VICTORIAN BAR NEWS

No. 107 SUMMER 1998

APPOINTMENT OF HER MAJESTY'S COUNSEL

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Farewell: Wayne Duncan, Barristers' Clerk

Obituaries: Neil McPhee Q.C. and Mietek Wajsenberg

Seventh Manfred Lachs Space Law Moot Competition

A Happy Coincidence of Self-Interest and Public Interest

Running on the Edge

US Lawyers Accessing Melbourne Barristers' Legal Website

Video-Conferencing in the County Court

The Adolf Beck Case

Pride and Prejudice: The Legal Fallacy

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for the year 1998/99
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Editors' Christmas Wish List

AND so it is Christmas again. A time for reflection, a time for contemplation. A time for thinking about things. In particular, gifts. Gifts for others, gifts for yourself.

And then there are the Christmas parties. Why do they happen? It's that time of the year when tiredness is rampant, when the thought of jollity causes fatigue. But still everybody goes through it. The micro-economists would ask the question, "Why do we have Christmas?" It channels peoples' minds in mid-November to think of non-work. It causes non-productivity. But still the parties go on. Plates of mini dim sims are regularly thrust forward with warmish sparkling wine, whilst folk stand in buildings with the air conditioning shut down.

But whatever mixed thoughts one has about Christmas there is always the honour of playing Father Christmas. Who will be the lucky person who hands out the presents at the Bar Children's Christmas Party? There have been many venerable barristers who have filled this role over the years. But now one of the two editors of the *Bar News* has been requested by the Bar Council to take on the onerous mantle of Santa Claus. But which one is it — this is the secret. The senior editor has the right looks but the junior editor has the right talent. This secret will never be revealed as the Bar has poured immense funds into creating a costume which will fool not only the children but the parents who attend the annual Christmas party in the Botanical Gardens.

So in this spirit of Christmas we have decided to draw up a Christmas gift list which reflects the needs of various sections of the law, the wish list which would solve many of the problems that bedevil the profession. And so here is our Santa list which will be handed out in the Botanical Gardens in the middle of December.

A CHRISTMAS WISH LIST

1. For the Criminal Bar:
   (a) money;
   (b) food hampers from Legal Aid;
   (c) a return to the fees paid to criminal barristers in 1975;
   (d) more money.
2. The Common Law Bar:
   (a) the return of common law rights for workers;
   (b) an increase in the number of reserve cases in the County Court so that barristers can catch up with friends in Court 32;
   (c) food parcels from the Victorian WorkCover Authority;
   (d) a brief fee for not being reached.
3. The State Government:
   Doesn't need anything, it's got the lot.
4. The Commercial Bar:
   Doesn't need anything, it has got the lot.
5. The State Opposition:
   (a) a Nintendo 94 featuring the Premier;
   (b) a miracle;
   (c) two old Melbournian ties for its leaders.
6. Legal Aid:
   (a) that the Criminal Bar Association be deregistered;
   (b) that all barristers become part of the public service;
   (c) food parcels from the State government.
7. The Family Law Bar:
   (a) Gucci watches for all;
   (b) Versace suits;
   (c) Armani power dresses;
   (d) gel.
8. The Junior Bar:
   (a) things like they used to be in 1975;
   (b) taxi cab drivers' licences;
   (c) food parcels from the Salvation Army.
9. The Chairman of the Bar Council:
   (a) a trouser press;
   (b) the engagement of Bob Ellis as a speech writer.

We can only hope that St Nicholas can make most of these dreams come true.

We hope that our readers get what they deserve in the new year and we wish everybody a Happy Christmas and a successful New Year.

CHRISTMAS CONFUSION

As sometimes happens at this time of the year, logistics and good intentions break down. In our case the logistical break down has meant that the farewell to the Honourable Justice Fogarty, that doyen of the Family Court, who, amongst his many achievements went to school with one of the Editors for many years, does not appear in this Summer issue of the journal.

John Fogarty's contribution to Australian law and the Australian legal profession needs little comment from us. It has been outstanding. The same logic and commonsense which he displayed

in "minding" opposing forwards in his school days has done much to ease the unhappiness caused to those involved in marital breakdowns.

His courtesy and sympathy for litigants (characteristics which he did not show on the football field) have been the subject of specific comment by many individuals who have appeared on their own behalf in the Family Court.

A formal farewell to Justice Fogarty will appear in the Autumn issue.

The Editors

What's in a Name? An Ode to VCAT

(Musings from a planning advocate)

For apprentices and journeymen
And those of higher state.
The appellate road lies waiting
Beyond the new named gate.

It first took wary residents
And others and their mates
Who rolled up sleeves and came
before
Dick Hamer's Delegates

Tribunals then, a new name found,
One changed the labels slowly,
A good step forward one then thought,
Without elevation holy.

In '80 spake one Opas man and
Vowed to make it better.
New Act and rules. It's now the Board
With substance, not just letter.

In '84 reform came again
To call another tune.
Directions hearings-never long
And others all a boon.

Admin. Tribunal for Appeals
To deal with many things,
Came into place and set the pace,
For administrative whinge.

By '97 diverse claims were rife
Whilst multi rules and forums
Befuddled many and without cause
Creating mild alarums.

The signposts change, the ranks are
new,
Some members have new rooms.
The public comes to the one spot
Looking for fresh brooms.

A fast turn round, decisions made
On applications new.
One may miss the name "Appeal"
For all, its just — "Review"!

We now farewell the AAT.
Note VCAT has come in.
One's view is "just to get it right"
So let the changes ring!

Tony Radford

Professional Negligence and MDPs: Law Council Proposals

THE Victorian Bar has often been called upon to remind governments and regulatory authorities of the crucial importance of an independent legal profession, and an independent Bar, in the administration of justice. On the whole, the Bar has been successful in this task. One measure of success is the recognition recently given by the Legal Practice Act to the sole practice rule, and the approval which has been given by the Legal Practice Board to the Bar rules generally. The Victorian public has an overwhelming interest in being able to secure the services of an independent specialist advocate. It is an interest which, not surprisingly, coincides with the interests of a competitive market.

In turn, the public significance of an independent Bar has prompted us to contribute to public debate in relation to law reform. In particular, the Victorian Bar has been required to make public statements regarding the importance of civil rights and common law rights. We have been required to make statements regarding the injustice which almost certainly results from hasty or thoughtless legislative incursions into those rights. In this endeavour our level of success has been more variable. The Bar's arguments in relation to the rights of injured workers, for example, or the rights of litigants in Family Court proceedings, have not prevailed. However, the Bar still holds some hope that the right to silence and rights of defendants to appeal may not be abolished without proper and informed public debate.

In the last few weeks the Bar Council has been required to assert these principles — the importance of an independent legal profession, and the importance of common law rights — in relation to Victorian legislative reforms which have been proposed not by government, but by the Law Council of Australia. The National Cooperation Working Group of the Law Council has put forward a number of proposals for discussion by the Law Council at a meeting to be held on 5 December 1998, including legislation for the reservation

of legal work, legislation for the capping of professional liability, legislation for the removal of joint and several liability for professional negligence causing financial loss, and legislation for the institution of "multi-disciplinary" legal practices.

In summary, the Law Council working group has made the following proposals:

- That the Law Council support the exclusive right of a lawyer to appear in a court or tribunal, to prepare wills and other testamentary instruments, to perform probate work, and to provide other legal services which governments decide, in the public interest, to reserve to lawyers; and that a non-lawyer who provides legal services must notify their client that they are not a lawyer;
- That the Law Council support the capping of liability for Australian professionals, including solicitors, by a legislative scheme similar to that instituted by the NSW *Professional Standards Act*, in relation to professional negligence which does not cause physical injury;
- That the Law Council support the abolition of joint and several liability in all Australian jurisdictions in respect of claims for professional negligence which do not result in physical injury, and the provision for a system of proportionate liability;
- That the Law Council support legislative provisions in all Australian jurisdictions to allow for the creation of "multi-disciplinary practices" (MDPs); that is, professional practices which offer both legal and non-legal services.

These proposals do not directly affect the interests of the Victorian Bar. The resolution of these proposals will have a greater impact on the working life of the solicitor branch of the profession. Victorian courts and tribunals are not heavily populated with non-lawyer advocates. A barrister, as an independent sole practitioner, could not become a partner or employee in an MDP. However, the Bar Council believes that these working group proposals raise questions of principle which we must address. In particular, some of the proposals are plainly inconsistent with the Bar Council's stance on common law rights and the independence of the profession.

With the assistance of Jack Rush Q.C., the Bar Council's representative on the Law Council, the Bar has prepared a detailed submission to the Law Council in respect of each of these issues. Copies of the submission are available from the Bar Council offices. Whilst we are pleased that the working group has adopted earlier Bar submissions to reserve litigation work as "legal work", the other proposals cause the Bar great concern.

In particular, the proposal to cap liability for the professions runs directly counter to the common law right of a plaintiff to be fully compensated for his or her injury. It has the potential to lead to a decline in professional standards. The Bar Council believes that the proposal, if adopted by the Law Council, would inevitably lead to suggestions that the Law Council had acted not in the public interest, but in the interests of those firms of solicitors who, under a common law system, feel they have the greatest exposure to negligence claims. Under the scheme, a firm of three partners or fewer attracts a minimum

insurance cover of $1.5 million for each and every claim. For larger firms, the figure is multiplied by the number of partners to a maximum of $10 million cover for each and every claim. The proposal would sit very uneasily with previous statements from the Australian legal profession in relation to common law rights. The Bar Council believes that compulsory professional indemnity insurance schemes for all professions is desirable, but that the capping of liability for professions under those schemes is counter-productive. We are yet to see any evidence from New South Wales, where the capping of solicitor's liability is already in place, that capping is in the interests of the public or in the long-term interests of the profession.

We believe that the third proposal, in respect of proportionate liability, is also misconceived. Again, this proposal would compromise the common law right of full recovery for economic loss. The New South Wales Law Reform Commission has conducted a long and detailed study of the supposed benefits of proportionate liability, but concluded last year that such a system was undesirable. The Commission found that a proportionate liability system would compromise the principle of full recovery, and that there remained practical difficulties in relation to estoppel, apportionment, and the complexity of applying different rules in respect of personal injury and economic loss. No major study of proportionate liability has adequately addressed these problems. The Bar Council is of the view that joint and several liability, together with rights of contribution, is a proven mechanism for the fair and efficient assessment of negligence claims.

Finally, it is the view of the Bar Council that the Working Group's proposal in relation to MDPs is premature. The proposal does not foreshadow adequate regulation of MDPs. We disagree with many of the premises of the Working Group's proposal, including the statements that "the regulatory regime should be directed to the individual lawyer" and that "the regulation of business structures should no longer be regarded as critical or necessary to the maintenance of professional standards". These statements are inconsistent with concerns recently expressed by the International Bar Association (IBA), and in particular the IBA statement that the conduct of MDPs should be the subject of precise rules on the avoidance of conflicting interests and precise rules in relation to confidential information. Mr Ward Bower, Chairman of the IBA's Standing Committee on Multidisciplinary Practice, recently stated that "caveat emptor is currently in order for legal clients of MDPs. The potential for loss of client privilege or lawyer independence is real." The Law Council statements are also inconsistent with the overall trend in Australia to increase the regulation of financial advisers. The working group resolution neither contains nor addresses these important reservations.

The Bar Council would be happy to assist the Law Council, governments and law reform commissions in any way possible to conduct research directed towards the merits of professional liability caps, proportionate liability and MDPs. We have certainly not reached a final position on any of these matters. However, it is clear that at least three of the four of the legislative changes recommended by the working group require a great deal more empirical study, with a careful eye on the experience of overseas jurisdictions. The proposals, if adopted by the Law Council and acted on by government, would introduce sweeping, and quite possibly damaging, changes. When one turns to the Australian consumer of legal services, Australian governments or to the rank and file of the legal profession itself, however, there does not seem to be overwhelming support for these moves. On all these matters — particularly where we are proposing to alter the common law rights and the independence of the legal profession — let us proceed with great caution.

David Curtain
Chairman

Practice Notes

The Victorian Bar Inc.

DETERMINATION OF CONTRIBUTIONS TO FIDELITY FUND FOR 1999

The *Victorian Bar News* is the official publication of the Victorian Bar and is used to inform members of the Bar and other practitioners regulated by the Victorian Bar Inc. of professional practice matters. From time to time it may be necessary to issue a supplement to the Bar News in order to comply with notification requirements of the *Legal Practice Act* 1996.

On 3 November 1998, *Victorian Bar News* Supplement 11/98 was issued. The supplement notifies a change to the determination under Division 1 of Part 7 of the Act for 1999. The determination relates to the levels of contributions to be made to the fidelity fund for 1999 by various classes of practising certificate holder authorised to receive trust money. Copies of the determination can be obtained from the Bar Council office.

RENEWAL OF PRACTISING CERTIFICATES FOR 1999

The Bar Council set 31 October 1998 as the closing date for applications for the renewal of practising certificates for 1999. Practising certificates for those regulated practitioners of the Victorian Bar who had applied by 31 October 1998, were issued on 30 November 1998. Any applications received out of time will be issued in due course.

Situation Improving for Women at the Bar

I was pleased to attend the release of the report *Equality of Opportunity for Women at the Victorian Bar*. Unfortunately, like anything that has the potential to be sensationalised, the media focused only on what could be perceived as the negative aspects of the report.

Unlike the media, I view the report as an indication that the situation is improving for women at the Bar. After all, the first step towards resolving an issue is acknowledging that one exists in the first place.

The report detailed objective evidence of women's experience at the Bar and explored gender barriers such as the perceived masculine culture at the Bar, the briefing process, whether women are channelled into particular areas of the law, interaction in the courtroom, and the difficulty faced in accommodating family responsibilities at the Bar.

While the research conducted shows that barriers towards women's advancement at the Bar do exist, what is also clear is that the Bar Council is reviewing the recommendations seriously and has set up a working party to develop plans of action to combat specific instances where female barristers experience some form of hardship.

One aspect I found particularly interesting in the report was the recommendations relating to balancing a family with one's career.

This is certainly an issue I am no stranger to — having experienced a series of rejections applying for positions as a junior solicitor because I was married and would inevitably have children. While times have changed enormously in that regard, women with children still find it difficult to enter into and be successful in some careers.

From the report, the research findings show that while there is a notion that the Bar offers flexibility conducive to combining practice with family responsibilities, some characteristics of the Bar — namely, the need to maintain solicitor contacts, the requirement of fitting around court timetables, and the

importance placed on experience and continuous practice — can mean that those women barristers who wish to combine work with an active parenting role face additional challenges in comparison to their male counterparts.

For the junior barrister in particular, coordinating children with work or attempting to re-establish a practice after giving birth or returning from full-time parenting can not only place demands on a family but on a fledgling career. The nature of work at the Bar, with its long hours and erratic work patterns, is such that women cannot just take time off without feeling they are jeopardising future work prospects.

On the positive side, however, changes to the Bar Rules to accommodate barristers with non-traditional working arrangements have benefited women with parenting responsibilities. Recently, barristers have been allowed to share chambers, work from home and pay reduced membership fees if their practices are in abeyance, for example, for family reasons. Both men and women have applauded the changes.

The report, while acknowledging this progress, has suggested that these changes do not go far enough and rather than women having to adapt themselves to existing work practices, the Bar could provide further practical assistance to offer flexibility to those women who need it, and perhaps develop a greater understanding of the hardships faced and the support required for many women at the Bar.

The recommendations made in this area are innovative and far-reaching, including practical suggestions such as:

- that the Bar Council initiate a change in attitude towards motherhood at the Bar, so that barristers who become pregnant can expect to be accepted and offered assistance in maintaining their practices;
- that the Bar Council and its Committees hold meetings at times that encourage participation by barristers with family responsibilities; and
- that the Bar Council engage in dialogue with the courts about more family-friendly work practices.

The issue of balancing a career against parenting has also been explored in Volume 1 of "Women on the Move", the State Government's two-year action plan for women, which was released this month.

The Government adopted a similar method of data collection to the Bar Council by taking written submissions and consulting with over five hundred women across the State. These women were asked for their comments on the draft document which was released for public comment in May and which contained current and possible Government programs.

One comment that emerged strongly during this process was that as workers with families, women emphasised the need for flexible work practices and support from and within the work community.

As a result, the Government has now embarked on a number of initiatives, including:

- consulting with women along the urban growth corridors and reporting on the provision of community services in those areas; and
- model best practice family-friendly

policies within the public sector to encourage the private sector to follow suit.

The Government is also working towards publishing a list of corporations that are considered exemplary in providing a family-friendly working environment and developing suitable criteria for assessing the application of family-friendly policies in workplaces.

This volume of the plan now presents a vision for women in Victoria and outlines current policy and program commitments for women in the following contexts:

- as students and educators;
- at work;
- in financial matters; and
- as leaders and decision-makers.

Our vision for all future Victorian workplaces is that a work–life balance is important for all workers, and both men and women are able to have the flexibility to manage work and their other responsibilities and interests.

I believe this vision is achievable in the not too distant future.

Exercises such as "Women on the Move" and the Bar Council's report raise awareness and can trigger necessary practical and attitudinal change. I commend the Bar Council for taking this step and look forward to further positive developments.

Jan Wade MP
Attorney-General

Justice Warren

ONE of the advantages of having been around the law for a while is to have had the opportunity of observing one's professional colleagues as they make the transition from barrister to judge. Some of them do so as if they were born to it. Some of them do it humbly. To some it is a little harder to take off the mantle of the advocate and become an impartial umpire. One judge continued to refer to the plaintiff as "my client" for some months after his appointment.

Some new appointees, however, change very little themselves, whilst having a great effect on the new environment in which they now find themselves. It is almost certain that the Supreme Court of Victoria's newest judge, the Honourable Justice Marilyn Louise Warren, will soon demonstrate that the qualities she has displayed throughout her professional life before her appointment to the Bench will continue to be evident well into the future, such that the Court is more likely to be changed for the better by her than she by the Court.

Welcomed to the Court on 20 October 1998 at the age of 47, Justice Warren is only the second woman to be appointed to the trial division of the Supreme Court despite its having existed for almost 150 years. She comes to the Court after 24 years in the law, time divided almost evenly between time as a public servant and time as a practising barrister — the last year or so as Queen's Counsel.

Justice Warren

Marilyn Warren served articles of clerkship under John K. Cook, the Solicitor to the Public Trustee, in 1974–75, the first woman ever to be articled to a solicitor in the public service. Her subsequent admission to practice in 1975 was so noteworthy that it was mentioned in State Parliament! Some time later, a technical error was found in the decision of the Board of Examiners to certify Her Honour's qualification for admission which resulted in her admission having to be reconsidered, and happily confirmed, by the Full Court. (Re Warren [1976] VR 406).

Her Honour's career in the Public Service included holding the appointments of Solicitor to the Controller of Stamps, Deputy Secretary of the Attorney-General's Department and Senior Legal Policy Adviser to three Attorneys-General: Haddon Storey Q.C., John Cain and Jim Kennan Q.C. In 1984 and 1985 she was Assistant Chief Parliamentary Counsel before signing the Bar Roll on 23 May 1985. She read with Chris Canavan Q.C.

