' direction they remained in the fleet after the five years which was then the normal spell for Commonwealth cars. They were all sold after Dixon retired. His car was acquired by a hire company. By chance I travelled in it to Essendon not long before that airport closed to regular traffic. It had always moved at a stately pace but by then was so slow that I was lucky not to miss the plane. The driver knew the history of his car.

I cannot remember who used the other Sydney car, but the second car in Melbourne, to Dixon's amusement, was normally used by Alf Foster of the Arbitration Commission.

I do not think that Dixon was much troubled by the cars' grandeur. The trappings of office interested him not at all. But the cars were spacious and he was tall. Moreover the passenger section contained two collapsible seats facing the main passenger seat so that the cars were convenient vehicles to ferry three or four Justices to lunch. The Sydney car was regularly used for that purpose since the court-house was at Darlinghurst.

Dixon belonged to a generation for whom the use of surnames was natural. R.G. Menzies, who had been his pupil, did address him as Dixon. So did J.B. Tait and so too all the other High Court Justices, of any age. I never heard him address Sir Wilfred Fullagar, whom he had known for almost fifty years, otherwise than as Fullagar. Associates, tipstaves and drivers were addressed in like manner, but were not expected to

reciprocate. The court crier, who was not of personal staff, he addressed as Mr Webb.

He was a stickler for propriety, not for its own sake but because he observed good manners. Visitors to his chambers entered through an ante-room and were required to be announced. One of Dixon's oldest friends was the federal bankruptcy judge T.S. Clyne, whose chambers in the Law Courts Place building were above Dixon's. His baptismal names were Thomas Stuart but he was universally known as Sammy. He came uninvited to see Dixon one morning. He had recently been knighted and I did not know by what title he had been dubbed. I asked Dixon whether he should be announced as Sir Thomas or Sir Stuart. Dixon thought for a moment and then with the cackling laugh S.E.K. Hulme has described said "How about Sir Samuel?" as he came out to greet him as Clyne and tell him the story.

Dixon's regular driver in Melbourne was Harley ("Huck") Finn. He was a Tobruk rat who had seen much of the world. He occasionally drove for other users of Commonwealth cars and had no illusions. He idolised Dixon. "After the good Lord made the Chief and old Willie Fullagar," he once said to me, "he threw the mould away."

James Merralls

Choosing an Internet service provider

Dear Bar News

YOU recently ran an article on connecting to the Internet and some aspects of using an Internet Service Provider (ISP). I should like to add to what was said in that article which may assist members.

ISP economics

An ISP is a commercial entity that makes its money by charging you, the customer, for accessing the Internet via its computers — it is your link to the net. While they charge you by the hour they are in fact charged by the megabyte downloaded. The average charge is around 20c although this can vary upwards or downwards depending where the information is downloaded from. The average customer downloads around one megabyte an hour although good users can get from 4 to 5 using a 33.4k modem. This is only the cost to the ISP of the petrol and doesn't include wages, costs of expensive computer equipment, telephone lines, rent, help and support, etc.; when all that is taken into account a cost to the ISP of at least $1.50+ per hour is reasonable. Profit is on top of that.

Apples and Pears

Almost all ISP's offer you a "headline" rate of $x.xx per hour or all you can eat for $xxx per year.

First we will deal with all you can eat offers. You can see from the economics of the business that an offer of unlimited access for $100/$300 or whatever per year does not add up. And indeed it doesn't if you want the sort of service I would expect barristers would need. To make this pay, restrictions have to apply which has led to them being known as "sludge nets". We will look at devices that ISPs can use in both charging methods to make their businesses viable. If an ISP is making a loss it is likely it will go out of business, as some have already done, leaving you a great deal on paper only.

Hours aren't hours. The chances are one ISP's hour is not the same as the next. This makes it exceptionally hard to compare. We will now look at some methods of calculation.

Methods that affect the price you really pay

The monthly package

This is probably the biggest one in use. It goes something like this. You pay say $20 per month and are entitled to 10 hours access to the Internet. Beyond that you pay say $5.00 per hour. You might be offered a variety of packages to "suit your needs". This example has a headline rate of $2.00 per hour and the ad will usually extol this. You don't need to be a genius to work out that if you only use 5 hours in the month you are actually paying $4 per hour or if you use 30 hours you are also paying $4.00 per hour! In fact the only way you can get the advertised rate in this example is if you use exactly 10 hours, which is highly improbable. The tip is don't go down this path. Use an ISP that either charges for the time you actually use, charges you by the megabyte or sells (and just as importantly) resells a block of hours that you can use as you wish. They do exist.

Joining charges

Sometimes you will be asked to pay once-only joining or connection charges, usually between $25 to $50. There is no basis for such a fee as connecting you is part of the ISP's business and in any event takes all of about 2 minutes. It's a bit like a shop charging you to enter! This is another example of exploiting ignorance.

Time blocks

You should be charged by the second. By this I mean if you use 2 minutes 26 seconds you should only pay for that exact time. Some ISP's will charge per 1, 5, 10, 15 even 30-minute blocks meaning your 2 minutes 26 seconds will be counted as 3 minutes, 5 minutes, 10 minutes or more as the case may be. Depending on your usage pattern and the size of the block, one ISP's $2 headline hourly charge can be five or more times another's $2 headline charge.

First time connect (modem-to-user ratio)

The sacred cow is a ratio of 10 users per modem. This is a little misleading and is a guide only. What is important is that the ISP has a policy that you connect to the Internet first time every time. If all the ISP's modems are in use you don't get on. The sacred cow is that a ratio of 10:1 ensures this. While it is likely that it will, it ultimately depends on the ISP's customers' usage patterns, number of permanent connections, etc. This may dictate more modems or allow for less as the case may be. Sludge nets almost always have many many users per modem so connecting is a real problem. Obviously you can't be costing them money if you can't use the service.

Bumping

This is a sludge net favourite. After a set period of time, often an hour, you are automatically disconnected. Of course you can dial in immediately and reconnect (if you can!). I wouldn't tolerate this practice.

Governing

An ISP can in fact control the amount of megabytes you can download in a given time if it chooses. The software is simple. Generally you will never be told about this. I think this comes very close to cheating but is an effective way of making a contact that that doesn't seem to add up, in fact, to be profitable.

Configuration

The Internet is a means of accessing many different functions: e-mail, the world wide web, newsgroups, FTP, gopher, telnet, chat, MUDs, MOOs, conferencing, etc. It is possible for the

ISP to configure its computers to favour some functions at the expense of others. A large ISP will usually take an average position, which may not suit your usage, whereas a smaller one will generally be set up to suit the use of most of its customers. I mainly use e-mail and the world wide web and have a big and small ISP. The small one is better for the web (and a lot cheaper too) but the big one is better for newsgroups. This is not actually a trick but shows the difficulty in comparing ISPs.

CONCLUSION

The Internet is an area characterised by consumer ignorance. The tried and true cliches apply: caveat emptor, you get what you pay for, bigger is not necessarily better, never give a sucker an even break, etc.

There are good ISPs out there with all the features I have described above. It's really a matter of knowing what it is you are consuming.

The right price for a good service is somewhere between $2.00 and $3.00 per hour. Any more and you're paying too much — less and you should be looking for pitfalls.

Two final comments. Credit cards are by far the most efficient way to pay and assist the good ISPs to offer the service and price you should expect. Some, and this applies to at least one large ISP, have an installation disk that changes your computer's settings that makes it difficult to change to someone else. I would want a guarantee from your ISP that that won't happen.

Basil L. Stafford

The Hon. Justice Guest

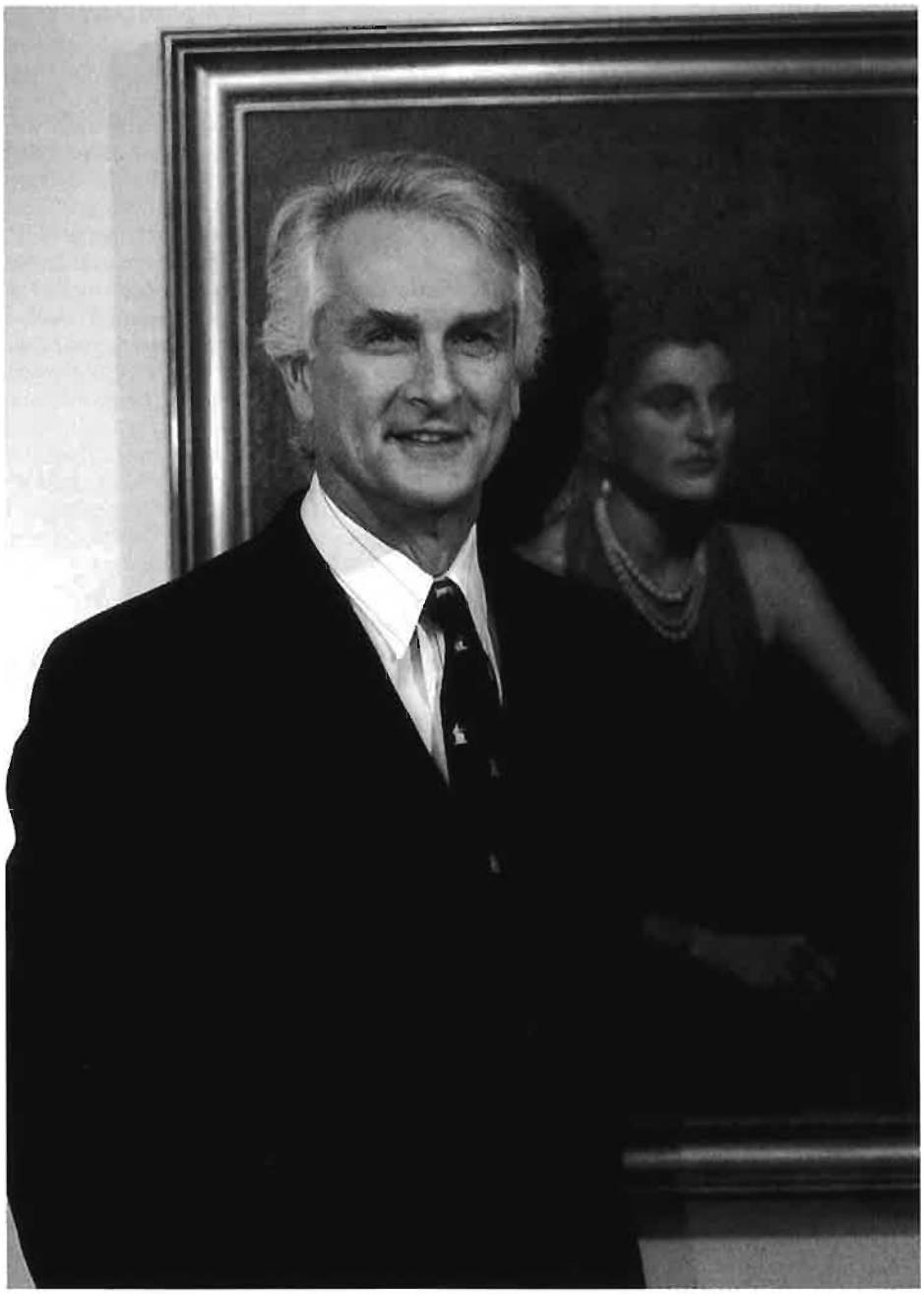
ON 1 May 1998, the Honourable Justice Guest was welcomed to the Bench of the Family Court of Australia. A member of this Bar for over 28 years before his elevation, the ceremonial sitting to mark his Honour's appointment was attended by many members of both State and Federal judiciaries, some of his former instructing solicitors, all six of his readers, many members of this Bar, friends, family members, and some former clients.

Any discussion of his Honour's time at this Bar must start with the observation that he was a big contributor to many of the Bar's activities, in addition to being one of its most admired and loved characters. It was no surprise that shortly before his appointment, his Honour was among those honoured at a dinner held to recognise the Bar's living legends.

Born in 1939, his Honour attended Wesley College, showing great promise in athletic events from an early age. His Honour rowed in the first eight in 1956 and 1957, and also captained athletics in 1957. From Wesley, his Honour went to Melbourne University, graduating LL B in 1964. His Honour's rowing prowess quickly took him to the highest levels of international competition and he represented Australia at the 1960, 1964 and 1968 Olympics, as well as in many other international competitions.

Admitted to practice on 1 April 1965, his Honour served articles at Ridgeway Pearce & Co and remained with that firm until signing the roll of counsel for Victoria in February 1969, reading with John Greenwell. During his Honour's first six years of practice at the Bar, the *Matrimonial Causes Act* 1959 was still in operation and his Honour had the distinction of appearing in the last case to be heard in Victoria where damages were sought for adultery. Appearing before Sir Esier Barber, his Honour obtained an award of $2,000 against the co-respondent, a significant award in those days!

In his Honour's time as a junior, only seven years' experience was required in order to take a reader. It is indicative of both his Honour's willingness to contribute to the Bar by taking readers, and the high regard in which he was held, that his Honour had many seeking to read with him, and from the first year in which he was able to take readers, he took one each year until taking silk: Joan Mcintosh, Michael Watt, Linda Dessau, (now the Honourable Justice Dessau), Murray Mcinnes, Judith Lord and Pam Darling. After fourteen-and-a-half years as a junior, his Honour took silk in 1983 and had completed fourteen-and-a-half years as a silk at the time of his appointment.



The Hon. Justice Guest

Other major areas of contribution to the Bar and its activities included his Honour's membership of the Ethics Committee from 1989 to 1997, his chairmanship of the Family Law Bar Association from 1986 to the time of his appointment, and for many years his Honour organised and participated in the family law component of the Bar

Readers' Course. As Bar Council Chairman Neil Young Q.C. said in his speech of welcome, "You have provided the Bar with countless hours of invaluable expertise, and the Bar Council is greatly in your debt."

His Honour's career at the Bar was by no means confined to family law and he ventured into many jurisdictions, but none quite so spectacularly as crime. There also his Honour competed at the highest degrees of difficulty and achieved record outcomes. In the case which his Honour prosecuted involving the Gippsland vet who claimed he had been locked in the boot of his car by his wife's killers while they performed the murder, his Honour secured a conviction where the evidence against the husband was largely circumstantial and he maintained his innocence to the end. Another notable case in his Honour's criminal practice involved one of five street kids charged with murder in what became known as "the Shakespeare Grove street kids killing". His Honour's defendant was found guilty of manslaughter. His Honour was not present when Justice Beach handed down his sentence, but Bill Morgan-Payler, his Honour's junior at the trial, attended sentencing and telephoned to advise the result. "How did we go?" asked his Honour. "You set a record!" came the reply. "A bond for manslaughter?" was his Honour's optimistic enquiry. "No, Paul," came the response, "Twelve years with a ten!" As far as can be ascertained, that record remains unbroken!

His Honour was involved in some of the leading cases in family law, including cases that went to the High Court. Many of his Honour's clients were people who had, like him, reached the pinnacles of success in their chosen field of endeavour and his Honour identified and empathised very closely with those clients, often forming friendships which lasted long after the dust of litigation had settled.

A major influence in his Honour's life was his rowing coach and friend for 35 years, the late Alan Jacobsen. He wrote about his Honour in these terms:

Paul Guest is an extrovert personality. He had whimsical ideas. He kept himself, and everybody else, motivated and entertained, while the serious business of training and repetitive, and sometimes monotonous, practice continued. His volatile wit seemed to be a happy relief to the crew after my own rather dour criticisms, and rare praise. When Paul Guest was of a mind for it, his rowing would be copy-book. For all his natural ability, however, he could be absolutely wayward. No one could bolt on the roller rails quite so fast and exasperatingly as he. "When he was good he was very very good, but when he was bad he was wicked!" although, one could add, always with charm. Some of the speakers at his Honour's welcome suggested that Alan Jacobsen's words should not be confined to his Honour's rowing activities!

His Honour was a leader at the Bar in every sense and will be remembered for the friendship and guidance he gave to his colleagues, the example he set as an advocate of the highest order, and for his irrepressible humour and charm. The Bar has lost a true leader — the Family Court has gained a wealth of experience and talent.

Mr Justice Graham retires

HIS Honour was born on 11 July 1938. He was educated at St Kevins and De La Salle College and later attended Melbourne University, where he completed his law course.

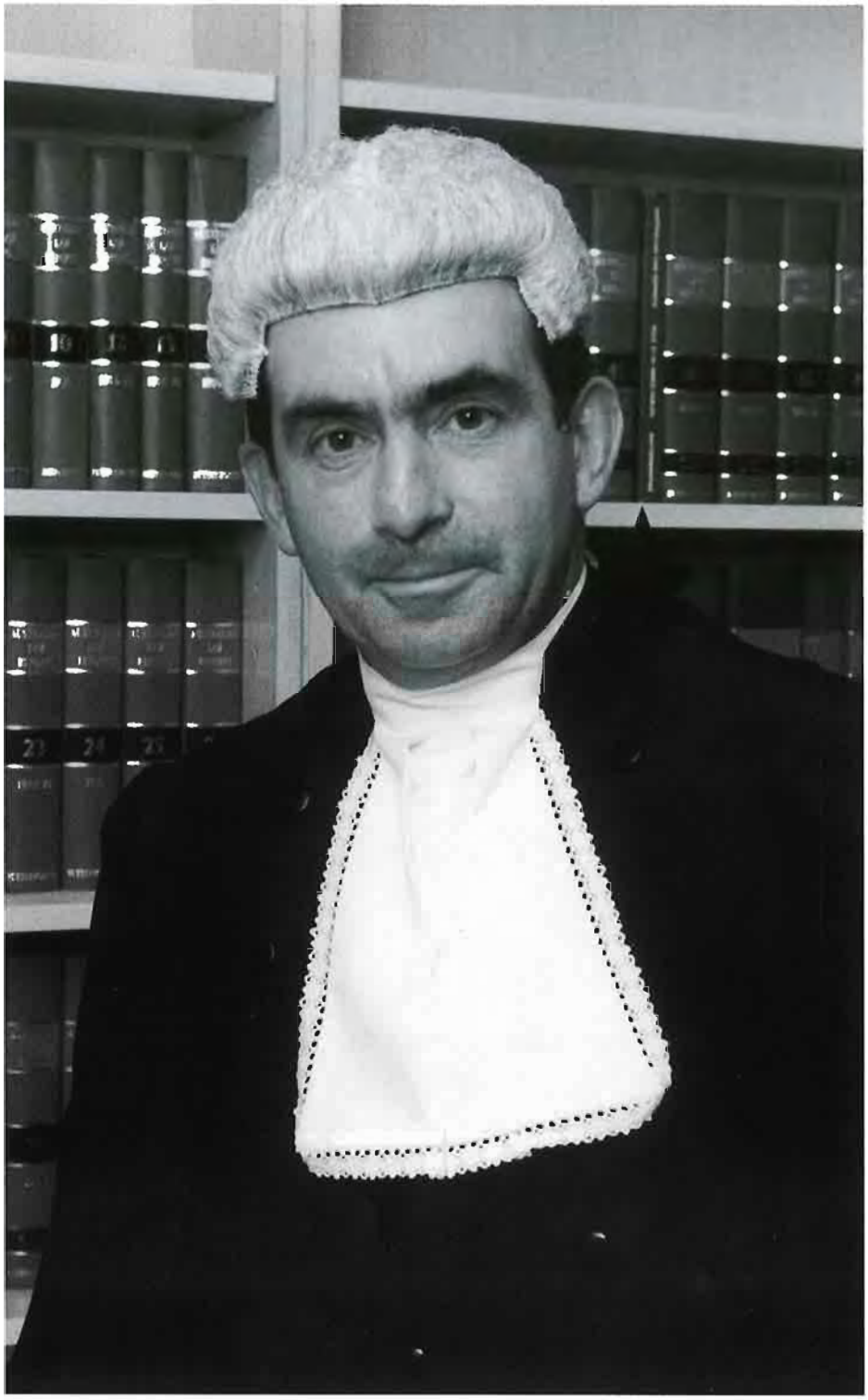
As a student he worked with Mr Williams of the firm of McInerney Williams & Curtain where he met Mr Patrick Cannon, a solicitor then employed by that firm. When Pat Cannon commenced practice at Sunshine, His Honour followed and was articled to him. His first "case" was representing a Sunshine Football player before the VFA Tribunal who was charged with a number of assaults upon opposing Yarraville players. Notwithstanding the hopelessness of the situation, a valiant, if unsuccessful defence was put forward. So launched His Honour's career.

His Honour came to the bar in 1956 and read in the chambers of Hubert Fredrico, now Justice Fredrico of the Family Court. He developed an extensive practice in personal injuries and crime, and later in town planning and family law. He had nine readers. He was appointed to the Family Court in 1988. He conducted the trials before him with the keen efficiency with which he ran his practice at the bar.

His Honour has always had an interest in sport, particularly the South Melbourne Football Club (the mighty Swans) which he followed through to Sydney. He has also been a very keen tennis player and has played B grade pennant. He has latterly taken up golf with the same devotion that he has given to tennis. His extra-curricular activities have included being on the Committee of the Kooyong Tennis Club for a short period. He has now taken up the guitar, which may be a reflection of his earlier entrepreneurial activities with the Esquire club which, as devotees of the '50s, will appreciate was a regular venue on Friday evenings.

His Honour is presently completing a doctrinal thesis at the University of Melbourne. He has taken chambers in Winneke Chambers and intends to return to practice at the bar.

John V. Kaufman



Mr Justice Graham

Judge Somerville

JOHN Somerville was born at Lilydale in Tasmania and educated as a boarder at Scotch College in Melbourne. He served with the R.A.A.F. during World war II. After discharge he returned to Tasmania where he completed his law course and was admitted to practice in the Supreme Court of Tasmania on 21 February 1948. He practised as a solicitor in Huonville in Tasmania for some years, during which time he met and married his first wife Nan by whom he had one daughter Alison of whom he was immensely proud.

John had always aspired to an advocate's life, particularly in the field of common law. As there was no separate bar in Tasmania he migrated to Victoria, worked for a time with the Crown Solicitor, was admitted to practice in Victoria on 1 April 1953 and signed the roll of counsel on 2 October 1953.

John Somerville

He read in Selbourne Chambers with Mr H.T. Frederico then one of the leading juniors of the common law bar. His clerk was the late Jim Foley. John soon established a substantial practice in personal injury and other common law work in Melbourne and on circuit particularly in Wangaratta. He was a good-looking character with a sardonic wit that came in words produced from the side of his mouth. He was part of a group of strong common law barristers such as Bilson Q.C., Crockett Q.C., Southwell Q.C. and Scurry Q.C. in the days when jury cases were jury cases and intensive statistics and "serious-injury" issues were unknown. He took silk on 28 November, 1967 and was very soon thereafter appointed a Judge of the County Court of Victoria.

On the Bench he was known for three things: first, his vice-like grip on the Wangaratta circuit, secondly, the rounded shoulders of his Associate, Mr Fay, who was bent over by the weight of carrying John's angling equipment, barbecue, tent, fire boots, dry-cleaning and three ice boxes, and thirdly, his "special relationship" with his "band of circuiteers". It had been reliably related that on circuit the co-operation between Judge and counsel was such that the Court's business was handled not only well but always with proper despatch. Thereafter he was free to follow that most gentlemanly of pastimes along the mountain streams of north-east Victoria. He would return to his hotel at Wangaratta in the late hours of the night, on the way leaving wet garments on the clothes line of some local and unsuspecting solicitor. Back at his hotel he would summon the night porter to arouse the happy band of circuiteers so they could enjoy his hospitality while listening to the story of "the one that got away". The next morning he would arrive on the bench promptly at 10.30 a.m. full of judicial vigour to the despair of counsel 20 and 30 years his junior.

He retired early from the bench on 17 December 1979 determined to enjoy his retirement as much as he had enjoyed his time on the bench. About this time he married his second wife Anne who was at least his equal as an angler. They spent 20 happy years at Crafters in the Adelaide Hills with annual extended visits to the Tasmanian Lake Country in their favourite pursuit of the elusive "rainbow" until his death on 1 November 1997.

Resolving the Republic Issue by 2005

Richard E. McGarvie AC

February's Constitutional Convention was enormously successful in revealing to the public for the first time the importance and complexities of the issue and the crucial differences in practical effect between the safe and risky ways of becoming a republic.

That the place in history of the model and the method of community choice which emerged from the Convention for the 1999 referendum will be no more than that of an educational step contributing to the later resolution of the issue is not the fault of the Convention process.

It is the result of the model's basic structure having been designed in the warm glow of theory, promoted in the public relations mode designed to attract votes, and its actual impact on our system in the harsh realities of politics receiving little attention. At the Convention other structural parts were added on, so as to get the votes on the floor that enabled the model to draw the highest level of minority support there.

I consider that the referendum in 1999 will fail because Australians are instinctively a wise constitutional people. They are well aware that they have the responsibility for maintaining for future generations one of the world's oldest and best democracies, which Australians have built. A referendum campaign tends to be all-revealing. By the time they vote, people will realise how the model would damage essential elements of our democratic system and how much it would strain our federation to have the Commonwealth become a republic while the States are left to fend for themselves.

The referendum will not resolve the republic issue because numerous voters, at heart favouring a republic, will put their democratic system and federation first, and vote against it.

TURNBULL MODEL

I will identify by the name of the person who moved its adoption each of the four models finally considered at the Convention. The Turnbull model, which will be the subject of next year's referendum, would depreciate the calibre of persons chosen as head of state by transferring the choice from the Prime Minister alone to the political parties; give the President the mandate of parliamentary election with its temptation to act as rival to the government; and inhibit or paralyse the protective mechanism relied on by the democratic system in a constitutional crisis.

These questions have little to do with constitutional law. They depend on an understanding of the realities of constitutional and political culture and practice in this country. This practice is played hard. In 1867 Walter Bagehot perceived the contrast between Australia's political culture of harsh, merciless realism, and that in Britain.[1] We also have some of the tightest discipline in the democratic world from our political parties, which typically follow their immediate political interests. These and other factors led Geoffrey Sawer, in his classic *Federation Under Strain,* to recognise that established constitutional customs are not binding conventions in Australia unless backed by so effective a practical penalty for breach as to make them binding in practice though not in law.[2] Within this environment our constitutional and political achievement has been impressive. Any republic model must work within this environment. The task is to assess the practical effect a model would have on the complex and interacting dynamics and balances of our working constitutional system.