In her time at the Bar, Justice Warren appeared in many courts and tribunals, both State and Federal. Her practice ranged across administrative law, commercial law, cases involving anti-discrimination legislation and, in particular, planning. Her name appears as counsel in many reported cases, most recently in the High Court in *Pyrenees Shire Council* v. *Day* (1998) 72 ALJR 152, a case which she had commenced at first instance all of the judgments in which, it is reliably believed, she fully understands.

During her time at the Bar, Her Honour sat on various quasi-judicial bodies ranging from the Estate Agents' Board to the Legal Profession Tribunal. Those who appeared before her in such tribunals have no doubt that her new career is one for which she is well suited.

Outside the law Justice Warren has played competitive squash at the highest levels, having won a full university blue in 1968 and been a member of the Australian Championship Women's Squash Team from 1976 to 1978. She is married to Mick Healy, a high school principal. They have two teenage children, Jack and Rose.

For many years Marilyn Warren's preferred mode of transport has been a bicycle. She could be seen on most mornings negotiating the traffic of the inner northern suburbs on her way to Chambers, often balancing the large quantity of paper which barristers seem to carry around with them. She intends to continue riding her bike to work; she will not be the first judge to do so. Whilst the fitness required for (or perhaps produced by) this activity might be foreign to some of her colleagues, they can at least take comfort in the fact that they will not need to find another parking space for yet another government-issue Fairlane. Her Honour's bike, and bright yellow riding gear, can be accommodated much more economically.

Speaking at Justice Warren's Welcome, the Chairman of the Bar, David Curtain Q.C., assured Her Honour that she has the confidence, support and best wishes of all its members. The Bar congratulates Justice Warren on her appointment and looks forward to appearing in her court and reading the erudite judgments which it knows will flow from her pen in due course. We wish her well.

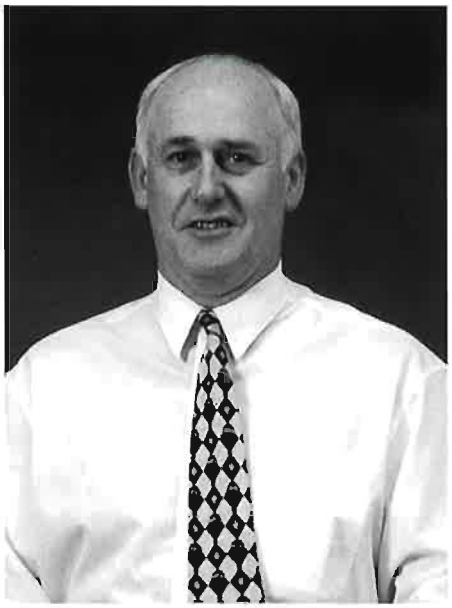
Farewell

Wayne Duncan

Barristers' Clerk

WAYNE Richard Duncan retired as a barristers clerk on 30 September 1998.

Wayne Duncan commenced employment with Jack Hyland in 1966. He was employed by Jack Hyland for a period of some 10 years. In January of 1976 List W was established and the List Committee appointed Wayne Duncan as its clerk. At that time 45 barristers comprised the new list, these barristers having come from the lists of Hyland, Calnin and Dever. The first List Committee was chaired by Richard McGarvie Q.C. (as he then was); the Vice-Chairman was Leo Lazarus Q.C. (as he then was). Wayne and the list office were housed in Owen Dixon East and he remained there until 1986. The list developed into a very busy one, as members of that list were much sought after by solicitors. A considerable number of judicial appointments were made from the list, namely Supreme Court, three Justices; County Court, three Judges; Family Court, three Justices and one Judicial Registrar; one Deputy State Coroner; Magistrates' Court, nine Magistrates; Crown Prosecutor and Senior Crown Prosecutor, and numerous other tribunal members.



Wayne Duncan

Wayne applied himself to the running of the list and in a short space of time was recognised both by instructing solicitors and counsel as an honourable and efficient clerk. His advice was sought not only in relation to the day-to-day problems that arose for counsel but also on personal and business matters. It was apparent that he displayed an "old-fashioned" sincerity in his approach to his professional obligations. His personable and pleasant disposition will be missed by all. At the time of his retirement Wayne was the longest serving clerk at the Bar.

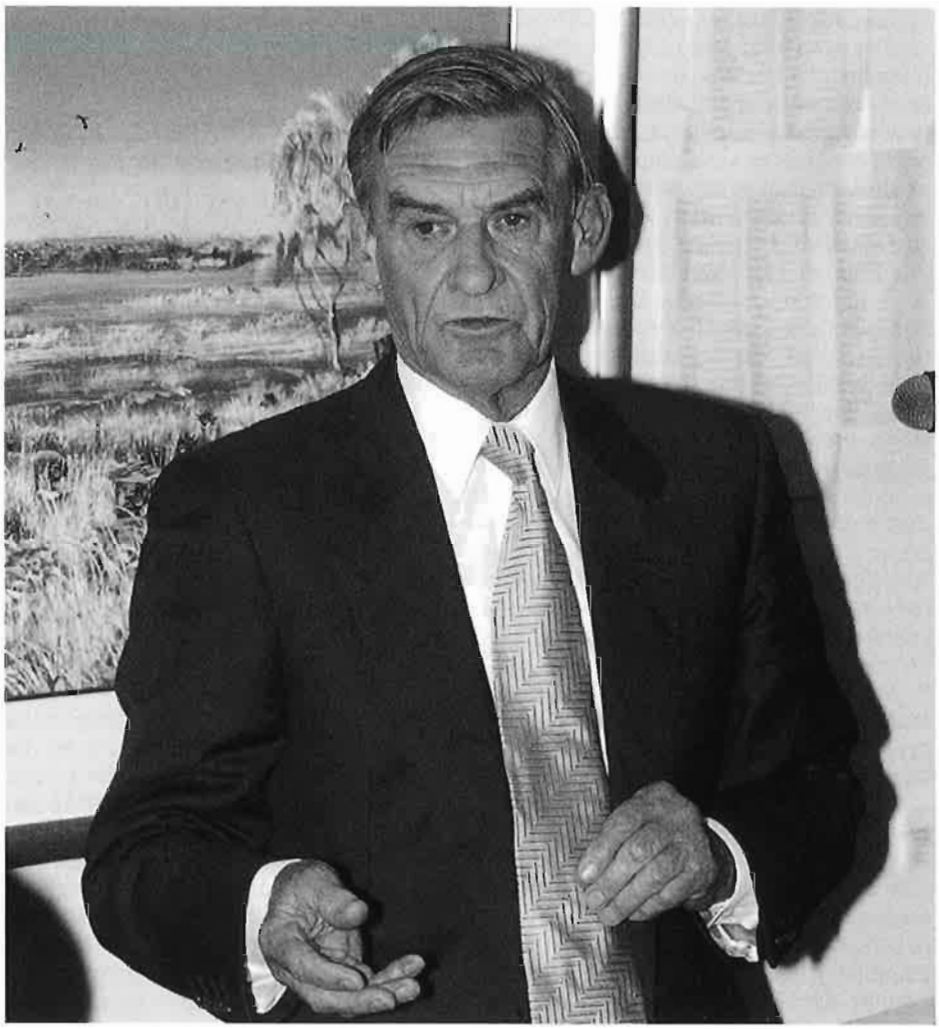
In recent times Wayne started to feel the pressure of having been an active clerk for so long and made a decision to retire and indulge in what had been his pastime, namely farming and agricultural pursuits. Wayne will spend a considerable part of his time at his farming property, hopefully enjoying a life of a less hectic nature. This will be after minor surgery and recuperation. He will no doubt watch the progress of the list under the leadership of Robert Patterson. Robert was appointed by the list as its barristers' clerk on 9 October 1998 and is looking forward to the challenge. Presently the list comprises 95 members and has a staff of seven. The list will continue under the Duncan name. Robert will be ably assisted by Glen Patterson who has been with the list for six years. We wish Wayne and his wife Helen a pleasant and peaceful retirement together.

Eulogy

Neil Raymond McPhee Q.C.

November 1928 to October 1998

On 20 October 1998 a service was held for the life and work of Neil Raymond McPhee Q.C. at the Scots' Church Melbourne. The President of the Court of Appeal, Mr Justice Winneke, gave the following eulogy.



Neil McPhee Q.C.

IT is not possible, during the course of this service, to pay adequate tribute to the memory of Neil McPhee; nor, I think, is it possible to fully and fairly describe the impact which he made upon those areas of community activity towards which he directed his remarkable talents.

Neil McPhee was a man with a broad range of interests, the pursuit of which brought him into contact with many members of society, some with influence and status, others with neither. He treated all as he found them and although his own intensely private disposition prevented many acquaintances from becoming friendships, I venture to suggest that there would be very few who did not admire and respect him. The large gathering of people here today is a testimonial to the validity of that assertion. He, however, would have been inclined to say: "What's all the fuss about?".

The significant mile-posts in Neil McPhee's career are to be found in public records, although the task of collating them, because of his own dislike of self-promotion, has not been easy. He started his career as a professional soldier, graduating from the Royal Military College at Duntroon in 1950. As became customary for him, his scholarship and leadership came to the fore. From what I have been told there also developed those traits of contrariety which, throughout his life, he displayed to us just to keep us "on the wrong foot". I can accept that he was a talented boxer at Duntroon; I can even accept that he adopted the "south-paw" style; that would have been a tactic. I can certainly accept that, as the captain/coach of the Australian Rules football team he had set game-plans that confounded all but himself. But even I was surprised to learn that he organized the first military choir at Duntroon.

He became enlisted in December 1950 and in 1951 served with the occupation forces in Japan. Whilst there he volunteered for the 3rd Battalion, R.A.R., and with that Regiment he saw active service in Korea from August 1952 to July 1954. It would seem that it was during his overseas military career that he honed the advocacy skills which his legal contemporaries came to admire. He was, I am told, in constant demand as "the soldier's friend" at courts martial, the military equivalent of defence counsel in the civilian sphere. Unsurprisingly, he had the reputation of being the master of "the Manual of Military Law".

When he returned from overseas service, Neil McPhee remained a commissioned officer in the military forces, taking up his duties as an instructor at the officers' training camp at Portsea. It was not long before his developed skills of advising others in trouble attracted him, with the Army's assistance, to the Law School at Melbourne University. He commenced his law course in 1955 at an age when, because of his military career, he was some years behind his chronological contemporaries. His late start proved no hardship to this extraordinary man. His innate intelligence combined with an inquiring mind and a quickly acquired understanding of legal principle led to an outstanding course, at the conclusion of which he won the Supreme Court Prize for the top law student in the State.

Although this marked the beginning of an illustrious career in the law, it was typical of the man that he never forgot the Army or the friendships which he forged whilst he was part of it. He was an instructor in the Melbourne University Regiment at a time when National Service was a compulsory part of the life of school-leavers. It was in that capacity that many who became his legal contemporaries first made his acquaintance. In later life many of his army contemporaries sought his advice and, even in recent years, he gave his services to them, free of charge, in high profile courts martial. It was also typical of a man completely without vanity that he never flaunted his service career or the decorations which came with it.

Many, if not most, of those who are here today to pay their respects to Neil McPhee knew him as an advocate, probably the finest exponent of the art of legal advocacy, in all its forms, of his generation. It is difficult to know what makes a good advocate, but if McPhee was the model, it is a blend of a number of things: first a profound understanding of the law; second a compassion for those who are disadvantaged; an equal degree of intolerance for those who would flout the law; and finally a principled approach to the practice of the law.

McPhee would tell you that he was fortunate to have entered the practice of the law when he did. In the 1950s and early '60s, the country was still recovering from a lengthy period of depression and conflict. There was only one law school and the profession was commensurately small. The Victorian Bar was few in number and, for those who had the inclination and ability, the whole of the law, and not merely a specialized portion of it, could be practised. Neil McPhee quickly became an acknowledged exponent of all its forms; whether it be common law, commercial law, criminal law or equity. He signed the Bar roll in August of 1960 and "took silk" in 1971 which, in those days, was an exceptionally short period of time as junior counsel.

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It would be futile to try to record the significant cases which have taken place in this country over the past 30 years in which McPhee Q.C. has played a principal role. It would be easier to record those in which he did not. He represented the interests of clients in the Privy Council, the High Court, the appellate and trial divisions of the Supreme Court, and all courts of inferior jurisdiction. There was rarely a royal comm-ission or board of inquiry in which he did not appear and, if he did not, he had usually given advice to one or other of the parties who were involved. He had retainers for many corporations throughout Australia including the Fairfax organization whose demands upon his services became so frequent that, in the 1980s the focus of his practice shifted to Sydney where the major defamation cases were fought. He remained, however, a firm believer in the view that the primary task of the barrister was performed in chambers, endeavouring to bring parties to a sensible resolution and advising them that litigation in court would rarely bring a result to the advantage of either party. However, if he had to go to court, there was no better exponent of adversarial advocacy. His capacity to "ferret out" the weakness of opposing cases was quite uncanny. But that capacity did not come without sheer hard work. He was able to sense an injustice and would search for hours to find the reason for its existence. He was incurably inquisitive, a habit which infuriated friend and foe. It is frequently said that it is bad form for a cross-examiner to ask a question to which he does not know the answer. This depends on the case and the circumstances but it can, at times, bring some embarrassing answers. McPhee was a victim of his own curiosity at a hearing of the DOGS case in the High Court some 20 years ago during the preliminary factual skirmish before Mr Justice Lionel Murphy. His clients were seeking to establish that government funding to non-government schools offended religious freedom. He was cross-examining a well-educated nun about the effect of religious beliefs in education. He asked:

Q: Do you pray a lot?
A: All the time Mr McPhee.
Q: What do you pray for?
A: World peace, salvation and relief of suffering.
Q: Anything else in particular?
A: In recent times we pray for you Mr McPhee.

Neil McPhee's contribution to the Victorian Bar cannot be over-estimated. He was a strong believer in its traditions and ethics and was always available to give advice to its younger members. He was, essentially, a barrister's barrister, spurning judicial office for fear of contracting what he would call "judicial atrophy". In this respect the Bar's gain was the law's loss because it was deprived of the beneficial slant which he could have given to it.

Despite the demands of his vast practice, McPhee found the time to pursue his interests of sailing, racing and football. It was typical of the eclectic traits of the man that he should start his career as a soldier and end up with an incurable love of the sea. He took navigation courses and bought his ocean cruising yacht which he moored at Townsville. In recent years it became his major source of relaxation. He also loved his racing, a pleasure that he was able to mix with his business because, for years, he acted for the stewards and appeared in many notable racing appeals. He was a part owner of the successful mare "Skating" and the pleasure which he derived from the horse's win in the Doncaster a few years ago was not wholly related to the fact that it started at 20–1.

Neil was a life-long supporter of the Richmond Football Club. He was also for many years its adviser. His love for the game and his keen sense of its prob-

lems led the VFL in the early 1980s to engage his services to rewrite their rules to cope with the pressures of restraint of trade. The current enduring rules are the product of his contribution.

He was also patently apolitical, so his capacity to surprise reached new levels when he entered local politics and secured what used to be called the "lawyer's ward" of the M.C.C. His avowed but unachieved aim was to secure for the Bar an overpass or underpass to enable safe passage across William Street from O.D.C. to the Courts. He shunned both the civic (or conservative) group and the labour faction and quickly assumed leadership of the independents from which position, I am told, he practised his well-refined tactical skills to prevent either political group from gaining control of the council. When he'd had some three years of fun, he quietly retreated leaving the council unabashed but better informed.

Neil is survived by a number of people who have played prominent parts in his life. He married Cosima whom he met at the university and who, apart from raising his three boys, still enjoys a successful career. Although their marriage did not survive, it was supplanted by a bond of mutual respect. The bond was enhanced by the pleasure derived from watching the development of the boys into the fine adults which they are today. Neil remained justifiably proud of Richard, Patrick and Hugh until the day he died. In more recent years he shared his life with Melanie Sloss, whom he met at the Bar, and to whom he became devoted, as did she to him. She, too, has enjoyed a successful career but it has not been made any easier by assuming care for Neil during these last few months. In keeping with his character, Neil sought to "crack hardy" about his final illness but the load of those who have cared for him has been increased by his insistence that his friends should not be burdened by knowledge of his illness. But even in those dark days, there were rays of sunshine, and the one which Sue and I will remember with pleasure was his attendance at the grand final less than a month ago.

Although I did not know her, Neil also spoke affectionately of his sister Yvonne who lives in New Zealand and who is here today. To all of those people we extend our sympathy.

I have said sufficient to demonstrate that Neil McPhee was a man who loved life and lived it to the full. He was an adornment to the profession which he dominated. He was a man who was completely without vanity or malice. I never heard him utter a bad word about any of his colleagues; to the contrary he admired them all. He was one of a kind and will be irreplaceable. Sue and I, like many who are here, have lost an admired and loyal friend. If there is any advantage in growing old, and I doubt that there is, it is perhaps to be found in the fact that our memories of him will burn more brightly. Vale Neil, we will miss you but we will not forget you.

Neil McPhee Q.C. — A Professional Perspective

I first met Neil McPhee in November 1960 in the Oak Bar of the long-since-gone Menzies Hotel on the corner of Bourke and William Streets (next door to Selborne Chambers, the then principal home of the Bar). He was reading with Dick Griffith, and Percy Dever was his clerk, as he was mine. McPhee put the first beer down like a man just out of the Great Gobi Desert, lit up a Camel cigarette and said "What the hell do you do when your client just said he did it?"

Of course, McPhee had no difficulty answering that question for himself. He simply applied his own innate sense of ethical conduct to Bar affairs and came up with the right answer. One of the first things to keep in mind about Neil McPhee is that he had probably the most wide-ranging practice of any barrister in Australia, at the highest level and in circumstances in which confidences of the most absorbing and interesting kind were virtually daily entrusted to him. He was scrupulous in preserving them. He was an absolute model of well-balanced ethics and had a strong sense of a barrister's responsibilities. This leads to a second perspective about Neil. Not only was he the repository of clients' secrets (and I am not simply talking about whether the client had dudded the tax man, but often State secrets), he was the confidant and adviser to more than a generation of barristers, young and old. He sought none of this but his remarkable combination of intellect, common sense and complete devotion to his clients' interest, drew those in strife, at the Bar and outside it, to go to him like shipwrecked sailors seeking a lifeboat. It is beyond doubt that Neil McPhee was *the* man the profession went to when they were in trouble. He acted as adviser to countless barristers. He never mentioned it — but *they* often did, after he had steered them through the rocky shoals. A greater tribute to his personal distinction among his peers can barely be imagined.