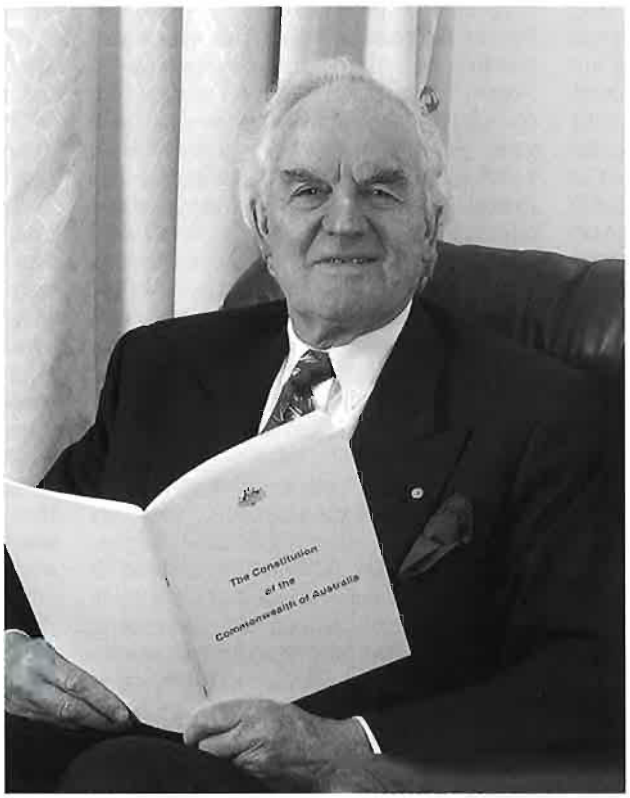
The Turnbull model would have a committee to consider community nominations for President and prepare a short list of suitable people.

The Turnbull model would have a committee to consider community nominations for President and prepare a short list of suitable people. Among its members the committee would have representatives of each political party with party status in the federal Parliament. After considering the short list, the Prime Minister and Leader of the Opposition are to agree on a person, who would become President when elected on their motion by a two-thirds majority of a joint sitting of the federal Parliament. The President would be appointed for five years but could at any time be dismissed instantly by written notice from the Prime Minister.

At present, as part of our system of representative democracy, the elected head of the elected government, the Prime Minister, has the sole responsibility for the choice of a Governor-General. Seen as acting for the whole community, and alone receiving all the praise or blame, the Prime Minister' s standing and reputation are affected by the community's assessment of the quality of the choice. Few challenge that our Prime Ministers have satisfied community expectations well. That will all be changed by immersing the selection decision in the processes of the political parties and making it just another political issue. No federal government for fifty years has had a two-thirds majority of a joint sitting. To get that majority, both Prime Minister and Leader of the Opposition will have to refer the choice to

their party rooms where veto and prejudice are likely to combine to produce a mediocre President. While each side of politics would veto top-ranking politicians from the other side, overseas experience, as in Ireland, points to the real prospect of a second-rank politician emerging when politicians choose a President.

Unlike the present system, it is highly likely that the names under consideration would be leaked to the media from the short list committee and later from the party rooms. As well as unofficial canvassing of suitability for office, there will be pressure for parliamentary inquiries similar to Senate inquiries into the suitability of nominees for the Supreme Court of the United States. In allowing his or her name to go forward, a person would be aware of the real prospect of facing baseless allegations of discreditable conduct within the glare of publicity. Allegations would be prone to surface from those opposed to the nominee or to the supporting Prime Minister, or from sheer seekers of publicity. Many, such as those who have been our Governors-General, would be reluctant towards the end of their career to subject their reputations and families to this.



Richard E. McGarvie AC

It would be naive to think the effective choice of President would be made in the joint sitting. It would be made in a political deal between the Prime Minister and Leader of the Opposition following reference to their party rooms. Political deals always have political terms, and the opposition's commanding position would enable it to demand a high price. It has the final say and if its price is not met it can refuse to agree and leave the government unable to have a President elected. The public would be unaware of the terms of the deal or of the actual reasons that led to the President's election.

Far from the calibre of the person chosen as President being the inescapable responsibility of the Prime Minister, responsibility will be unidentifiable, with everyone able to blame everyone else.

Under the present system a Governor-General, having been chosen by the current or a former Prime Minister, has no shadow of mandate that would encourage opposing the government. It would follow from party discipline that a President agreed to by government and opposition will receive virtually all the votes of the joint sitting. This will usually far exceed the parliamentary mandate of the Prime Minister, who may have the support of a small majority in the lower house, have been elected leader by a small margin in the party room and have minority support in the Senate. Under our system, every influence of the setting within which the head of state works should counteract any temptation to exercise effective political power or influence. The Turnbull model instead gives the encouragement of the mandate from the people's representatives to incite the temptation. The title 'President' would further fuel that temptation. The community familiarity with the office of the same name in the United States would generate expectations that an Australian President would pursue a similarly predominant role. The President would be under pressure to go as far as practicable without incurring the penalty of dismissal for breach of convention. Once the community accepted the President as a kind of political overseer of the Prime Minister, it would become politically difficult for the Prime Minister to impose upon the President the penalty of dismissal for breach of the conventions against exercise of political power and influence. It is essential to our kind of democracy that those conventions have practical binding force and it is the ready availability of the penalty of prompt dismissal for breach that makes them binding.

In the various versions of the model, the provision for presidential dismissal has gone from the extreme of an undismissible President, which would have ruined our democracy, through quickly abandoned changes, to the extreme of an instantly dismissible President, which will block the system's protective mechanism needed in constitutional crisis. I pointed out on 1 May 1997 that as no federal government had for over fifty years had a two-thirds majority of a joint sitting, the provision for dismissal by that majority would in practice create an undismissible President.[3] No change was made until the first day of the Constitutional Convention when Mr Turnbull proposed dismissal by a majority of the House of Representatives. Two days later he added that pending the House's decision on dismissal, the President could not dissolve Parliament. The following week all that was abandoned. Under Mr Turnbull's final motion the President is instantly dismissible by the Prime Minister's written notice. The dismissal would be referred to the House of Representatives, which could express lack of confidence in the Prime Minister but the Prime Minister would usually have a majority there so that would be a remote prospect. The House would have no power to cancel the dismissal.

The method of dismissal of a President could be of overwhelming importance in a constitutional crisis. Most constitutional systems have their provisions to deal with emergencies. In some systems the head of state takes over government. In our system a protective mechanism enables the head of state, as a last resort, to exercise reserve powers so as to refer an intractable constitutional situation to one or other of the decision-making centres of our de-

mocracy, Parliament or the electorate, for solution. It is only to be done to protect the democratic system from stalling or from illegality or constitutional abuse of a grave nature and from the damage or destruction that could cause.

The Senate's power to deny financial supply to a government, provides an example of the need for the protective mechanism. If a confrontation such as occurred in 1975 remains intractable, there comes a time when, in the long term interest of the democratic system, the head of state has no real option but to dissolve Parliament for an election. In order to do so it may also be necessary to dismiss the Prime Minister and appoint another. It is very much in the interest of the system, and community confidence in it, that the head of state should neither take such action in a pre-emptive way without warning, so as to ambush the Prime Minister, nor refrain through fear of the consequences from taking the action when necessary.

Sir John Kerr thought that unless he dismissed Mr Whitlam without warning, the Prime Minister, on being warned of the prospect of the reserve powers being exercised, would have telephoned the Queen and advised her to dismiss Sir John, which the Queen would forthwith have done. He thought therefore, that if he warned the Prime Minister, he would lose the capacity of dissolving Parliament for an election. Sir John was wrong on that. First, effecting the dismissal of the umpire during a constitutional crisis would produce such an electoral backlash that it would be politically unwise to try. Second, an attempted dismissal would not in practice deprive the Governor-General of the capacity to dissolve Parliament. It treats the Queen as an inexperienced amateur to assume that if advised to dismiss, she would not use her entitlement of time to investigate and consider whether to counsel the Prime Minister against persisting with his advice. If the Prime Minister persisted, she would be bound by convention to dismiss. While not bound by rules of natural justice, ordinary administrative fairness would demand that the investigation include obtaining the Governor-General's version of events. The Governor-General, who has a right of immediate dismissal of a Prime Minister, would have adequate opportunity to use it and dissolve Parliament.[4]

The Turnbull model would convert John Kerr's unfounded fear into the stark constitutional reality of the future. It would deprive the head of state of primacy over the Prime Minister in the capacity to bring about the other's dismissal, which is essential to the effective operation of the protective mechanism. The President in a situation of deep intransigence, such as that of 1975, would be faced by only repulsive options. Warning the Prime Minister, the fair and expected course and the one likely to optimise the prospects of a political solution of the impasse, would allow the Prime Minister to jam the protective mechanism and render it inoperable. A Prime Minister who allowed passion for the retention of political power to override good political judgment could prevent dissolution by dismissing the President and, in turn, any replacement administrator. If, to avoid this, the Prime Minister was dismissed without warning, it would damage public confidence in the system and the President would encounter the outrage and loss of reputation that Sir John Kerr did. It would be open to the President to do nothing and allow the democratic system to stall and slide into chaos.

When Australians appreciate the realities of the Turnbull model, they will agree with Sir Anthony Mason. In predicting that the referendum in 1999 is unlikely to succeed, he said of the model: "I don't think it is satisfactory in terms of the relationship between the Prime Minister and the president, on the question of dismissal".[5]

The Constitutional Convention recommended that the Turnbull model be put to referendum only to change the Commonwealth system to a republic. Only the amendment power under s. 128 of the Commonwealth Constitution is to be relied on. It is left to each State to decide whether, when and how to become republican. The ludicrous result of the Commonwealth and some State systems becoming republican, while one or more States remain monarchies, would produce pressures on the Commonwealth to act to force the monarchic States to become republican and provoke threats of secession.[6]

Constitutional lawyers of high credibility hold the opinion that s. 128 of the Constitution does not alone enable the Commonwealth to change to a republic and that s. 7 of the *Australia Acts* 1986 prevents a State making that change by the ordinary amendment provisions of the State constitutions. I do not share those opinions but recognise the potent use likely to be made in a referendum campaign of the argument that a vote, "Yes", is a vote for constitutional invalidity.[7]

POST-1999

The Canadian experience of the last twenty years shows how continued, unresolved dispute on basic constitutional provisions can destabilise a democratic federation. We should resolve the republic issue in this country as soon as is practicable.

If the Turnbull model fails at next year's referendum, this will not resolve the republic issue and the community will look towards resolving the issue upon a model such as mine or upon a direct election model.

The experience of the Constitutional Convention demonstrates that, while at first sight there is attraction to a popularly elected head of state in a democracy, deeper thought reveals the incompatibility of that model with our kind of democracy. In our system the case for electing the head of state is no stronger than the case for electing our judges. A popularly elected head of state would have the enormous mandate of the only office-holder elected by the whole of Australia. The impracticality of even a multi-millionaire being elected without the support of the finances and resources of a political party would ensure as President a politician who was a member of or obliged to a political party. Most people of the standing and reputation expected of a Governor-General would not be prepared to run in such an election. When the mirage of codification of presidential conventions is seen through, it is recognised as little more than a panacea for the credulous. Only a substantial remaking of our constitutional system could accommodate direct presidential election. A political party candidate receiving thirty-five per cent of first preferences, and elected with a majority of fifty-two per cent after preference distribution, would not be well placed to perform the unifying function we expect of a head of state. Both directly elected presidential models before the Constitutional Convention, the Gallop model and the Hayden model, would make dismissal of a President an inordinately slow and difficult process at any time and usually an impossibility at times of minority government.

The growing community realisation of the unsuitability of direct election models for the Australian style of democracy was reflected by the fact that the

McGarvie model, which started as a rank outsider in May 1997, had by the time of the Constitutional Convention gathered the support to eliminate both direct election models and finish as runner-up to the Turnbull model. I will keep my model before the public eye so that, if next year's referendum fails, it will be seen as the natural alternative for resolving the republic issue.

My model originated when the Republic Advisory Committee sought my views in 1993 on the minimum constitutional changes necessary to achieve a viable republic. I advanced the model as the natural way of taking the evolution of Australian democracy the further step to a republic. I do not side with republicans or monarchists but am concerned to maintain the quality of our democracy whether in a monarchy or a republic.

The model provides the practical and simple way of becoming a republic while maintaining in full, the quality and strength of our present system of democracy. It will transfer to the Governor-General and Governors the Queen's remaining powers so that they become actual rather than de facto heads of state of their systems. The Queen's only active duty, appointing or dismissing the Governor-General and Governors, will be done in each system, on the advice of the Prime Minister or Premier, by a Constitutional Council of three experienced Australians, set up under the Commonwealth or State constitution. The only operational change the model makes is to substitute for the Queen, Constitutional Councils to perform her remaining duty. They will do precisely what the Queen does now, no more and no less, and do it in the same way as she does. Because the Governor-General and Governors will be performing the same responsibilities, within the same setting and subject to the same incentives, penalties and influences, they will continue to operate in a republic the same way as they do now.

Most of the criticism of the model has concentrated on two areas. Many monarchists and republicans have an almost supernatural belief that the only thing that keeps the Governor-General and Governors complying with constitutional conventions is the exertion over them of some mysterious and unspecified power or influence of the Queen. It is said that without a monarchy the conventions would no longer bind. This is a myth. For decades the Queen has had no power or influence beyond that of good example. What keeps a convention binding is the backing of an effective practical penalty for breach. As the penalties come from the operation of the system, and as the system will operate in the same way, all conventions now binding will remain so.

Criticism has been directed to the Constitutional Council and is based mainly on emotional grounds. It has often been misrepresented that a Council will choose a head of state or be an advisory Council on the appointment. Of course, the Prime Minister or Premier still chooses. The Constitutional Council, like the Queen, would be entitled to counsel against the appointment of an inappropriate person, but, if the Prime Minister or Premier insists, will be bound by effective convention to appoint. The convention will be backed by the practical penalty that failure to appoint within fourteen days of written advice to do so would result in automatic dismissal from the Council and the public humiliation that this would involve. The Council's only power or function is to appoint or dismiss on advice. Ordinarily it would only meet about every five years when a new head of state is to be appointed.

The Council has been criticised as elite or elderly but there are good reasons for its membership. The community would not accept anyone choosing the members, so they will be determined by automatic constitutional formula. To avoid conflict of interest with an existing position, they will be retired people. Because a Constitutional Council will be essential to the working of the constitutional system over the century or more that new constitutional provisions are likely to last, there must always be an ample supply of members. This is best ensured if they are retirees from constitutional positions which will last for that time. They need the constitutional experience and community respect that go with high constitutional positions of trust. People experienced in the responsibilities of head of state or judiciary have advantages over those from the two political organs of government, the Parliament and government.

To meet these requirements the Commonwealth Constitution will provide for places on the Constitutional Council first to go to retired Governors-General with priority to the more recently retired. Places left unfilled will go on the same basis in turn to retired State Governors, Lieutenant-Governors, High Court Judges and Federal Court Judges. For thirty years there will be a temporary provision that if there is no woman in the first two places filled, the third place will go to the woman with the highest priority amongst the eligible persons. My earlier proposals for age limits revealed a great deal of ageist prejudice against community elders. I now propose for all members an upper age limit of 74 or such age as Parliament prescribes, and no lower limit. Retired judges would be eligible only if they had served for ten years.

State Constitutional Councils would have similar membership and operate in the same way.

I consider that Australians will not be attracted to the approach of treating the Commonwealth system as the only one on which the community should concentrate with regard to the republic issue. My proposal is that the issue be resolved at the same time for the whole federation. To resolve it in this way would involve the production of a great deal of consensus and co-operative federalism. It would be pointless to seek consensus on whether or not we change to a republic. Consensus on how to go about resolving this issue should be achievable. Consensus would be needed on the model for head of state in a republic that would best maintain the strengths and safeguards of our present system of democracy, and on a method of making a clear choice between that model and the present system in a way that does not overstrain our federation and is constitutionally valid beyond credible argument.

The referendum campaign and decision in 1999 is likely to reveal to voters the lasting advantages which a dull, tried and reliable model for republican head of state, like mine, has over the untried novelty of the exotic imported models. It is significant that in the Morgan Poll taken throughout Australia during the first week of the Constitutional Convention, the answers to one of the questions gave the following percentage preferences: Monarchy — 29; Republic with President elected by two-thirds majority of joint sitting — 34; Republic based on the McGarvie model — 26; Undecided — 11. Answers to another question revealed that only 23 per cent of respondents said they were aware of the McGarvie model before being told of it by the pollster.[8]

By relying on s. 15(1) of the Australia Acts 1986 (Commonwealth and U.K.) in addition to ss. 128 and 51(xxxviii) of the Commonwealth Constitution, Australians

could make a clear referendum choice between the best republic model and the present system. It could be made in a way that, according to the choice, the Commonwealth and all States would together become republican or would all remain monarchic. The mechanism would be a referendum upon Commonwealth legislation to amend the Commonwealth and each State constitution to the republican form, which would only have any effect if approved by a majority of voters in Australia and each State and if requested (or concurred in) by each State Parliament. Amendments made to Commonwealth and State constitutions in this way would be valid beyond credible argument.[9]

Daunting though this method is, it seems to me the only practical way of resolving the republic issue.[10] I consider that a second referendum could be held in about 2005. The referendum of 1999 will have impressed on the public mind both the difficulty and importance of resolving the issue. It will also have demonstrated that the way to resolution is not through the shrill disputation of ordinary political contest but by the approach appropriate to the resolution of a constitutional issue — the building of consensus. By the perspectives of constitutional history, if Australia resolves the issue by 2005, it will have acted with expedition.

NOTES

1. Walter Bagehot, *The English Constitution (1867)*, Crossman edn, Fontana, London 1963, pp. 237–8.
2. Geoffrey Sawer, *Federation Under Strain*, MUP, Melbourne 1977, pp. 133, 177–92.
3. "Our Democracy in Peril: The Safe Way to a Democratic Republic", Paper published substantially in the *Australian*, *Age* and *Herald Sun*, 1 May 1997 and fully in (1997) 101 Vic B.N., p. 31.
4. Sawer, p. 184; Bill Hayden, *An Autobiography*, Angus & Robertson, Sydney 1996, pp. 293–4.
5. Tony Parkinson, "Republic 'would fail' at first referendum", *The Age*, 2 March 1998, p.A2.
6. Former Solicitor-General, Gavan Griffith Q.C., has expressed the opinion that, if the Commonwealth becomes a republic, a law of the Commonwealth Parliament could sever the links of a State to the monarchy: Bernard Lane, "Q.C. rules out State monarchies", *The Australian*, 10 March 1998, p.6.
7. The arguments that s. 128 is inadequate are outlined by Professor Greg Craven, "The Constitutional Minefseld of Australian Republicanism", *Policy*, Spring 1992, p.33. In respect of State constitutions the argument is that s. 7 entrenches the monarchy.
8. Morgan Poll, conducted 4–5 February 1998 throughout Australia, Finding No. 3054, Questions 4 and 7.
9. This mechanism has much in common with that recommended by the South Australian Constitutional Advisory Council, First Report, *South Australia and Proposals for an Australian Republic* (Associate Professor Peter Howell, Chairman), September 1996, chaps 5 & 7.
10. My Internet papers at **http:/www.chilli.net.au/~mcgarvie** give additional information on my model and approach.

List of crazy lawsuits never ends

DEAR Ann Landers: So you like "crazy lawsuits"? In the three years I have been writing the Random Nuts column for *Graffiti* magazine, I've collected some doozies and am pleased to pass some of the best along. Here they are:

After he threatened to sue McDonald's for $5 million, a former research scientist was arrested for extortion. The scientist claimed he ate part of a fried rat tail he found in Happy Meal french fries, but a grand jury said the tail came from one of his laboratory rats.

A convict wants $1000 because the state of New York made him eat "vegetable diet loaf" as a punishment for violating prison rules.

Another prisoner is suing because he claims secondhand smoke from other prisoners is ruining his health, even though he smokes himself.

The all-time Random Nuts champ has to be a convicted Brooklyn burglar who is suing the state for $989 billion because prison guards beat up his jacket, which he wasn't wearing at the time.

In Boston, two women unsuccessfully sued for reinstatement after they were fired for refusing to work the night of December 25. They claimed their Catholic beliefs prevented them from working on Christmas. The two women were employed as betting clerks at a local racetrack.

The US Supreme Court refused to hear an appeal of a case filed by a woman against her local electric company. The woman said she had a nervous breakdown because the company published her rice recipe in its cookbook without her permission. Her husband also put in a claim for "loss of companionship".

A Los Angeles attorney filed suit on behalf of his miniature poodle when the dog was ejected from a cafe's outdoor patio. The attorney said that since pigeons and other birds are allowed to roam freely on the restaurant's property the ejection was a violation of the Constitution's equal protection clause.

A 73-year-old Milwaukee woman claimed she became sexually attracted to other women and started having spontaneous orgasms after an electric bingo scoreboard fell on her head. The woman asked for $90,000 from the church where the bingo game took place, but the judge threw out her case.

A woman in Israel is suing a TV weatherman because she says his prediction of sunny skies caused her to go out in the rain and catch the flu.

Environmentalists in Japan filed suit on behalf of a flock of geese in an attempt to get the government to earmark funds for wetlands preservation, but a judge ruled that geese can't sue anybody.

A worker at a truck plant in Virginia sued his employer after it suspended him for attacking its mascot. The worker lost it when an actor, dressed as a giant rooster and hired by the automaker to discourage tardiness, snuck up behind the worker and crowed. The judge ruled in the worker's favour, noting that "the bird had it coming".

I hope your readers will enjoy these. — John Wehrle, Random Nuts editor, *Graffiti* Magazine, Charleston, W.Va.

Dear John: Thanks for some beauts.

Ann Landers appears Sunday through Friday in the *Free Press*. Write to her and other columnists at PO Box 828, Detroit 48231.

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 final instalment of a three-part analysis of *The Cancer in Litigation.*

(7) Delusions of Grandeur

THE common law system is a product of the empirical rather than the rationalist view of the world. The two are worlds apart. To convert a common lawyer to an inquisitor is like bringing unrestrained capitalism to a doctrinaire communist. Pollock and Maitland saw the genesis this way:

> The behaviour which is expected of a judge in different ages and by different systems of law seems to fluctuate between two poles. At one of these the model is the conduct of the man of science who is making researches in his laboratory and will use all appropriate methods for the solution of problems and the discovery of truth. At the other stands the umpire of our English games, who is there, not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed. It is towards the second of these ideals that our English medieval procedure is strongly inclined. We are often reminded of the cricket match. The judges sit in court, not in order that they may discover the truth, but in order that the may answer the question, 'How's that?'

As the High Court observed on another occasion, a trial does not involve the pursuit of truth by any means. Or, as Sir Owen Dixon observed, "the object of the parties is always victory, not absolute truth".

The Return of the Inquisition

There is a drift away from this view. There is a tendency to seek to determine not just what the rules say is the preferred view on the evidence in that particular case, but something that can, if the inquiry is wide enough, be held up as absolute truth. Some such thinking was presumably behind the suggestion that courts could order people to publish the truth in a libel action. This is all very well until someone comes along later with a better version and the contrary result is held to obtain.

The immense effort put into the investigation of a case by the parties and their lawyers in big cases encourages the notion that absolute truth may be within grasp. I have referred to the tendency for the paper-chases or witchhunts to wind up like something that more resembles a Royal Commission — truly an inquisition that the judges who know best stay well away from — than a common law trial. Where people can get badly hurt in litigation is where the judge is persuaded to take an acute interest in an area of inquiry generally and make pronouncements upon a course of conduct by professional people or others in the public eye that may go a lot wider than the case warrants, and which may well be found to be unwarranted or unfair if all of the material that would be available to a Royal Commission were available. The trouble with the preliminaries to big civil cases — the interlocutory steps prior to trial — is that they were meant to shorten the trial, not lengthen it, or make it impossible, or make it something it was not designed for. If we have got to the stage where we have developed a system of interlocutory steps that not just lengthens the trial, but puts it beyond reach, then we have truly brought ourselves undone.

There is a similar tendency for appellate courts to expand their role. These courts may be able to afford fuller analysis than the trial judge. But their first job is to decide the case. It makes you wince when you hear the Crown say that some citizen's affairs provide the appropriate "vehicle" for the consideration of a point of law. How much choice did the litigant have about getting into the vehicle before it hit this particular lamp-post? When Justice Cardozo remarked that "The sordid controversies of the litigants are the stuff out of which great and shining truths will ultimately be shaped", this was better news for the jurists than the litigants — the litigants just want the sordidness to be over; they can leave the shining lights to all those who go in for that sort of thing.

Of course some of the older judges flirted a little with the strictness of the law of precedent; but they did not flaunt it. Of course it was a fairytale that judges only declare the law and do not make it. But did this fairytale do any harm? If the answer is yes, the next question is whether it did any more harm than its repudiation, and the robust assertion that the judges have the right to make laws. A premise of this position, sometimes not entirely inarticulate, is that the executive and the parliament cannot be trusted to do their job properly, a view that has been significant in the development of administrative law, and also in the growing tension between the courts and the other two arms of government.

The Revival of Rationalism

In some appellate judgments, there is a faith in logic, a doctrinaire element, and a commitment to the rationalist method that can lead to an expansiveness that the system was not designed for. All lawyers know the celebrated dictum of Justice Holmes that the life of the law has not been logic, but experience. It is at the heart of the distinction I am presently discussing. It is as well also to recall his related observation in the same lecture that the law could be safely left to the development of judges "as the law is administered by able and experienced men who know too much to sacrifice good sense to a syllogism". His Honour was there speaking of the ability of the common law judge to prevent ossification, and apply the law to new cases, but the observation equally applies to the danger of letting logic dictate a result in terms of a paramount development that experience suggests may be too much too soon.