This is a professional recollection of Neil McPhee, not a personal memoir, although it is, of course, impossible to detach the connection of personal knowledge and friendship from such judgments. I knew him closely from his earliest Bar days. A few others had the same privilege, doubtless with better memories than me, e.g. Peter O'Callaghan Q.C., former Judge Cairns Villeneuve-Smith Q.C., and President John Winneke Q.C, to name but three. I speak only of my perspective of a fine man and a great advocate as one who was with him and against him over the 30 years between 1960 and 1990. The archaism, the cliché if you like, is nevertheless true — we will not see his like again, as specialization has taken over. Like me, he came to the Bar when the post-war expansion of Australian prosperity had not merely warmed up but was beginning to burn. Doubtless, a case can be made for many periods as the Golden Age of the Bar. But 1960 to the late '80s seems, in retrospect, a period in which the litigation graph went

up steadily. The Bar, 180–200 strong in the late 1950s, was 1300 by 1988. The growth, not only in common law but of criminal, administrative and commercial law was phenomenal. This is no occasion for direct comparisons, but there was no-one to equal him in the breadth of his practice in that rising tide of notable litigation and few counsel of equal distinction, in or out of court. The President of the Court of Appeal, Justice John Winneke in a masterly and moving eulogy at Neil McPhee's service at Scots Church on the occasion of his death said it all, for the world to hear. This tribute is for the Bar, who knew him as one of them and as the best of them.

To recall just some of his Royal Commission and Inquiry appearances reminds us of many important events in the life of this State over those years, and in other places as well. One might commence with the original Royal Commission into Liquor in Victoria conducted by P.D. Phillips Q.C., when the drinking-dining opportunities for Victorians were altered forever, in which Neil McPhee was junior Counsel to Don Campbell Q.C. He later appeared in the related Davies Inquiry. If a plane crashed, or a boat collided with a bridge, McPhee was likely to be at the ensuing Inquiry. He appeared in the Poker Machine Inquiry, the Kaye Royal Commission into police misconduct, (being specifically briefed to cross-examine the principal witness, as to police corruption in relation to abortion clinics) and had a standing retainer in the Costigan Royal Commission. He appeared in many Broadcasting Tribunal Inquiries, the Norris Inquiry into Press ownership and in the Royal Commission into the Meat Industry in 1983–84, with Ken Hayne and Jeremy Rapke as his juniors.

Anyone interested in the sport of kings must have known McPhee who regularly appeared before the various Committees which heard racing appeals in the '60s and '70s and later before the Racing Appeal Tribunal. Although he more often than not acted for the stewards, it should be said that he also appeared in many cases for trainers, jockeys and owners. He loved his racing cases because he loved the colour and verve of the race track, and racing people. We used go to the races at Moonee Valley whose roast turkey lunch he greatly favoured. He was a natural to appear in racing cases, following on after former great advocates there — Gorman, Starke, Sweeney. This also accorded with what I will later develop about his litigation preferences.

McPhee was fascinated by the imponderables of litigation, the unseen currents and wraiths within which were locked the answers to the case, if only they could be known. I speak of his Doctrine of the Ultimate Fact, discussed over many a bottle of red, as he propounded his belief that each case had secreted within it one fact, the proof of which would be absolutely crucial, critical and decisive if one only knew it, and his continuing search for the method of unearthing it. The plaintiff's opening was, we agreed, much more important for the plaintiff than the final address. But for the defendant, the final address was everything and he preferred to go first. He always liked to have first crack at the jury for a defendant and I have known him to call a superfluous defence witness in a civil proceeding to *lose* the right of reply in order to have first address. He would then often endeavour to time the end of his address to get the opposition up late in the day when the jury's attention span was at its lowest ebb.

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He once asked me what I thought was the best way in an address to get a jury's attention. Rather idly I said, "To get to a good point as quickly as you can." He rapidly developed this into the Principle of Immediate Attention, which he embellished with McPhee-style touches, although it ultimately merged into his own style which was an absorbing mix of intellectual challenge, scornful mockery of the opposition case delivered in the vernacular and a powerful appeal to both the minds and emotions of the jury. He was a natural jury advocate. But, whilst he tailored his address to a judge alone according to his understanding of the judge's predilections, he by no means eliminated variety and colour from his address to a judge. He spoke very directly, saying just what he meant, and frequently in language that was highly colloquial.

He always enjoyed the Warrnambool circuit before he was drawn into bigger cases nationally, there jousting with other masters of the black art of jury persuasion on that circuit, O'Callaghan and Villeneuve-Smith, hard-fought cases between friends, much enlivened by wit and humour. It was McPhee who, in his address to a jury, christened Villeneuve-Smith "The Silver Panther", the carnivore who lay concealed on the lowest branch of the tree waiting to drop on and devour the unwary plaintiff below. With O'Callaghan, Villeneuve and other notable bon vivants, I enjoyed McPhee's company at Friday lunch (court permitting) at Triaca's Cafe Latin for more than 20 years. There were others at that table, some now departed — Stan Keon, R.R. Walker, Gordon Leckie et al. — men of sharp wit and intellectual gifts for whom McPhee laid mind traps, occasionally snaring them, just as often demolished by their quickness of tongue and thought.

I have heard many say that Neil was a great cross-examiner. I think this is true, particularly as he was both perspicacious and resourceful. But to my way of thinking, his outstanding gift was that he had a remarkably creative mind for a barrister, the nature of whose work is to deal with events which have already occurred. He was a legal Edward de Bono before de Bono was heard of, as he thought laterally about most matters, including his approach to cross-examination, where the touch of the unexpected caught witnesses and opposition by surprise. It could not be easily prepared against. It was this creative instinct, adapted to the facts, that dominated the way in which he shaped his case. It was as though he looked at the case from above or through a prism. Indeed, he once said to me that he always turned the facts back to front to look at them differently. He called this the Mirror Effect. This novelty of perspective manifested itself in his strategy and tactics, primarily in his pre-trial planning, at which he had no peer. Perhaps it was linked to his military background, but my own opinion is that it was his natural mode of thought. But the basis of his incomparable practice and success was not

to be found solely in his fine intellect and mastery of legal principle, particularly of the common law. It was to be found in the first place in unremitting preparation and attention to detail and second in his instinctive grasp of likely human behaviour and responses. I claim to be the one who christened him "The Muttering Scot", having frequently caught him out apparently talking to himself, actually internally trying out addresses or cross-examination. At least in his early days, the apparent ease of the penetrating questions was not as spontaneous as it seemed. He thought out every question beforehand. It was not his nature to leave such serious matters to chance; he indulged in chance on the racecourse, where he planned low-grade coups with notable relish.

He was without doubt a convinced legal conspiracy theorist. If he was scheming to bring you undone, then you must be doing that to him too. There was, if you were sufficiently aware, an occasional unexpected bonus for you, his opponent, arising from his plots and subplots to envelop and destroy your case. McPhee was a man essentially without vanity and self-importance, although of course he had a very well-grounded belief in his skills. But he had, legally speaking, a suspicious mind; it was natural for him to believe that you were also plotting, laying snares and traps for him. Mostly this was completely wrong but one could occasionally derive advantage from what Sir Maurice Byers once referred to at a Victorian Bar dinner as McPhee's "Byzantine mind". I fluked it once. He had an exaggerated respect for what he thought were my Irish ambush instincts. I only learned later that in a particular case he had instructed his principal witness that he was *not* going to get him to give evidence on a critical point because he was "ambushing back the laughin' Irishman" who would blunder into cross-examining on the issue, the witness would blow me out of the water on the cross and McPhee would deliver the *coup de grâce* on re-examination. Alas, I had not appreciated the point and never cross-examined the witness on it at all, leaving the Scot to glower and mutter about the luck of the Irish. It was about the only time I had such an advantage.

His legal-conspiratorial nature led him to revel in the royal commission into the meat industry, the only royal commission in which, I believe, he was counsel assisting. Kicked off by kangaroo meat substitution in exports to the US, it rapidly widened to investigate fraud and dishonesty generally occurring in the industry at that time. There was a rich cast of Runyonesque characters with Hollywood names, e.g. "Waxy" Pearce, a few major villains (all with German names, which pleased him because it conformed to his historical military approach to the known enemy), some larger-than-life bit players from boning rooms and meatworks, rich and unctuous industry proprietors; all of this delighted McPhee. Even better, *real* conspiracies were going on side-by-side with the commission hearings, because the suspects held secret meetings to prepare false evidence to be given at the next capital city hearings of the royal commission. McPhee's counter plot, a real ripper, was to put a turncoat boning room villain in as a mole at the script-writing meetings, so that McPhee and Hayne knew in advance what the story would be, say, in Perth. Pure bliss to the Scot, but how subtly he managed it! It was the racing world all over again; the attempts at fixing, plots, cover-ups — nectar for the conspiracy theorist! His brief diversion into Melbourne City Council politics was, I think, all part of this — he was curious about the secret and conspiratorial exercise of power behind closed doors.

Neil occupied his room on the 10th floor at Owen Dixon East for twenty years. He threw a party in his room every year for the new silks, a lovely thought. He greatly enjoyed the company of his friends there — Jack Winneke, Woods Lloyd, Michael Dowling, Stewart Campbell, David Ashley and Jack Keenan, to name but a few of that lively throng. I used to ponder Woods' and Neil's likenesses and differences. They were both famous counsel and stylish advocates, and I loved them both. But, like Wilde, Woods put his genius into his life and his talent into his work. McPhee was not like that. His life was quite private. He put everything into his practice. He rarely published anything, rarely spoke in public, hardly ever made after-dinner speeches. It was a task to get him to come to a big dinner (except the Bar dinner to which he always went and was twice Mr Junior, the second time as Mr Junior Silk), much less speak at one. He made significant contributions to the Bar as a senior member of the Bar Council, but apart from that, professionally speaking, he put his unmatched ability into his life as a barrister, working prodigious hours and taking on seriously difficult cases over the full litigation spectrum. He did not care much for pure corporate and commercial work although he occasionally had to do it. Essentially he was a common lawyer. He was as good a lawyer as anyone, but he did not like the law for the law's sake. He loved it for its capacity to showcase human nature, for its variety, personalities and movement and his part in the drama. He was perfect for defamation work, of which he was a master and perhaps for which he will be best remembered. John Winneke has already referred to his Fairfax retainer which led him to the Privy Council in the *Clive Lloyd* case. But he also appeared for plaintiffs, e.g. a two-month trial against Alec Shand in *Sergi* v. *The Australian*. Indeed, he also appeared often for *The Australian*. But we all knew that he had an intellectually rigorous mind which underpinned his legal work. He respected and understood legal principle and the rule of law, and had little time for those who sought to depreciate the importance of it. The range of his practice beyond the fundamental common law actions knew few boundaries — patents (ask Alex Chernov), trade secrets and confidential information (ask Stephen Charles, both he and I being Neil's juniors in such a case, which was full of such excitement as attempts to "kidnap" the vital machine and smuggle it interstate, followed by a midnight injunction from Mr Justice Dunn); constitutional issues (the famous DOGS case, before Lionel Murphy and then the High Court on appeal) to mention but a few. He had a vast advice practice, engaged at the outset in important disputes that covered every aspect of the law.

There has passed a great Bar figure, who loved its ambience and traditions, who fostered and re-created them. But out of the professional milieu, a private man enjoying a small group of friends, not spendthrift of his love and loyalty. It was a privilege to be his fellow counsel, an honour to be his friend and, might I say, to have been a judge before whom he appeared.

Farewell old friend — soldier, sailor, the voice of the poor as well as the powerful, scholar and consummate advocate, a hero of the Victorian Bar, living and dead.

Jack Hedigan

Mietek Wajsenberg

23 February 1923 to 19 August 1998

MIETEK (Mike) Wajsenberg was the consummate nonconformist. At times he was spoken of as the Rumpole of the Victorian Bar. His first encounter with the law was in 1959. Mike, then a restaurateur, was the victim of an assault in his restaurant. The perpetrator was apprehended, charged and convicted. Mike, the principal witness for the prosecution turned on a star performance. Anecdotal evidence is that he showed such flair in the witness box that his wife Sonia suggested he should study law. Mike did not need convincing. He set about obtaining the requisite evidence of successful completion of his secondary education from his native Poland. He eventually sat for the entry examinations, was successful and commenced reading law at Melbourne Law School in 1962. He was then 39 years old.

Mike completed reading law and was awarded his degree in the minimum time for a full-time student notwithstanding that, at the same time as reading law at university, he managed his new restaurant and occasionally acted as first chef. Members of the Victorian Bar who were privileged to be invited for dinner by the Wajsenbergs at their home were awed by the artistry of the cuisine and the succulence of the culinary creations of Master Chef Mike.

Mike served his articles of clerkship with Paine & Son and at the Bar read principally with Abe Monester. He also read, for short periods of time, with Neil Williams and Alan Dixon (now Judge Dixon). He retained a very close and personal relationship with his masters (now known as mentors).

Mike showed great promise as defence counsel in the criminal courts in his early years at the Bar. He aspired to being appointed a crown prosecutor. It was rumoured at the time that his accent stood in the way of the fulfilment of his aspiration. A pragmatist, he found his niche in common law jury trials with excursions into other areas of the law and more particularly in the general commercial area of practice where he again showed particular flair, but Mike was a jury man and would not trade a jury trial for anything. Of all the qualities that Mike brought to the Bar, the outstanding one was his power of lateral thought. Many a colleague received the benefit of a novel view or approach to a professional or personal problem after a talk to Mike.

Mike Wajsenberg

By the time Mike commenced reading law at Melbourne University he had already lived one lifetime and was well into his second. In 1939 he was caught up in Hitler's final solution and Mike was not about letting Hitler have it all his own way. In mid-1949 he migrated to Australia with his wife and in April, 1966, he signed the Victorian Bar Roll.

Mike was born in Slonim, Poland. Soon after his birth his family moved to Warsaw. At the outbreak of World War II Mike was barely sixteen years old. He fled to Bialystok where he met his wife, Sonia, at high school. He courted her at the same time as he completed his secondary education. At the age of 18 years he began to travel the length and breadth of occupied Poland, sometimes crossing its borders on false documents. He became proficient at obtaining and smuggling food and other necessaries for the survival of his family and the inhabitants of ghettos mainly in Bialystok and Warsaw. He also became adept at smuggling people, including his wife and her best friend, out of ghettos. In December, 1942, the occupying authorities caught up with young Mike and deported him to Majdanek concentration camp. He remained there for three months and was then transferred to Buchenwald. In April, 1944 Mike escaped from Wuppertal in the company of two Russian officers. Wuppertal was Buchenwald's satellite camp. The escape was one of the very few successful escapes from Buchenwald. From April 1944 until the end of World War II Mike took the war to his and his people's oppressors by individual acts of sabotage of the rail transport system in and around Warsaw and supplying intelligence information to units of the Russian army.

In mid-1949 and at the ripe old age of 26 years, Mike migrated to Australia where he commenced life as a labourer, graduating to an unskilled worker. He then established an iron foundry, and became a caterer and a restaurateur.

For all his experiences and maybe because of them, Mike loved the Victorian Bar and all it stood for.

Mike also loved sharing a bottle or two of vodka with his friends. He even initiated some of his friends to the mysteries of pure hangovers. He enjoyed playing chess.

Mike is survived by his wife, Sonia, his daughter, Jenny, his son-in-law, Mark, and his granddaughter, Alia.

Tony Bonnici

Seventh Manfred Lachs Space Law Moot Competition

Banco Court of the Melbourne Supreme Court, on 1 October 1998

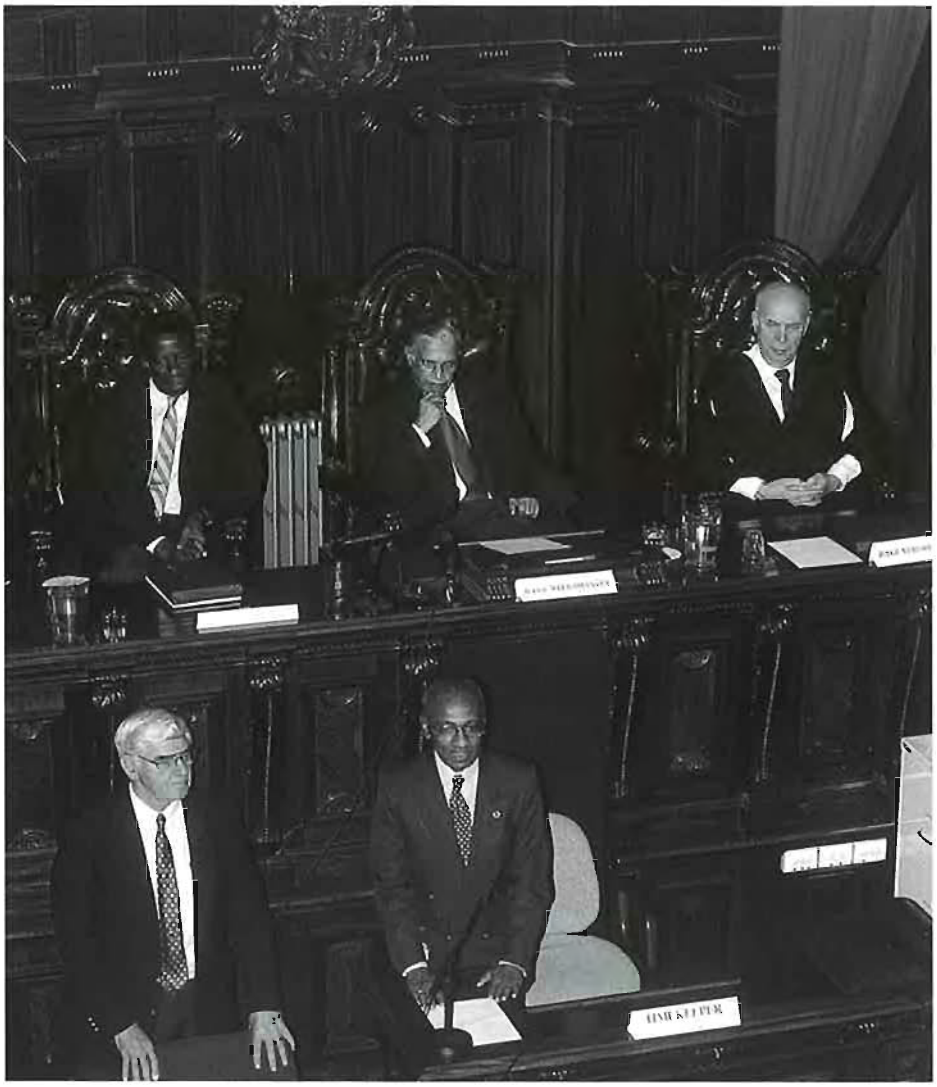
THE *Manfred Lachs Space Law Moot Court Competition* is an annual event organised by the United Nations Office for Outer Space Affairs and the prestigious International Institute of Space Law of the International Astronautical Federation. The Moot is named in honour of the late Justice Manfred Lachs, a world renowned jurist who was a member of the International Court of Justice from February 1967 until 1986 and President of the Court for the period 1973–76.

Currently, only teams from universities in Europe and the United States participate in the moot. It is envisaged that an Asian round to the competition will be established in the future. This year the seventh annual moot was held in Melbourne in conjunction with the 49th Conference of the International Astronautical Federation and the 41st annual Colloquium of the International Institute of Space Law. The moot, conducted in English, was held at the ceremonial (Banco Court) of Melbourne Supreme Court on Thursday 1 October between 2.00 p.m. and 5.00 p.m.

The judges of the moot have, since its

Jose Monserat Filho, Brazilian Society of Aerospace Law; Professor Toshio Kosuge, University of Electro-Communications, Tokyo, Japan; and Mr Frans G. von der Dunk, Co-Director of the Institute of Air and Space Law, Leiden University, the Netherlands.

Jack Tamm, USA; His Excellency Justice Vereshchetin; and R. Carl Christol, USA.



Left to right are adjudicators, His Excellency Justice Koroma, His Excellency Justice Weeramantry, and His Excellency Justice Vereshchetin, Judges of the International Court of Justice (World Court).

inception, consisted of three members of the International Court of Justice, better known as the World Court which is the highest judicial organ of the United Nations. This is the only law moot competition in the world to have this prestigious honour! The judges on this occasion were His Excellency Justice Weeramantry (Vice-President of the World Court), His Excellency Justice Koroma and His Excellency Justice Vereshchetin.

This year's moot finalists were teams from the University of North Carolina and University of Helsinki. It was won by North Carolina. After the moot a reception was held at the library of the Supreme Court of Victoria, graced by the Chief Justice and several other distinguished invitees.

The 1998 moot and the visit of the three ICJ Judges was sponsored by the Law Faculty of Monash University.

N.Jasentuliyana, Director-General, United Nations Office in Vienna and Director for Outer Space affairs, and his wife Shanthi; and His Excellency Justice Weeramantry.

Professor Vladimir Kopal; N. Jasentuliyana, Deputy Director-General, United Nations Office at Vienna, and Director, Office for Outer Space Affairs; and his wife Shanthi.

His Excellency Justice Koroma, the Hon. Justice Balmford, and the Hon. Chief Justice Phillips Q.C.

James Summers and Mirkka Mykkanen from the University of Helsinki, Finland.

Alf Wikstrom and Christian Ekblom, Sweden; Carol Norberg, Britain; and Dr Seppo Korpela, Finland.

Gary Smith and Robin Frankenberg, from the University of North Carolina, USA.

Council's Preliminary Response to "Equality of Opportunity for Women at the Victorian Bar" Report

Launched at 9 October, 1998 seminar

EQUALITY OF OPPORTUNITY FOR WOMEN AT THE VICTORIAN BAR

ON 9 October 1998, the Bar Council hosted a seminar to launch its preliminary response to the report entitled *Equality of Opportunity for Women at the Victorian Bar*.

Invitations to the seminar were extended to people and organisations who were associated with the preparation of the report and will be involved in the implementation of its recommendations. The attendees included the Attorney-General, Jan Wade; members of the Bench, magistracy and tribunals; academics with an interest in equality of opportunity; various organisations including the Women Barristers Association and Australian Women Lawyers; and many practising barristers.

The Chairman of the Victorian Bar, David Curtain Q.C., opened the seminar and announced that many of the recommendations contained in the report have been accepted by the Bar Council and will be implemented. Through its working party, the Bar Council will continue to consider and adopt further initiatives and monitor progress.

The immediate past Chairman of the Bar, Neil Young Q.C., chaired the seminar. Fiona McLeod presented the Bar Council's preliminary response to the Report and outlined the measures that the Bar Council had resolved to take to implement recommendations directed towards providing greater opportunity for women barristers.

The seminar was then addressed by the Honourable Mr Justice John Phillips, AC, Chief Justice of Victoria, Susan Crennan Q.C., former Chairman of the

Fiona McLeod presented Bar Council's preliminary response.

Bar Council, Andrew Scott, President of the Law Institute of Victoria, Professor Marcia Neave of Monash University and Catherine Walter, Company Director and former Managing Partner of Clayton Utz. Each of the speakers gave their perceptions on the report and the general issue of equality of opportunity for women in the law. Following the presentations, questions and remarks were invited from the audience. The seminar was a valuable opportunity for the speakers and members of the audience to put forward their views. Whilst there was disagreement between some women barristers in relation to the degree of discrimination they had experienced, the report identified that discrimination did exist and therefore the Bar Council has taken steps to investigate the causes of the discrimination and to eradicate it.

Following the seminar, a dinner was held to thank the many people who had contributed to the preparation and analysis of the equality of opportunity report. The Honourable Justice Mary Gaudron was the guest speaker and she presented a challenging and entertaining address which highlighted the Bar's role in the advancement of justice generally and emphasised that part of this responsibility is the elimination of any form of discrimination within its own ranks.

The Bar Council's working party on equality of opportunity will continue to implement the initiatives taken by the Bar Council. The committee's membership has been extended to include Ms Moira Rayner, who will join the committee as a representative of the Law Institute of Victoria.

As mentioned earlier, the Bar Council's response to the equality of opportunity report was presented by Fiona McLeod. The text of the address is set out below.

FIVE years ago, in July 1993, the Victorian Bar made submissions on gender issues and the judiciary to the Senate Standing Committee of Legal and Constitutional Affairs, following a questionnaire sent to every member of the Victorian Bar aimed at discovering the attitude of judges and barristers to gender issues.

Some of you may recall significant media attention focused on judicial comments at the time.

When looking at the answers to the questionnaire the Bar Council reported as follows. It appeared that male barristers were less likely to notice gender bias than female barristers. Further and unfortunately in reading through the responses from male barristers one could not fail to sense in about one-fifth of the cases a latent hostility or resentment of women as barristers. The submission later asserted, ". . . we can do something about creating an environment in which the expression of such hostility is not acceptable conduct . . . many . . . are ignorant of the real hurt that is done by deliberate or inadvertent sexual prejudice. They are unaware of the real harm that is done to female barristers and their professional careers. They are not themselves guilty of prejudice but they are ignorant of prejudice in others."

In that same year November, 1993, the Women Barristers Association was created.

Perhaps the hostility observed in 1993 no longer exists. Certainly there are many who have never experienced such hostility in their life at the Bar. If it does not, then this is due in large part to the active role and acceptance of the Women Barristers Association, the Equality before the Law Committee and the Bar Council.

The first woman to practise as a barrister in Victoria, Joan Rosanove, signed the Bar Roll 75 years ago. In that time the number of women in active practice at the Bar has increased from one to 211 today.

In the 30 years since Ms Rosanove took silk, the number of women Queen's Counsel in active practice has increased from one to nine.

In the five years since the Bar's submissions to the Senate Standing Committee, the number of women in the senior category of the Bar Council has gone from one to none. But in that time the Bar has initiated many projects aimed at improving opportunities for women barristers.

The report commissioned by the Bar Council indicates that it is not enough to simply wait for the numbers of women at the Bar to increase without positively confronting the hard issues and attempting to transform the experience of being a female barrister at Victorian Bar (p. 151).

The Bar Council is committed to ensuring women are not disadvantaged in their practice as barristers and are entitled to equal opportunities. It was evident to members of Bar and the Bar Council, and often reported anecdotally, that women for the most part were not progressing "naturally"; that is, in proportion to their numbers at the Bar they were not appearing in cases of increasing length and complexity and were not advancing to levels of recognized seniority in accordance with their number of years of practice.

The question was asked by many — why is this so, and why do women with promising careers and apparent merit leave the Bar before they reach these levels of seniority?

The Bar Council, in a move described by some as courageous, committed itself to conducting empirical research into the actual numbers of women appearing in the jurisdictions traditionally reserved for senior barristers — the Supreme and Federal Courts, the Family Court and County Court. The aim was to collate systematic and reliable data over a fixed period of the number of women appearing in trials as a proportion of all appearances. The Bar Council accepted the need to do so — if there was in fact a real problem and a section of its members were potentially facing unfairness and injustice then this unfairness would affect those individuals, the Bar community as a whole, and the wider

Seated left to right: Catherine Walter, Professor Marcia Neave, Andrew Scott, Susan Crennan Q.C., The Hon. Mr Justice John Phillips AC, Fiona McLeod, Neil Young Q.C., and David Curtain Q.C. addressing the seminar.

community seeking the best possible independent representation in its advocates and in the composition of its courts.

It was perhaps no surprise to many that the results indicated women were under represented in proportion to their numbers and seniority at the bar in longer trials and in areas traditionally thought of as "male" areas of practice — crime, personal injuries, insurance, commercial and appeals (p. 95).

Faced with the results of this survey the researchers sought to identify and clarify the reasons for women's under representation by examining barristers' motivations, the culture of the Bar, briefing practices and expectations of solicitors, family responsibilities and the courtroom environment. The researchers asked a number of those at the Bar and associated with it a standard set of questions designed to elicit a range of frank and considered responses (p. 6). Having identified there was a problem they sought to understand why it was so.

The Bar Council has committed itself to the implementation of a long-term strategy. Its working party has asked for suggestions and guidance from the Women Barristers Association, the Australian Women Lawyers, the Australian Institute of Judicial Administration, Barristers' Chambers Limited, the clerking committees, the Bar's own committees including the Readers' Course Committee, the Ethics Committee, the Essoign Club and the Sexual Harassment Conciliators. It has consulted with the Law Institute, the Commonwealth and State Public Prosecutors and Victoria Legal Aid. It will continue to consult with solicitors in private practice and government departments. Some very useful suggestions have come from these meetings, including positive strategies for education and ensuring women are considered for briefing where their skills are appropriate, where before they may have been overlooked.

Victoria Legal Aid agreed, for example, to the following plan of action:

1. It would review its briefing policy to ensure it met equal opportunity principles.
2. It would review the extent to which its briefing practices allow women to follow a career path which progresses beyond the lower jurisdictions.
3. It would brief staff in relation to the report and the meetings with the working party.
4. It would circulate to its staff lists of women barristers.
5. It would accept responsibility for guiding client preferences in relation to choice of counsel, with the aim of promoting equality of opportunity.
6. It would compile more comprehensive statistics indicating the level of seniority of barristers briefed and dollar values of briefs.

Obviously if all briefing solicitors, private and corporate, undertook such initiatives then the position of women would be significantly advanced.

In addition I am pleased to announce that as a preliminary step the Bar Council has adopted a number of courses of action designed to immediately and powerfully redress areas identified by the report as areas of concern.

Broadly speaking, the Bar's response falls into three areas: Bar culture (including courtroom environment), briefing practices and family responsibilities.

BAR CULTURE

The Bar Council is committed to achieving fair representation of women on all of its committees including the Bar Council itself. The current composition of the Council is two men and two women in the junior category, four men and two women in the middle category, eleven men and no women in the senior category. There are currently no female directors of Barristers' Chambers Limited. There are women on all internal Bar Council Committees, including the Ethics Committee, although there are no women in the role of Court–Bar Council liaison committees, which interact on a formal basis with judges and leaders of the profession.

The Bar is committed to redressing the balance and investigating the best manner of doing so. This will necessarily involve a consideration of the composition of the Bar Council and may ultimately require amendment of the Bar Constitution.

It is no criticism of many of these committees that women are nox represented — for whatever reason women may not have been putting themselves forward for election or selection onto these bodies. Again, the report indicates that it is not enough to wait for women to do so in the natural course; there should be some encouragement. Just how this encouragement is best achieved is a difficult question. The Bar Council is committed to examining the options and achieving fair representation of women.

The Bar Council will direct all new committees, to be reconstituted in the next week or so, to ask members about convenient meeting times to accommodate members with child-minding responsibilities.

It appears that many young women leave the Bar at the five- to ten-year level, when one might expect their practices to be flourishing. These members do not, for the most part, return to active practice. This has prompted the Bar Council to investigate further. In order to discover the motivations of those leaving the Bar, the Council has established a confidential questionnaire seeking the reasons for members leaving the Bar. The results of the questionnaire will be reviewed every twelve months. The information will provide a valuable indicator towards future action to be taken by the Bar Council

In view of the Bar Council's commitment to eliminate all forms of sexual harassment and discrimination, the Bar rules were amended years ago by the insertion of a code of conduct to prohibit sexual harassment or vilification by members and to appoint sexual harassment conciliators (who now number four experienced members). The conciliators are available to the Bar and their staff to consult and where appropriate advise and conciliate complaints. The Bar will now republish these rules with information as to the names and contact numbers of the sexual harassment conciliators and ask them to report annually on the number and nature of complaints. It is hoped that if the system is widely publicised, this of itself will discourage acts of harassment and discrimination.

The most obvious avenue for education and encouragement of members of the Bar is through the Bar Readers' Course. In recent years the number of women in the Readers' Course has remained at about 30 per cent of the total. It is felt that if women readers are made aware of the commitment of the Bar Council to dispel perceptions of discrimination, they may be encouraged to stay at the Bar and return after any leave of absence.

The Bar Council is proud of the standard of its Readers' Course and is very appreciative of the enormous contribution made by mentors (who incidentally used to be called "masters"

and instructors. For some time now the course administrator has ensured that all instructors are aware of equal opportunity issues and the desirability of using gender-inclusive language; she has informally instructed many mentors on good mentoring practices and continually reviews all course material to ensure gender-inclusive language and examples are used for teaching. I believe even the judiciary are not immune to her gentle coaching in this regard. The Bar Council has asked the Readers' Course Committee to consider, implement and monitor the provision of information about sexual harassment policies during the ethics workshop, the introduction of a discrimination moot involving the participation of the Equal Opportunity Commissioner and the Deputy President of the Victorian Civil and Administrative Tribunal in charge of the Anti-Discrimination List, the provision of information about parental leave policies and the availability of a rent subsidy for new parents.

Five years ago the Women Barristers Association formed. The Association has initiated programs aimed at improving equality of opportunity for women. The Bar Council has resolved to assist the Association in conducting workshops directed to the particular needs of women barristers with the intention of overcoming perceived obstacles to effective advocacy by women. It will assist the Association in compiling a list of senior women prepared to act as informal mentors for new women barristers and will assist in the compilation, publication and promotion of a directory of women barristers.

BRIEFING PRACTICES

In addition to assisting the Association in preparing a directory, the Bar Council will liaise with the clerks and list committees with the intention of eliminating any favouritism of clerks with regard to the distribution of work. Most clerks report there is no such discrimination, but there may still be a perception of bias amongst some barristers and some briefing solicitors. The Bar Council will ask clerks and list committees to formulate and adopt an equal opportunity policy to ensure there is an awareness of the issue. Many barristers who are also mothers reported that they believed their clerks had made assumptions about their capacity and desire to work when pregnant and after childbirth. The Bar Council asks all clerks to assume all members wish to continue to work full-time unless advised to the contrary by individual barristers, and the Bar Council has asked all clerks to report regularly on the implementation of equal opportunity policies.

FAMILY RESPONSIBILITIES

A survey of the Bar conducted in June 1994 by the Victorian Bar Council found 257 respondents then had school-age or pre-school children, that 50 per cent of all respondents to the survey hoped to return to work within three months of having children and that the most commonly experienced problem for parents of pre-school-aged and school-aged children was having to reduce working hours when children were sick or when childcare arrangements broke down. While people do make individual choices about parenting and time taken away from work, the Bar Council is acutely aware of difficulties facing new parents and aims to encourage them to return to work when they choose to do so. To support the return to work by new mothers, the Bar has fitted out a parents' room in Owen Dixon Chambers to ensure hygienic, private and comfortable facilities are available for breast feeding and expressing breast milk.

The Bar Council has had for some time a system of rent assistance in place for those temporarily leaving the Bar to care for very young children. The aim of the scheme is to support the return of new parents to the Bar by allowing them to retain chambers at minimal cost during their period of absence. The system has been in place for about three years and it is thought that it is timely to review the effectiveness of the policy and whether any increase in the rate of subsidy is considered appropriate.

CONCLUSION

The report has been published for less than three months now. It has generated a significant degree of interest and discussion. The initiatives described represent the Bar Council's preliminary action plan. It expects that its working party will continue to formulate and advance proposals and will continue to consult widely.

At the dinner: left to right: Brind Zichy-Woinarski Q.C., Associate Professor Rosemary Hunter, Liz Hollingworth, Hilary Bonney

The working party has been greatly assisted by the past Chairman of the Bar Council, Neil Young Q.C. One would expect a Chairman of the Bar Council upon finishing his term to step away from onerous duties. Neil Young has, to the contrary, spent many hours leading and inspiring the working party in its work to date. We thank him for his contribution.

The working party has also received considerable input from the Women Barristers Association and the Equality before the Law Committee and I take the opportunity to thank them also.

In working towards improving opportunities for women and ultimately the quality of their professional lives at the Victorian Bar, we depend to a very large degree on the goodwill of all of you. Many of you are responsible for briefing women and interact with women barristers and the senior management of the Bar regularly. Every time you consciously consider whether a woman has the appropriate expertise to act on behalf of your clients you are advancing the lot of women at the Bar. I encourage you to continue to do so and thank you for your willingness to participate in this debate.

A Happy Coincidence of Self-Interest and Public Interest

The Honourable Justice Mary Gaudron, High Court of Australia

Set out below, with the permission of Her Honour, is the text of the speech which the Honourable Justice Mary Gaudron gave at the launch of that report on 9 October 1998.

EQUALITY is sometimes a difficult concept. It can be difficult because, although we assert the equality of all, we are patently different, patently unequal in ability, wealth and personal qualities. And the evidence is that we are, and, indeed, always have been, an unequal society. And it can be difficult because "equality" is often no more than political rhetoric manipulated to suit whatever is the agenda of the day.

Yet equality is the cornerstone of justice and of the judicial system. Witness the judicial oath! The oath to discharge the duties of judicial office without "fear, favour or affection" is, as we all know, neither more nor less than a promise to do equal justice. Because equality is the cornerstone of justice, the concept should be as clear as day to all who practise law and all who administer justice. Regrettably, there is an abundance of evidence to the contrary.

Until relatively recent times, "equality" was not the subject of deep jurisprudential analysis. Professor Dicey simply treated it as an aspect of the Rule of Law, meaning that "every man, whatever his condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals".[1] Professor Dicey did not, apparently, favour gender-neutral language. It may be that Professor Holdsworth was more enlightened for he defined equality in perfectly neutral terms as "the equal subjection of all

Women in the Bar Seminar: the Hon. Justice Gaudron speaking at the dinner at the Essoign Club following the seminar.

classes to the ordinary law of the land administered by the ordinary law courts".[2] However, neither was speaking of equality in the sense involved in the expression "equal opportunity".

Other cultures have taken a more sophisticated and, perhaps, a more practical approach to the notion of equality.

Aristotle dealt with it this way. "[I]f the people involved are not equal", he wrote in his *Nicomachean Ethics*,[3] "they will not justly receive equal shares; indeed, when equals receive unequal shares or unequals equal shares in a distribution, that is the source of quarrels and accusations". So too, the French Declaration of Rights of 1798 asserted that:

> all . . . are equally eligible for all honours, places and employments, according to their different abilities, without any other distinction than that created by their virtues and talents.

Aristotle and the French Declaration of Rights deal with equality by taking account of genuine difference, rejecting the notion that equality is uniformity, sameness, identical and undifferentiating treatment, no matter the different circumstances of those concerned.

It is the Aristotelian analysis which has been brought to bear in the theory of equality that underlies ss 92[4] and 117[5] of the Australian Constitution. This theory requires that, for people to be treated equally, artificial and irrelevant distinctions be put aside, but that genuine and relevant distinctions be taken into account. It is this theory that underlies anti-discrimination legislation. And it is this theory that must be put into practice if there is to be equality of opportunity at the Victorian Bar. It is neither a radical theory nor one that is difficult to implement. This can easily be illustrated by the report on equality of opportunity which is the focus of tonight's activities.