In one political speech case (*Theophanous*), Sir William Deane got to a position that many thought was the one logically dictated by the premises of the others of the majority, namely, that the freedom of political discussion implied by the Commonwealth Constitution was wholly inconsistent with the common law of libel as it applied to political discussion. The problem was that this view, which had not been professed for decades even in the United States where there is an express constitutional stipulation for the freedom of the press, was contrary to all the precedent in the High Court, was unlikely to command the intellectual assent of others, and simply did not appear to be sensible. The fact that there was no coherent majority for that decision at least provided the basis for its review by a later court. While Roscoe Pound derided "the jurisprudence of conceptions" for leading to the constrictions of Procrustes, we are perhaps getting into trouble at the other end with too much expansion, rather than too little:

> Legal conceptions were like Lewis Carroll's watch. Facts had no more effect upon the one than time upon the other. Ideas may require such things. But men revolt against them and this revolt of men is one cause of legal development.

The other problems of delusions of grandeur are more familiar. It is hard for the big firms and the top silks to avoid an impression of a felt superiority that is generally unwarranted and never welcome. The price of this sense of superiority is that it does nothing to discourage the largesse that ought to be lavished on a case so that it is clear to the world that the case is worthy of the attentions of those engaged in it. The result is a gaggle of pin-striped clones pushing trolleys behind their billowing betters lost in a stream of their own self-consciousness. It may even be doubted whether this makes for good television. As an indulgence in *amour propre*, it is nothing if not dear.

(8) The Failure of Will

At a meeting of administrative lawyers at the ANU while the Hawke government was still in office, the faithful got a bit of a jolt when a minister of that government, Mr Peter Walsh, said he hoped the lawyers were all enjoying themselves because he did not think the system could afford their indulgence much longer. The President of my tribunal (the Victorian AAT), Justice Rowlands, had earlier revved up some of his Commonwealth brethren. His Honour said that he came from Victoria, a place where the judges wrote their judgements at night. This was a reference to what we understood to be the pleasingly relaxed structure of hearings at the Commonwealth AAT that permitted time off, and apparently equal time off, for writing decisions.

Taking time off to write decisions has, I think, only happened in superior courts at first instance, at least on any scale, in the last twenty years. There is apparently a new trend, starting now, for judges to take time off to prepare for a case. When judges take time off, there is a problem for litigants. It is, after all, the function of a judge to judge, and our constitutional settlement in its most celebrated document expressly forbids that justice be denied or delayed. It is common now for judgments at first instance to be reserved for weeks, months and sometimes years. This can put an appalling strain on litigants, even corporate litigants. It can also be grossly unfair. I do not know how people can decide controverted issues of fact involving issues of credit when they have allowed sufficient time to expire effectively to forget all about it. It would be as well for the judges to remember that the basic assumption of a fair trial may be refuted for judges as well as juries, if too much time is allowed to pass, and the ability to remember and weigh the evidence is correspondingly impaired.

They apparently order things better in England. In 1986 Sir Frederick Lawton had this to say of a delay of a judge in giving judgment of less than eight months (in the experience of his Lordship, an unprecedented delay):

> . . . long delays in delivering judgment can cause disquiet and suspicion amongst litigants who lose — and those who win may feel they have been deprived of justice far too long. Delays of this length should not occur unless there are compelling reasons why they should; and, if there are such reasons, it would be prudent for a judge to refer to them briefly. In this case, for all we know, there may have been such reasons. We have kept in mind that the parties had a most patient hearing and that the judge must have kept a very full note to deliver the judgment he did.

What is required for a judge to stay on top of his or her workload is, I suppose, the same that is required of any other lawyer — some dedication, hard work, and commonsense. If the system is making this impossible, people deserve to be told so that they can make the appropriate representations to the politicians. But it is sometimes hard to avoid the impression that it is not the pressure of work, but simply a sulky indifference to its performance, or a concern that in other contexts would be said to be one of demarcation or relativity, that is the root cause of the problem. Perhaps again the problem relates to the difficulty now that people apparently fear about giving simple opinions which refer only to the evidence and conclusions of law necessary to sustain the decision. The wealth of the law does make it harder, but the parties just want

a decision, not one that explores every avenue, and seeks to seal off all grounds of criticism.

There is at least a potential problem of dedication for advocates. The cab rank rule at the Bar was I think more honoured in the breach than the observance, but market forces nowadays mean that counsel can be obtained for cases on a contingency basis. This is also the case with solicitors. It is as well that we retain an independent Bar so that people will have access to some of the best legal minds in the country to represent their interests, if necessary against the force of the State, big corporations or unions.

There is a problem here with the big firms. They act for a number of the big corporations, and the big corporations have a number of firms on their panel, so that the big firms can be reluctant to engage in litigation against big corporations. Since they are now all in the market competing for government work, and are capable of being duchessed by government, they may start to feel a similar reluctance in acting against governments. If this is the case, the system will require strong intermediate firms with access to appropriate independent counsel.

(9) Overloading the Gravy Train — Bring Your Own Trolley

A lot of the problem of litigation comes from over-servicing. This happens when the lawyers are doing more than is reasonably necessary. It is a problem lawyers share with doctors. For a long time the law has recognised that the loser should not have to pay for everything that the other side's lawyers may think is necessary. But the gap between what the law will allow for costs and what in fact is incurred appears to be increasing. In the big cases it can be enormous. Indeed the difference between the costs that a party will spend, and what the party will recover, is often a critical factor in inducing that party to settle.

Some of this over-servicing appears to be the product of greed. Otherwise it is just a lack of judgment and care. The ordinary litigant must wonder, why if the case is of substance, two barristers are required as well as a number of lawyers. The same litigant must also wonder why so much paper, or so many computer terminals, are necessary. As I mentioned earlier, a part of this problem started with the large allowance made by the rules for photocopying. But it has since got out of hand. If you are hearing a case in the AAT involving the law of charity, there will inevitably be a reference to the definition of Lord Macnaghten in *Pemsel's Case*. It occupies part of one paragraph. You will almost always be given the whole case, some 61 pages. It is of course always entertaining to read the prose of Lord Macnaghten, particularly when he is diverting himself with a discussion of the customs of the Moravians, but it is quite unnecessary, and quite wrong, for someone to be asked to pay for this.

Another obvious problem with the gravy train is that the lawyers have no incentive to get rid of a case quickly. People on both sides of the profession are now paid by the hour or the day. CEO's of big firms have red lights that go up in their heads or on little screens when "hungry hours" appear. These people may not have been brought up within the discipline of the profession of the law. You may be looking at a firm that has more than 500 lawyers (much more than the Victorian Bar when I joined it in 1971) and a turnover well in excess of $100,000,000 (many times greater than the annual budgets of the High Court and Federal Court combined), but very high fixed overheads. It will be interesting to see which of the big firms survive strangulation at the hands of their own economic imperatives.

It is hard with some barristers to avoid the impression that time has just stood still and appears to be of no moment. Some take an inordinate time to get to the point. Indeed there still appear to be adherents to the Alfred Hitchcock school of advocacy in Victoria that suggests that the point should not be unveiled until the last possible moment, and then only as something of a surprise.

If the judges give themselves some reading time to resolve a case, it is probably a lot less than what senior counsel now require to prepare for it. A number of the factors I have referred to above make it hard for counsel responsibly to commence a case with only a conference the evening before. The age of Sir Patrick Hastings has long gone. The premium allowed for reading is part of the problem. My impression is that this may have started with the Commonwealth Crown, particularly in tax cases. They used to have very low brief fees, but were understanding on reading fees. That seems to me about as sensible as paying politicians a low salary but giving them plenty of latitude on travel allowances. I think also that the takeover litigation, particularly that involving BHP, led to distortion of the market in fees for lawyers. We may therefore still be suffering from what are described as the excesses of the '80s. Whatever may be the background, the current attention on payment by time spent, while simple enough in its rationale, has to be looked at. Perhaps we might even go back to the idea of a brief fee. If a lawyer wanted a house built, the lawyer would feel uneasy if there was no fixed price but a cost-plus contract and it was left up to the builder to say how much time the job would take. A lawyer who advised a client to enter such a contract would be likely to be sued for negligence.

The judges also have to accept some responsibility for the way the gravy train rocks along. It is their job to control the case, and keep the parties to the point, and also, I think, to discourage people from showering the room with paper, or computer terminals, unless it is affirmatively established that the process is likely to be conducive to the proper administration of justice, and in a way that the parties can tolerate.

(10) The Lure of the Cop-Out

We all have known judges who would go to great extremes to avoid having to hear and decide a case. When I started at the Bar, there was a magistrate who was famous for this. He would direct counsel to try to settle their case. They would say it had been tried but the process was futile. He would tell them to try again. When they came back to report to the clerk that they had failed again, his Worship had gone. What was truly remarkable, not to say lamentable, was the ill fate of persons within the acquaintance of his Worship to die at regular intervals such that he would be called off at short notice to attend a funeral. The problem is I think now no worse than it has been, although there is now one new factor at play.

Most cases settle. A lot settle at the door of court. The reason for those two propositions is plain enough. The congestion in the lists has meant that the courts have resorted to two strategies. One is to throw everything into the pot, and terrify people into settling, or give their lawyers a good reason to think seriously about settlement because they are not going to get on. The other is to encourage settlement by making a process available. The pre-trial conference,

which was more or less mandatory, has now become a court-ordered mediation.

Mediation is, and has been for years, the flavour of the month. It is working. There are some very good mediators who have done a very good job in settling some of the big and unmanageable cases. The results obtained in mediation have saved a lot of people a lot of money and worry. The trick in mediation is to get the litigants at the stage when they are, in the words of the play about the usages of power in administering the laws, "desperately mortal". It is important in a lot of mediations that those involved feel that they have had their say, and that their position has been put forward. It is a little like the need that some people have to have their day in court.

And if all else fails, this is just what they are entitled to. At the moment we are at the risk of driving people to mediation, and forcing them to settle, because the alternative is simply too awful to contemplate. If the safety valve allowed by mediation, and the possibility of driving people to agree, becomes seen as an alternative to having a binding determination of the issues by one of Her Majesty's judges, backed by the authority of the State, then the system has failed very badly. Just as there are more or less covert pressures on accused persons to plead guilty, so there is a lot of pressure on parties to settle. It is no bad thing to discourage people from litigation, and to encourage them to settle, but it is very wrong to conduct the process in such a way as to, in substance, deprive them of a fundamental right. Lawyers should not have to apologise for asking a judge to do the work of a judge. At the rate we are going, we could well privatise the whole justice system.

III CONCLUSIONS

We do, I suppose, spend the first half of our lives promising not to repeat the sins of our forebears by saying that we know more than those who are coming after us, and then we spend the second half of our lives violating that promise by saying that we used to do things better in our day. This sort of generational arrogance is, I think, a function of nature — at both ends.

In 1906 Rosco Pound delivered an address to the American Bar Association in St Paul Minnesota called "The Causes of Popular Dissatisfaction with the Administration of Justice". The judges and lawyers in the audience were not amused. A resolution for the printing of the speech was defeated. In the address Pound attacked "the sporting theory of justice", the preoccupation with technical points of procedure, and said that "A multiplicity of courts is characteristic of archaic law". In looking at the causes of dissatisfaction that lay in the environment of judicial administration, Pound listed the following: "(1) popular lack of interest in justice . . .; (2) the strain put upon law in that it has today to do the work of morals also; (3) the effect of transition to a period of legislation; (4) the putting of our courts into politics; (5) the making of the legal profession into a trade . . . and (6) public ignorance of the real workings of courts due to ignorant and sensational reports in the press". There was, apparently, a failure of morale. Although the origins may be different, we are, I think, in the same position today.

The system of law that I came to at the end of the 1960s had some very bad features. The law of divorce was to my mind an appallingly offensive relic of a bygone age. The court lists were unconscionably long and the judges had not assumed responsibility for their management. It looks now like that the community may not have been willing to afford the luxury that the running-down work and conveyancing provided as the staple for lawyers. There has since been a breaking down of some of the sillier old traditions and practices, so that we now look to be in trouble at the other end of having professional obligations wholly replaced by contractual rules like those that govern the acquisition of goods and services, and are not predicated on a duty to provide the knowledge and level of service derived from membership of a profession.

But although there have been many significant improvements, and although a lot of what I have written above serves as a personal catharsis, it does seem to me that the changes have brought with them other results that are not as good, and that I regard as unacceptable. It was simple enough to practise law back then. Now it is always hard and frequently unsatisfying. But the problems we have with our litigation cannot be put down to the deterioration in the law.

I began by referring to suggestions that the criminal justice system is out of control. For the reasons I have given, I believe that the state of the civil system is just as bad. There is general agreement among my clients and colleagues that we have lost the plot with litigation. It is not my purpose here to suggest remedies, although it will I think be obvious that I regard at least five matters as vital: (1) we have to get back to concentrating on hearing and deciding cases rather than concentrating on what goes on before and after; (2) we have to control discovery, or abolish it, even if there may be a risk of short-suiting some litigants; (3) we have to get rid of our facile, lazy and wasteful fascination with paper and bulk; (4) those retaining counsel should negotiate a fee which encourages expedition rather than dilatoriness; and (5) above all, we have to allow and require our judges to judge by hearing and determining cases expeditiously — if some people get unhappy about all that, it is just too bad because we cannot do more — we have tried, and failed. The word that the feminists use is *empowerment*, and I am beginning to understand what they mean.

When I did a course in mediation recently, my professors taught me that the first thing to do is to come to grips with the full extent of the problem, and then you can set about trying to fix it. It is, I suppose, a bit like Alcoholics Anonymous. In my view there is general unhappiness in the profession with the way larger civil litigation is conducted. If that is right, it is time we did something about it. Otherwise the risk is that we will just drown in our own detritus, and Her Majesty's judges will go quietly down with the rest of the ship.

NOTES

Criminal Trials Out of Control: *R* v. *Wilson & Grimwade* [1995] 1 VR 156, 163, 180. *DPP Reference Number 2 of 1996*, Court of Criminal Appeal of Victoria, unreported, 26 September 1997 (252/1996).

Craig and Bentley: *R* v. *Secretary of State Ex Parte Bentley* (1994) 2 WLR 101 (an application by the sister of Bentley against the decision of the Home Secretary to refuse a posthumous pardon).

Mrs Chamberlain: *Chamberlain* v. *R* (1983) 72 FLR 1 and *Chamberlain* v. *R (No. 2)* (1983) 153 CLR 521; *Evil Angels*, Bryson, Penguin, 1988.

Other Trials: Nuremberg: *The Anatomy of the Nuremberg Trials*, Telford Taylor, 1992, Alfred Knopf, 89, 164, 609. **Rasputin**: *Youssopoff* v. *MGM* (1934) 50 TLR 581, Sir Patrick Hastings KC: *Autobiography*, Heinemann, 1948 96. **Obscenity**: *The Trial of Lady Chatterley's Lover*, CH Rolph, Penguin, 1961, 152. **QBVII:** *Rebel Advocate*, Muriel Box, London, 1983, 147–69. Justice Jackson of the US Supreme Court led for the prosecution at Nuremberg. He later gave advice to counsel appearing before that Court which should be tattooed on all those of us who have to appear as counsel in any

tribunal: "The purpose of a hearing is that the Court may learn what it does not know, and it knows least about the facts. It may sound paradoxical, but most contentions of law are won or lost on the facts". "Some Suggestions for Effective Case Presentations", 37 *ABA Journal* (1951) 901; in "The Supreme Court and its Justices", *ABA*, 1987, 254, 261.

English Trials in 1976: Lord Devlin, *The Judge*, OUP, 1981, 55–6. In *Easing the Passing*, Bodley Head, 1985, Lord Devlin gave a full account of the trial for murder of Dr John Bodkin Adams from 18 March to 9 April 1957. He was assigned the case by Lord Goddard. "He did not sit silently behind the scales of justice watching for a grain to be added to one scale and a scruple to the other. The scales inside his mind were jerking all the time and the movements were fully signalled" (34). The trial judge regarded the prosecuting Attorney-General, Sir Reginald Manningham-Buller (later Viscount Dilhorne) with contempt. "I do not think that Reggie's tongue knew where his cheek was. It was his firm conviction always that what he was saying was right and that deviation from it by a hair's breadth would be wrong. This is what gave to his utterance the massiveness which lasted until a sense of absurdity took its place" (190).

The Trials of Mr Bond: Computer searches disclose 10 reported cases involving litigation between interests of Mr Bond and the Australian Broadcasting Tribunal, and 91 cases involving those interests in general.

Serbonian bog: Milton, *Paradise Lost*, Book 2, 592. (In 1934 Justice Cardozo said that insurance law relating to "accidental" could plunge into a Serbonian bog; considering a similar issue later, the Supreme Court of Colorado said "whatever kind of bog that is, we concur": the cases are mentioned in *AF & G Robinson* v. *Evans Bros. Pty Ltd* (1969) VR 885, 893–95.)

Judgment on Government: The 1986 case is *Minister for Aboriginal Affairs* v. *Peko-Wallsend Ltd* (1986) 162 CLR 24. The 1997 case is *Australian Heritage Commission* v. *Mount Isa Mines Ltd* (1997) 187 CLR 197. The question reserved was whether the land was a place that the Commission thought should be part of the national estate, or whether it was a place that "objectively answers" the statutory criteria. The Court agreed with Black CJ that the question suggested a false dichotomy. The BBC's legal correspondent, Joshua Rozenberg, published a book this year called *Trial of Strength, The Battle Between Ministers and Judges Over Who Makes the Law*, London, 1997. (Notice that the Parliament does not get a look-in in the title).

High Court on Equity in Commercial Transactions: *Hewett* v. *Court* (1983) 149 CLR 639 (equitable lien), *Taylor* v. *Johnson* (1983) 151 CLR 422 (unconscionability and mistake), *Commercial Bank of Australia* v. *Amadio* (1983) 15 CLR 447 (duty of banks to guarantors), *Legione* v. *Hateley* (1983) 152 CLR 406 (estoppel), and *Walton Stores (Interstate) Limited* v. *Maher* (1988) 164 CLR 387 (contract by estoppel). An example of the way equity can complicate commercial disputes is *Hughes Aircraft* v. *Air Services Australia* (1997) 146 ALR. A Californian company sued the CAA after losing a tender. The hearing went for 25 days. The judgment, including four pages of headnotes, covers 119 pages. Among other things, His Honour found: (1) there was a term to be implied *ad hoc* (as being so obvious to go without saying) that the Commonwealth would conduct its tender evaluation fairly; (2) as a matter of comity he would adhere to the view of Justice Gummow that there was no general implied duty of good faith and fair dealing in our law of contract, although his own view was to the same effect as that of Priestley JA that there was such a general duty; (3) in any event the nature of this contract involving a government entity in a competitive tender process was such that as a matter of law there was a term implied that the Commonwealth would deal fairly with its tenderers; and (4) the standards of integrity and loyalty required of a fiduciary are significantly higher than those of good faith and fair dealing, and embody *the morality of aspiration*, but that there was no fiduciary relationship between the Common-wealth and the bidders in this case. The trial judge, Justice Finn, had split the case. There may be more to come. Perhaps the Californians may get to feel at home.

Contracts out of Focus: "the genesis and aim of the transaction": *Prenn* v. *Simmonds* [1971] 1 WLR 1381, 1384; "factual matrix": *Reardon Smith Line* v. *Hansen-Tangen* [1976] 1 WLR 989, 997; implied terms: *Codelfa Construction Pty Ltd* v. *State Rail Authority of NSW* (1982) 149 CLR 337; misleading conduct: s. 52 of the *Trade Practices Act* 1974 (Cwlth), and related State acts.

Evidence for Further Discovery: *Mulley* v. *Manifold* (1959) 103 CLR 341, 343, 345 (Menzies, J). The phrase "train of inquiry" was pregnant with troubles. Sir Douglas Menzies dismissed one ground of the application (at 345) by saying "This is not merely clutching at a non-existent straw, but expecting to be carried by it".

Ethical Duty to Know the Law: Sir Owen Dixon, "Professional Conduct", in *Jesting Pilate*, Law Book Co., 1965, 131.

Henry James: The citation is as expressed by Manning Clark in his introduction to his Boyer Lectures. The full text (*Dencombe, in the Middle Years, The Complete Tales of Henry James*, Vol 9, 1964 Ed) is, I believe: "We work in the dark — we do what we can — we give what we have. Our doubt is our passion and our passion is our task. The rest is the madness of art". The full text is more apt for our discussion.

Counsel Playing to the Crowd: "Clients unfortunately desire, and their presence is apt to encourage, qualities in an argument that are least admired by judges." Justice Jackson, above (at 263). I cannot resist one other citation (at 257). "Be respectful, of course, but also be self-respectful, and neither disparage yourself nor flatter the Justices. We think well enough of ourselves already."

Duty of Counsel to the Court: *R* v. *Wilson & Grimwade*, above, 180.

Precepts of Sir Owen Dixon: strict legalism in constitutional matters: "Address on Taking Office of Chief Justice in 1952" (*Jesting Pilate*, 247); adherence to precedents in "Concerning Judicial Method", Yale, 1955 (*Jesting Pilate*, 158–9). Lord Denning was later to claim (by a process that elsewhere would be in danger of being described as verballing) that he had agreement from Sir Owen on at least some points of equitable estoppel: *The Discipline of the Law*, London, 1979, 217.

Emotive Language: *Mabo* v. *Queensland (No. 2)* (1992) 174 CLR, 1, 109, 120.

Lord Devlin on Judging: Devlin, *The Judge*, above, 17. His Lordship had earlier (9) remarked that: "In our own country the reputation of the judiciary for independence and impartiality is a national asset of such richness that one government after another tries to plunder it. This is a danger about which the judiciary itself has been too easy-going. To break up the asset so as to ease the parturition of judicial creativity, an embryo with a doubtful future, would be a calamity. The asset which I would deny to governments I would deny also to social reformers.". Amen. If the judiciary has been expanding its role because it does not believe the other two arms of government — the parliament and the executive — have been discharging their responsibilities (which is, I believe, the case both here and in England), then they can expect at least two consequences. First, they will provoke antagonism from those two quarters. Secondly, other people will tend to think the same of judges as they do of politicians and civil servants (which is not much). Both prophecies have been fulfilled.

Political Speech Cases: *Theophanous* v. *Herald and Weekly Times Limited* (1994) 182 CLR 104; *Lange* v. *Australian Broadcasting Corporation* (1997) 71 ALJR 818. In 1996 the High Court considered how the old law of innocent dissemination may apply to live TV broadcasts. Brennan CJ, Dawson and Toohey JJ said that in one case Lord Esher MR. had "rationalized rather than explained a decision" but "In fairness to Lord Esher, he added" an observation from which it was to be inferred that the common law would not sustain a proposition that was unmeasurable and unjust (*Thompson* v. *Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 585). Some may think this treatment of Lord Esher was a bit rich given the failure by the Justices of the High Court to explain the relevant law in its modern context. It is a shame, really, that we cannot ask Lord Esher for his opinion — at least we would not have been left in any doubt about what the opinion was. One of the sources of friction in England between the judges and the other two arms of government has been the invocation of "higher-order" law and a direct challenge to the supremacy of parliament: see

Rozenberg, 134–7, above.

Pound on Conceptions: *Interpretations of Legal History*, Macmillan, New York, 1923, 124.

Knight Errant: Cardozo, *The Nature of the Judicial Process*, 1921, Yale University Press, 141.

The Repudiation of Restraint: *Rozenberg*, above, 84–94, 122–4.

Bank Nationalisation Case: (1948) 76 CLR 1 (1949) 79 CLR 497. (The failure of moderation and the problems of the zealot are not new: the report of the argument of Dr Evatt KC in the Privy Council covers 43 pages; the opinion of the Privy Council, which was in substance obiter, covers 24 pages. Dr Evatt addressed for 14 days. The two Law Lords most favourable to his case died in the course of the appeal. It was said that Evatt had bored them to death: *Evatt, Politics and Justice*, Tennant, K, Angus & Robertson, 1972, 243.)

Roman Empire: ". . . the decline of Rome was the natural and inevitable effect of immoderate greatness. Prosperity ripened the principle of decay ... as soon as time or accident had removed the artificial supports, the stupendous fabric yielded to the pressure of its own weight": Gibbon, *Decline and Fall of the Roman Empire*, Everyman, Volume 4, 119.

Time Limits for Counsel: *Equal Justice Under the Law*, Supreme Court Historical Society, 1982, 136. (It was halved from one hour in 1970.)

Function of Common Law Judge: *History of English Law*, Pollock and Maitland, Cambridge, 1899, Volume 2, 670–1. Lord Devlin (above, 54) said that the essential difference between the adversarial and inquisitorial systems is that one is a trial of strength and the other is an inquiry.

The Pursuit of Truth: In *Whitehorn* v. *R* (1983) 152 CLR 657, 682 Sir Daryl Dawson said: "A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. When a party's case is deficient, the ordinary consequences is that it does not succeed". Adopted by the Full Court in *R* v. *Apostolides* (1984) 154 CLR 563, 576. For Sir Owen Dixon on absolute truth, see *Jesting Pilate*, above, 16.

Litigants as Source Material: Cardozo, *The Nature of the Judicial Process*. It is a question Law Schools could spend more time on with their students — who is there to mourn for those who were buried alive while we were building this prodigious edifice?

Logic in the Common Law: O.W. Holmes, *The Common Law*, Boston 1881, 1, 36.

Constitution against Delay: *Magna Carta*, 1215 (see 25 Ed 1, Chapter 29); *Imperial Acts Application Act* 1986. By the seventeenth century, Lord Coke had said this meant justice had to be free, full and speedy. In 1844 Mr. Baron Alderson had a pleasingly Victorian view of these rights: "I ought not to allow this case to go further. It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time, but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very injust to put him on his trial." (1844) 1 Cox C.C. 114; *Jago* v. *District Court* (1989) 168 CLR 23, 42–3, 62.

Failure of Judge to Give Judgment: *Rolled Steel Ltd* v. *British Steel Corporation* [1986] Ch 246, 310. The conclusion of the observations of his Lordship reminds us that they hear very big cases in England without a transcript — a heretical suggestion for the colonies.