A very great deal of the report is concerned with matters that can be grouped into three broad categories:

1. Words and conduct which belittle and demean women whether women generally, women barristers or some particular woman barrister.
2. An environment that is not friendly to women, particularly young women.
3. A pervasive male culture which excludes women from social and other collegiate activities.

Associate Professor Rosemary Hunter, author of the report on women at the Bar.

These matters can be simply analysed. More often than not, demeaning conduct is simply the manifestation of ignorance bred of fear. An environment that is unfriendly to women is a manifestation of favouritism. And a pervasive male culture is neither more nor less than an up-market description of Australian mateship, or affection. And there you have it — fear, favour and affection — the trifecta for inequality and injustice.

It should not need a report or, indeed, my presence here tonight to draw attention to the undesirability of demeaning conduct, an unfriendly environment and a pervasive male culture. Plain, old-fashioned good manners, which I have always thought to be the hallmark of the Victorian Bar, tell you that such conduct is not to be tolerated. And plain, old-fashioned good manners dictate that steps be taken to reverse it.

There are two other aspects of the report to which I should advert. The first is "merit" and the "merit theory" which contends that women of merit will ultimately achieve the success they deserve and its only a matter of time till that is so. There are, perhaps, fields of endeavour in which "merit" and "merit theory" have a fair measure of legitimacy. But they can have no legitimacy if patronage or "the Old Mates Act" also applies.

I have spoken previously about patronage. It is as well that I do so again. Patronage is about the creation of others in one's own image. Thus, it tends to perpetuate the status quo, to secure conformity and protect the prevailing ethos. It means, too, that merit is not the only criterion of success and, thus, some succeed beyond their abilities. And like Newton's third law of motion which holds that for every action there is an equal and opposite reaction, for every one who succeeds beyond his ability, there's another who fails to achieve the success she deserves.

The other matter to which I should refer is briefing practice. Of course, the structure of the legal profession makes it impossible for the Bar to guarantee that women get the briefs they deserve. But it is not totally beyond the control of individual members. Let me illustrate. When I was Solicitor-General of New South Wales, I sometimes had female juniors and sometimes male juniors. Inevitably, the fact that I had a female junior would attract adverse comment. Even so, it was common for other Solicitors-General to have female juniors, with the result that there was rarely a major constitutional case in which there were not two, three or more women at the Bar table. However, things seemed to change a little thereafter and, one day, it struck me that one of the new Solicitors-General never had a woman junior in the High Court. As luck would have it, I met him at the airport and asked him why. He replied that he didn't know any good female barristers. I gave him the names of several. And I'm happy to report the increased appearance of women from that State in constitutional matters.

Susan Crennan Q.C.

David Curtain Q.C.
Chairman of the Bar Council

Catherine Walter

Neil Young Q.C.

Speakers addressing the Equality of Opportunity Seminar

Professor Marcia Neave

Andrew Scott

Attorney-General, The Hon.Jan Wade, M.P.

The Hon. Chief Justice Phillips A.C.

And so we come back almost to where we started. If we assume that solicitors, senior counsel and Solicitors-General all know good male juniors but don't know any good women juniors, we have a difference. The reasons for such a difference are probably clear to all. So, too, the consequences! Women are disadvantaged, not because of any lack of merit, but because others are ignorant of their ability. This is a difference that requires redress.

I'm often asked what it is like being the only woman on the High Court. I have not yet found a satisfactory adjective to answer that question — but "improbable" comes close. One of my more improbable experiences occurred when, à propos of nothing in particular, one of my colleagues asked me what sort of feminist I thought he was. I think he will not mind if I tell you that, until that moment, I hadn't thought he was any sort of feminist. But I knew what sort he would admire — a feminist who was educated, intelligent, witty, independent, unconventional, heroic, romantic, tragic and dead. So I said, I think you might be a Mary Wollstonecraft feminist. He thereafter read much of her writings and delved into the life of that great philosopher and would-be revolutionary who advocated radical political reform and who as a single woman in London in the last part of the 18th Century, wrote and published works of fiction and philosophy, as well as political tracts, openly engaged in sexual liaisons, gave birth to and reared an illegitimate child, twice attempted suicide and then died giving birth to the child who later wrote *Frankenstein*. It was a mistake to introduce him to Mary Wollstonecraft for he thereafter categorised me, rather churlishly, I thought, as a "wimp feminist".

That brings me to this question: "Will the Victorian Bar wimp the challenge to ensure equal opportunity for women?" Perhaps the more pertinent question is "Can it afford to?" We all know that confidence in the law and in its processes is essential if there is to be a Rule of Law. And we know, too, that this confidence is easily shattered.

Confidence in the law is shaken every time a judge makes a statement that implies women or members of some minority group in our society are less deserving of the law's protection than others: it is shaken every time a lawyer stereotypes a group of litigants, as for example, by referring to "Mediterranean backs"; confidence in the law and in lawyers is shaken every time a case or, even, an aspect of the case is distorted to fit the lawyer's preconception of reality: it is shaken every time a barrister fails to convey the client's real situation to the court, and, again when the judge fails to appreciate it.

Regrettably, judges and lawyers have provided sufficient evidence of their insensitivity to the situation of women for many women to believe that the courts and establishment lawyers simply do not serve the interests of women and, thus, to that extent do not serve the interests of justice. They want women lawyers who can and will communicate their reality to the courts. And they want women judges as evidence that the legal system is about equal justice.

I'm often asked what it is like being the only woman on the High Court. I have not yet found a satisfactory adjective to answer that question — but "improbable" comes close.

It seems to me that the institutions of the law simply cannot afford for women to be under-represented in their ranks. And the very least — the barest minimum — that must be done to ensure that they are not is to bring about equality of opportunity. If that can be achieved at the Victorian Bar — and I think it's a big "if" — the interests of women, the interests of the Bar and the public interest will be advanced. There will be what I have referred to in the title of tonight's address a happy coincidence of self-interest and the public interest.

I've already indicated that I think equality of opportunity for women at the Bar is somewhat problematic. At least this is so in the short-term future. It is not going to be achieved by commissioning reports or by sitting around and discussing the issue. But both are essential first steps. The report speaks for itself. For my part, I would like to conclude with some remarks on the art of discussion.

The feminists of the 1960s and 1970s — first-wave feminists, as they are now known — made the valid point that much of our language reinforced stereotypes because it was exclusionary. Thus, the need for gender-neutral language. It has occurred to me in recent times that feminism has developed its own discourse — a discourse of dissent and, also, of exclusion. To talk of patriarchal attitudes, male hegemony and male hierarchies is to reinforce stereotypes and, also, to exclude men from discussion in much the same way the report reveals that men exclude women barristers from their discussions.

If the recommendations in the report are to have any chance of making a substantive impact, the men and women of the Victorian Bar must talk to each other. This is only common courtesy. It is also common sense. It seems to me that the days have long gone when men can afford to deprive themselves of the intellectual contribution that women can make to society and the law. And if women want to make that contribution, they've got to make themselves heard.

I am honoured to have been invited here tonight to speak at this dinner to launch the report *Equality of Opportunity for Women at the Victorian Bar*. My pleasure in being here is all the greater as I have for a very long time considered the Victorian Bar to be much better in its treatment of women than its Sydney counterpart. This report confirms my assessment. I congratulate the Bar Council for commissioning the report. I congratulate its authors on its comprehensive nature. I shall keep watch for signs that the position of Victorian women barristers continues to improve. I hope, one day, to be comfortably satisfied that the Victorian Bar is, indeed, an equal opportunity Bar.

1. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (1959) at 193.
2. Holdsworth, *A History of English Law* (1966), vol. 10 at 649.
3. *The Nicomachean Ethics*, Book V.
4. See *Castlemaine Tooheys Ltd* v. *South Australia* (1990) 169 CLR 436.
5. See *Street* v. *Queensland Bar Association* (1989) 168 CLR 461.

Running on the Edge

Presented by the Honourable Justice Catherine Branson, at the Women Lawyers' Association 1997 breakfast series, at the Sydney Town Hall on 15 October 1997.

IN the life of the High Court of Australia 41 justices have been appointed to it. Only one of those has been a woman. The last four appointees have been men.

In the life of the Federal Court of Australia 85 justices have been appointed to it. All but five of those have been men. The last 13 appointees have been men.

In the life of the Supreme Court of New South Wales, just over 180 justices have been appointed to it. Only three of those have been women. The last five appointees have been men.

You might wonder why I have bothered to open this address with these not particularly surprising statistics. The reason is that I want to juxtapose them with some remarks recently made by a member of the NSW senior Bar, as an introduction to the notion of women lawyers "running on the edge".

But before I do so, could I thank the President of the NSW Women Lawyers Association, Ruth McColl S.C., for the catchy title to my address! My proposal "Outsider In Our Own Profession" not only lacked the charm of Ruth's contribution, but would, no doubt, have been less alluring by reason of the greater transparency of its message. Nonetheless, it is that issue which I wish to address this morning: the issue of women being in the legal profession without being at its heart, of being women lawyers rather than lawyers who are women.

The remarks that I wish to juxtapose to the statistics with which I opened were made at a recent NSW Bar Association function. What was said on the occasion to which I am referring was something to this effect:

> X's appointment to the Supreme Court, whilst most welcome, took us all by surprise, after all he is a male, heterosexual, came from the inner Bar and he knows something about the law having practised it for many years.

I chose in collecting the statistics with which I opened, first, to concentrate on those courts whose members are likely to be well known to the speaker in question, and secondly, this being a women lawyers' function, to identify only the numbers of women appointed to those courts. I could have instead looked at how many appointees came from the inner Bar or how many had practised for a good number of years. I probably could not have determined how many were heterosexual, but nor would I have wanted to do so. But as to the other two factors, the statistics would, I am confident, have been little different from those that I recited. Overwhelmingly those who are appointed to superior courts in Australia are male members of the inner Bar with a good number of years of practice behind them.

So why is it regarded as appropriate for one who so plainly fits that mould to suggest that a quite different type of person is more likely to be appointed and, when appointed, is less likely to be competent than someone like him? Even if it was done, as it apparently was, in a clumsy attempt at humour, why did so many in the audience apparently find it funny? Why, you might think it more pertinent to ask, does it matter? Is the issue any more than one of "political correctness"?

I will come back to the question of political correctness; but first I want to subject the remarks to a little analysis as a part of exploring why I think that we should not go on allowing remarks of this kind to be simply ignored.

First, it is important, I think, to note that the remarks were made at a Bar Association function. Membership of the Bar Association is not limited to male members of the practising Bar; women barristers and women judges are members of the Bar Association. Indeed, Ruth McColl is a senior member of the Bar Council. The plain tenor of the remark, however, you will notice, was that those of us who really matter here in the Bar Association are male — and, of course, males who are heterosexual and Queen's Counsel. But for present purposes, I want only to concentrate on the male/female dichotomy.

The second thing to note about the remarks is that they were based on a premise that even the most cursory analysis of the evidence would have shown to be ridiculous. They were, in this sense, reinforcement of a myth, which is curiously gaining currency, that women are taking over the judiciary. This myth seems to gain particular strength in respect of any court on which the number of women judges exceeds one!

The remarks, of course, graphically illustrate the truth of the adage that myth is strangely impervious to fact. If someone wants to believe that his chance of taking judicial appointment, and that of his mates taking theirs, is being significantly undermined by the unwarranted preference of women for appointment, nothing much will be gained by demonstrating that this is simply untrue.

So why bother publicly to challenge such remarks? If they could safely be left unchallenged, there would be much to be said in favour of simply ignoring them. However, it seems to me that remarks of the kind that I have drawn attention to do need to be challenged. They need to be challenged because they grow out of, and help support, a culture within the legal profession which has a significant potential to cause harm.

Let me explain why I believe that such remarks have the potential to cause harm, concentrating, as the occasion demands, on the issue of their likely impact on legal practitioners who are women.

As Justice Gaudron has recently pointed out,[1] women of the generation to which she, and I interpolate, I, belong, thought in headier days that, if the formal obstacles to women's participation in the profession were knocked down, success would be inevitable. This

was not, of course, a view limited to women lawyers.

None of us, in the decade which saw the demolition of the formal barriers to women's equal participation with men in social and economic life, had any real appreciation of the complex forms in which discrimination may come, nor any real understanding of the degree of societal change that would be required before women and men would be equal participants in public life. As I have said on another occasion,[2] the philosophy behind the equal opportunity legislation of the 1970s and early 1980s was that women should be free, should they so choose, to live their lives like men do. The legitimate claim of women today has moved on from there: it is to be free to participate fully in society without having to live as though we were men. If I may quote from a paper which I delivered in 1995:

> There is no genuine equal opportunity in allowing women to enter traditionally male institutions — but only on the basis that the values of such establishments, and the way that they are run are to remain unchanged. The freedom to be an honorary man, or alternatively, an outsider, is a freedom few women aspire to.[3]

Only a few weeks ago the Australian Women Lawyers Association was launched. During the 1970s it would not have been contemplated that in 1997 there could be any need for such an association. On the occasion of the launch. Justice Gaudron observed:

> It has been said for many many years, that it is only a matter of time until women are properly represented in the various fields of legal endeavour. Well, how much time?[4]

She pointed out that it was close to 100 years since we have had women lawyers, over 30 years since we have had women silks and over 20 years since women have represented in excess of 30 per cent of all law graduates — in recent years they have represented more than half of all law graduates. Yet women remain underrepresented in all positions of influence in the law. Her Honour asked the question:

> Could it be that work practices at the Bar are not congenial to women? Could it be that the cost of establishing chambers has a different impact on women who may need to interrupt their careers by reason of motherhood? Could it be that the system of patronage, which, after all, is about maintaining the status quo, is inimical to women? Could it be that the environment that men have created is hostile?

Studies concerned with gender bias and the law[5] have identified the culture of the legal profession, both in the private law firms and at the Bar, as an impediment to women's success in the law. As Justice Kirby noted in a speech given by him earlier in this breakfast series,[6] an increasing proportion of women lawyers in NSW is working in private corporations and a decreasing proportion is working in the private sector of the legal profession. This may well, as His Honour pointed out, raise questions as to the respective capacities of the corporate sector and the private legal sector to make cultural changes in response to the increasing numbers of professional women in the workplace. From my own observations here and in South Australia, it would seem likely that government, and other public law offices, are more conducive to female success than private law offices or the Bar.

Even within the private legal profession the difficulties that women face can vary. Some problems are, I think, uniformly experienced by all women, some are experienced more by younger women and others more by senior women. Some of the problems experienced at the Bar are not experienced to the same extent in the firms and the reverse is also true. Ultimately, however, the sorts of problems of which I wish to speak have the same base. They are to do with not being stereotypically male.

I am not a proponent of the view that senior female barristers have found it harder than similarly qualified men to gain appointment as Queen's Counsel, or that governments and chief justices have been unsympathetic to the appointment of women as judges. It may be that, so far as judicial appointments are concerned, governments have been less risk averse in the selection of male judges than in the selection of female judges. I am not able to bring to mind a woman legal academic, or a woman solicitor, who has been appointed to either the High Court, the Federal Court or a State Supreme Court, although distinguished male judges have been appointed from those backgrounds. However, I know from my own time as a government lawyer, as a silk, and as a judge, that, generally speaking, attorneys-general and chief justices strive to identify suitable female candidates for judicial appointment. I have reason to believe that those responsible for nominating counsel for appointment to the inner Bar are pleased when the opportunity arises to nominate a woman. It is not a myth that women silks have a greater likelihood than their male colleagues of similar seniority to be offered judicial appointment. However, it is a problem that there are not enough women silks, and it is a problem that there are not enough women barristers gaining the experience likely to qualify them to take silk.

It is also, of course, a matter of regret that every woman appointed to any position of seniority in the law has to face, at least, implicit suggestions that she was not appointed on the basis of merit but rather for reasons of tokenism. This is not the occasion to embark on a detailed critique of the notion of "merit" in the law, but I would like to say just this. The qualities thought to be necessary for a person to be a good judge are fairly readily identifiable. In addition to a sound knowledge of the law, they include personal integrity and independence, a sense of fair play and of social justice, and patience, courtesy and restraint balanced with an ability to manage time and resources efficiently and effectively. Why is it then, that in ordinary legal discourse, merit for judicial appointment is regarded as synonymous with a successful practice as a Queen's Counsel at the appellate commercial Bar? Many highly eminent judges have come from this background, as many more, no doubt will in the future. Nonetheless, it seems unlikely that the qualities that we look for in judges are overwhelmingly more likely to be found in barristers with this sort of practice than in lawyers with other sorts of practices? Is the reality that in the pecking order of our profession, barristers of this, predominantly male, kind, are regarded as being at the top and for this reason alone, regarded as necessarily more meritorious for judicial appointment?

Nonetheless, the priority issue, in my view, is not judicial appointment procedures, or the procedures whereby senior counsel are appointed, although it is possible that they could be improved, but the issue of what is happening to talented, hard-working and ambitious female law graduates in the early years of their professional practices. Why is it that between five and ten years after their admission as legal practitioners so many of them seem to disappear from

view? Why is it, as Justice Kirby pointed out in the same speech to which I earlier referred,[7] that virtually none of them is taking speaking parts in the High Court? I interpolate that the position is little better in the Federal Court. Why is it that in the law firms there is a limited number of female partners, and as anecdotal evidence suggests, even where they are to be found their authority is often more ostensible than real? Who or what is responsible?

It is not, in my view, an acceptable explanation to suggest that young women choose voluntarily to leave their employing firms or the Bar — the question is why do they make this choice?[8] Nor is it an acceptable explanation to suggest that they are at home having happily chosen the role of wife and mother. First, it can be shown that many are doing no such thing. Moreover, we know that in countries where there is a career judiciary, selected soon after the attainment of legal qualifications, the proportion of women judges to male judges has more or less kept pace with the proportion of women law graduates to male law graduates.[9]

Nor am I able to accept that the explanation lies in our "adversarial" system of justice as contrasted with the "inquisitional" or civil justice system. First, the differences between the two systems can be exaggerated. Secondly, nothing in my experience suggests that Australia's women lawyers are fairly described as a class as shrinking violets.

I have a fear, however, that a significant problem does arise because, as women in our profession, we are made to feel that we are outsiders — not of the mainstream. Those few women who do achieve some prominence in the law provide no real challenge to this notion — we are easily categorised as exceptions; we do not exist in sufficient numbers to challenge stereotypes.

There are, of course, other problems. Justice Gaudron, in the passage from her recent speech from which I have quoted, identifies some of them. Others, I suspect, flow from what has been described as the sex-based stereotyping of traits. That is, that men are generally perceived as naturally possessing the competency cluster of traits, including strength, toughness, assertion, responsibility, authoritativeness, credibility, whilst women are seen as naturally possessing the nurturing cluster — caring, vulnerability, passivity, indecisiveness. That is, men are assumed to be credible and competent, (i.e., likely to make good lawyers) until they demonstrate otherwise; women are seen as lacking in assertiveness and credibility, (i.e., unlikely to make good lawyers) until they demonstrate otherwise. Thus, even when women remain in the profession, there is a tendency for them to be easily siphoned off into supportive, back-room roles whilst their male colleagues are encouraged into more prominent roles.

It is fair, I think, to add to this, what, in another context, has been described as the "invisible knapsack"[10] which those who can identify as a member of the dominant group carry with them. This notion of the invisible knapsack was identified by Peggy Macintosh in the area of race relations. I wish to quote from a paper written by Justice Fraser, Chief Justice of Alberta, Canada,[11] who referred to Macintosh's paper entitled "White Privilege: Unpacking the Invisible Knapsack" in the following passage:

> Here are just some of the 26 privileges that Macintosh classifies as aspects of her white privilege: she can move into housing she has chosen and be pretty sure her neighbours will be neutral or pleasant to her; she can turn on the TV or open the newspaper and see people of her ethnicity widely and positively represented; she can speak in public to a powerful male group without putting her ethnicity on trial. She does not have to educate her children to be aware of systemic racism for their own daily protection; she can swear, dress poorly or not answer letters, without having people attribute those choices to the bad morals, poverty or lack of literacy of her ethnicity; she can criticise the government without being seen as a cultural outsider; she can worry about racism without being scorned as self-interested or self-seeking; and she can remain oblivious to the language and customs of people of colour, who constitute the world's majority, without feeling any penalty for such oblivion.

The priority issue, in my view, is not judicial appointment procedures, or the procedures whereby senior counsel are appointed, although it is possible that they could be improved, but the issue of what is happening to talented, hard-working and ambitious female law graduates in the early years of their professional practices.

All of us who are female will, I think, grasp at once the notion of an "invisible knapsack" carried by male lawyers. In their case a full-time, and working life-long, commitment to their profession is assumed; in our case it is to be demonstrated. In their case a desire to marry and raise a family is seen as a mark of responsibility; in our case it is a demonstration of divided loyalty. In their case, ambition and assertiveness are positive traits; in ours they are often taken to be "pushy" and unfeminine. I could go on.

It is, I suspect, the fact that women lawyers fear being seen to lack commitment to their profession that explains why, although I have had a number of male barristers suggest to me that they would find it inconvenient for the court to sit late because they have childcare responsibilities, I have never experienced a woman making a similar statement. It may be because women solicitors lack confidence that they themselves are seen as completely legitimate, they seem to show reluctance to brief women barristers. That is, they may see a two-woman team as peculiarly vulnerable to attack should a case be lost.

It seems to me that even those of us who understand in a general sense that young women lawyers face some difficulties that their male colleagues do not face, may easily underestimate the impact on young women of moving from the universities, where their legitimacy as students is taken for granted, to the law firms or the Bar, where the need to demonstrate their legitimacy suddenly arises. On top of this, of course, they also find that they have moved into an environment in which power is nearly exclusively exercised by men, and the prevailing culture is based on male values and male behaviours.

So what is to be done?

The way to address these difficulties, is not, I am sure, to create or exacerbate any divide between lawyers who are male and lawyers who are female. There is plainly a need to channel the very considerable goodwill that exists within all

sections of the legal community towards the breaking down of barriers in the way of greater numbers of women achieving success in the law. But it is important to challenge the notion that time alone will fix the problem, or that it will be sufficient for individual women to be seen to practise the law with a high degree of competence. These things we now know cannot alone achieve significant change.

However, it will be a real help, I am confident, if we can identify, and then challenge, the values and beliefs that form the base of a legal culture antagonistic to female success.

I suspect that of crucial importance to the above process is the need to reduce the investment which so many of our senior professional colleagues have in myths concerning the legal past; to reduce the extent to which their professional sense of themselves is tied to the notions of male virility and mateship between men; notions antagonistic to a genuine recognition of women as colleagues of equal standing.

It is for this reason that I have drawn attention to the sort of discourse that tends to go unchallenged on legal occasions. In one sense such discourse is trivial and unimportant; in another sense, it is an important reflection and reinforcement of an established culture. Examples of such discourse are provided by the typical legal "war stories" which we have all heard so often on legal occasions. What can be said of these stories?

First, the main players, the agents of power and authority in them, are universally men. Women, if they play a role at all in such stories, tend to be the unclad young practitioner surprised by a colleague in a senior counsel's chambers, or the client from the entertainment industry captivated by the sexual force of senior counsel's measured control. Secondly, of their very nature, such stories can only be told by men. Whilst male bonding no doubt flows from the telling of such stories, their effect is to make young women feel that they will always be outsiders at the powerful end of the profession; that they can not realistically aspire to be otherwise.

It was interesting for me to note my own reaction to the remarks with which I opened this talk. Interesting because, in comparison with most women lawyers, I ought to feel fairly secure. I found that I had to fight against feeling offended by the remarks and not simply because of their gracelessness. I was reminded that, judge or not, I was still an outsider in the eyes of at least some senior members of the profession.

How much more powerfully must such remarks have struck the younger women in the room who enjoy none of the protection of position that I enjoy? What message would they have carried away with them? Can we know the extent to which such remarks undermine the validity of the role models to whom these women look?

Given enough time I am confident that behaviour of the kind of which I have spoken will pass away. But, without conscious endeavour by concerned individuals, that time will be too long.

All of us, in our own ways, can play a part in exposing the myths about the legal profession, and the role of women in it, that are allowed more or less unchallenged circulation. We can subject legal discourse to intellectual analysis. We can refuse to play a part in reinforcing a culture antagonistic to all of us who do not fit the stereotypical male model.

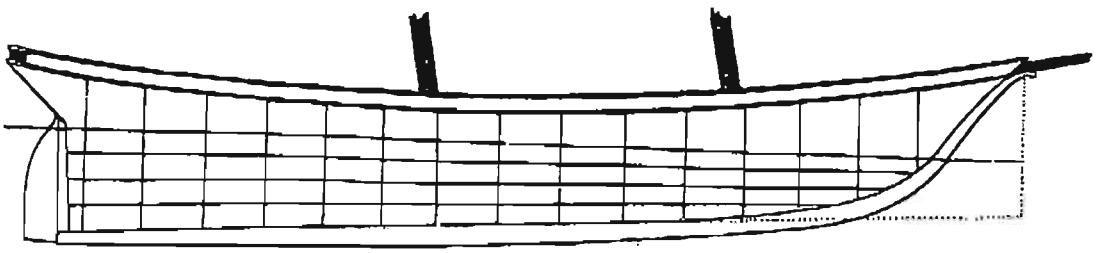
But there is, I think, a special role that those of us whose political authority is greater than average can play. Included in that class are all those who hold positions of authority in Bar Associations, Law Societies, legal firms and, of course, those who hold judicial office. All of us in these positions enjoy the privileges, and share the responsibilities, of leadership. We can, if we choose to do so, exert particular influence within our own legal institutions in an endeavour to make them places in which all lawyers, female and male, can feel comfortable and find support and encouragement. We can do all of this whilst at the same time seeking to protect that which is positive in our legal traditions. We can, in short, seek to expose attempts, conscious and unconscious, to maintain as part of the law, a male-based culture already passed its use-by date.

And to return to a concept touched on earlier, this might well involve a measure of what it is currently fashionable to describe as "political correctness". As I understand the notion of "political correctness", it involves an eschewing of language which, either implicitly or explicitly, excludes from a group those who have a legitimate claim to be part of it; and it further involves not articulating judgments based on prejudices that cannot withstand intellectual scrutiny. So understood, I am happy to say that I am a supporter of political correctness. So understood, more, not less of its it seems to me, would be in the public interest.

May I close by saying that I know that many find issues of the kind which I have been discussing uncomfortable to address; and it is not only men who do so. Nonetheless, it is, I think, important that they be discussed by fair-minded people and recognised as important social justice issues, and that we all take action where it is open to us to do so, to ensure that the legal profession is a profession truly open to all persons properly qualified to serve the public as members of it.

NOTES

1. The Hon. Justice Mary Gaudron's speech to launch "Australian Women Lawyers", 19 September 1997.
2. Mitchell oration, "Equal Opportunity: The Next Twenty Years", November 1995.
3. See endnote 2.
4. See endnote 2.
5. See, for example, NSW Attorney-General's Dept., "Gender Bias and the Law: Women Working in the Legal Profession", October 1996; also Report of Chief Justice's "Task Force on Gender Bias", Western Australia, June 1994.
6. The Hon. Justice Michael Kirby, "Women Lawyers — Making a Difference", Women Lawyers Association of NSW, 18 June 1997.
7. See endnote 6.
8. Interim Report of the Victorian Law Foundation as part of a study on gender, employment and the law, August 1995. See also Dissenting Report of the NSW Bar Association on Recommendations on Judicial Appointments contained in New South Wales, Department for Women, "Gender Bias and the Law: Women Working in the Legal Profession — Report of the Implementation Committee" (1996) at p. 30.
9. Eighth AIJA Oration in Judicial Administration, "Professional Training of Judges and Public Prosecutors in France", Monsieur le Judge Marcei Lemonde, Court of Appeal, Versailles.
10. Peggy Macintosh, "White Privilege: Unpacking the Invisible Knapsack" (1989 July/August), Peace and Freedom, *Bimonthly Journal of the Women's International League for Peace and Freedom*, cited by The Hon. Catherine A. Fraser (see endnote 11).
11. The Hon. Catherine A. Fraser, Chief Justice of Alberta, Canada, "Judicial Awareness Education", presented at the Australian Legal Convention, September 1995.



NOTICE OF RACE

WIGS & GOWNS SQUADRON

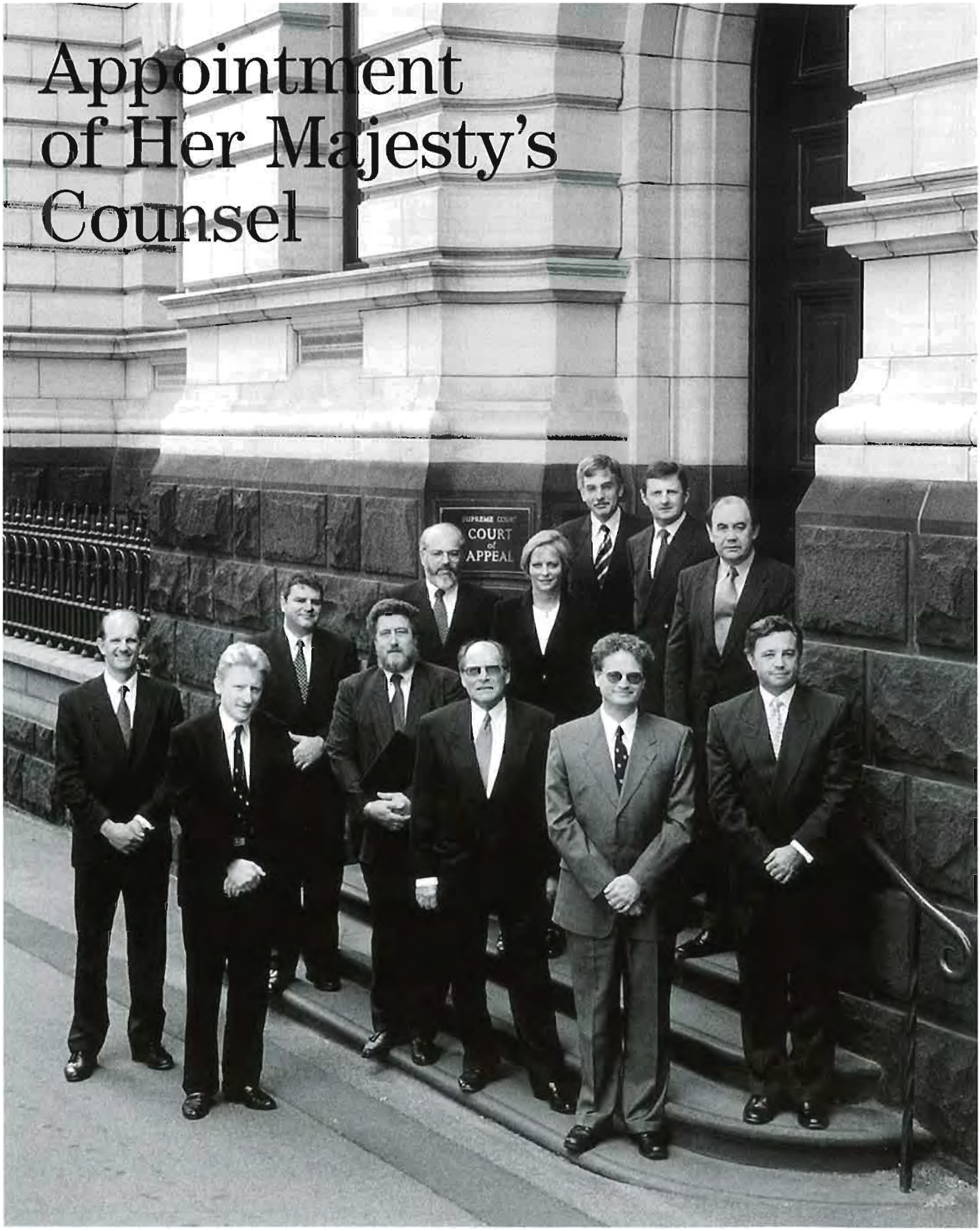
The inaugural race for NEIL RAYMOND McPHEE Q.C. TROPHY will be held on the waters of Hobson Bay on Monday, 21 December 1998. The race is to be an open handicap event over approximately five nautical miles. Invitations are extended to yachts of all types.

Yachts will meet at the NE end of the Royal Yacht Club of Victoria marina from 1100 hours onwards. The start will be at 1200 hours.

The race will be followed by a luncheon and drinks at the Royal Yacht Club of Victoria. Visitors and non-sailors are welcome.

It would be appreciated if those sailing and/or attending the after-race celebrations could contact RATTRAY Q.C. (9740) or MICHELL (8334).

Appointment of Her Majesty's Counsel



ON 24 November 1998 the Governor in Council appointed as Her Majesty's Counsel the persons listed below in order or precedence:

Neil James Williams
Remy van de Wiel
John Dermot McArdle
Martin Bartfeld
John Herbert Lytton Forrest
Gregory John Davies
Rowan Milton Downing
Eamonn Patrick Aquinas Moran
Peter Jeffrey Bick
Phillip Geoffrey Priest
Alexandra Richards
Christopher Murray Maxwell
Oliver Paul Holdenson

The new silks announced their appointment in Court on Tuesday, 1 December 1998. The Bar warmly congratulates each of them on their appointment.

Name:	**Neil J. Williams**
Date of signing Bar Roll:	1 February 1957
Areas of practice:	Insurance and Maritime Law
Readers:	Michael Wajsenberg, J. Anthony Magee
Reaction on appointment:	Considerable satisfaction.
Reason for applying:	It seemed the right thing to do.

Name:	**Remigius Louis Bernardos Michael Christopher van de Wiel**
Date of signing Bar Roll:	5 April 1973
Areas of practice:	Crime, All Jurisdictions
Readers:	Bamber, Rosencwajg, Lindner (S), Holden, Porter
Reaction on appointment:	This is all Richter's fault.
Reason for applying:	Duress.

Name:	**Martin Bartfeld**
Date of signing Bar Roll:	29 May 1986
Areas of practice:	Family Law
Readers:	Sharon Johns
Reaction on appointment:	Delighted at having enough seniority to avoid being Mr Junior Silk.
Reason for applying:	Because it is important for every barrister to get their name on the noticeboards in the lifts more than once.

Name:	**Rowan M. Downing**
Date of signing Bar Roll:	Re-signed 16 June 1983
Areas of practice:	Administrative Law, Constitutional Law, Equity and Industrial Law
Readers:	Bill Bowney, Heather Lini
Reaction on appointment:	Excitement.
Reason for applying:	Optimism.

Name:	**Eamonn Patrick Aquinas Moran**
Date of signing Bar Roll:	15 March 1979
Areas of practice:	Legislative Drafting, Statutory Interpretation
Readers:	Nil
Reaction on appointment:	Very happy and very honoured.
Reason for applying:	It seemed to be an appropriate thing to do and an appropriate time to do it.

Name:	**Peter Bick**
Date of signing Bar Roll:	8 June 1979
Areas of practice:	Commercial Law
Readers:	Maryanne Loughnan, James Elliott, Matthew Connock, Nicholas Hopkins
Reaction on appointment:	Pleased.
Reason for applying:	—

Name:	**Phillip Geoffrey Priest**
Date of signing Bar Roll:	13 March 1980
Areas of practice:	Criminal Law, Court of Appeal
Readers:	Nqayi
Reaction on appointment:	Honoured.
Reason for applying:	—

Name:	**Alexandra Richards**
Date of signing Bar Roll:	27 May 1984
Areas of practice:	Taxation, Discrimination, Administrative Law
Readers:	—
Reaction on appointment:	Surreal and then elation.
Reason for applying:	A new dimension.

Name:	**Christopher Maxwell**
Date of signing Bar Roll:	24 November 1984
Areas of practice:	Commercial, Constitutional, Tax
Readers:	Lachlan Carter, Lawrence Maher, Garry Fitzgerald, Colin Campbell, Rika Teicher, Philip Solomon, Stephen Sharpley, Judith Bornstein
Reaction on appointment:	Delighted but apprehensive
Reason for applying:	—

Name:	**Oliver Paul Holdenson**
Date of signing Bar Roll:	25 May 1989
Areas of practice:	Criminal Law, Administrative Law, Racing
Readers:	Nil
Reaction on appointment:	Humbled, apprehensive.
Reason for applying:	My old gown was torn — it was either silk or a new stuffed gown.

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

1. Eamonn Moran
2. Peter Bick
3. John McArdle
4. Martin Bartfeld
5. Alexandra Richards
6. Gregory Davies
7. Oliver (Paul) Holdenson
8. Philip Priest
9. Remigius (Remy) van de Weil
10. Neil Williams
11. Rowan Downing
12. John (Jack) Forrest

Absent:
Christopher Maxwell

Odds and Ends

THE Internet has become very popular in the past three years. Everyone has heard about it, and many use it daily. With it has come e-mail, with its address template *addressee@server.com.* The form is universal, so much so that most word-processors automatically give an expression in that form an e-mail hyperlink. Nevertheless, the @ which unequivocally marks it as an e-mail address has no generally accepted English name.

Officially, it is called the *atmark,* or *commercial at.* If you think these names are widely known, just try using one of them when giving an e-mail address, and see the confusion it causes.

Other languages are not so backward. In Italian, it is called *chiocciola* (little snail). In Dutch it is an *aperstaart* (monkey's tail). In Swedish, it is a *snabel-a* ('a' with an elephant's trunk), or *kanelbulle* (the Swedish equivalent of the Chelsea bun). Using the same metaphor, it is a *strudel* in Hebrew. In German it is *eine Klammerraffe* (a clinging monkey). In Finnish, it is a *monkey's tail,* in Greek it is a *duck,* and in Russian it is a *dog.*

One observer has suggested that it should be an *ampersat* in English, which avoids the frivolity of the Europeans, and claims legitimacy by familiarity. It does not have a common heritage with the *ampersand (&),* but no matter.