Charity: *Income Tax Special Purposes Commissioners* v. *Pemsel* [1891] AC 531. Immediately before Lord Macnaghten gave his celebrated characterisation of the four divisions of "charity" in its legal sense, he referred to the observations of Lord Esher as being too wide. "If I may say so without offence, under conceivable circumstances, it may cover a trip to the Continent, or a box at the Opera. But how does it save Moravian missions? The Moravians are particularly zealous in missionary work. It is one of their distinguishing tenets. I think they would be surprised to learn that the substantial cause of their missionary zeal was an intention to assist the poverty of heathen tribes".

The Drives of the Big Firms: A lot of those on the bench now may have little understanding of the forces at work within the big national firms, some of which have turnovers higher than most public companies. A survey recently carried out at the University of Westminster presented some evidence that the interests of the big UK firms in *pro bono publico* is linked with the reinvigoration of the notion of professionalism, and "the wish of the profession, in defence of both its fragile status and autonomy, to strengthen the association of legal professionals with public service". See Boon and Abbey: "Moral Agendas? Pro Bono Publico in Large Law Firms in the United Kingdom" (1977) 60 *Modern Law Review*, 630. *The Australian Financial Review* of 5 September 1997 (at 25) quoted Justice Michael Kirby of the High Court as saying "The great debate for lawyers in the coming century . . . is whether the ascendancy of economics and competition, unrestrained, will snuff out what is left of the nobility of the legal calling and the idealism of those who are attracted to its service". If I may say so, I agree with his Honour. The proposed merger of KPMG and Ernst & Young is set to lead to revenue of $20 billion a year worldwide for the new entity.

Desperately Mortal: *Measure for Measure* 4.2.148.

Judges' Refusal to Judge: Perhaps Napoleon was right on this point. Article 4 of his Code Civil provides *"Le juge, qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être suivi comme coupable de deni de justice"*. (The judge who shall refuse to give judgment under pretext of the silence, of the obscurity, or of the inadequacy of the laws, shall be subject to prosecution as guilty of a denial of justice.) It would be enlightening to see how some of our appellate judges reacted to Article 5.

Privatising the Justice System: It is hard to keep track. In Victoria, the level of fees now — more than $2200 to start an action in the Commercial List, about $1000 a day for transcript — means you pay as you go. Arbitration is probably cheaper. Mediation certainly is. The alternative systems to those provided by the State are commercial. On the other hand, the Victorian government is taking steps to remove disciplinary powers from the profession. It is an ironic fact of the social history of both this country and England that it is the governments that describe themselves as conservative rather than those that describe themselves as labour that are the most intent on attacking the lawyers — either for their elitism or for their professionalism, depending on your point of view. I had thought it was generally agreed that professional bodies were harder on and better at enforcing professional standards than government agents. There are many reasons why this is so. At a time when government is privatising as many functions as possible — for example, legal advice to government and the maintenance of prisons — it is curious that government wants to reverse this process for controlling the standards observed by the lawyers. I know there was some tension between the disciplinary functions and the trade union functions. My own view is that it was the union members rather than the punters that suffered from this tension, but is it really believed that the punters will be better off if whatever standards that may be laid down by government are enforced by a gaggle of full-time civil servants and part-time dogooders rather than those who know and care about what they are doing? Perhaps this State could become a test tube. The government will take over the professional functions and the old guilds will be abolished. It then allows the big firms to float themselves and makes the bar a public corporation so that they can share their wealth and spread their liabilities. It could then put the court system out to tender and allow the successful tenderers to compete with the ADR centres already run by former judges for private profit. Well, yes, Miranda, then we would have a brave new world, but would we want to live in it now that my books have lost all their magic?

Pound in 1906: "The Causes of Popular Dissatisfaction with the Administration of Justice", address delivered at ABA in 1906, reprinted in proceedings of the Journal of the Amercian Judicature Society, *Judicature*, 20 (5), 178 (February 1937).

"A Night for Lawyers: Inside Pentridge"

Edited speech by Justice John Coldrey in aid of the Brosnan Centre, on 2 April 1998

AS will shortly become obvious, my appearance here this evening has nothing whatsoever to do with the Melbourne International Comedy Festival.

When I was asked to speak by Mick O'Brien I wondered, why me? Could it be, I thought in my paranoid way, that research had revealed that at any one time I had more clients in Pentridge than any other member of the Criminal Bar? Of course not. If that had been the case, the honour would probably have gone to my mate Frank Vincent. I mention him solely because I know he is not here to defend himself. Rumour has it that his Honour's loyalty to clients was so great that he obtained the position of Chairman of the Parole Board so he could look after them when they were eventually released. Mind you, not all the prisoners he has had to deal with have been grateful and his Honour has received some interesting mail. One letter commenced "Dear Maggot" and concluded "Yours sincerely". But the item that really impressed him was a Christmas card with a beautiful illustration on the front together with the words "Jesus Loves You", which, when opened, continued: "Personally I think you're an arsehole". Well that's enough publicity for him.

My own first memory of Pentridge was as a young student. I had come to witness a play performed by the prisoners entitled "The Caine Mutiny Court Martial". This was based on a book by Herman Wouk, (I throw that in on the off-chance that there are any literary people here.) The leading role was brilliantly played by John Bryan Kerr, an inmate who had been convicted of the murder of a young woman on a bayside beach: see *R.* v. *Kerr* (No.1) (1951) V.L.R. 211 and *R.* v. *Kerr* (No.2) (1951) V.L.R. 23. I must cure myself of this habit. I've been writing too many judgments recently.

At the end of the evening, in my excitement at meeting the cast, I lost the plastic pass I had been issued. I can still remember a huge warder, being appraised of this information, calling out to a colleague: "Make that one more for breakfast".

Justice John Coldrey

My next recollection of Pentridge was as a barrister. It was of a young prisoner emerging from the prison bakery with his arms full of steaming freshly baked bread rolls, calling out to me as he passed: "I'm bloody glad I pleaded guilty".

But prisons are not, of course, happy places. One of my early clients, after assaulting a fellow inmate, had been transferred to the notorious H Division. There prisoners were permitted to speak only when spoken to, and their initial activity was working on a rock pile to produce road screenings.

Those who behaved themselves were fortunate enough to graduate to brush making or, better still, assembling electrical components.

In an endeavour to get out of H Division my client had driven a three-inch darning needle into his right eye. Fortunately doctors at the Eye and Ear Hospital managed to save his sight. It was shortly after this case, in December 1972, that Ken Jenkinson, Q.C., (as he then was) was appointed to conduct an inquiry which included prisoners' complaints about treatment in 'H' Division. I understand that he was invited to try the rock breaking. He managed to get the sledge hammer above his head but when it hit the rock it slewed off at right angles taking him with it. The warder in charge remarked encouragingly: "You improve with practice you know".

In his report of September 1973 Mr Jenkinson found that a number of prisoners were habitually subjected to ill-treatment by the unlawful violence of several prison officers in H Division.

Some years later another H Division inmate said to me, with attempted black humour,: "Everyone in prison does it hard in their own way. The terrible thing about H Division is hearing the men crying at night. I've had to change my mattress three times in the last month — they grow mildew from the dampness."

On many occasions in my early days at the Bar I sat in court whilst Judge Stafford, who might be described as a heavy teetotaller, intoned: "The path to Pentridge lies through the door of the public house". A colleague on the County Court Bench, Judge Gamble, was renowned for his great enthusiasm for all things alcoholic. On one occasion he said to Judge Stafford: "Stafford, we have something very much in common".

"What do you mean?" queried a horrified Stafford. To which Gamble responded: "We are neither of us, moderate men." As some of you will have discerned, that little snippet has a very tenuous link to this evening's subject, but I rather liked it. (Having seen your reaction I can't understand why.)

Apart from the violence perpetrated by inmates upon each other, this prison has seen State-authorised violence. In 1957 William O'Meally, the State's longest serving prisoner, escaped with

another inmate through the main gate of Pentridge, wounding a prison officer with a revolver that had been smuggled into the prison. Apart from receiving long sentences, both were ordered to be flogged. These were the last floggings in Victoria. The last hanging in Victoria was, of course, that of Ronald Ryan, which occurred at 8 a.m. on 3 February 1967. Many of you will remember precisely what you were doing at the time this event occurred. I was driving in my battered FJ Holden to the Ringwood Court of Petty Sessions when the news of the execution came through. I felt sickened by the barbarity of the event. There was a public outcry over the Ryan hanging that led eventually to the abolition of capital punishment in Victoria.

Nothing I say should be taken as suggesting that prisons are not needed. Prisons have been described as a necessary evil, and so they are. But society has the right to protect itself from those who threaten the community at an individual or general level; and when the State becomes the agent of punishment for the individual victim, retribution will always be an element of the sentencing process.

It is perhaps trite to say that punishment should not involve harsh conditions of the type that existed in much of this prison for so many years. Nor should it involve the exposure of inmates to the risk of violence from their fellows. The essence of punishment by imprisonment is the deprivation of freedom. The loss of freedom to be with loved ones and friends; the loss of freedom to go shopping, or to the cinema, or to kick a football in the park; and the loss of freedom to do anything, on any day, which does not conform to the prison regime. That is what punishment is all about, and a sentence of 10 years to be served in the Sheraton Hotel is ultimately just as onerous as any sentence to be served behind bluestone walls.

An old client of mine put it this way: "The worst day on the outside is better than the best day on the inside".

There is an old French proverb: "If all were known, all would be forgiven". I became very fond of quoting this proverb when making a plea for leniency. On many occasions I obviously did not make enough known, because, judging by the sentences imposed on my clients, very little was forgiven.

The proverb, of course, is not true. But if all were known, much would be explained.

What has to be remembered is that such factors as poverty, unemployment, oppression and the lack of opportunity to achieve desired goals are the genesis of criminal activity. There is an inexorable link between the commission of crime and economic, social, and intellectual disadvantage.

We hear talk about "the war against crime". It is a meaningless phrase. It assumes a battle that can be won. But crime will always be with us, just so long as the social injustices that generate it are with us. Those injustices will not be solved by legislating for longer and longer prison sentences. Such a simplistic approach can never solve the complex social issues that face this society.

Of course, we can put prisoners out of circulation by warehousing them for longer periods of time. But one day, almost without exception, the people we lock up will return to our community. Even the economic rationalist may be brought to realise that the cost of operating prisons syphons off money which may better be used in tackling the problems that generate crime in the first place.

It is precisely because today's prisoners are tomorrow's neighbours, that we need to concentrate upon the reformation through rehabilitation of the inmates of our gaols. Apart from the provision of humane and accountable prisons, the need to develop and fund comprehensive educational and skills programs within our gaols should be a paramount objective. Even putting aside the moral imperative, enlightened self-interest demands no less of us. We need to be very clear indeed that the inmates of our prisons have a worth and value that is not to be measured on the basis of the profit per unit.

In an article in *The Bridge*, a magazine published by VACRO (the Victorian Association for the Care and Re-settlement of Offenders) Justice Vincent (there's that man again) stated:

> The sad progression of deprived, abused or disadvantaged young people through grossly inadequate institutions from which they emerge without adequate educational or social skills but with a strong sense of alienation from society, has been a continuing aspect of our history.
>
> Our prisons are over-crowded and, in spite of relatively recent efforts at improvement, are, for the most part, primitive and dehumanising.
>
> There is still an enormous amount remaining to be done in the establishment of prison industries and training schemes.
>
> Our post-release support systems are appallingly inadequate; a state of affairs which must have some influence on the rate of recidivism.
>
> Whilst the economic cost of any serious attempt to deal with these questions would be very substantial, I have no doubt that the economic and social costs of our failure to deal adequately with them have been, and will continue to be, massive indeed.

That was written a decade ago. No doubt we have come some distance since then, but there is still a long way to go. And we, as lawyers, should support initiatives for progressive reform.

As we are about to set off on our tour of this prison, I leave you with the words of Oscar Wilde, from his poem "The Ballad of Reading Gaol":

> I know not whether Laws be right,
> Or whether Laws be wrong;
> All that we know who lie in gaol
> Is that the wall is strong;
> And that each day is like a year,
> A year whose days are long.

Travels with my brother

A journey by Stephen and Benjamin Lindner

"Kto ratuje jedno zycie, jakby swat caly ratouwal."
Whoever saves one life, it is as if they saved the whole world
(Yad Vashem)

IN June 1997, two members of the Victorian Bar, the brothers Lindner, boarded a Lot Airlines flight to their parents' homeland — Warsaw, Poland — in search of ancestral traces.

One aim of the journey was to find, if we could, an attic. This "strich" hid our parents for 14 months from May 1943 to August 1944 from the Nazi invaders. In this attic, they spent their first wedding anniversary . . . and their second. Actually, the description we took with us was not of an "attic" strictly speaking, but merely of a gap between ceiling and roof in which there was not enough space to stand upright, only to lie down or crouch. Our parents' survival depended upon their ability to remain secreted in that space without being discovered or betrayed. Their's was an "Anne Frank" story, without the diary. For both of us, this attic was more than a symbol of our parents' struggle to avoid the fate suffered by their own families, their parents, sisters, cousins. We felt it was important to see, smell and, for a short time, sense the confinement of the "strich" where our parents were saved from their predators.

But our quest for our personal grail was infinitely more difficult than simply taking a taxi to the door of the house. For we had no address, and only a precious few clues drawn from our mother's memory. We spent Friday nights at the family dinner table delving into the recollections of our 82-year-old mother, who has spent the last half century trying to forget; to forget the loss of family, friends and dreams from an era beset by institutionalised anti-Semitism from which she feared none could escape, but only hide. To bear arms was not an option for them. So while our mother was striving to forget, we tried to reconstruct her life in pre-war and wartime Warsaw, to capture if we could, the flavour of the life of a middle-class Jewish couple coping with survival in the Warsaw Ghetto until their escape in May 1943. We would be breathing the air of our past, but we needed to take with us images of the era, as we were guaranteed that the roads and buildings that once housed the ghetto would not be there for us to see.

The ghetto area of Warsaw had been razed, left as a pile of rubble when General Jurgen Stroop, who had been handed the task of overseeing its final liquidation, wrote in his diary on 16 May, 1943: "The former Jewish section of Warsaw no longer exists. The large-scale operation was completed with the demolition of the Warsaw synagogue at 8.15pm." Notwithstanding the complete physical change in the former Jewish quarter of Warsaw, we set out to wander the site of its streets. Now constructed in bleak, utilitarian and unimaginative street-scapes, we were still able to "find" the location of our parents' apartments in the northern part of the Ghetto area. Both ulica (street) Franszciskanska and ulica Swietojerska were still in existence although they had moved a little in the reconstruction. Our point of reference was a map we had brought with us, a map dated 1943. Before a surrounding four-metre brick wall was built, the northern streets of Warsaw had been a heavily populated Jewish area the East StKilda/Caulfield of Warsaw. We could locate the general area of our parents' apartments but the precise location of the attic remained a mystery, relieved, or tantalised by our small handful of clues.

Unable to liquidate the Jews in the Warsaw Ghetto by deportation or other means, the ghetto area was systematically set ablaze, building by building, in April/May 1943. The last image our mother clung to when leaving her birthplace was of a ghetto in flames. Bribing their way out of the ghetto, equipped with only the clothes they stood in, their wits and false identification papers in the names of Polish Catholics, they took a local train to a village called Srodborow, about an hour's travel south-east of Warsaw. Disembarking, they walked for about 20 minutes, our mother recalls, until they arrived at our father's family's holiday house. It was a two-storey wooden house divided into four apartments. Close by, on the same plot of land stood a caretaker's cottage. In that one-room dwelling lived the Polish Catholic caretaker (our mother, Wanda, recalled his name was "Alexander" but could not say whether this was his first name or surname), his wife and their five children. They were permanent residents and maintained the apartments and grounds in exchange for their accommodation. Wanda and our father, Rafal, arrived from the railway station in the dead of night to confront the caretaker, we were told, who hurriedly arranged for them to climb a ladder into the attic of the cottage. For the next 14 months, the caretaker's wife would, nightly, place a bowl of soup in a bucket, which would be hauled up by a rope. The same bucket was used as their toilet before being lowered. She did this late each night when her husband and children had been fed. After the initial meeting there was no face-to-face or even verbal contact with the caretakers, for the safety of all concerned.

In earlier, more "normal" times, the caretakers would meet the Lindner family during the summer holidays when they would come from Warsaw to occupy one apartment, relaxing and going for long walks in the surrounding dense pine forest. The caretakers had worked for the Lindners for many years and had seen Rafal grow up from childhood. Both families went to Srodborow for vacation, where our parents met. Srodborow was a holiday resort area, popular with the pre-war Jewish population of Warsaw. It boasted a climate reputed to be particularly effective for the cure of lung complaints. That was particularly apt as Stephen had developed an asthmatic rasp by the time we arrived in June 1997. As he coughed, we searched.

To retrace the parental steps as best

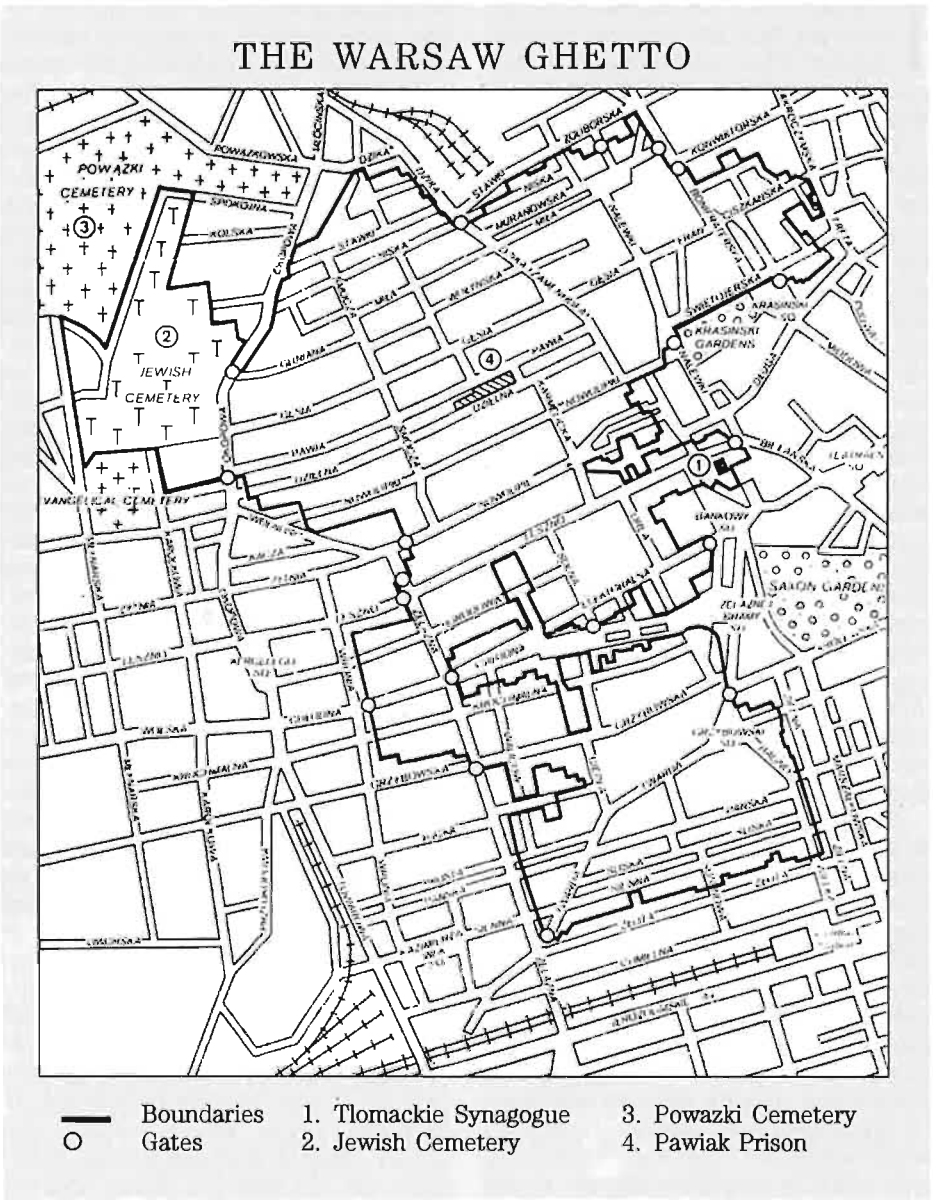
we could, we travelled by train to Srodborow; it quickly became apparent that the landscape had probably not changed dramatically in the last 60 years. It was still thickly forested, with but one asphalt road and many dirt tracks winding amongst the fresh, crisp pine trees. It struck us as a very good area in which to find seclusion in the forest, and we arbitrarily decided to walk in an easterly direction from the Srodborow station to see what we could find 20 minutes away. We noted each street name we passed with a view to telephoning our mother (who was not herself interested in returning) to see if any would jog her memory. There seemed to be countless houses matching the description of the two-storey building, it's age and style being left to our imagination, such details having been lost in Wanda's memory. The search for the attic soon attracted the "needle in a haystack" comment . . . from each of us. Our mother remembered none of the street names we anxiously read out when we rang her. Despondent, we returned to Warsaw, putting our search for the attic on hold to confront "Graveyard Poland" as post-Holocaust Jews regard it.

There Stephen's daughter, Adele, joined us from her sojourn in Israel, and we met our guide for the day, Darek Bezduszniak (his surname means literally, and inappropriately, 'man without a soul'). Together, the four of us walked the pathways of Treblinka, cobbled with its broken scraps of Jewish gravestones. They could now only be identified by the odd Hebrew character underfoot. The death camp was now regrowth forest. Nothing but a large monument marks the massive grave. There was an eerie silence. We hardly spoke to each other that day. Majdanek and Auschwitz–Birkenau, two of the more notorious death camps, were also part of the journey, part of the puzzle as to where other members of our parents' families may have ended their lives. But the search for the attic still continued to taunt us. We resumed the quest upon our return to Warsaw.

The Jewish Historical Institute in Warsaw stands opposite where the central Warsaw synagogue once stood on ulica Tlomackie. A 30-storey mirror-glass monolith housing the Sony company now occupies the former temple's locale. Maybe records could be found of names and addresses in pre-war Poland amongst the archives of the Jewish Historical Institute. It was worth a try. Yes, we were confronted with many records — lists of survivors who registered after 1945 — and our parents were amongst those recorded. We photocopied their registration cards.

In our broken Polish, we asked a young assistant whether she could help us find a house in Srodborow, owned before the war by our grandfather. She was unable to give us any help at all, but then fate stepped in. Another employee stopped in his tracks as he overheard our reference to the unremarkable village of Srodborow (too small to be found on any but the most detailed maps of Poland). This man, who introduced himself as Piotr, happened to have a special interest in that village because it had housed, during the Second World War, a Jewish orphanage. In his research he had obtained a list of orphans, many of whom would still be alive and whom he hoped to track down. Excited by our reference to this obscure village, he noted our surname, and ran off to check his list before we could explain our mission. Piotr returned with the news that our surname was not amongst the Srodborow orphans. We were not surprised. When they were hiding in the attic, our parents were 27 years old, orphans but not children.

While he recovered from his disappointment, we explained to Piotr the purpose of our search. As luck would have it, Piotr had, for his research into the orphanage, acquired special permis-



sion from the Polish Government for access to closed archival material in the neighbouring township of Otwock, just 5 kilometres toward Warsaw. Otwock is the regional centre housing the court, local government buildings and the titles office for Srodborow. Piotr was sure that while searching the archives he had seen a hand-written list, compiled by the German invaders in 1940, of Jewish homes in the area that were confiscated at that time. They had been redistributed for occupation by German officers employed as guards at the nearby Otwock concentration camp. He promised to have a look for us when next he returned to Otwock for further research, in a couple of weeks.

Grandparent's house in Srodborow, Poland.

As it was over 50 years since a Lindner had set foot on the property, another couple of weeks would not matter — except that by now, a Friday, we had only one week left before returning to Melbourne. We told Piotr of the reason for our journey and our sense of urgency. He understood. The following Monday, he accompanied us to Otwock. While he went about his research armed only with our grandparents names (Solomon and Basia Lindner), we booked into the newest accommodation in Srodborow — refurbished units which, we were told whilst checking in as the establishment's first guests of the new era, once housed the Jewish orphans! It seemed appropriate. The air was fresh with a tangible tranquillity. In contrast, we nervously waited for Piotr. After more than 50 years we were hopeful but could not afford to be too optimistic. Three hours later he returned, with the old line "do you want to hear the good news first, or the bad news". This was no time for jokes.

The good news was that, yes, there was, in a compilation of confiscated houses, a listing of two houses adjacent to our grandmother's name, Basia Lindner. The bad news was that the property was only identified by the street name, and not the number in the street. Our hearts jumped when the street name was revealed as "ulica Alexander Fredry". That was one of the street names we had cited to our mother three weeks earlier. Could it be that her recall of "Alexander" was the name of the street, not the caretaker? Surely we were getting close. Piotr's own research called him back to Warsaw; he refused to accept anything more than a shout of lunch as reward for his invaluable services.

Alexander Fredry was a Polish poet. The streets in the area were named after literary figures with the orphanage on "ulica Literacki" — Srodborow's equivalent of Elwood with it's Poets Grove, Dickens, Coleridge and Tennyson Streets. Our search had narrowed the potential from hundreds of possible houses down to about 20. Alexander Fredry Street was a one-kilometre long, narrow gravel lane. Most of the houses adorning its flanks could be eliminated as they were built of brick, were too old, too new, too big, too small, or were not configured with a smaller house next to a double-storey wooden one. We noted the addresses of four houses, numbers 8, 10, 12, and 14, all on the south side of the street as potential candidates.

We were sceptical as to whether the local population would be of any assistance to us in our search for the attic, as we suspected that they would fear our goal was to attempt to reclaim their property and evict them. In any event, as so much time had passed, we thought it unlikely that the present incumbents would have any idea of the history of the properties, especially since, during the communist era their ownership had passed to the central government. So rather than approach residents, we harnessed our legal training and set off, like articled clerks, to the Otwock Titles Office.

Old common law titles and dusty registers, based on an ancient numbering system, proved to be cumbersome and time consuming . . . with no reward. Our fingers were caked with the dust of ages which had settled on the old chains of title that we arduously searched and searched and searched. To no avail. Frustration set in and the relentless rain didn't help our spirits. Nor did our unfamiliarity with the language and inconvenient locations of the various offices we had to attend to secure the information required to conduct a search of the titles.