The *ampersand* used to be part of the alphabet learned at school by children. When reciting the alphabet, they would recite A *per se* A, B *per se* B . . . meaning, "A as a word by itself is pronounced A . . ." etc. The last term in the series was & *per se and.* Before long, repeated incantation had worn it down to *ampersand.*

* * * * *

There are other common things which we all recognise but cannot name. For example, an obvious feature of every person's face is the vertical groove from the nose to the upper lip. It is part of the natural topography of shaving. It is the *philtrum,* and you will find it in Nathaniel Bailey's English Dictionary (1742). Nevertheless, it does not appear in Johnson (1755), nor in the OED2 or Webster. However, for recent verification, you will find it in the 2nd edition of the *Random House Dictionary of the English Language.*

The word *lace* has several quite different meanings. The original sense is *a cord* or *thread,* especially for drawing edges together by passing it through eyelets. It comes from the Latin *laqueum (lacium)* meaning *a noose.* From the 13th century the word meant a cord or thread, but also meant a *net, snare* or *noose. Lasso* gets its meaning directly from this.

St Aetheldreda (St Audrey) wore a silken cord around her neck, and when she developed a tumour of the throat she attributed it to this vanity. The style came to be called *St Audrey's lace,* and later *tawdry lace.* Apparently, the quality of tawdry lace sold at the markets fell, to the point that *tawdry* no longer has any sense of quality or fineness.

By skilful use of a thread, an open-work fabric can be made, and by transfer of ideas this came to be called *lace.*

Corsets, stays and other garments used to be fastened with laces. If fastened tightly, they would necessarily have constricted movement. It is not difficult to imagine the personal psychology of a person who chose to have their stays laced excessively tightly. Since *strait* means narrow or tight (as the *Straits of Gibraltar,* and *in straitened circumstances)* a person disposed to over-tighten their stay-laces was described as *strait-laced.*

Another meaning of *lace* (used as a verb) is *to beat* or *thrash,* and in 18th century cooking circles it meant *to make a number of incisions in the breast of a bird.* It is possible that these meanings arise from a confusion with *lash,* since the sounds are similar, and in nautical use *lashing* (whether beating a person or making fast a piece of equipment) involves the use of a cord. The temptation to assume that *lacerate* is a related word is understandable, but wrong.

But how to explain *lace* in the usage *lace a person's drink*? In *The Private Lives of English Words* (Heller et al., 1984), the authors suggest that it comes from the fact that the drink is embellished by the illicit additive. Possible, but not really convincing. An alternative explanation might be that, for a time, *lace* was also used to mean *sugar.* In 1687, Miege's French Dictionary translated "to lace coffee" as *mettre un peu de sucre dans une tasse de caphe.* Johnson also treats *lace* as meaning *sugar* in the same context, but says the usage is obsolete. *Lace* got that meaning from a closely related Latin origin: *lacere (to snare),* whence *delicere (to divert by trickery).* From this we get *delicious, delicacy,* and (via German) *delicatessen.*

And what about those handy little things at the end of shoelaces which make it easier to thread them through the eyelets? They are *aglets* and are recognised in Bailey, Johnson, Webster and OED2.

* * * * *

And now for something completely different. I am not normally much interested in word-games of the form "What are the only three words in the English language which end with the letters *gry*?" Still, most rules have exceptions, and for no obvious reason I was interested to read recently a discussion of the appearance of concatenations of consonants in English words. It is notorious that some eastern European languages manage to string together impossibly large collections of consonants unrelieved by vowels. We generally assume that English confines itself to two or three consonants at a time. So, *consonants* ends with a string of three consonants, a pattern which is not obvious but not uncommon. A little thought on the problem leads us to *rhythm,* which might be said to have six consonants in a row. However, there is a trick in this word, arising from the fact that the letter *y* in English does double service, both as a consonant and as a quasi-vowel. For a purist, then, *tachydysrhythmia* (rapid heart beats resulting from psychological disturbance) is stripped of its otherwise distinguished position of having nine consonants in a row. However, even excluding words which depend on the vocalic *y,* it is possible to find English words that contain six consonants in a row. There are two such words at least which are in very common use. I will mention them next time.

Julian Burnside

New Readers' Competition — Stunning New Pen City Prize!

Identify the author of the following apt judicial comments and provide an apocryphal context for at least one.

"Plutarch tells us that Homer died of chagrin because he was unable to solve a riddle. Ever since I encountered s.568(1) of the *Crimes Act* 1958 I have wondered what it means."

"I would add that it is important not to lose sight of the circumstances which must exist before s.600 can apply, namely that a liquidator has reported on the existence of one or more of the serious matters referred to in s.533 in relation to *two or more* companies of which the person concerned was a director. As Lady Bracknell might say, to lose one company may be regarded as a misfortune, to lose two looks like carelessness."

"I believe that I sufficiently made clear that my position was that I was not intending to impose a limit on the final address, despite my concerns. I did refer to the length of the prosecutor's address and to the possibility of my reacting to a jury request. However, the context was such as to sufficiently indicate that both matters were said not to be what would, but rather what might possibly, be taken into account, if my position was other than what it was."

"There is an air of unreality about this stated case. It has the appearance of a law school moot based on an episode taken from the adventures of *Maxwell Smart*."

Entries to Gerry Nash Q.C., c/- Clerk S, Owen Dixon Chambers West by 26 February 1999.

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

Verbatim

A Bad Day at the Office?

County Court of Victoria

June 1998

Tipstaff, closing Court: "This horrible Court stands adjourned *sine die*".

Australian Accent

County Court of Victoria

Grubisic v. *Heath Worker's Compensation (Vic) Pty Ltd*

Coram: Judge G. D. Lewis

R. Gorton Q.C. and J. Mighell for plaintiff

V. F. Ellis for defendant

After an argument over costs in which Gorton Q.C.'s fee on brief was reduced by the Court, Gorton resumed his seat with audible and feigned exasperation.

His Honour: Mr Gorton, I hear what you sigh.

Oh Lordy

Supreme Court of Victoria

17 June 1998

Clancy v. *Santorno*

Coram: Coldrey J.

Galbally Q.C., Cooke and Winneke for the plaintiffs

Pannam Q.C. and Maclean for defendant

Bernard Daniel Bongiorno sworn and examined.

— Are you one of Her Majesty's Counsel?

— I am.

— Do you know Dr George Santorno?

— Yes I do.

— Did you act for him in 1990?

— Yes I did.

— In a probate proceeding before Mr Justice Nathan?

— Yes.

— Can you tell His Honour whether you formed any view as to the merits of Dr Santorno's case?

— Well, certainly at the time I regarded the case as one that could well have been won. I probably would put it as high as say ought to have been won by Dr Santorno having regard to the fact that the treating doctor's evidence was advantageous to the proposition that he was maintaining. The decision came as a surprise to me when His Lordship, as His Honour now is, handed it down.

Indecent Obsession

Transcript from a pretrial hearing that took place on May 5 1997 in a criminal court in Adelaide, Australia, before Judge Roy Grubb. In the transcript, the prisoner is Yusuf Biyikli, a Turkish immigrant charged with assault occasioning actual bodily harm. Mr Smart is the attorney for the crown.

(The charge is read).

Prisoner: Shut up, fucking poofter. You poofter, thank you.

His Honour: You just keep quiet, we will have a word with you in a moment.

Prisoner: Fuck to you. All right, you poofter. All right, I fuck you. That is answer.

His Honour: It is said that you assaulted . . .

Prisoner: Fuck the English, fuck the colony, all right.

His Honour: If you don't shut up . . .

Prisoner: Fuck the judge too. That is not true.

His Honour: Do we assume this is a plea of not guilty?

Mr Smart: Yes, I think we can assume that.

Prisoner: I fuck you, answer you, stuff you, poofter. Is that enough answer for you?

His Honour: That is no answer, but I take it as a plea of not guilty. In view of the outrageous outburst from the accused, I assume that the torrent of language from him is a plea of not guilty to each count. Remanded for trial. Has anyone been imprudent enough to grant a bail agreement?

Mr Smart: I hesitate to ask him.

Prisoner: Fuck you.

His Honour: Do you wish to ask for bail?

Prisoner: You ask yourself bail, poofter. Now ask me.

His Honour: I don't have to ask.

Prisoner: Fuck the bail. Fuck Australia.

His Honour: I take it then you don't wish to seek bail.

Prisoner: Stuff that.

His Honour: No application for bail. The accused is remanded for trial in custody.

Prisoner: Fucking bastard, poofter, melon-arse.

Loss of Criminal Career

Psychologist's report from County Court proceedings by a prisoner against prison authorities.

Conclusion:

It appears that Mr _____ suffers from a traumatic blow physically and mentally as a result of his being assaulted by a man in Pentridge jail on 25 May 1987. Mr _____ described loss of self-esteem and self-confidence. As a result he had to give up his career as a criminal prematurely and, as he believes, lost the opportunity of a comfortable future.

Mr _____ still complained of feeling of loss of confidence, being socially sensitive and withdrawn and he was easily startled. In other words, he was no longer the man he used to be. Whether this is a blessing in disguise is a matter of opinion. But from Mr _____'s point of view, the assault has robbed him of a "promising career" and his self-esteem as a man. He is also suffering from anxiety symptoms.

It is my opinion that Mr _____ could benefit from some therapy and treatment for his anxiety.

Interrogatories Time Wasting

County Court Directions Hearing

26 May 1998

Counsel (Robins) seeking leave to interrogate.

Judge: I am not granting leave to interrogate.

Robins: Your Honour will recall from your own practice at the Bar . . .

Judge: My experience from my practice at the Bar is that interrogatories were a waste of time . . . Nonetheless I do not intend returning any part of any fee I received for drafting them.

Bar Envy

County Court Trial

19 October 1998
Coram: Judge Shelton
Crown: Keiran Gilligan
Defence: Trish Riddell

Accused was charged with one count of perjury, the allegation being that in September 1996 he swore on oath that he had not been at court in November 1990 where he was given a community-based order. The magistrate who sentenced him to the community-based order was His Worship, Mr Peter Mealy. His Worship was called by the Crown to give evidence and was cross-examined by counsel for the accused.
Riddell (about to cross-examine Mealy, M): Your Worship, I think I am the envy of the Bar this morning at this moment.

Questions in Poor Taste

ANZ v. *Permewans*
Coram: Byrne J.
Moore: Permewans
Denton: ANZ
Nolan: Romanis

Nolan: It could have well been to build a 95-square-metre extension and improvement to your house?
Witness: Absolutely no way known, Mr Nolan. The construction cost of that building was in the order of 50 or $60,000 to my recollection, and it — certainly the whole of Tanglewood was only $400,000.
Nolan: Now, can I take you back to the document of CXI342, Mr Donaghey?
Witness: Yes, 134 — yes, I have that document.
Nolan: Can you give any explanation as to why your liabilities in the company weren't included in this statement of assets and liabilities?
Witness: I am of the view that intercompany loans net out —
Nolan: I take it that you used the $350,000 to live on?
Witness: No, no.
Nolan: What did you live on, Mr Donaghey?
Witness: We live a — if I may answer that question, Mr Nolan we lived a very modest lifestyle.
Nolan: I see. Can you tell His Honour what type of car you were driving in March 1989?
Witness: My normal drive car was a . . . a Ford LTD.
Nolan: And what about your Rolls Royce?
Witness: Yes, I owned that, I owned a Rolls Royce.
Nolan: And that is the modest lifestyle?
Witness: It was a secondhand one.
Nolan: In relation to your modest lifestyle you also had a unit up at Yarrawonga?
Witness: We used to go to McDonald's in the Rolls, Mr Nolan. I think that that balances it out a bit, and it is . . .
Nolan: Mr Donaghey, I didn't ask you any questions about your poor taste in food. I asked you about your unit in Yarrawonga?
Witness: Yes, Mr Nolan.

The Battered Door Syndrome

High Court of Australia

5 August 1998
R v. *East & Ors., Ex parte Nguyen*
Coram: Gleeson CJ., Gaudron McHugh, Gummow, Kirby, Hayne and Callinan JJ.

Vickery with Perkins seeking declarations and writs of *certiari* and *habeas corpus*.
Gleeson CJ: That analysis illustrates the importance of the earlier question as to whether or not section 9 binds judges of State courts in the context of equal treatment before the law.
Vickery: Yes. We say this, that section 9 is a section which applies throughout Australia to all persons within Australia and that is sufficient. Once unlawfulness of any person is established, then the writ may issue.
Kirby J: I can see that if this be so, the jurisdiction of this Court is vastly increased. No-one will pursue appeals. They will come straight here, no nasty little red lights and orange lights, straight to this Court, hundreds of them all around the country, battering on our doors.
Vickery: And receive as fair a hearing as I have received this morning. Those are my submissions.
Gleeson CJ: Yes. Thank-you, Mr Vickery.

Will Legal Aid take High Court advice

High Court of Australia

14 November 1997
Thompson v. *His Honour Judge Byrne*
Applicant for Special Leave in person:

Gaudron J: Now, Mr Thompson, you have done a very creditable job of advocacy on your own behalf today.
Mr Thompson (in person)**:** I have not won yet.
Gaudron J: Exactly. We were going to suggest that given the need to reopen *Mills* v. *Meeking* before you succeed, and given that there might be some disadvantage to you in being so close to the proceedings, it would be worth your while considering whether or not you should be legally represented.
McHugh J: There may be civil liberties groups, for example, that . . .
Mr Thompson: Regrettably, with funding from . . .
Gummow J: You are in the High Court now, their view may change.
Mr Thompson: Well, everyone has said no to me so far. They have got no money; neither have I.
Gaudron J: Yes, they may have a different attitude in view of the grant of special leave.
Mr Thompson: I will revisit them, thank you.

24 November 1998

Dear Practitioner,

OPENING OF THE LEGAL YEAR: MONDAY, 1 FEBRUARY 1999

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

St Paul's Cathedral
Cnr Swanston and Flinders Streets, Melbourne
at 9.30 a.m.

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

Temple Beth
76–82 Alma Road, St Kilda
at 9.30 a.m.

St Eustathios Cathedral
221 Dorcas Street, South Melbourne
at 9.30 a.m.

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

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

Yours sincerely,
JOHN HARBER PHILLIPS, AC
Chief Justice

Invitation

OPENING OF THE LEGAL YEAR BREAKFAST

St Paul's Cathedral is pleased to invite all practitioners to The Opening of the 1999 Legal Year Breakfast

to be held at:

The Chapter House
St Paul's Cathedral
199 Flinders Lane,
Melbourne

on

Monday, 1 February 1999
at 8.00 a.m.

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

Please contact Sue Henderson on (ph) 9608 8038 or (fax) 9670 0273 to purchase your ticket, which will cost $25. Unless otherwise requested, tables will be organised according to practitioners' years of graduation, giving you an opportunity to catch up with friends.

INTERNET
LEGAL & BUSINESS ASPECTS

VOLUME 3, NUMBER 6 Published by Leader Publications, a division of New York Law Publishing Company SEPTEMBER 1998

WEBSITE OF THE MONTH

Peter Searle, an Australian barrister, has developed an international legal site called NetJustice, at *http://www.netjustice.com.au/*. Its organisation and depth of legal resources are impressive. Click on "Top Ten Legal Channels" to find US specific sources, at *http://wwwnetjustice.com.au/content/980520lawontheinternet.html*. Users may add and organise their own content.

Mr Searle recently published the following article describing the development of the site, at *http://www.netjustice.com.au/content/why.html*.

US Lawyers Accessing Melbourne Barristers' Legal Website

BARRISTERS are notoriously slow at implementing new technology. In my case, I have been prodded along since I signed the Victorian Bar Roll in 1986 by my cousin Greg Searle, a systems engineer. In early 1995 he told me I should be doing my legal research on the Internet. I told him that it wouldn't catch on and that it wouldn't work for barristers. I was extremely reluctant to leave the safety of my law books and newly acquired CD-Roms. However, I was prepared to give the Internet a go.

After nearly two years using the Internet on a comprehensive basis I told Greg that I would give up the Internet and stay with the books and CD-Roms. The problems I encountered on the Internet were as follows:

1. The Internet does not have a central legal index.
2. My own database of legal materials accumulated over the last 20 years was in books and other hard copies and indexed in a database on my notebook computer. This contained approximately 3000 to 4000 entries of cases and statutory materials classified by subject matter, loosely in accordance with the Commonwealth Law Reports index.
3. I found during my first two years using the Internet that I was traversing between books, CD-Roms, the Internet and my own legal database.
4. Although I continued to accumulate legal material on my own legal database, I found that I was duplicating legal research.
5. I needed one comprehensive legal system that could collate and collect primary legal materials and submissions from previous cases which concerned a range of legal subject matter.
6. I accumulated a vast number of bookmarks on my browser which were not indexed, searchable or even decipherable.
7. Every time I used a different computer I had to find the same primary resources again (or remember the URLs!!!) because my bookmarks weren't accessible from other computers.

Greg Searle advised me that we should rebuild my own legal database on the Internet. This would require two primary tasks:

1. From the lawyer, reclassifying all of the legal material I had accumulated, some 4000 documents, into a database which could be relational in nature and which was classified in a tree structure. That is, every piece of data had to relate to another piece of data in a logical sequence.
2. Greg would write some software which would allow the relational database to operate on the Internet in such a way that we could add to and edit the data and hyperlink relevant cases and statutes to primary material available on the Internet and on CD-Roms.

In late 1996 to early 1997 we created a concept plan and strategy for the

creation of "Your Electronic Barrister". This involved preparation of the primary level of the tree structure (the first level of the tree) which evolved to be based on the legal indices contained in the Commonwealth Law Reports, the Victorian Reports and the United States Reports, the primary materials with which I was familiar.

I then set about the task of recreating my database on an Excel spread sheet so that all the data would relate to level one of the tree, which in turn would relate to levels two, three and so on. In its initial stages alone this task took over 1000 hours to complete. I found, as would most lawyers, that our classifications are broadly based upon section numbers of Acts — s.25 of the *Income Tax Assessment Act* 1936 for assessable income, s.177A of the *Income Tax Assessment Act* 1936 for anti-avoidance provisions, s.459 of the Corporations Law for Statutory Demands and so on. All of those classifications had to be changed to relate to words — *taxation*, *assessable income*, *anti-avoidance* and *statutory demands* respectively. While completing this task we held numerous discussions concerning classification of legal material, debated where non-legal resources such as information technology, health, education would fit into the relational database and considered how this could be achieved. Greg decided on a PROGRESS WebSpeed development and deployment environment and spent over 1000 hours writing software for the database. We downloaded 1263 Commonwealth Acts and wrote an algorithm to classify the relevant Acts into the level one subject headings. We were then ready to connect the data on the Excel spreadsheet onto the Internet and run another program Greg wrote to link all High and Federal Court cases automatically to the relevant case in the database. The program linked about 1000 cases automatically and we had to complete the rest manually. This involved finding the case on the Internet and linking the URLs. The process will never finish.