Fortuitously, we had arranged three weeks earlier to meet Darek, our interpreter and guide, in Srodborow the next day. He arrived in a small two-door Russian-built Fiat-style car. When we told him how far our search had advanced — that we had narrowed it down to a street — he enthusiastically joined our quest. It became his own. We spent another day of unsuccessful searching at the Titles Office. We tried another line of enquiry through the Otwock museum director who introduced us to an elderly local pharmacist' a man who was reputed to "know everyone in Srodborow before the war". But he knew no Lindners.

By late afternoon our hopes were diminishing rapidly. Darek suggested we go to ulica Alexander Fredry where he would try to engage the locals in conversation to find out whether any memory of our grandparents had survived the family's absence — a long shot, but we had nothing to lose. The Titles Office had closed for the day, its secrets intact.

We waited hopefully in the car as Darek spoke to a quartet of women in

Helena Pawlikowska, aged 91, "Righteous Gentile".

their sixties huddled around the doorway of number 8 ulica Alexander Fredry. After a half hour's intense conversation, there was not a memory to be found . . . or admitted. But there was a suggestion that we speak to an older lady who had lived at number 12 for many years. We had for some reason, eliminated that house at the Titles Office. Nevertheless, Darek went inside to speak to the occupant. She was 72 years old. He returned after 5 minutes, panting excitedly, with the news that this lady did remember the surname but could not recall the house the name was associated with before the war. But here was a memory — a living connection with an ancestral trace. We were invited in for a cup of tea. But she knew nothing of any Jews hiding in an attic during the war.

We were about to leave, hoping to speak to her older sister in Warsaw the next day, whose memory she thought may be better, when one of us mentioned that the caretaker may have been called "Alexander". "Ah! Tak!" ("Yes!"), she exclaimed with a smile, there had been a caretaker of that name in the street, but he passed away many years ago, perhaps in the late 1940's. She sat pensively, then stood up and left without a word.

In less than five minutes, she returned with the announcement that there was someone in the house at number 9, with whom we should speak! It was on the other side of the road, directly opposite her home. It was the house which, long ago, had a caretaker named Alexander, and one of his daughters was now living in one of the apartments of the two-storey timber building. We were stunned. Had we stumbled across the grail? Was the "strich" suddenly within our grasp? Questions tumbled as we raced over the damp track that was ulica Alexander Fredry, where our family had once enjoyed a holiday stroll.

We approached a white-haired lady with a large smile and a growling dog. We tried to introduce ourselves to her over the yelps of her canine guard. She welcomed us, bidding us to come inside the apartment. So we did . . . to be confronted by another woman, seated on her lounge surrounded by ornaments from a bygone era. She was introduced to us as "moja matka" — the white-haired lady's own mother, Helena Pawlikowska. Now 91 years old, physically frail having lived an incredibly demanding life, she sat there before us. We were momentarily speechless before the person who had sustained our parents, at the time when handing Jews over to the German authorities was applauded, and rewarded. Indeed, had the secret been revealed to the Germans, this lady and her entire family would undoubtedly have faced summary execution.

And so we sat, face to face, with this amazingly modest woman, in awe of her courage. Mentally, she was still sharp, as she recounted the detail of events of a half century ago. She told us, through Darek, that her husband, Alexander, had died in 1949. She bore him eight children, all daughters, five of whom were alive when our parents were hiding above them in the cottage. To the day

he died, she told us, Alexander Pawlikowski, the caretaker, never knew that our parents had been secreted in the attic. Helena Pawlikowska was the only one who knew. Alexander was a heavy vodka drinker, she explained, who could not be trusted with such knowledge. Nor could any of the young daughters. Her courage was humbling. She told us that she managed to keep her family alive, and was permitted to remain in the cottage by doing the laundry for the German troops who occupied the surrounding houses, one within sight of the cottage — a long stone's throw. The danger of her circumstances was palpable.

"Ale gdzie jest ten strich?" ("But where is the attic?"), we asked. "Oh, the caretaker's cottage, with its attic, fell down twenty years ago" came the reply. As for the lady herself, Helena now lives in a nearby village, and happened to be visiting her daughter for a day or two when we stumbled in.

So the brothers Lindner had travelled half way around the world to search for an inanimate object, a "strich", only to find something much more unexpected — the woman who was singly responsible not only for their parents' survival, but ultimately for their own lives and those of their children. We returned the following day with many questions for Helena, having tape-recorded a message in Polish from our mother, who we rang that night. She was astonished by our find. The Polish exhortation where you might wish another "Sto lat" (100 years of life) seemed a little mean for a 91-year-old. So Wanda wished her 120 years!

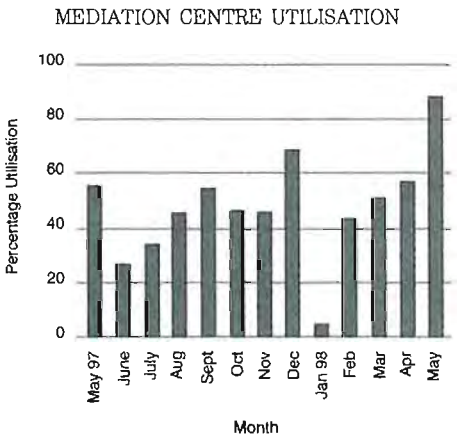
Postscript 1: The State of Israel acknowledges those who, in wartime, helped Jews in outstanding circumstances. Upon returning to Melbourne, we drafted the appropriate affidavits for an application to Yad Vashem Holocaust Museum in Jerusalem requesting that Helena Pawlikowska be recognised with the title of "Righteous Gentile Among the Nations" for her courage. The Committee considered the submission and, in March 1998, she was awarded a medallion and certificate acknowledging her standing as a Righteous Gentile. A tree will be planted in her honour at Yad Vashem, alongside others including notables such as Oscar Schindler and Raoul Wallenberg.

A legal addendum: From 1933 to 1938 Rafal completed a law degree at the University of Warsaw. It was an era which segregated students in the lecture theatre — his student card was stamped with a designation that required him, along with all Jews, to occupy only the seats on the left side of the lecture theatre. Wanda and Rafal saw no future for themselves in post-war Poland. In 1950, they travelled aboard the migrant ship, *Surriento,* from Genoa to Melbourne, as far from Europe as they could. They developed a successful "shmata" business but Rafal still dreamt of the legal career which had been denied him after 1938. Twenty-five years later, and despite language and financial hurdles, he graduated with a second law degree, this time from the University of Melbourne. He conducted a solicitor's practice to the day he died in 1982. Wanda still lives in active retirement in Melbourne.

Victorian Bar Mediation Centre, twelve months on

THE Victorian Bar Mediation Centre, located on the 3rd floor, Douglas Menzies Chambers, 180 William Street, Melbourne, has now been operating for 12 months. The Centre was officially opened on 30 April 1997 by The Honourable Mr Justice Phillips, Chief Justice of the Supreme Court of Victoria.

Over the past year the Centre has gained acceptance with barristers and many firms of solicitors as their preferred venue for mediation and arbitration. The growth in the use of the Centre can be seen from the following graph:



Dr Cronin of the Australian Law Reform Commission is reported as saying "lawyers in Melbourne are more active in encouraging settlements and mediation". The Victorian Bar has for some time provided a dispute resolution service through its Dispute Resolution Scheme and this service is complemented and encouraged by the facilities of the Victoria Bar Mediation Centre.

The Centre consists of two boardrooms and four meeting rooms supported by ancillary services such as catering, photocopying and receptionist. The normal configuration for a two-party mediation is a boardroom which seats 18 people and two meeting rooms each of which seats 10 people. The Centre is thus able to conduct two mediations simultaneously or alternatively the entire Centre can be booked in order to accommodate larger mediations. An after-hours staffing service is available for an additional fee.

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

Experience over the past year has shown that the Centre's design is both functional and attractive. The parties to the disputes have particularly appreciated the assistance provided by the receptionists who take care of the administrative tasks such as telephone calls, faxes and catering.

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

David Bremner

Launch of the Australasian Disp

Victorian Bar Readers Centre, 18 May 1998

The Victoria/Tasmania branch of the Australasian Disputes Centre was launched at a ceremony conducted in the Victorian Bar Readers Centre on 18 May 1998.
The keynote address was given by The Rt Hon. Sir Ninian Stephen AK CGMG GCVO KBE who is a patron of the Australasian Disputes Centre.

In his address, Sir Ninian spoke of the mission of the ADC to promote a culture of cooperative problem solving in the business and wider community by generating an understanding of dispute resolution and conflict management, by providing a focal point for the development and dissemination of dispute resolution services, and by offering convenient access to dispute resolvers, facilities, information and support.

Deborah King, left, and Nicole Arendsen, far right, both of Financial Services Complaints Resolution Scheme, Tony, Elder, second from left, of Dunhill Madden Butler, and Jonathan Rothfield.

Jamie Learmonth and Dudley Wilde, AM.

Sir Ninian Stephen

The President of the ADC, Mr Ken Hinds, welcomed the audience to the launch and briefly reviewed the history of the ADC. Mr Hinds outlined the membership of the ADC which is made up of governing members, corporate members and individual members. He welcomed any person or body involved in dispute resolution to join the ADC.

The Junior Vice-Chairman of the Victorian Bar, Mark Derham Q.C., welcomed the ADC to the Victorian Bar and spoke of the use of mediation by Victorian Courts and the encouragement given to the dispute resolution process by the Victorian Bar through the establishment of its purpose-built Mediation Centre.

utes Centre

Ken Hinds

David Laidlaw, David Bailey and Greg Campbell.

Rod Smith, John Sharkey and Andrew Scott, President of the Law Institute.

Mark Derham, Q.C., Sir Ninian Stephen and John Ralph.

Bill Martin, Q.C., John Ralph and Alan Mulgrew.

Ken Hinds, George Golvan, Q.C., and John Sharkey.

David Bremner, Juliet Pegler and Doug Peck.

Verbatim

Deceased defendants

County Court of Victoria

5 May 1998
Citipower v. *G. and L. Ghantous t/as Galleria Coffee Lounge*
Coram: Keon-Cohen
Barrett for the plaintiff
Di Santo for the defendants

Directions Hearing — Barrett seeking leave to join three defendants.
His Honour: What's this matter about?
Barrett: $70,000 of undercharging on a electricity meter, Your Honour.
His Honour: (To Mr Di Santo) I know of a case in China where they executed someone charged with tampering with a meter.
Di Santo: Well in this case two of the defendants sought to be joined are actually deceased.
Barrett: We had nothing to do with that Your Honour.

A Local Government List?

On 20 January 1998, the following extract was taken from a web-site on the Internet.

Dever's List
Queens Council
A.J. Dever Pty Ltd
Barristers Clerk
ACN 006 767 997
Phone: 9608 7999, Fax: 9608 7728
Pager: 04111 00091
Email: ajdever@ozemail.com.au
Owen Dixon Chambers
205 William Street, Melbourne Vic 3000

Judicial cross-reference

High Court of Australia

23 April 1998
Osland v. *The Queen*

Ms Scutt: Take, for example, the case of Moffa, and this is one case in which we can take issue with His Honour Justice Murphy, where we do not agree with what he said in that case, if one looks at the ethnicity and so forth . . .
Kirby J: I did not sit in Moffa. Did you say me?
Ms Scutt: Is it Moffa?
Kirby J: I did not sit in Moffa. Justice McHugh sat in Moffa.
McHugh J: No, I did not sit in Moffa. Moffa is in 138 CLR.
Ms Scutt: No, I am sorry, I am talking about Lionel Murphy. I beg your pardon, I am talking about Justice Murphy, I am sorry, in Moffa. I beg your pardon, I have been mixed up.
McHugh J: I think you said Justice Murphy. That is what you said.
Ms Scutt: Did I? Well, then we will just have to get the reference, but it is the case where . . .
McHugh J: It is 138 CLR, is it not, from memory?
Gaudron J: You and the bench are at cross purposes to some extent, but as it happens, you are perfectly correct, you have nothing to apologise for.

Simon says

Supreme Court of Victoria

Commercial List Directions
6 March 1998
Coram, Ashley J

Wilson QC: (after putting a series of persistent arguments with respect to discovery and further particulars) I know I have said this so often that I would by annoying Your Honour.
Ashley J: Well, at least you have said one thing today that's correct.

Justice brought to book

Osland v. *The Queen*

Callinan J: I do not think domestic violence is necessarily confined to people who are not as well off, the under-privileged.
Ms Scutt: No, but what — may I say I absolutely agree with Your Honour, and I know that Your Honour is very well aware of that from the book that Your Honour has written.
Callinan J: Thank you, Doctor.
Ms Scutt: Yes, I know that.
McHugh J: That is a work of fiction, is it not?
Ms Scutt: In that particular case, Your Honour, the woman in that circumstances was able to escape because she had the resource . . .
Callinan J: Do not trouble about my book.
Ms Scutt: She had resources by which she could do that.
Kirby J: Will you give me the reference to this authority?

Dope capital?

Commonwealth Administrative Appeals Tribunal

September 1997
Application seeking to set aside an order for deportation
Deputy President McDonald presiding.

Gunst: You have used illicit drugs in the past few years, haven't you?
Applicant: No.
Gunst: I put it to you that you have a conviction for using cannabis in Canberra.
Applicant: Oh that. No. Everyone smokes dope in Canberra.

Nothing permanent in NSW?

In the Land and Environment Court of New South Wales

No. 10776 of 1994
12 May 1995
Maybury v. *Minister for Planning & Anor*
Coram: Stein J
"Extemporary Judgment on Notices of Motion".

Ducks, drakes, or shovels

Australian Industrial Relations Commission

17 March 1997
Coram: Deputy President Drake

Mr Downing: If I could just indicate by way of possibly concession of assistance to my learned friend, you can call a shovel a pick as long as you like.
Her Honour: Or something else, a duck.
Mr Downing: . . . but still remains a shovel. I beg your pardon?
Her Honour: Or a duck.
Mr Downing: Or a duck. You can call it whatever you like.
Her Honour: I think that is what Northrop J refers to, does he not, ducks and . . .

Mr Downing: Yes. So that characterisation is something for you to ultimately reach. And I am quite happy to concede that.
Her Honour: Yes. Well, we have got ducks and shovels here, Mr Irving.
Mr Irving: And drakes.
Her Honour: I think we can give up that point then.

The gentle approach

Supreme Court of Victoria

13 February 1998
Coram: Byrne J
O'Keeffe (plaintiff) in person
Saccardo for defendant
Medical negligence claim.

O'Keeffe: May I make a submission to Your Honour?
His Honour: About which?
O'Keeffe: I believe Your Honour should disqualify himself from this case.
His Honour: Why is that?
O'Keeffe: A slight amount of bias.
His Honour: Yes?
O'Keeffe: Very, very, very slight amount of incompetence, and fairly healthy dose of absurdity.
His Honour: Let me just deal with each of those in turn. So far as bias is concerned, what do you want to say about that?
O'Keeffe: The Legal Aid counsellor in Frankston suggested to me that judges and magistrates hate to give decisions against their fellow lawyers. Mr Saccardo is a lawyer; I not. I have discovered since I filed this writ that usually, there is also a slight — some amount of bias against plaintiff victims in favour of defendant criminals. I am not saying that this is a case of a criminal, it certainly is not, I must make that clear. But there is a certain amount of bias in favour of defendants on the grounds that I have just said. So I have discerned a very, very slight amount of bias in Your Honour.
His Honour: If that is right, then every judge would be subject to that bias would they not, because without venturing upon the accuracy of the observation, it would follow, would it not, that every party who is representing themself would be subject to that bias?
O'Keeffe: Yes, Your Honour.
His Honour: In this case how are you going to get your case tried?
O'Keeffe: By a jury, Your Honour. This is why I insisted from the start that I should prefer a jury to do it, and I was very fond of those two juries which I very carelessly lost. I would like to get another one back.
His Honour: What is the next ground? You mentioned that there was a slight amount of incompetence. What do you want to say about that?
O'Keeffe: Very, very slight, Your Honour, in that Your Honour did not warn the plaintiff of this possibility that the jury would be discharged. I believe that a competent judge, a very, very competent one, would have discerned the desire of the plaintiff to be heard by a jury, and would have warned that plaintiff of any possible consequences that could lead to the dismissal of that jury. And Your Honour did not do this. I am complaining about Dr Rosen's failing to warn me before I had this operation. Therefore I believe the judge should have warned the plaintiff who desires a jury trial, against any possibility of him losing that jury.
His Honour: Yes.
O'Keeffe: And the third objection is, I believe a certain amount of absurdity in that I certainly cannot understand the reason why the jury was dismissed. Now, I know it is in the law there, but the fact that I am prepared to pay the jury fees now, I was prepared to pay the jury fees this morning, and the fact that I didn't pay them last night seems to me quite inconsequential, and therefore I do not believe that the jury should have been dismissed. It is on those grounds that I would ask the learned judge that he might consider that we start afresh in the morning with a jury. That's all I wish to say.

Newtonian physics

Supreme Court of Victoria

6 February 1998
Mikulich v. *Amcor Ltd*
Coram: Smith J and a jury of 6
Monester Q.C. with Jewell for plaintiff
Noonan for defendant

Monester: (examining plaintiff as to the manner in which a tree is cut down) Do you always make a second cut?
Plaintiff: They told us, but I have forgotten. If the trees are small, it's not necessary.
Monester: Well, can you explain what happened? After making your first cut, do you then push the tree, or use a bar or something to tilt it, what happens?
Plaintiff: I did not use a bar on that tree.
Monester: What causes the tree to fall when you only make one cut?
Plaintiff: I don't now what causes it, it falls when you cut it.
His Honour: It's called gravity, I think.

Clausewitz on litigation

High Court of Australia

28April 1998
Patrick Stevedores Operations No. 2 Pty Ltd v. *Maritime Union of Australia*

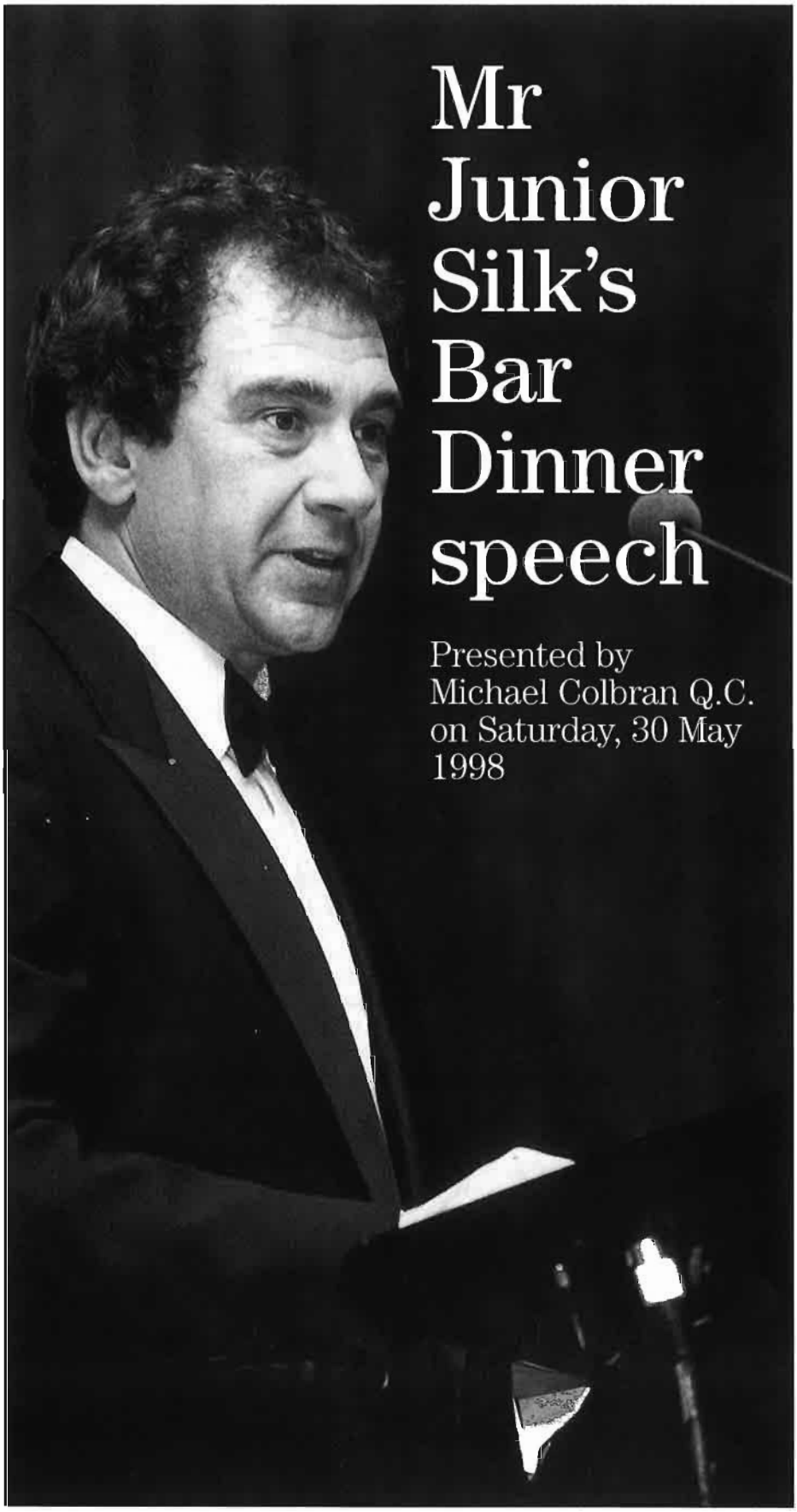
Burnside Q.C.: (for the MUA) . . . all of those ranged against us say the Court is powerless to do anything except to watch Patricks count the dead and bayonet the wounded. We say that is not so and the Court can step in to prevent further harm from occurring.

The food of angels?

Supreme Court of Victoria

5 March 1998
Smith v. *Cardamone*
Coram; Smith J
Keenan Q.C. with Philbrick for plaintiff
Curtain Q.C. with Middleton for defendant

Keenan: What was going to be your intention if the clock had stopped at the end of work on Friday, 27 May 1994 and the events of the following day had not occurred? What was going to be your intention?
Plaintiff: I was going to work with Dominic, basically to see how that went, but I'd also entertained the thought of going back into work for myself and that's why on Saturday I'd organised to meet a fellow called David Heaven. He was . . .
Keenan: Heaven, that's the place to which my learned junior Mr. Philbrick aspires to go, Heaven.
Curtain: Yeah, pizza heaven.



Mr Junior Silk's Bar Dinner speech

Presented by Michael Colbran Q.C. on Saturday, 30 May 1998

MR Chairman, distinguished guests, ladies and gentlemen, it is a great honour to be asked to propose this toast.

I have been told that I should "honour the Bench and amuse the Bar". I fear that in seeking to do justice to the former objective I shall amuse none but those gambling on a long speech. But, as was recently said, "A sense of inadequacy is no excuse for a lack of courage or determination".

I am at least fortunate in one respect. Fundamental to a good after-dinner speech is a good audience. It is widely known that the characteristics of such an audience are that they should be "intelligent . . . well-educated . . . and slightly inebriated." There is no doubt on the first two counts. And I hope that the wines selected by the Essoign Club may have been effective to encourage the last.

Many things are said of our profession — most of them unflattering and for the same reason inaccurate — but one of those which has the ring of truth is that our job attracts individualists and by its practice magnifies their trait of independence. So it is hardly surprising that the search for a unifying common theme amongst our honoured guests is fruitless.

Some sub-themes did however emerge. As you will see, we have the horticultural, the literary, the culinary, the magical, and some others. Finally there is a group who defy synthesis but epitomise that independence which is the defining characteristic and highest justification of both Bench and Bar.

First in precedence among our Honoured Guests is the new Chief Justice of the High Court.

Sir Patrick Hastings once said that "at least 90 per cent of all cases win or lose themselves and that the result would have been the same whatever counsel the parties had chosen to represent them". It is difficult to find any natural explanation for the fact that argument of most of the remaining 10 per cent seemed so frequently to fall to Justice Gleeson.

At the time of his appointment to the New South Wales Supreme Court His Honour was unquestionably regarded as Australia's foremost advocate. His Honour became an Officer of the Order of Australia while still enjoying his large and lucrative practice at the Sydney Bar. When asked the reason for the award,

Michael Colbran Q.C., Junior silk.

His Honour responded that "it was for services to the revenue".

The Victorian Bar joins with the general community — including on this occasion the media — in the universal enthusiasm for His Honour's appointment.

It is said that the new Chief Justice earned the soubriquet "Smiler" because he has never been known to smile in court. But it must be doubted that with Justice Hayne beside him he will long be able to sustain that reputation.

Justice Hayne is widely regarded at our Bar for his lightning fast wit and more importantly for the good-natured humour at whose beck alone the lightning is caused to strike.

Many years ago in the pages of *Bar News*, His Honour wrote of the main point of a case. He said:

> In the Magistrates' Court it is the point ignored by the prosecuting sergeant;
>
> In the County Court it is the point your opponent forgot;
>
> In the Supreme Court it is the point the Judge raises in final addresses;
>
> And in the High Court it is the point that was not raised at all.

If this can be called "counsel's lament", Justice Hayne has more recently offered a different perspective. When sworn in as a Justice of the High Court in September last year he observed that:

> The work of a Trial Judge is hard — and as a Trial Judge it seemed to me that much of the difficulty in the work was caused by the Appeal Division; subsequently as a Judge of Appeal I identified the cause of difficulties as lying elsewhere.

Perhaps now all difficulty will disappear if His Honour recalls the occasion in the House of Lords when Lord Russell expressed sympathy for counsel who, despite having all the law on his side, would be dismayed to find that he was appearing, in effect, before the prophets.

This is the third time that His Honour has been an honoured guest at the Dinner. Experience joins with common sense in the happy conclusion that without doubt His Honour will return for another serve.

Said by his juniors to be a softly spoken and hypnotic advocate, His Honour Justice Callinan practiced widely throughout Australia, leading in some of the most important trials of the past decade.

That His Honour was destined for great things in the law appeared clearly from the first case in which his name is mentioned. As a litigant, in 1957, His Honour successfully appealed a determination of the Solicitors' Board which would have prevented his entry into articles unless His Honour first obtained a pass in Latin — a subject for which, as the report indicates, His Honour had no great affinity. Australia is fortunate indeed that His Honour's first foray into litigation should have been such a resounding success.

His Honour's recently published novel *The Lawyer and the Libertine* contains a passage which has, I expect, been often put to him in recent weeks. The author offered this description of the High Court:

> It consisted of a series of inelegant cubes and painted steel bearers and uprights. For more than 100 feet a shallow cataract ran from the façade of the buildings to the street frontage. The Court House was linked to the equally ugly art gallery by a bridge, each sharing the distinction of being the only examples of that happily transient style of architecture aptly named "the New Brutalism".

In the novel one of the principal characters asked what another had thought "as each morning he was driven past the jowls of this unsuitable edifice into the Judge's carpark?" Perhaps His Honour will now publish a sequel to the novel giving the authoritative answer.

In the Australia Day Honours List the Chief Justice of the Supreme Court of Victoria was made a Companion of the Order of Australia. The citation refers to services to the law, law reform and education, and to contributions to literature, visual arts and the community.

Of course, His Honour has had a glittering career in the law. And his literary career has often been noted. It is, however, to some of His Honour's other

The Hon. Sir Gerard Brennan, AC

The Hon. Justice Kenny

Justice Guest

Neil Young Q.C.

achievements outside the law that we turn tonight.

There is an old and unkind proverb that "a good lawyer makes an ill neighbour". But such is not the condition of His Honour whose voice lifted in song early on a Kew morning has the effect of enchanting rather than enraging his neighbours. This may be, in part, the basis for his accolade for service to the community.

Many different passions are reflected in the citation of His Honour's contribution to visual arts. I am told, for example, by another Chief of horticultural bent, that His Honour takes personal responsibility for the geraniums which grace the window boxes of the Supreme Court.

The honour which we recognise tonight demonstrates how comprehensively our Chief Justice has met the responsibilities which he identified at his welcome back in January 1992. The profession is greatly indebted for his careful leadership in times of significant change in the administration of justice in this State.

The Chief Justice of the Federal Court was also made a Companion of the Order of Australia, for services to the law, law reform and the resolution of disputes.

One of the first things one learns about Justice Black is that he has a great deal of style. Indeed so much has been said of His Honour's style that one sometimes forgets that he was generally regarded as one of the most powerful advocates of his time.

In addition, notwithstanding his vast practice, His Honour, like his Master (Woods Lloyd), always had time for those new to the profession. As a junior His Honour was one of the most highly sought after Masters, having had ten readers. His Honour was also the first Chairman of the Readers Course and under His Honour that course became a model both within and outside Australia.

Chief Justice Black shares with Chief Justice Phillips a love of gardens and gardening. Often through the aromatic clouds emanating from His Honour's eternal Villiger cigars one would glimpse on his table a perfect rose, carefully cultivated by His Honour and culled at its peak.

His Honour has now brought this private passion to the service of the public. His Honour has been scrupulous to ensure that every hearing room in the new Federal Court building has been designed so as to have a view of the Flagstaff Gardens. Those that would not do so naturally achieve the effect through the subtle use of mirrors. Of course, this use of mirrors will come as no surprise to those who remember his feats of advocacy as often verging on the magical.

Rather like a brilliant comet Her Honour Justice Kenny has been in an elliptical orbit which bought her back to us frequently but for regrettably short periods.

Chief Justice Black shares with Chief Justice Phillips a love of gardens and gardening . . . His Honour has now brought this private passion to the service of the public.

After admission to practice she became Associate to Sir Ninian Stephen. After reading with Peter Heerey in 198,[1] Her Honour practised among us for four years until 1985 when she commenced work for her doctorate at Oxford. Her Honour returned to the Bar but in 1991 took up an appointment in Canberra.

Despite these excursions, and her involvement in almost every important constitutional case of the past decade, Her Honour found time to contribute much to the life of the Victorian Bar. She served on the Ethics Committee and taught at the Readers Course. She represented the Bar at the Law Council of Australia. Her Honour also had three readers each of whom when asked to speak of her simply utter a string of superlatives in which words such as loyalty, dedication and kindness feature prominently.

The Victorian profession is delighted that Her Honour's orbit has, for the time being at least, become more focussed by her appointment to the Court of Appeal.

With the appointment of Peter Buchanan to the Court of Appeal in September 1997 the Bar suffered the loss of one of its best loved members.

As Balzac wrote "Power is not revealed by striking often, but by striking true".

His Honour had the unnerving capacity to master the strongest legal argument and to present it with simplicity and power. It is likely that this style was developed on the motorcycle raceways. On the track, as in His Honour's advocacy, the distinguishing features were speed, daring and technical precision.

Chief Justice of the Victorian Supreme Court, Phillips.

Philip Solomon, James Gorton and Philip Cummins.

At His Honour's welcome our Chairman said that:

His ability to quickly discern the real issue and to strip away that which was less persuasive set a benchmark for the profession, a decisive, focussed and economical advocate.

Economy is indeed something of a leitmotif. There is the notorious parsimony of His Honour's wardrobe, and his famed preference for the focussed light of a desk lamp and the focussed heat of a Bar radiator over the more general luxuries afforded by Barristers' Chambers Limited.

It has been put to me that this approach was also to be demonstrated when confronted by the issue of how to

Justice Hayne

Sir Gerard Brennan, Fiona Connor and David Habersberger.

Diane Anderson, Rohan Hamilton and Marg O'Connell (Ombudsman).

Anthony Krohn and Roz Zalewski.

extract a large motorcycle from the front room of his National Trust classified house. Again, decisive, focussed and economical, His Honour simply stripped away those bricks which stood in the way, so as to let the bike escape.

While the Bar regrets the loss of one of its most treasured members it nevertheless warmly congratulates the Government on persuading him to make his talents available to the service of the general community.

Mr Justice Kellam joined the Bar in 1977 and quickly built a reputation as an advocate before juries. The jury, it will be recalled, has been defined as a group (often of 12) whose task it is to solemnly decide which party has the best lawyer. It is not at all surprising that their judgment went for Kellam far more often than not.

His Honour was a member of the Bar Council for very many years and the Bar was deprived by His Honour's appointment to judicial office in 1994 of one who would undoubtedly have been a great Chairman.

It is well known that His Honour is an adept Royal Tennis Player and a keen yachtsman but in recent times His Honour has developed an interest in motorcycles. He was recently seen at the Phillip Island racetrack where we are told he subjected his new red Honda to cruel and unusual punishment in an attempt to beat Doohan's lap record.

His Honour's hospitality is appropriately famous. Always at the ready in his home were the finest wines and His Honour's skill as a Chef de Barbecue is legendary. At the time of his appointment His Honour left not only the responsibilities of Bar Council office but also a position as Treasurer of the Essoign Club. His aspiration to that office was natural given his predilection for the cuisine gourmand.

His Honour has now been appointed President of that new institution which rejoices under the acronym VCAT. Said to be a smorgasboard of tribunals, the fare on offer is various indeed. The Attorney-General is to be congratulated on establishing the institution and appointing Justice Kellam as its head chef.

One has a high degree of assurance that both on the bench of the Supreme Court and as Senior President of VCAT His Honour will command that admiration and affection which has followed him thus far at every stage of his career.

Justice Giudice this year fulfilled the promise of his name becoming a Federal Court Judge. Respected on both sides of a highly political jurisdiction, His Honour's hallmark at the Bar was the quality of absolute courtesy which he brought to all dealings with Counsel, with the Bench and with clients. Those who practiced with and against him speak of His Honour as one whose strong personality was always exercised to assert and preserve the dignity of any proceeding in which he was involved. This was no mean feat in a jurisdiction where clients sometimes expect Counsel to match with stridency the strength of their own convictions.

It is not to be thought, however, that His Honour is without flair. The creativity of the legal arguments which he advanced in some of the cases which laid down new principles for industrial law in Australia found some reflection in the increasingly rococo flourishes of his bow ties.

His Honour had two readers each of whom speak of him with affection and admiration — although they have refrained from emulating His Honour's penchant for flamboyant neck attire.

We warmly recognise tonight His Honour's appointment to the Federal Court and as President of the Australian Industrial Relations Commission.

Described in a 1989 newspaper article as, "a tall man in a short body", Justice Finkelstein apparently told the reporter that he had never really wanted to be a lawyer — but rather a lecturer in history. One may wonder what miracles of revisionism would have been wrought in that discipline by one whose creative genius is so irrepressible.

At the Bar His Honour was regarded as one of our most friendly and funny members. Finkelstein is a great loss to the Bar and a loss too, to the Court of Appeal who will miss the excitement of appearance by one whose outline of argument frequently bore no resemblance to his oral submissions.

Lord Justice Scrutton once commented with a touch of concern that he

regretted that Counsel would find in the judgments shortly to be delivered no hint of the careful arguments put. His Honour should not feel any tenderness on that account for Counsel appearing before him. They will accept with alacrity the thrill now lost to the Court of Appeal.

His Honour has a widely acknowledged passion for motorcars, having owned Bentleys, Jaguars, a Fiat Bambino, a Bristol, a Karmann Ghia, and an Alfa Romeo. Indeed the photograph accompanying the article to which I have referred depicted His Honour draped decorously over the bonnet of his beloved Thunderbird.

His Honour also has and rides a fleet of motorbikes. No doubt it will not be long before there will be added to the annual range of Bench and Bar sporting functions a motorcycle race in which Buchanan, Kellam and Finkelstein can take on the world — and each other.

Ladies and Gentlemen, we have suffered the loss this year of others whose stature far exceeded their size.

One of Justice Finkelstein's last cases was that concerning the stolen generation. He took up this pro bono brief when Neil Forsyth became too ill to continue.

Neil was a true leader of the Victorian Bar. He was deeply learned and at the same time wise in the law. His generosity and kindness in dealings with clients, solicitors and other barristers knew no bounds. Over many years Forsyth contributed in countless ways to the Victorian Bar Council and the Bar as a whole. He bore the burden of his illness, which may have been caused by a most unjust prosecution, with great resilience and good humour.

Rupert Balfe was also a man of great generosity and charm and his advocacy was a combination of flair and determination.

It was Balfe who coined an expression heard frequently around the Courts. Once when Sir John Young asked him for an estimate of the length of his argument and suggested that it was "only a short point", Balfe responded with the immortal words now known to us all — "it is a short point,Your Honour, but it may take some time to get to it".

Those who knew him valued more than anything else Rupert's courage in the face of the unambiguous prognosis of his illness.

The memory of these men, like that of Woods Lloyd and others, casts a lustre on our profession and on each of us who follow them in it.

The Hon. Sir George Lush, The Hon.Richard McGarvie and The Hon. Jan Wade.

Justice Paul Guest is a particularly lustrous example.

Shortly after I commenced reading for the Bar I found myself in Chambers adjacent to His Honour. At that time it seemed to me that His Honour was silver through and through. His hair was already (many years ago) silvering and he certainly had a silver tongue. His repartee was quicksilver and the whole impression was as smooth as the silk which, within a very short time he became.

His Honour gave greatly to the Bar. Apart from other offices, he was a member of the Ethics Committee for a marathon period from 1988 until 1997. Indeed His Honour's tenure of that office could have gone on forever as he was regarded by successive members of the Committee, and by those who appeared before it, as one of its most perceptive and fair minded members.

His Honour is a most modest man. He was much pressed some years ago by the editors of a certain leading fashion magazine to be the subject of a feature article and to pose for their centrefold photograph. His Honour refused all entreaties not least because His Honour considered that the use proposed for the single prop allowed, a wig, would be disrespectful.

His Honour's unique combination of perceptiveness, judgment, charm and good humour will ensure a successful career on the Family Court.

? glued to the radio.

After coming to the Bar in 1978 Her Honour Justice Carter developed a general practice, later specialising in Family Law.

In 1991 she travelled to Perth and undertook the difficult task of establishing a practice at the very small independent Bar. Her Honour also served as a Magistrate in the Family jurisdiction in Perth.

On one occasion while at the Perth Bar she was acting for an adult child in a family law matter. Silk from the West

Australian Bar represented Mum and Dad.

The trial started but the Judge directed that the parties negotiate. The negotiations went for 10 days.

After the third day the two silks were no longer speaking with each other. Her Honour was heard to say loudly and publicly that they should each pick up their rattles and get back in their cots. Each complained that they could not deal with the other so for the next six days Her Honour engaged in shuttle diplomacy which was ultimately successful.

The Bar is delighted that Her Honour has once again taken up judicial office.

Admitted to practice in 1972, Her Honour Judge Pannam practised principally in the Family Law jurisdiction as a partner in the firm Stedman Cameron for 18 years.

Her Honour's contribution to the law in this State has been important not only through her extensive practice but also through the service she has given to the Law Institute.

Always unremitting on behalf of her clients, Her Honour had no time for obfuscation or time-wasting manoeuvres, but had great confidence in the Court process, and was a great supporter of the independent Bar.

Her Honour was once called upon to advise a wife who was divorcing her second husband. The wife had a son by her first marriage, the first husband wouldn't support the child because she had remarried. The second husband wouldn't support the child because it was not his child. Her Honour reassured the wife saying "Don't worry Leanne, we'll deal with this prick first then we'll deal with the other berk" — or words to that effect.

The Bar warmly welcomes Her Honour to the County Court Bench and congratulates the Government on her appointment.

In addition to Her Honour there are five further appointments to the County Court.

Recently we had staying with us a girl a few years older than, but a great favourite of, my daughter. This was at the time of the Spice Girls' visit and she was and is a devotee. The excitement caused by the visit of these five has stayed with me, as has the romantic association of the names of these modern icons.

The new additions to the County Court Bench comprise a spice tray of their own: Judge Douglas — All Spice; Judge Holt — Spicy Spice; Judge Wood — undoubtedly Salty Spice; Judge Robertson — Ginger Spice and Judge Anderson for reasons soon to be remembered we should certainly know as Hot Spice.

After spending her early years as an all rounder, Her Honour Judge Douglas established a reputation as one of the fairest and best prosecutors at the Bar. In January 1986, Her Honour was appointed to the office of Prosecutor for the Queen along with Betty King Q.C. They were the first women ever appointed to that office.

Her Honour made a great contribution to the Bar and her commitment to those new to the profession was demonstrated by her service to the Readers Course and when teaching advocacy to the Leo Cussen Institute. As a member of the Executive of the Criminal Bar Association Her Honour was particularly effective in representing women barristers and new members of the Bar.

It is said by her friends that Her Honour's driving skills are idiosyncratic. On one occasion recently she was stopped by a police car while travelling to Court. The officer asked if she would pull into the kerb. Her Honour misheard and thinking that she had been asked to drive forward, nearly ran the poor fellow down.

After explanations and apologies the task of establishing her identity commenced, Her Honour apparently had three goes at it. Her Honour's explanation of a recent change of marital status was not a complete answer. History does not record how the issue of occupation was resolved.

Her Honour's years of practice as an all-rounder explains why her appointment has been so well received in all quarters.

After service in Vietnam the path of His Honour Judge Holt to the Bench has been by measured and certain stages.

First His Honour worked, for many years, in the Prothonotarys Office of the Supreme Court while completing his law degree. No doubt His Honour will deploy his command of the intricacies of practice in debates within the Court concerning interlocutory procedures.

The next six years were devoted largely to the drafting of the first Companies Code. He then became a Deputy Commissioner for Corporate Affairs.

From 1988 His Honour served as a Chairman or Deputy Chairman of a plethora of statutory tribunals touching on travel, credit, licensing and prostitution. It is in that last capacity that His Honour developed his now recognised spiciness.

Apart from his deep knowledge of procedure and of a variety of commercial disputes His Honour has a temperament which all acknowledge to be ideally suited to the Bench.

His Honour Judge Wood is frequently associated with matters maritime. A member of the Naval Reserve with extensive service he has been awarded a Reserve Forces Decoration.

Not surprisingly His Honour is a keen yachtsman and, together with Judge Stuart Campbell, His Honour has an interest in a yacht.

His propensity for running aground in this yacht has been mentioned at his various welcomes, together with His Honour's explanations thus: a grounding in Sealers Cove Wilson Promotory (for which he blamed the crew), a grounding in Devonport (for which he blamed Campbell), a grounding at Cape Otway (McPhee this time), a grounding outside Queenscliff (Campbell again), are all tolerably well documented.

It has been suggested, however, that the true explanation for these groundings has been given by Wood in a secret memo to the Naval Board and (as part of a job application) to His Honour Justice Kellam as mere mishaps caused by haste in the search for good seafood supplies.

His Honour is a great addition to the County Court and a fine choice to assist Justice Kellam in the VCAT kitchens.

For many years His Honour Judge Robertson dominated the Supreme and County Court circuits in Mildura and Geelong. It is understood that His Honour has put his profound understanding of circuit practice to good effect at the recent sittings in Ballarat where His Honour so stirred the profession that he is now referred to as "Ginger".

His success was built on cross examination and His Honour is the only Australian advocate known to have closely emulated the famous feat of Norman Birkett with the co-efficient of the expansion of brass. An eminent engineer could not match His Honour's understanding of Newton's Laws of Motion and when the witness was unable to recite each of the relevant principles he left court with his opinion, and his nerves, shattered.

There is, however, nothing wrong with His Honour's nerves. Once during a

violent storm a sheet of galvanized iron crashed through the window of his chambers splintering his desk.

His Honour was not phased by this near death experience, clear evidence that he is ideally suited to the crisis of judicial office. Always of good humour, courteous and polite His Honour will be missed in the corridors of Owen Dixon.

Notwithstanding the demands of his busy commercial practice, His Honour Judge Anderson found time to serve the community in many fields outside the law. He was a councillor of the Shire of Gisborne and is very much involved in the Latvian Community.

Like his brother Robertson, Judge Anderson retains his clarity of thought under the most extreme of pressures.

Prior to 1983 His Honour's home was in Mount Macedon but it succumbed to the fires of Ash Wednesday. His Honour was at home with one of his children when the fires broke out. After fighting for some time to save their home it became clear that this was impossible. All means of escape blocked, His Honour lay on the lawn over his young child and covered himself with a sodden blanket. The fire burnt on and passed. Shortly after His Honour found his spectacles melted a mere few yards from where he had sheltered.

The community is fortunate indeed for his Honours foresight, and the Bar congratulates the Government on the appointment of Judge "Hot Spice" Anderson.

Ladies and Gentlemen,

John Marshall became Chief Justice of the United States Supreme Court in 1801. As Chief Justice he immediately set out to strengthen the Court by unifying it — a task made easier, it is said, by explicit threats to the Court by Congress.

Marshall defined the nature of the office of Chief Justice on whom, in the United States, rests the duty of visibly protecting judicial independence.

By common acclaim Marshall was "The Great Chief Justice", a greatness which Oliver Wendell Holmes said consisted partly in "being there" during a formative part of the Court's history. He was also a man of deep humility and modesty.

Sir Gerard Brennan retired last week after 17 years on the High Court, the last three as Chief Justice. The standing ovation at a recent dinner given for His Honour attended by all of His Honour's former associates demonstrated the deep affection in which he is held by all of those with whom His Honour has worked closely. To some extent that affection springs from His Honour's humility, a trait he shares with Marshall. For example, when as a member of the Australian Industrial Court it was put to him by his then Associate that he should be on the High Court, His Honour's immediate response was that "They are in a different league". Very much later when His Honour had proved conclusively that no one is infallible, Sir Gerard was asked what he did for a living. His Honour responded, without a hint of irony that he worked "for the public service".

To some extent the affection is explained by the deep and sincere regard which he has always demonstrated towards others. In a simple way this may be seen in the practice of His Honour at Christmas time, both before and after becoming Chief, to take half a day away from the law to personally visit every employee of the Court to wish them well for the Christmas season.

But, in part the affection also springs from the recognition that he is a man deeply committed to the service of the law and to his chosen profession — one which, as His Honour said, should never be permitted to become "a puppet of the powerful". As Justice Michael Kirby has observed the love of the law "represents one of the great well springs of Sir Gerard's life".

A speech given by Sir Gerard was published in 1996 in the *Australian Bar Review* under the title "Why Be a Judge". The answer Sir Gerard gives lies in the fact that it is in the binding resolution of disputes at all levels that the peace and freedom of society are preserved. As His Honour said, it is the hallmark of a free society that disputes are resolved by Courts whose authority depends not so much on the force available to the State but upon the acceptance of the authority of their decisions. This depends upon the maintenance of public confidence in the judiciary. In other words the job is of the utmost importance.

Each of the State and Federal Governments have by the many appointments we recognise tonight done much to ensure that public confidence in the Courts shall be maintained, and the authority of the Courts shall be strengthened.

Ladies and Gentlemen,

I would ask that you rise and join with me in drinking a toast to our Honoured Guests.

Bar Dinner: social notes

TRADITION was broken at the 1998 Bar Dinner. Mr Junior Silk did not put a pair of black lady's underpants on his head while he spoke; nor did he put a funny hat on the Governor.

Indeed Mr Junior Silk, Michael Colbran Q.C. was, as is his want, very nice. He had 18 guests to cover so the stop watches came out again. His speech took off at 9.17 and landed at 9.51. Thirty-four minutes, which means a bit less than two minutes for each guest. Therefore pre-dinner suggestions, by some, that in future Mr Junior Silk's speeches should be given in shifts were groundless.

As to the other speeches it must be said that Chairman Young will never compere Wheel Of Fortune. Robert Godeson Q.C., President of the Australian Bar Association hit the mark with his toast. The Honourable Justice Kenny finished the speeches in a truly judicial manner and was well accepted by the difficult throng present.

The second change in tradition was the lack of a toast to the Queen. This caused much consternation at many tables. Was it simply an oversight? Had the Quit campaign hit the Bar? If there was no toast to the Queen then nobody in the room could light up a cigarette or cigar. Senior members of the Bar delivered frantic notes to the Chairman. Would there be a toast, or was the Bar Dinner organised by closet Republicans? It appears that it was a conscious decision but we are still awaiting the reasons.

One tradition that did remain was the Bar Grace. Mr Justice Batt launched a heated discussion as to from which Psalm the words of the Grace are taken. Nobody at his table, Catholics included,

Neil Young Q.C. addresses the Bar Dinner.

could resolve the question. Intense research has shown that it is Psalm 145 verse 15 and following.

Tradition was also upheld by the domination of the colour black in the dressing. Betty King Q.C., who has become well known over the years for her use of colour, was spotted wearing an off-the-shoulder black crepe gown. When asked for the reasons for her fashion statement Betty replied, "I'm wearing black because it is slimming." This of course explains Simon Wilson Q.C.'s change from an extravagant white tuxedo to a moderate black dinner suit. But one must be careful in making broad statements about the use of black. Both Maya Rozner and Roisin Annesley were horrified that anyone would think that their short sequined dresses were of the colour of the funeral. They were indeed midnight blue. Judge Elizabeth Curtain had given away the sequins and looked stunning in a black and white dress which resembled the male dinner suit. Former Chairman of the Bar, Sue Crennan again would not be hidebound by tradition. She looked overwhelming in a crushed shantung trouser suit in pheasant blue. Rumour has it that it was made by her own personal Irish designer.

Indeed it appears that sequins are back. Fashion guru Kingsley Davis assured us that this was the case. Glitter abounded throughout Leonda. Dimity Southall broke the black colour mould by wearing a charming bright red sequined outfit.

The evening was notable for many to be unable to remain at their tables. Even before the entree had been served there was much promenading throughout the room.

As for the food, the ubiquitous grilled chicken breast was replaced by the ubiquitous house aged eye fillet tournedos with pan-wilted baby spinach and roasted red capsicum butter. This was preceded by gravlax of Tasmanian salmon and followed by chocolate and ginger pudding and thence cheese. One still has to marvel at the ability of Leonda to produce four or five hundred grilled pieces of excellent meat. Is there a team of junior barristers out the back placing hot irons upon the aged fillets? The wines were again excellent with a standout being the AP Birke's 1992 Cabernet. Some complained that the Highfield Sauvignon Blanc was a mite bit flowery.

The evening was notable for many to be unable to remain at their tables. Even before the entree had been served there was much promenading throughout the room. Michael Shatin Q.C. appeared briefly at his table only to disappear on a regular basis. As most will know, Michael has been on a strict diet for many years. He plans to promote the Shatin fat and gluten free diet through Amway. Michael's healthy eating habits are reflected by his extraordinary performances on the Bar cricket field. Unfortunately it appears that his absences were tied to the lack of the Queen's toast. He was regularly discovered in pacing the foyer, cigarette in hand.

One knows that the Bar Dinner is coming to an end when they turn the lights out. Every bottle of alcohol had been drained. Bentleys and other assorted carriages assembled to take much of the throng off to Silvers nightclub. Or so they thought. Silvers nightclub had been the finishing spot for so many years. But not 1998. On arrival many were told that Silvers had become "young". Divorcees and barristers were no longer the clientele they wished to encourage. The dinner-suited clique was ushered upstairs to a new spot for the elderly. This is entitled the Havana Bar. Evidently it proved extremely suitable for the brigade. Sixties and seventies music was accompanied by the puffing upon $30 cigars. An appropriate end to a Bar Dinner.

Victorian Bar's centenary celeb

NINETEEN-EIGHTY-FOUR was a considerable year in the annals of the Victorian Bar. There had been a running dispute since the 1970s as to when the Bar's Centenary should be celebrated. The decision for 1984 was made after an opinion was obtained from Hulme, Q.C. and Merralls, Q.C. They advised that 1884 was the most significant date for the Bar's origin, since on 10 July 1884 there were adopted Bar Regulations governing the conduct of "members of the Bar of Victoria". 1860 and 1871 were discarded, although both years had supporters. The Bar Council decided to act on the joint opinion, disregarding a disgruntled faction which complained that the opinion contributed more to oenology than to the correct identification of the Bar's origins. The Hulme–Merralls opinion will be found quoted in full in the Centenary Edition of the *Bar News*, published in 1984.

The event was duly celebrated with a dinner at Moonee Valley Racing Club, and was the largest Bar Dinner ever, partly because, for the first (and only) time, partners were invited. The Chief Justice of Australia, Sir Harry Gibbs, spoke, the only element of his admirable speech requiring comment now being that he pronounced the word "centenary" with the stress on the first, not the second, syllable, which was also spoken as "tin" not "teen". Many in the audience assumed that this was a solecism permitted to a Chief Justice, and anyway he was a Queenslander. I spoke next, on behalf of the Bar Council. Earlier that day I had actually checked the pronunciation of "centenary", only to find that Sir Harry's was the version preferred by the OED. When I copied his usage several times in my speech, I was subjected to a deal of vulgar abuse from some of the more bibulous elements of the audience, the canard being that I was cravenly attempting to curry favour with the High Court.

One week later the present Chief Justice was first appointed to the Supreme Court. Neil McPhee, Q.C. was to speak for the Victorian Bar at his welcome, which was fixed on the appointed day for 10 a.m. At 9.58 that morning, there was no sign, in or out of court, of McPhee, and the judge's associate was sent to delay the arrival of the judge. The senior member of the Bar Council present was Chernov, Q.C., who, at 10.10 a.m., on the spot and off the cuff, made so admirable a speech that the new judge was said not to have known that anything was amiss, or how near to catastrophe his welcome had come. Chernov, J. still regards this performance as his greatest, under extreme pressure, but on balance prefers not to be reminded of the occasion. McPhee, who may then have been concentrating on one of those interrogations which have gained him the reputation of possibly Australia's foremost cross-examiner, later asserted that (a) he was stuck in a traffic jam on the freeway, and (b) anyway, the welcome was supposed to be at 10.30.

None of these amiable diversions would have merited mention in the *Bar News* at this time were it not for the fact that they provoked Michael

HOW THE CENTENARY DATE WAS FIXED

Memorandum

From: Frank Costigan Esq., Q.C., Chairman
To: S E K Hulme Esq., Q C
J D Merralls Esq., Q.C.

The Victorian Bar is slowly approaching its Centenary. The difficulty with that statement is that it does not know for certain when its centenary occurs It may well be 2000 although there are some suggestions in Sir Arthur Dean's book which would put forward the date to the late 1980's.

I have in mind that when the appropriate date is ascertained the Bar should give serious consideration to putting down a first class red wine which could be specially labelled for the occasion and used by the Bar at its various celebrations during that year and also made available for sale to members of the Bar

Before any such decision can be made it will be necessary to determine in a conventional sense the appropriate date. I would accordingly be grateful if you could constitute yourself as a Committee to consider the matter and report to the Bar Council as to what you deem to be the appropriate date

Owen Dixon Chambers.
205 William Street.
Melbourne. 3000

18th August, 1978

4 Victorian Bar News

rations revisited

Owen Dixon Chambers
23rd August, 1978

Dear Mr. Chairman.

On historical grounds, and without reference to vintages, we recommend:
(a) That wine of 1971* be laid down for drinking in the year 1984;
(b) That wine of 1971* and/or 1984 and/or 1991 be laid down for drinking in the year 2000.

We publish our reasons

On 20th October 1871 and 13th December 1871 there were held the first recorded formal meetings of Victorian barristers: Dean 87. (We observe that the proceedings of the second of these meetings were reported in the Argus of 14th December 1871. Not all problems are new.) These meetings did not lead to the formation of either a code of ethics or any continuing organisation. It seems improper to regard them as constituting the origin of the Victorian Bar But it would seem proper to give their significance a nod, by choosing wine of the centenary of that year.

In February 1884 and on 17th** July 1884 took place the next known meetings: Dean 89-90. A committee was appointed at the February meeting, and at the July meeting (and a series of further meetings) there were adopted the Bar Regulations 1884. In February 1885 a new committee was elected Dean finds no evidence of the committee operating thereafter, and suggests that its continued existence seems inconsistent with the Rules adopted by the newly formed Bar Association in 1891: Dean 93

Dean does not say on what he founds that inconsistency. The Rules of the Association could well have been intended to provide a proper basis for a continuing ad hoc committee. They do not necessarily show that there was no existing committee. But it must be admitted that there is no evidence of the 1885 committee being active at any time after 1885.

The Bar Association formed in 1891 was dissolved in 1892. On no view do it and the Victorian Bar Council have continuity. But again some recognition of 1891 is appropriate, and we have recommended choosing wine of the centenary of that year also.

It seems to us doubtful that the Bar Regulations of 1884 were ever completely laid aside. That is not the way of lawyers. There is plenty of evidence that there did exist in the 1880's a body of persons called "the Bar", with a well-developed clerking system. It seems to us significant that as late as 1910 the Committee of the Victorian Bar (which as appears below dates from 20th June 1900) referred to one of the 1884 Rules as indicating what had hitherto been the practice in Victoria: Dean p. 105.

As just stated, 20th June 1900 is a significant date. On that day a meeting of Counsel agreed to appoint a Committee, and proceeded itself to do so. Rules were adopted. The continuity of the Victorian Bar Council from that Committee is undoubted and needs no amplification

In our view two Centenaries emerge:

(a) The Centenary of the Victorian Bar
We fix this on 10th July 1984, in deference to the meeting of 10th July 1884 at which there were adopted Bar Regulations governing the conduct of "members of the Bar of Victoria"

(b) The Centenary of the Victorian Bar Council
This fixes itself, at 20th June 2000.

Of the two dates, we regard 1884 as the more significant. At all times since then there has existed in Victoria a definable body, known to itself and the public as the Bar, and carrying on, pursuant to a known code of governance, functions similar to those carried on by the members of the Bar of England. That it lacked a formal representative body seems to us unimportant, when compared with the features it did have. Until that date gentlemen practising as barristers did so as individuals, regulated in the conduct of their professional affairs only by the Court that had admitted them. After that date regulation by the profession itself had begun, and "the Victorian Bar" existed

We have the honour to be, Sir,
Your most humble etc. servants,

(Sgd.) S E K Hulme
James Merralls

* Although historically appropriate, the 1971 vintage may be found oenologically unsuitable. Some regard it as the worst Hunter vintage in recent memory, and suitable wines from other areas may be found too expensive for laying down now. Though having no claim to historical significance, 1976 may be a more practical year in these respects.

** So says Dean at p. 89 and p. 92. The Bar Regulations themselves, set out at pp. 90-02, refer to the meeting as having been held on 10th July 1984. We will pursue this point further

Centenary Edition 1884 – 1984 5

Crennan into writing (with some assistance from Hamlet and Gerontion) the following piece, which appeared at page 36 in the Summer 1984 edition of the *Bar News*.

INNS OF COURT HONOUR VICTORIAN BAR CENTENARY

"The absence of representatives of the English Bar at the recent Centenary (sic) Dinner of the Bar caused some adverse comment. In what may be perceived by some as a gesture of reparation, the Inns of Court have presented the Victorian Bar with a handsome gift, described below.

The subject of the donation came to light during excavation of the Gough Square area, north of Fleet Street where it will be remembered. Samuel Johnson and his team of assistants worked on the great Johnsonian Dictionary. It seems that the Inns of Court have obtained on advantageous terms the financial support of a Saudi Arabian group to erect for an undisclosed figure a new and spacious building on the site of *inter alia* 17 Gough Square in order to replace the cramped and outmoded accommodation available heretofore to the Bar.

In the course of levelling the site workmen came across a metal strongbox containing the archaeological lexicographical find of the century: several as yet unpublished sheets of the Dictionary. Whether these sheets form part of Johnson's contemplated but abandoned third supplement or were merely misplaced it is impossible to say. The Syndics of the Oxford University Press have agreed to publish the sheets in facsimile, together with an amended version of each entry with modern examples of usage. The gift referred to above is a handsomely mounted diptych of two of the leaves together with an individually numbered copy of the Press's modern version. The diptyth is available for inspection by all members of the Bar in the office of Barristers' Chambers Limited, by appointment. The modern entries are reprinted herewith.

MCPHEE (*Makfee*) (origin obscure, possibly Gothic Macfeoan to squat, or Sanskrit maccveeion, a water course).

A. Substantive 1. A dilatory rogue, a maker of false excuses.

(a) "For who would bear the wips and scorns of time. Th' oppressor's wrong, the proud man's contumely. The pangs of despised love. McPhee's delay." (Shakespeare)

(b) "Here am I, an old man in a dry mouth.
Waiting for McPhee". (T.S. Eliot 1917)

2. Inexplicable absence (1744): **3.** Excuse for absence Court (vide Essoign).

B. Verb 1. To omit or eschew appearance. **2.** To create a gap or hiatus. **3.** To leave a lacuna. **4.** To fail to welcome, be inhospitable. **5.** To be silent.

CENTENARY (from the Urdu *Sentenri*, a savage feast at which the woman of the warrior caste were temporarily released from purdah).

Substantive 1. An occasion of wanton mirth, a celebration. **2.** A celebration esp. of an an-

niversary of uncertain period, thus 100, 115 or 124 years. (Meaning 2 has given rise to the false etymology from the Latin *centennius*, leading to the corrupt pronunciation *senteenary*. The phonetic spelling of the Urdu original is the preferred guide).❞

M. CRENNAN

The exquisite perfection of Crennan's work was not fully appreciated until the March part of the 1985 *Australian Law Journal* hit readers' desks. At page 129, under the heading "Current Topics", the journal recorded that two Centenaries had occurred in 1984, those of the Victorian Bar and the Law Society of New South Wales. After some laudatory comment on the Centenary edition of the *Victorian Bar News*, the editorialist continued:

The English Inns of Court handsomely honoured the Centenary by presenting the Victorian Bar with a mounted diptych of two unpublished sheets of a recently discovered set of unpublished sheets of Dr Samuel Johnson's 18th century dictionary, together with an individually numbered copy of the publication by the Oxford University Press containing the facsimiles of the set of unpublished leaves. Having regard to Dr Johnson's close relationship with English and Scots law and lawyers, as described in the note in 58 *ALJ* 628, this is a wonderful gift to the Victorian Bar. One of the sheets in the diptych contained appropriately the word "Centenary", defined as "an occasion of wanton mirth, a celebration".

The generosity of the Inns of Court to the Victorian Bar was happily not exhausted. Michael Crennan's excellent channels of communication with the Oxford University Press resulted in the publication, at page 23 of the Winter 1985 edition of the *Bar News*, of the following, this time aided by Macbeth and Troilus and Cressida.

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The

Australian Law Journal

Volume 59 March, 1985 Number 3

Current Topics

Two Centenaries of 1984 — the Victorian Bar and the Law Society of New South Wales

The year 1984 was notable not only for being the Orwellian year of the famous novel by George Orwell, but also as marking a number of centenaries related to the law, such as the centenary of the opening of the building in Melbourne of the Supreme Court of Victoria (see 58 A.L.J. 247), the bicentenary of the death of Dr Samuel Johnson (see 58 A.L.J. 628) and the centenary of the first issue of what is perhaps the most famous law journal in the world, *The Law Quarterly Review*. Apart from these, there were celebrated in 1984, in appropriate style, the centenaries, respectively, of the Victorian bar and of the Law Society of New South Wales.

The Victorian bar came into being as an organised body in 1884, when Bar Regulations were adopted governing the conduct of "members of the Bar of Victoria" in their relations with both solicitors and clients. Although barristers had practised in Melbourne prior to the adoption of these Regulations, it has been accepted that such adoption represented the first step which created the Victorian bar as a formal entity. Until then persons who practised as barristers did so as individuals, subject to regulation in the conduct of their professional business only by the overseeing Supreme Court of Victoria, by which Court they had been admitted as practitioners. The centenary was celebrated, inter alia, by a Centenary Dinner of the bar, and by the publication of a centenary edition of the *Victorian Bar News*, an issue which will certainly in the future become a collector's item. It contained a series of articles on different periods, including three fascinating studies in particular, namely, "1920-1940; the Era of Dixon and Menzies", by Sir Gregory Gowans, "1950-1961; the Bar Expands", by Mr Justice K. H. Marks, and "1970-1980; a Community of Interests", by Mr David Henshall. The English Inns of Court handsomely honoured the centenary by presenting the Victorian bar with a mounted diptych of two unpublished sheets of a recently-discovered set of unpublished sheets of Dr Samuel Johnson's eighteenth-century dictionary, together with an individually numbered copy of the publication by the Oxford University Press containing the facsimiles of the set of unpublished leaves. Having regard to Dr Johnson's close relationship with English and Scots law and lawyers, as described in the note in 58 A.L.J. 628, this is a wonderful gift to the Victorian bar. One of the sheets in the diptych contained appropriately the word "centenary", defined as "an occasion of wanton mirth, a celebration".

In Sydney, there were likewise celebrations to commemorate the centenary of the foundation of the Law Society of New South Wales. Corresponding to the centenary edition of the *Victorian Bar News*, there was published a commemorative issue of the Society's Official Journal, the *Law Society Journal* (issue of December 1984). This number of the *Journal* contained a comprehensive pictorial

AUSTRALIAN LAW JOURNAL ACCOLADE

❝The Bar's recent acquisition of Johnsoniana was given some publicity in the March edition of the *Australian Law Journal* (59 *ALJ* 129). The authors of the comments therein contained will be interested to learn that the trustees of the Samuel Johnson Diptych (Gift) Trust after consultation with the Syndics of the Oxford University Press have authorised the editors of the *Victorian Bar News* to print a further entry from the recently discovered holograph.

EDITOR: (Sb.) from the Provencal "Aidetour" originally a keeper of Manuscripts. The term fell into opprobrium after the Albigensian extirpations, as used on one associated with heterodox views or fabulous relics.

1. A purveyor of apocrypha
   "Why! Though the very editors do cry it in the market place still it may be true."
   Shakespeare
   "A tale told by an editor, full of sound and fury, signifying nothing."
   Shakespeare
2. As adjective: Editorial: a generous suspension of disbelief in the fabrications of social inferiors; thus, editor: a gull, one overly credulous.
   "This nonsense got into all the editions by a mistake of the editors".
   Alexander Pope 1725
   "The simplicity of the gulled editor."
   Charles Lamb Guy Faux 1811
   "It is as well to believe that we are good natured editors who will easily swallow."
   Duke of Wellington Despatches VII, 511.
   Cassandra "Farewell. Yes, soft! Editor, I take my leave
   Thou dost thyself and all our Troy deceive"
   Shakespeare❞

MICHAEL CRENNAN

Editors' Note

Attentive students of Johnsoniana will have noticed the discovery of a previously unpublished letter of Samuel Johnson in the National Library in Canberra (*The Age* 5 June 1985 p. 9). We await with interest any topical comment in a future edition of the *ALJ*.

Anxious scrutiny of later editions of the *Australian Law Journal* has not, alas, produced any evidence that the editor of that esteemed journal was ever made aware of this second example of the generosity of the Trustees of the Samuel Johnson Trust towards the Victorian Bar.

Two classes of accused revisited

The following extract from *The Economist* of April 11, 1998 bears out the concerns expressed in the Editor's Backsheet in the last issue of this journal.

AFTER adverting to the American "commitment to the ideal of equality before the law" *The Economist*'s writer says:

This is the image most Americans still have of their criminal justice system — the fairest in the world, in which any defendant, no matter how poor, gets a smartaleck lawyer who, too often, manages to get the culprit off on a technicality. Nothing could be further from the truth. About 80 per cent of people accused of a felony have to depend on a publicly provided lawyer; but over the past two decades the eagerness of politicians to look harsh on crime, their reluctance to pay for public defenders, and a series of Supreme Court judgments restricting the grounds for appeal have made a mockery of Gideon. Today many indigent defendants, including those facing long terms of imprisonment or even death, are treated to a "meet 'em and plead 'em" defence — a brief consultation in which a harried or incompetent lawyer encourages them to plead guilty or, if that fails, struggles through a short trial in which the defence is massively outgunned by a more experienced, better-paid and better-prepared prosecutor.

He or she then quotes Stephen Bright, the director of the Southern Center for Human Rights, as saying:

We have a wealth-based system of justice. For the wealthy, it's gold-plated. For the average poor person, it's like being herded to the slaughterhouse. In many places the adversary system barely exists for the poor.

The Economist writer continues:

Many lawyers, of course, have made heroic efforts for particular defendants for little or no pay, but the charity of lawyers can be relied on to handle only a tiny fraction of cases. As spending on police, prosecutors and prisons has steadily climbed in the past decade, increasing the number of people charged and imprisoned, spending on indigent defence has not kept pace, overwhelming an already hard-pressed system.

A rise in the hourly rate paid to defence lawyers preparing a case in the federal courts, approved by Congress in 1986, has still not been implemented in 77 of the country's 94 federal districts because Congress itself refuses to appropriate any additional money. At $45 an hour, many defence lawyers practising in the federal courts are not paid enough to cover their hourly overhead costs for maintaining a law office, according to the federal government's own calculations.

The article gives some analysis of the fees paid to lawyers representing legally aided clients both in the federal system and in the states. These figures, which certainly in relative terms are considerably worse than the Victorian figures, have led to a situation where:

Many poor defendants receive less than sterling representation. Mr Bright's files are stuffed with examples of people whose public defenders were either grossly negligent or ignorant.

We have not yet reached that stage in any Australian state.

The Economist writer concludes:

Providing poor defendants with proper legal representation would cost money, but it is affordable. The estimated spending on indigent defence is less than 2 per cent of total national spending on law enforcement, and only about 10 per cent of spending on all judicial and legal services. Some states, found the money for a reasonably financed public-defender programme. Criminal legal aid is also starved of support in many other countries, but some, such as Britain and the Scandinavian countries, can find the money to do the job well.

A Lou Richards forecast?

Judges return to the court after lunch yesterday.
The Australian Financial Review, Friday, 24 April 1998 (Picture: Peter Braig)

Black holes

IT is a curious thing about the English language, that although it has a vast vocabulary and rich idiomatic variations, it lacks words for some common and useful ideas. This is so, despite the fact that we have words for ideas so obscure that they can hardly expect to be used more than once in a lifetime. For example:

abaciscus A square compartment enclosing a part or the entire pattern or design of a Mosaic pavement.

catapan The officer who governed Calabria and Apulia under the Byzantine emperors.

denariate A portion of land worth a penny a year.

holluschickie Young males of the northern, Pribilof, or Alaska fur seal.

pitarah A basket or box used in travelling by palankeen to carry the traveller's clothes.

spetch A piece or strip of undressed leather, a trimming of hide, used in making glue or size.

wennish Of the nature of a wen.

turdiform Having the form or appearance of a thrush.

Philip Howard — sometime Literary Editor of *The Times*, and a splendid writer about words — calls these gaps "black holes". In deference to him, I adopt the same tag, although it is inappropriate. The intended meaning is a gap, or an absence where a presence might be expected. By contrast, a black hole is caused by the presence of an enormous mass concentrated to an extent inconceivable to all but physicists. The gravitational pull of this mass is so great that nothing — not even light — can escape from it, once the gravitational horizon has been crossed. We misuse *black hole* colloquially just as we misuse *quantum leap* colloquially — but only physicists are likely to be upset or confused.

Philip Howard identifies *Schadenfreude* as one of the black holes in English. One commentator (R.C. Trench) celebrates this gap, saying "What a fearful thing is it that any language should have a word expressive of the pleasure which men feel at the calamities of others; *for the existence of the word bears testimony to the existence of the thing.* And yet in more than one, such a word is found: in the Greek *epikairekakia,* in the German, *Schadenfreude".* Well, it is rare to see such refinement of feeling deployed in the service of philology, but relations between the English and the Germans has always been complex. Personally, I think *Schadenfreude* is a useful and expressive word, and much to be preferred to *epikairekakia.*

Terry Lane has defined *Schadenfreude* as the sensation experienced when you see two Mercedes Benz collide: but that may reflect his preference for Australian-made cars more than his proud egalitarianism. In either case, it is a near-perfect definition for a sentiment which dares not speak its name in English. Clive James admits to *Schadenfreude* when he sees his rival's books in the remainders bin.

Trench's point is neatly made in the Victorian laws against homosexuality. Since Queen Victoria refused to accept the possibility of homosexual attraction between women, the offence created by Parliament was confined in application to men (as Oscar Wilde soon found to his grief) and it was not until 1925 that Aldous Huxley borrowed (this time from the Greek) and coined the word *lesbian.*

The presence in English of an unnaturalized foreign word is a fair indicator of a black hole in the language. The presence of a convenient foreign word very likely prevents the emergence of an English equivalent. So, expressions such as *savoir faire, déjà vu, décolletage, faux pas, outré, de trop,* and *l'esprit d'escalier* are well understood and very useful. They serve a purpose that is not adequately served by existing English words. However, although these and similar expressions fill a gap, they leave unfilled room around the edges. English is very ready to create variants of existing words, in order to allow (for example) a noun to generate a verb, an adjective and an adverb. Thus the language can be used more flexibly to deploy the central idea. *Grovelling* is an adverb, not a participle. But it looks like a participle, so we freely backform a verb *to grovel,* and a noun *a grovel. A* vast number of English words have identical or similar relatives which serve as other grammatical forms. By contrast, unnaturalized foreign words and phrases do not lend themselves to conversion into related grammatical forms. So, *déjà vu* is a useful noun, but how to make an adjective which describes an occurrence which has the characteristics of *déjà vu*? Likewise, you could not possibly say a person smiled *Schadenfreudishly,* as their enemy *faux pas*ed their way through a conversation!

Although *savoir faire* is a pair of verbs in French, it can only be used as a noun in English. Such a pity it cannot be used adjectivally: *she was as savoir faire as he was gauche.* By contrast, *gauche* has been naturalized: we speak more readily of *gaucheness* than the correct *gaucherie. Naïve* has also been naturalized: it can be used as noun and adjective, and becomes *naïvely* when an adverb is needed.

Argument by *reductio ad absurdum* is useful and common, especially in the realms of philosophical and legal discourse. Obviously it cannot be converted into a different grammatical form. In order to describe the mode of argument, we say it is an *argument by reductio ad absurdum.* Happily, there is an adjective–adverb pair with the same meaning: *apagogical, apagogically.*

Unhappily, there is no equivalent way of expressing the adverbial phrase *mutatis mutandis* in adjectival form or as a verb. How handy it would be to ask a typist to *mutandise* a summons into a draft order, or to *mutatise* this set of interrogatories into a form appropriate to the facts of the next case. *Mutate* would be good, but it is taken already for a different meaning.

It is probably a good working test of naturalization of a foreign word that it can be converted into other grammatical forms. It is one of the great strengths of the English language that it absorbs so many foreign words and then treats them as native. In *Modern English Usage* (1926), H.W. Fowler lists a number of French words and phrases, with guidance for their pronunciation and plural forms. They are listed, clearly, as un-naturalized foreign words. It is instructive to see that the list includes many words that are still obviously foreign (*chic, en famille, metayage, petit, pis aller, redaction, sangfroid, soi disant*), but it also includes many which have since been naturalized: *ballet, bureau, calorie, carafe, casserole, chassis, clairvoyant, diplomat, gauche, insouciant, liaison, macabre, massage, mayon-*

naise, nuance, panache, provenance, regime, restaurant, ricochet, sabotage, and *verve*.

Despite all this wanton borrowing from other languages, there remain obvious gaps in English. We need an equivalent to the Italian *ma gare* which translates roughly as "Ah, but that it were so". We have *if only,* and *you wish,* but neither quite captures it.

Why do we not have a word for the sensation of disaster narrowly averted and later remembered from the vantage point of safety? It is different from fear: that was the sensation at the time the danger was present, and the outcome was unknown. Later, usually in the dark, unsleeping hours before dawn, the sense of what might have been returns with added elements of guilt, shame and sweating relief, in a mixture which is too powerful and familiar to be unnamed.

And what of its approximate opposite: the instantaneous sensation when, for example, you are pulled over by a booze bus, and have not had a drink for two weeks! Despite demonstrable innocence, there is a flash of guilt — *empty guilt* perhaps? — which, I suspect, most people experience.

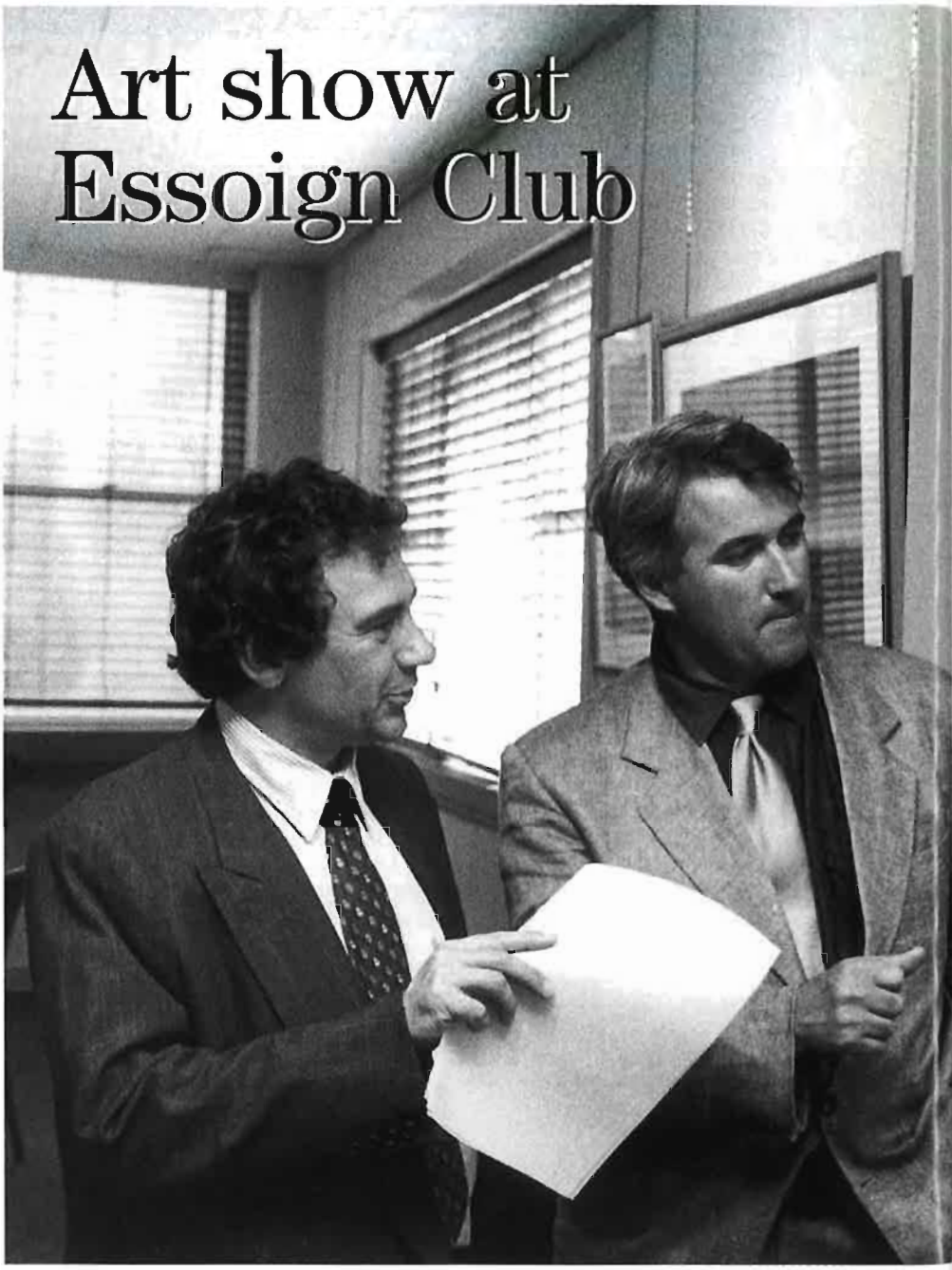
We should have a word to take the place of *Yes,* when it is used in conversation to signify that the hearer is understanding, but not agreeing with, the argument being developed by the speaker. It is possible to use the phrase *I hear what you say,* but this has a dismissive connotation which makes it dangerous at times. I understand that judges find it particularly irritating when used by counsel, and on the few occasions I have seen my opponent use it in argument, the effect has invariably helped my case!

And whilst I am advocating linguistic inventions, can we have a word for the sensation when sleepiness swerves briefly back into alertness at the moment your head drops forward during a dull lecture, or your opponent's tedious cross-examination.

We need a noun cognate with *ignore,* but different from *ignorance.* "She treated him with contempt and ignore" catches a meaning we all need to express, but *ignore* cannot be used that way except for humorous effect. *Ignoral* is sometimes seen, but is also jocular. *Ignoration* has this sense as a secondary meaning. It is recorded as last used in 1881: perhaps we should revive it.

Julian Burnside

Art show at Essoign Club



The Essoign Club is host to exhibitions of art by various artists throughout the year. Escape from the dull greyness of late Autumn was offered by the brilliant colours and wide horizons of Russell Morrison's landscapes exhibited during April and May. The exhibition was highly successful and hopefully Morrison will be back next year.

On show now in the Club is an eclectic collection of works by Spooner, Leunig, Gurvich and others. This show is current until mid July and provides a provocative ambience for the wholesome cuisine offered by the Essoign Club. No more pleasant distraction can be imagined for those quiet hours in the middle of the day.

James Mighell and Graeme Uren admire Morrison's work.

Jane Radas and Russell Morrison.

Andrew Grozier-Durham, Heather Gordon and Geoff Combes.

Top left: Chairman of Essoign Club Michael Colbran with artist Russell Morrison and his painting called "Black Cocky Rock".

Left: Chris Thomson and Russell Morrison admiring Morrison's "Darling Cockies" which Thomson has bought for chambers.

One all at Bar *v.* Mallesons Steph

First XI — beaten by 21 runs at Wesley College, Sunday 5 April 1998

Chris Connor, Denis Gibson, Ragu Appudurai, Johnathan Davis, Jon Sampson, Matthew Paenell, The Hon. Mr Justice Gillard (absent from photo), Tony Southhall Q.C., Matthew Walsh, Lachlan Wraith, Andrew Dickenson, Stephen Mathews and Neville Kenyon.

LOOKING for its fourth win in a row against Mallesons Stephen Jaques, the Bar team was surprised by a strong MSJ combination to be beaten by 21 runs in a high-scoring game at Wesley College, Prahran at the tail end of the recent cricket season.

The firsts selected some new talent in Andrew Dickenson, Matthew Walsh and John Davis and all performed creditably.

Upon winning the toss MSJ wisely chose to bat first and were soon scoring briskly. Matthew Parnell and Jon Sampson shared the majority of the wickets with three apiece. John Davis and Matthew Walsh complemented the Bar's attack with tidy spells but Connor was treated by the MSJ hitters much like Warne was recently dealt with by Tendulkar on the sub-continent. Tony Southall maintained his string of consistent performances with the gloves. MSJ reached 8/188 from their 35 overs.

Unfortunately Stephen Mathews suffered a career-threatening injury when he sustained a complicated fracture to his right shoulder which he had unknowingly damaged the weekend before in his heroic dive to gain his ground while stealing the winning run against the NSW Bar.

With the required run rate approaching 51/2 runs per over MSJ bowled leg theory and set a defensive field.

Matthew Parnell (52 retired) and Lachlan Wraith (31) were the mainstays of the Bar's innings, but the run rate kept climbing inexorably.

Whilst Neville Kenyon and others tried valiantly to score the necessary runs, the deepening late afternoon light increased the difficulty of their task. A late flurry saw Connor finish with 33 n.o., but with 5/167 the Bar was well short of its target when stumps were drawn.

Congratulations to MSJ upon their victory. The fixture which began at the start of this decade (see *Victorian Bar News* No. 72, p.44) now stands at 5–3 in favour of the Bar.

en Jaques 1st & 2nd XI matches

Second XI — regain the Phil Opas Trophy

AFTER suffering a humiliating defeat by Malleson Stephen Jaques on the last occasion, the Bar's 2nd XI regained the Phil Opas Trophy on Sunday 5 April 1998 at Wesley College.

In a high scoring game, the Bar's 280 runs (in 35 overs) were sufficient to hold off a determined "fight-back" by MSJ which scored 267 runs in the same number of overs.

This game was remarkable in that the batsmen, bowlers and fielders in both teams played aggressively from start to finish.

After the Bar had literally thrashed the MSJ bowlers for over two hours, one might have expected the MSJ players to have been somewhat demoralised. Indeed, if anyone had predicted the closeness of the scores after the Bar had accumulated that massive total of 280 runs, he might reasonably have been accused of having "pipe-dreams" or, more pertinently, "prohibited substance dreams". However, the MSJ batsmen accepted the challenge and did not give up until the last ball was bowled.

Paul Graham's 54 runs and a wicket, Mark Serong's 49 runs, Adrian Ryan's 45 runs and a wicket, Bill Serong's 35 runs and two wickets, Glen Patterson's 3 wickets, Stuart Wood's two wickets, Joel Atkinson's 20 runs and his brilliant wicket-keeping as well as bowling, Will Alstergren's bowling and fielding (especially when he took over from Joel as the wicket keeper), Mark Greenshield's economic bowling (7 overs for 25 runs and two superb catches) and Warren Swain's bowling and fielding are all deserving of mention.

But, possibly, the highlight of the match for the Bar was provided in a "cameo innings" by Paul Hayes who hit 17 runs off four balls in the Bar's final over. Having regard to the winning margin of 13 runs, Paul's contribution was vital to success.

Seeing Paul batting brings back memories of watching Merv Hughes, Ian Botham and, more recently, Arjuna Ranatunga of Sri Lanka and Inzamam-ul-Haq of Pakistan play. They all hit the ball hard and, it would appear, that none of them has ever met Jenny Craig.

Even those poor souls, or should it be soulless people, who find cricket boring would have enjoyed the spectacle that both teams provided.

The Bar congratulates MSJ on its fighting spirit and its usual excellent organisation of the game but is pleased to have won back the Trophy. We look forward to the next game in 1999 and to another win.

Michael Shatin Q.C.

BAR & BENCH

DRAGON BOAT RACING TEAM

IMPRESS YOUR FAMILY
DENY YOUR AGE
DO SOMETHING MORE SILLY AND POINTLESS THAN LAW
HAVE FUN

Twenty-two men and women (of unsound mind) are required for the BAR & BENCH Dragon Boat racing team.

Each year Dragon Boat racing attracts over 100,000 spectators along the Yarra for Moomba.

Get out of the crowd and into a boat!

I need your help to:

• paddle • lodge appeals • protest

(Life jackets for non-swimmers)

Other teams include law firms (try touting as you ram their boat!), corporations, restaurants (mostly Chinese), the Navy (something for everyone, and they lost last year!) Volvo, Drake, Transfield, etc.

FITNESS FROWNED UPON!

I need expressions of interest to register a team, for information call:
Arnold Dix on 9608 8890

1998 trials – Transfield crashed into Drake. Navy in foreground wins. Three protests lodged – nice work for the lawyers.

Conflict of Laws: Commentary and Materials

By Davies, Ricketson and Lindell
Butterworths, Sydney, 1998
Paperback, liv, 814 pp

THIS seems to me a really good student casebook on private international law. It contains extracts of all the main cases in each area with a linking commentary. The commentary is generally clear and well written.

At times the questions in the commentary (presumably designed to focus students' interest and provide topics for class discussion) seem a little clever. For example, there are some pinpointing supposed logical errors by judges. As practising barristers are aware, if such errors do exist, the reasons for them are best regarded as being unknowable.

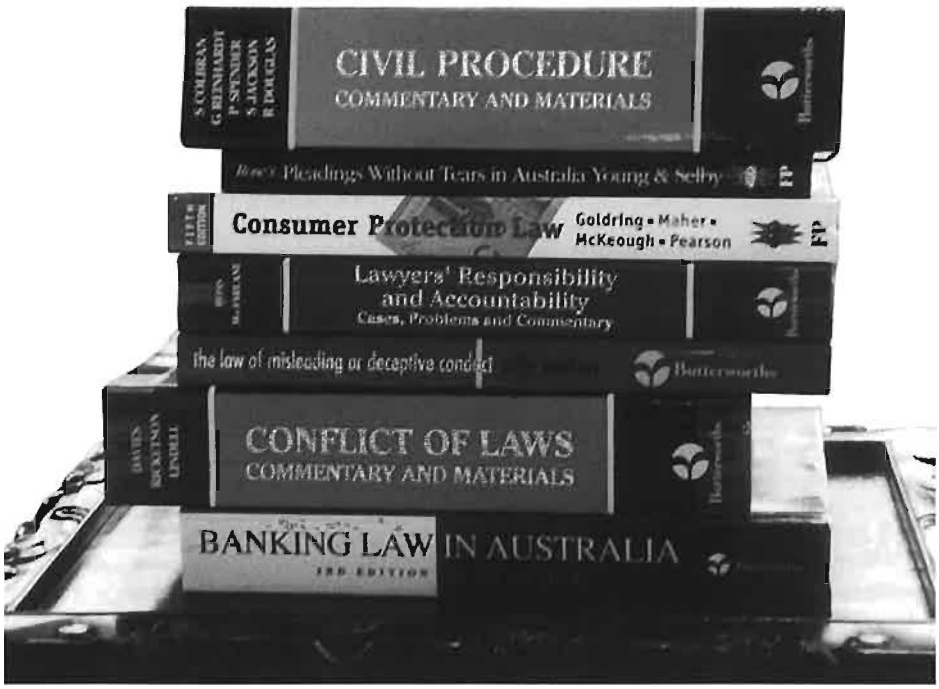
The book covers the law in common law countries about when the courts will exercise jurisdiction, when foreign laws will be applied and foreign judgments enforced, and factors that connect people and companies to particular jurisdictions. Special chapters deal with choice of law in areas including torts, contract, property, succession and family law. There is also a consideration of the additional problems raised by Federal systems like Australia.

Choice and application of law in many of these areas can be extraordinarily difficult. It is not made any easier by the confusing and contradictory efforts of the High Court and other courts in recent years. The authors of this book are to be admired for making such a complex subject at least occasionally seem clear.

Michael Gronow

The Law of Misleading or Deceptive Conduct

By Colin Lockhart
Butterworths 1998
pp. i–vi, Table of Cases vii–xxviii, Table of Statutes xxix–xxxvi, 1–320, Index 321–329



THE Law of Misleading or Deceptive Conduct comprehensively deals with the law that has developed regarding s. 52 of the *Trade Practices Act* 1974 and that section's corresponding enactment in various State laws.

The multitude of cases and fact situations that rely on s. 52 can almost be described as a legal growth industry. Certainly claims founded on alleged breaches of s. 52 have been far more prevalent than claims relying on the now Part VIA of the Trade Practices Act (Unconscionable Conduct) or indeed any other section of the Trade Practices Act. Claims based on misleading or deceptive conduct have now become an almost pro forma allegation in commercial disputes. Consequently this book is welcomed as an extremely useful resource in relation to this important aspect of commercial disputes and commercial law.

The book is broken up into two broad parts, each part containing a number of chapters. At the beginning of each chapter there is an index to that chapter. From a practical point of view this enables the reader to locate relevant parts of the text quickly. In addition, the text is comprehensively footnoted with appropriate statute and case references which enable the reader to follow up lines of further enquiry and research if necessary.

In Part A of *The Law of Misleading or Deceptive Conduct* there are chapters dealing the scope and ambit of the Trade Practices Act generally, the meaning of the phrase "conduct in trade or commerce", and discrete chapters dealing with particular instances of misleading or deceptive conduct such as "non-disclosure", and misleading or deceptive conduct by way of suggestion or implication of a commercial association with a particular product or person.

Part B deals with the legal consequence of the impugned conduct, and contains a comprehensive discussion and analysis of the various remedies available. It includes a specific chapter dealing with issues that arise in relation to pecuniary compensation (chapter 11), such as the components or heads of damage and discussion of the remedies available under s. 87 in addition or as an alternative to s. 82 damages. There are further chapters in Part B dealing with limitation periods, including specific discussion of issues that arise in determining when a cause of action accrues (Chapter 12), and the identification of parties potentially caught by the s. 52 "net" (i.e./persons "engaged in" or "involved in" misleading or deceptive conduct (Chapter 8).

The work is clearly aimed at those who need to have a comprehensive working knowledge of both the general principles and practical application of the law that has developed in Australia in relation to s. 52 of the Trade Practices Act over the last (almost) 25 years

The work will be of much use to practitioners as it provides insight into practical aspects of s. 52 claims, such as the need to correctly plead s. 51A (representation with respect to a future matter), the question of the proof of misleading and deceptive conduct (see generally paragraphs [3.27] [3.41] and [6.49]–[6.53]) and has extensive chapters

on remedies and a chapter on limitation periods.

This work is a timely and necessary analysis and guide to this important area of the law and commercial disputes.

P.W. Lithgow

Lawyers' Responsibility and Accountability: Cases, Problems and Commentary

By Ross and Macfarlane
Butterworths, Sydney, 1997

WHEN I was a solicitor, one of my employers told me there were basically two rules of conduct for lawyers. They were:

(a) don't tell lies; and
(b) don't steal your clients' money.

Recent events have shown that some lawyers have trouble remembering even that. But as we all know, professional ethics and conduct can raise issues of considerable complexity. Sometimes the difficulty is not finding the strength of character to do the right thing, but finding out what the right thing is. Many lay-people do not appreciate how hard it can be to balance one's duties to the client, the other parties, one's colleagues, the courts and the general public (to name but a few), let alone bringing off a transaction or a case while doing so. Contrary to the views of John Mortimer's father, being a competent and ethical lawyer requires more than common sense and relatively clean fingernails.

Given how hard it is to be a lawyer now, it is not surprising that courses in the ethical and professional obligations of lawyers are becoming increasingly popular. They are frequently compulsory as part of a law degree, as a requirement to admission and as continuing legal education. It remains to be seen whether this is enough to improve our standards of behaviour, and lift our reputation from its present low. At least it shows we are trying.

This book is designed for use in such a course. I think it would be good. It covers not only admission and conduct requirements, but also things that may emerge in practice like conflicts of interest and negligence claims. It has extracts from many of the most important cases on lawyers' professional conduct and admission and practising requirements. Together with the commentary, the extracts provide a comprehensive and up-to-date coverage of our professional standards. I think this book could also be useful to practitioners advising or acting in the area, or confronted themselves with an ethical or professional dilemma.

Michael Gronow

Consumer Protection Law (5th edn)

By J. Goldring, L.W. Maher, J. McKeough and G. Pearson
The Federation Press 1998
i–iv, Preface v, Table of Cases vi–xix, Table of Statutes xx–xxxiv, 1–431, Index 432–436

IT is a tribute to the standard of scholarship and its relevance that *Consumer Protection Law* is now in its fifth edition.

While the authors all have strong academic backgrounds, two of the authors have a significant practical background, one being a Judge of the District Court of New South Wales. The book derives much of its strength from the combination of legal scholarship with practical concerns in its text.

Consumer Protection Law provides a concise, yet detailed, exposition and analysis of various aspects of the law as it has developed in relation to consumer transactions throughout all Australian jurisdictions.

The traditional areas of consumer protection such as contractual rights (arising from both express and implied terms) and manufacturers liability for defective products (principally arising under the *Trade Practices Act)* and the general law in relation to misleading and deceptive conduct are all the subject of separate and comprehensive chapters. In addition there is a further chapter dealing with specific types of deceptive practices such as, inertia selling, mock auctions and pyramid selling schemes and a chapter relevant to standards for goods and services (i.e. safety and food standards, etc.).

A further chapter is devoted to occupational licencing regimes, which includes reference to general occupational licences such as apply to doctors, lawyers, architects, etc. as well as other specific occupations such as travel agents, motor vehicle dealers, builders and those involved in credit and finance, for instance, who are subject to specific statutory regulation and control.

A discrete chapter provides extensive analysis of the new national consumer credit laws with particular focus on the *Uniform Consumer Credit Code* which was introduced in all States (except Tasmania) on 1 November 1996. This chapter also covers the earlier State consumer credit laws and provides an explanation of the processes that led to the adoption of the national consumer credit regime.

This is an excellent work. It provides Australia-wide coverage and excellent legal analysis by reference to cases, statutes and general principles of all the relevant law. Where appropriate the text discusses the underlying social and economic factors that are the background to consumer protection law and its development. Tables are provided where appropriate to enable the cross-referencing of legislation between the various jurisdictions. *Consumer Protection Law* is sure to find a niche on the bookshelves of students, consumer advocates, the suppliers of goods and services, as well as being a valuable resource for legal practitioners.

P.W. Lithgow

Rose's Pleadings Without Tears in Australia

By Peter Young and Hugh Selby
The Federation Press 1997
256 pages

LAST year the *Australian Financial Review* reported that the Supreme Court of South Australia struck out the South Australian Government's 500-page statement of claim against the auditors of the former State Bank on the grounds of its complexity. The Government's response was to file a new 2600 page statement of claim which was also dismissed as unworkable! ! The authors of these two tomes would have benefited from reading *Rose's Pleadings Without Tears in Australia*, which aims to encourage tight, logical, well-expressed pleadings.

Pleadings Without Tears is aimed at the beginner but experienced drafters will also find parts of the text of benefit. It is not a precedents book: in the Intro-

duction the author explains that he was motivated to write the book to fill a gap in the market for an "idiot's guide" to drafting pleadings. It is the only book I know of where the advantages and disadvantages of using such time-honoured phrases as "at all material times" and "on or about" are discussed.

In addition to drafting pleadings, the book discusses drafting interrogatories, affidavits and minutes of court orders. A chapter on drafting statements of facts and contentions, which are used in the Administrative Appeals Tribunal and the Federal Court, has also been included by the Australian editors.

The only criticism I have is that in one part the book assumes a knowledge of the jurisdictional limits of courts in New South Wales. Some readers may also be critical of the drafting style the author adopts in drawing statements of claim. When I was taught to draft pleadings I was told that it was preferable to limit each paragraph of the statement of claim to a single allegation of fact, particularly if the allegation was likely to be contentious. The advantage of drafting a statement of claim in this manner is that it should be clearer which allegations are being denied and which admitted when the Defence is drafted. However, a number of the examples of statements of claim provided by the author bundle up more than one allegation in a single paragraph. In some of those examples my own preference would be to split the allegations between two paragraphs, but this may be no more than a personal preference.

Pleadings Without Tears is much more than an idiots guide to drafting pleadings. It deals with issues not covered in traditional pleadings precedents books and would be of value to anyone starting at the Bar who expects to be drafting pleadings.

Michael Flynn

Civil Procedure: Commentary and Materials

By S. Colbran, G. Reinhardt, P. Spender, F. Jackson and R. Douglas
Butterworths 1998
pp.i–xiv, Table of Cases xv–xxxix, Table of Statutes xli–lii, Table of Statutory Rules liii–lxevi, Table of Practice Directions lxevii, 1–962, Select Bibliography 963–5, Index 967–89

AS the Preface to *Civil Procedure: Commentary and Materials* notes this work is an attempt ". . . to present a coherent exposition of modern civil litigation in all Australian jurisdictions . . . to summarise Austrian procedural law, compile a useful set of materials, and to create a standard national approach to the teaching of this subject".

The aim, format and structure of "commentary and materials" textbooks is first and foremost as teaching tools designed for the needs of teachers and students. It is of secondary concern whether or not the text is of use to practitioners. However, from a practitioner's point of view this work will be of use for three principal reasons.

First, the text is completely comprehensive in its coverage from service and appearance through to appeals and enforcement.

Second, at the end of each chapter there is a substantive list of further reading which refers the user to articles, loose-leaf publications and texts relevant to the topic. As well, within the body of each chapter there are further specific suggestions as to relevant sources and materials on specific aspects raised within each chapter. These references are in addition to the various extracts and references to cases and statutory rules that are extracted or referred to in the text. Accordingly, where a practitioner is looking for more than just the relevant rules but rather needs a deeper understanding of a particular aspect of civil procedure, this text provides an extremely useful guide to avenues of further research and study.

Third, although the text is not concerned with "evidence", the interplay of the *Evidence Act* 1995 (Cth) and civil procedure does impact on aspects such as discovery and other incidental pretrial processes and accordingly the text provides some guidance to the changes that result from this legislate innovation.

Civil Procedure: Commentary and Materials is comprehensive in its coverage of the civil procedure process, with specific chapters devoted to important areas such as limitation of actions, jurisdiction, discovery, interlocutory procedures (including Anton Piller orders and Mareva injunctions) appeals and new trials and enforcement of judgments. Other more particular and specialised aspects of litigation such as service, appearance, pleadings, affidavits and disposition, both by summary application and by settlement or compromise, are the subject of separate chapters.

This is a text to which many practitioners will usefully refer. Although on one view, the matters contained within the text may not be directly applicable to a practitioner in a particular jurisdiction, the principles as explained and applied have a common link between all jurisdictions.

The book will not replace for Victorian practitioners the loose-leaf services *Civil Procedure — Victoria* by Mr Williams or *Victorian Courts* by Mr Nash or indeed the *Annotated Rules of Court* by Mr Cook. The text will, however, be a useful adjunct to those services for many practitioners and of course will be a sound and comprehensive basis for the teaching of civil procedure.

P.W. Lithgow

Banking Law in Australia (3rd edn)

By Alan L. Tyree
Butterworths
pp. I–xli. 1–540 (including index)

I have found this book to be very informative. It is clearly written and contains a wealth of material. In the first chapter "Outline", the author discusses the structure of Australian banking, which includes an examination of the *Financial Transactions Reports Act* 1988. The discussion includes the concept of significant cash transactions. I note that reference was not made to *Leask* v. *The Commonwealth (1996)* 187 CLR 579 in which the constitutionality of section 31(1) of that Act was challenged.

The book encompasses a wide range of topics in relation to banking in Australia. Cheques are dealt with in two sections. The second section includes an analysis of other instruments, such as bank cheques. Dr Tyree observes that the commercial community ". . . generally treats bank cheques as having the same commercial status as cash. Consequently, it sometimes comes as a surprise to the community to find that bank cheques may be dishonoured and that the drawer of the bank cheque may raise defences in exactly the same way

the drawer of an ordinary cheque" (6.85). The author refers to *Sydney Raper Pty Ltd* v. *The Commonwealth* and to *Justin Seward Pty Ltd* v. *Commissioners of Rural and Industries Bank* in which the rule emerged that principles of law applicable to bank cheques were no different from those that applied to ordinary cheques. The certainty that the commercial community places in bank cheques is illustrated by the provision of Table A of the *Transfer of Land Act* which requires settlement moneys on the sale of land to be paid, *inter alia*, by bank cheque.

I found the author's discussion of other payments systems in chapter 8 interesting. The author discusses the GIRO System and the EFT system which is of growing importance. The banks have moved to an electronic clearing system for cheques, and the author discusses the new Australian settlement structure in terms that enable the untechnical to obtain a clear appreciation of how the system works.

In the field of international trade, letters of credit are of considerable importance. For those not involved in international trade, the operation of letters of credit remain somewhat of a mystery. The letter of credit is a form of lending which enables purchasers of goods from overseas to provide a method of payment to the overseas supplier and which provides that supplier with security. Dr Tyree discusses the effects of letters of credit, and other forms of lending, in considerable detail.

I would recommend this book as an important work, and it has the attraction of clarity and ease of reference.

John V. Kaufman

Conference update

3–4 July 1998: Brisbane. AIJA Conference on Reforming Court Process for Law Enforcement. Contact: AIJA Secretariat. Tel: 03 9347 6600.

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, Ltd. 4005, email: helix@thehub.com.au.

29 July–2 August 1998: San Francisco. Law Asia 3rd Conference on Intellectual Property. Contact: Law Asia Secretariat.

13–18 September 1998: Vancouver. International Bar Association Biennial Conference. Contact: International Bar Association, 271 Regent Street, London, W1 R7PA, 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.

6–8 October 1998: Shanghai. 3rd Asia Pacific Courts Conference. Contact: Tel: 0011 44 171 824 8257; Fax: 0011 44 171 730 4293.

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.

9–10 November1998: Tokyo. Third Law Asia Business Conference. Contact: Law Asia Secretariat, GP0 Box 3275, Darwin, NT, 0801; Tel: 89459500; Fax: 89469505.

6–9 January 1999: Cortina D'Ampezo, 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.