One of the main technical difficulties we had to overcome was that we needed a service provider to provide guaranteed fast bandwidth at a moderate cost. No service provider we were aware of could guarantee us access to such bandwidth. Accordingly, we had to build our own servers. Greg built these from the motherboard up so he'd know exactly what was in them. I applied for vacant chambers at Owen Dixon Chambers to install the servers and 2 MB link but was told this would involve a rule change at Barristers Chambers Ltd. We found alternative accommodation with a progressive law firm which can see a technological future. We then purchased and installed a 2 MB link from Telstra and set up our own routers and servers. We have 32 ISDN lines and created sufficient capacity on our servers, routers and bandwidth to allow us to have a large number of hits simultaneously. We can run NetTV, rock concerts and live court proceedings. The maximum rate of hits we have had on our servers is 66,000 in a two-hour period. Accordingly, that aspect of the technical difficulties was overcome.

Peter K. Searle

While the creation of a structured navigable legal database is extremely useful, it isn't all that is needed by a practising lawyer. Sometimes you can't find what you think is the relevant law by navigating through the tree structure. Greg designed a "Find" button which allows the user to search over the NetJustice database and his or her own data. Thus, a "Find" for "fraud" on NetJustice may give the user only about 30 hits but they are classified back into the tree structure so the user can find materials on and around the various legal subject matters — contract/fraud; property law/indefeasibility of title; setting aside judgements obtained by fraud; defrauding the revenue; criminal law offence of fraud, and so on.

In addition, a structured legal database on the Internet requires direct access to external legal resources available on the Internet. We devised a "New Document" button which enables the user to cut and paste any free or subscription resources into their own personal channel or work area. Such additions are invisible to all the world except the person who added the data. Freely available material may be published publicly or within an intranet. As a barrister, the passages I cut and paste into the new document are the passages I propose to read to the court. In this way, each new channel becomes a combination of a summary of argument and a hyperlinked list of authorities. And any subsequent "Find" will search over the passages pasted into the new document.

Virtually every free database on the Internet is unstructured in that it requires the power of search engines to find what you want — see Austlii, Scale Plus, Findlaw and many other legal databases. In essence, such databases use the same technology that generic search engines like Yahoo, Excite, Lycos, Looksmart and AltaVista use — they give the user a powerful search engine to search across the database. Thus, a search for "fraud" at Austlii provides about 5000 hits. A researcher needs external search engines within a mouse click or two so we added a facility to enable the user to have immediate access to such search engines. This task was successfully completed, firstly, with a navigation palette in the form of a separate frame at the bottom of the screen, and secondly, with an additional icon at the top right-hand side of the screen linked to the Austlii search engine. More recently, Greg designed a pop-up menu bar which replaces the navigation palette and allows the user to search over many search engines including 400 legal databases at LawGuru (one of which is Austlii).

We also found that, although the majority of the database was initially based on Australian law, a lot of law available on the Internet came from the United States, Canada, Europe and so on. This involved us periodically reviewing the entire structure of the database. The solution we arrived at was to allow for the classification of legal material by subject matter at the first level of the tree and to allow for specific countries at, say, the third level of the tree (see,

for example, constitutional law/judicial power). We also allowed for the classification of legal material by geographical region or jurisdiction (see: Resources and the various geographical classifications contained therein like the USA).

The database was first put on the web in April 1997 at the Taxation Institute of Australia conference in Melbourne. We then reconstructed major components on it and put it back on the web in late June, 1997. Effectively, the database has been on the web for about 99 per cent of the time since then. The other 1 per cent has involved upgrading servers, routers, WebSpeed, development, manual back-up, daily automatic backup and occasional midnight forays to restart the servers during teething problems with the auto backup.

In November 1997 I presented a paper live on the Internet to the International Bar Association conference in New Delhi. At that conference I used the NetJustice database at our server in Melbourne and was on the Internet for the entire day from 9.00 a.m. to 5.00 p.m. I was on an international panel dealing with taxation, superannuation and pension fund issues.

I then prepared a number of papers concerning legal research on the Internet which I presented to the Victorian Society for Computers and the Law in March, 1998, the Inter Pacific Bar Association in Auckland, New Zealand, on 1 May 1998 and to the Victorian Bar Readers' course in April 1998.

The legal material on the website is updated on a daily basis by a number of different people from recent High Court decisions and recent Federal Court decisions at the Austlii database and various other databases at ScalePlus. Legal material from other jurisdictions is added on a more ad-hoc basis. Hence, legal material concerning the Maritime Union of Australia dispute was collected, collated and accessed by various lawyers on both sides of the dispute and by our own people.

We also implemented a registration process (over 800 users, mostly lawyers, are registered at NetJustice) a data collection process which enables us to log the number of times any particular channel is accessed. The depth and breadth of the legal material is demonstrated with reference to the Top 10 Legal Channels which is able to be accessed for free from the front page of the site.

The primary legal material at NetJustice is totally free for all lawyers and indeed for all users. Users who want to use the database as their own personal or firm intranet are charged a fee unless they are exempt (exempt persons are Judges, associates, pro-bono workers, students and teachers). In more recent times we have created individual personalised databases which are tailor-made for individual law firms and organisations like the Victorian Society for Computers and the Law. We have also created a linking process so that legal subject matter (such as in the Mareva Injunction channel) can be linked into other subject areas (such as labour and employment law/ Maritime Union of Australia dispute). This allows individual firms and organisations to customise their own database to suit their own practice areas and specialities.

The main benefits resulting from the innovations are that the problems summarised in paragraph two were solved. Any user can prepare and work remotely from any location with Internet access. At present over 80 per cent of my work as a barrister is done on the Internet. This includes preparation of legal submissions I have filed in the High Court, the Federal Court of Australia and the Supreme Court of Victoria. I electronically receive, settle and serve witness statements and other court documents. My submissions are created in HTML and hyperlinked to the various statutes and cases to which I refer. Clients and solicitors have found this of great use as they may not have alternative access to the statutes and cases referred to in a barrister's advice. NetJustice also allows smaller firms to compete internationally in the increasingly globalized economy.

NetJustice was originally devised to be "Your Electronic Barrister". I think it is. It now contains over 20,000 links and is an ongoing system which is updated on a daily basis but which does not require any infrastructure changes for any user to update the data.

Peter K. Searle

STOP PRESS: Best Legal Site WebAward for 1998

Subject: WebAward Winners
Date: Wed, 2 Dec 1998 00:15:55 -0500 (EST)
From: <wrice@webaward.org>
Organisation: Web Marketing Association
To: psearle@netjustice.com.au

The Web Marketing Association is pleased to announce that your entry #399 NetJustice has been judged by our panel of independent expert judges and has been awarded the Best Legal Site WebAward for 1998. Your site received a score of 41 out of a possible 70 points . . .

In the next few weeks, we will send to you some of the judges comments regarding your site. Although not every site received comments, we hope that these unbiased comments will provide you with insight for future site development. We also expect to send you a short survey via e-mail in January to provide us your views on how we can improve the 1999 WebAwards competition.

On behalf of the 1998 WebAwards competition and the Web Marketing Association, I congratulate you and Information Brokers Pty Ltd on your outstanding work on the NetJustice site and hope that you are able to use this achievement to promote your firm and the winning site.

Congratulations once again,

William Rice
President,
Web Marketing Association
wrice@webaward.org

Video-Conferencing in the County Court

Terry Kearney Registrar, (Acting), County Court

Practitioners may not be aware that Victorian Courts are leading the way in the use of video-conferencing technology for the conduct of trials and other hearings. The use of video-link can substantially reduce the cost of a trial or more importantly, prevent delay simply because a witness is overseas, interstate or in country Victoria.

This paper is written primarily from the County Court perspective and is not designed to be a step by step outline of procedure for the arranging of Video-Links for trials in the County Court, but rather an indicator of the main requirements of which practitioners should be aware. More complete details are available from the video-link coordinators at the County Court and from the coordinators of the other jurisdictions.

One aspect will be obvious and that is that the use of the video-link facility is on a "user pays" basis.

Where practicable, the three major jurisdictions have attempted to maintain similar administrative procedures but practitioners will find some differences between jurisdictions due to their very nature.

BACKGROUND

VIDEO-CONFERENCING was trialed in the Melbourne County Court, Melbourne Magistrates Court, Mildura Court and Moe Court from 1996. During the period of the trial project, video-conferencing was used to take evidence from all over Australia, from many international sites and to facilitate proceedings between the courts in Melbourne, Moe and Mildura

Video-link facilities are now installed in almost every courtroom in the County Court at Melbourne. Facilities have also been installed in the Magistrates Court, the Supreme Court and in nine Victorian country courts, namely Ballarat, Bendigo, Geelong, Mildura, Moe, Morwell, Shepparton, Wangaratta and Warrnambool, with additional country sites proposed. There are now approximately 50 courtrooms at 15 Victorian court locations with the facility. The Coroners Court and the Victorian Civil and Administrative Tribunal (VCAT) also have video-link facilities.

Certain prisons also have or will have video-link facilities:

- Fulham Correctional Centre
- Port Phillip Prison
- Metropolitan Women's Correctional Centre (Deer Park Women's Prison)
- Melbourne Assessment Prison
- Barwon Prison (currently being fitted out).

The Police Forensic Science Laboratories also have video-link facilities.

THE LEGISLATION

The *Evidence (Audio Visual and Audio Linking) Act* 1997 came into operation on 22 December 1997. This Act amends the *Evidence Act* 1958. The Act provides that in suitable cases, persons may appear by audio or audio visual link, rather than having to appear before the court in person.

The court can, in any case, civil or criminal, direct that persons appear by means of video-link. The court has an overriding discretion to direct that a person appear physically before the court. The legislation makes special provision for the use of video-link facilities in proceedings involving children.

Main Legislative Provisions

This is a general overview and practitioners should be fully familiar with the provisions of the Act and relevant rules.

The court may, *on application of a party*, or on its own initiative, direct that a person may appear before, or give evidence or make a submission to a court by video-link — Section 42E (form 41AA).

In certain *criminal proceedings* accused in custody will automatically appear by video-link for bail and other pre-trial proceedings. Section 42K(1) (form 211AA) outlines the type of proceedings where an accused person may appear before a court by way of video-link unless the court otherwise orders.

The court on its own initiative, or on application by, or on behalf of the accused, can require the accused to appear in person before the court. Such an application is made under Section 42L (form 2-11AB), must be in writing, must specify the grounds for the application and provide written submissions

In certain *criminal proceedings* accused in custody must appear in person — Section 42K(2).

Before directing that a video-link take place in any proceeding the court must be satisfied that the remote site is equipped with the *technical requirements* that enable all persons at the court to *see and hear* the person appearing and giving evidence. The persons at the remote site must be able to see and hear the appropriate persons at the court — Section 42G.

In addition, the County Court has (as have the other jurisdictions) made rules of court prescribing procedures and forms under the Act and the County Court Rules are:

The County Court (Chapter 1 Amendment No. 31) Rules 1997.

The County Court (Chapter II Amendment No. 10) Rules 1997.

MAKING AN APPLICATION FOR VIDEO-LINK TO THE COUNTY COURT

The experience so far in the County Court at Melbourne is that the video-link facility is mainly used for civil trials, however, there is an increasing usage for arraignments, criminal mentions and other applications to prisons, etc.

The County Court has connected to sites in countries such as the United Kingdom, the USA, Canada, China, Japan, Italy, Germany, France, etc. as well as to sites in every Australian State and Territory. However, the biggest problem has been with parties who contact the court at the last moment attempting to arrange a video-link connection to a remote site, invariably overseas. It is imperative that applications be made well before the hearing date to enable the video-link to be put in place. Late applications may result in refusal by the court or the inability by court staff to process the application due to insufficient time.

County Court Coordinators

At the Melbourne County Court the coordination is in two parts depending on whether the application relates to a Civil or Criminal proceedings.

Civil Video-Link Coordinator
Jane Manning
Civil Listings
Ground Floor
223 William Street, Melbourne
Phone: (03) 9603 6415
Facsimile: (03) 9603 6412

Criminal Video-Link Coordinator
All CTLD Officers
Criminal Trial Listing Directorate
Third Floor
436 Lonsdale Street, Melbourne
Phone (03) 9603 9384
Facsimile: (03) 9603 9377

Application for Directions

Extensive material is available from the video-link coordinators at the County Court to assist practitioners in making an application for a video-link and is available on request.

Terry Kearney

An Application for Directions for Video-Link must be made on the prescribed form Section 42E(1) — refer County Court Rule 41A.02 and Form 41AA.

Applications for Directions must be made at least *14 days* prior to the date on which the person the subject of the application is due to give evidence — refer County Court Rule 41A.03.

The application for directions *must* be accompanied by the Audio-Visual Call Setup Form which is available from the video-link coordinators at the County Court. This form provides details of the remote site to which the call is to be made from the County Court. Without this information the coordinators cannot program the court computer, nor can the Judge dealing with the application be satisfied that the technology exists as is required under Section 42G of the Act.

In criminal matters, please contact the Criminal Trial Listing Directorate before making your application.

Booking the Remote Site

It is the responsibility of the practitioner to make the arrangements for the remote site and to provide those details on the Audio-Visual Call Setup Form — it is *not* the responsibility of court staff. There are service providers available to whom the coordinator can refer practitioners who will arrange remote sites — this information must then be provided to the court coordinator on the form referred to above.

Practitioners are responsible for costs of arranging the remote site and also for costs incurred at the remote site (usually only booking and conference room hire as the County Court dials in to the remote site when the proceedings allow — the remote site does not dial the County Court).

In summary, the party requesting the video-link bears the total costs, i.e. the costs of the application to the court, the cost of the line fees to the remote site, the cost of arranging the remote site connection and any costs incurred in the use of the remote site.

Within Victoria, it is possible to link a trial from the County Court at Melbourne to a country circuit court location for the taking evidence from a person who lives in or near that country town, using the remote witness facilities at some country courts which have been connected to the video-link system.

The County Court at Melbourne has two remote witness rooms connected to the video-link system and it is possible to link from a country court to the County Court at Melbourne for the taking of a person's evidence. However, this will require the usual application being filed with the Deputy Registrar at the circuit court who will in turn liaise with the coordinator at Melbourne. It may also be possible to use other Department of Justice sites e.g. VGRS — no additional charge is made for another Department of Justice site. If an Attorney-General site is not available, a service provider should be contacted to arrange a Melbourne venue for a video-link from country Victoria.

Some interstate courts have a reciprocal arrangement for video-conferencing with Victoria. Those interstate courts are:

- Perth Magistrates Court
- Adelaide Magistrates Court
- Hobart Magistrates Court
- Brisbane Magistrates Court
- Alice Springs Magistrates Court.

Date and Time Zones

When making arrangements with remote sites, practitioners should be extremely careful with date and time zones for overseas connections, bearing in mind that the Executive Committee of Judges in the County Court has determined as a matter of policy that the court will not sit outside normal hours for the taking of video evidence (subject to directions of the trial judge).

Fees

On lodgement, there is a fee payable for the application for directions for video-link.

In addition the practitioner will be required to pay the first hour's video-link line transmission fee (first quarter-hour for overseas connections) to cover the initial costs in the County Court making the test transmission to the remote site. This cost is credited to the first hour or quarter hour fee respectively, should the video-link proceed. If the video-link does not proceed, the fees are not refundable as the court has incurred those charges in administrative and line costs in booking, listing the application, contacting the remote site to arrange a test (often involving an overseas telephone call) and testing the video-link equipment via direct connection to the remote site.

At the completion of the hearing, an invoice will be sent to the practitioner for any additional line fees incurred as a result of the County Court dialling in to the remote site. Fee details are obtainable from the coordinator.

Tentative Date and Time

Once all the necessary information is supplied by the practitioner the coordinator will be able to provide that practitioner with a tentative date and time for connecting to the remote site.

The Directions Hearing

Armed with the information from the coordinator, the practitioner will attend the directions hearing and be in a position to advise the judge in charge of the relevant list of the tentative dates and time for the video-link as recommended by the coordinator. This is especially so at Melbourne where there are fixed trial dates. If satisfied, the Judge will make the appropriate orders for connecting from Melbourne to the remote site. Although there is no prescribed form of order for the approval of a video-link a Form of Order has been drafted and is available if required.

Circuit County Courts

As circuit County Courts do not have fixed trial dates, an application for directions by way of video-link should be filed with the court for hearing on a directions hearings date (which hearings are now also done by video-link from Melbourne to the circuit court). Such applications may need to also seek orders to be made for priority and for the fixing of a date for the trial (or at least the video-link evidence).

After the Directions Hearing

Where the court gives directions for the video-link evidence to be taken, it be quite specific as to where the link is going, what date and what time (see *Date and Time Zones* referred to above). The court will generally generate an order to that effect based on the details provided to the practitioner by the video-link coordinator (if the application is granted).

The Hearing Date

The County Court dials in to the remote site at the time fixed by the court at the directions hearing — the remote site does not dial the County Court. As the numbers have been programmed into the computer, the judge's tipstaff or associate will be able to call up the number in the computer and dial the remote site. The technology is very reliable and a connection should be made with little or no trouble.

The transmission speed of the equipment at the remote site will govern the quality of the picture and the sound. The County Court can transmit at 384K but if the remote site has a lower speed the quality will diminish. This does not mean that the video-link cannot proceed, it just means that the quality is less than the best available.

During Hearing — Judge's Initiative

Where the video-link is to be used on a judge's initiative rather than on the application of one of the parties, and the convenience of a particular party or that party's witness(es) is to be met by the use of the video-link, the appropriate fee must be forthcoming from that party before an order is made. If the party in question cannot pay the appropriate fee, short of the other party paying, the video-link cannot be used.

Cancellation of Video-Link

The Remote Site: Parties must be aware that cancellation charges may be incurred if sufficient notice is not given to the service provider of the remote site. Some service providers who organise remote sites require 48 hours notice of cancellation. Again, it is the responsibility of the practitioner to advise the service provider, not the court.

The Melbourne County Court: The video-link coordinator at the County Court must be advised forthwith, whether before or after a video-link direction has been given, that the video-link is no longer required — refer County Court Rule 41A.05.

PRISONS

Thus far the process discussed has related more towards the booking of remote locations for civil trials. The procedure is essentially the same where a defendant wishes to call a witness *in a criminal trial* by way of video-link from a remote site.

As mentioned above, Section 42K(1) of *Evidence (Audio Visual and Audio Linking) Act* 1997 governs persons in custody and under that section, a prisoner is to appear via video-link in the following proceedings:

(a) bail applications
(b) remands
(c) status hearings, committal mentions or contest mentions
(d) applications for adjournments
(e) arraignments.

In the County Court parts (a), (b), (d) and (e) are applicable. Where the prisoner wishes to attend court an application under Section 42L using form 2-11AA may be made.

In *arraignment hearings* a judge will conduct the hearings via video-link from Melbourne. Where an accused is in custody he/she will be taken to the circuit court. Application can be made for the accused to be taken to the Melbourne County Court if desirable. In the near future it may be possible to have a three-way video-link with the prisoner remaining in gaol, the judge sitting at Melbourne and the country practitioner attending at his local Magistrates Court.

In criminal trial proceedings or proceedings involving matters relating to accused in custody or prisoners, application either to use video or not to use video are to be made to the Criminal Trial Listing Directorate on 96039384.

Further Information:
Terry Kearney, Registrar (Acting)
Ph: (03) 9603 6430
Jane Manning, Video-Link Coordinator
Ph: (03) 9603 6415
Ian McPhee, Director (Acting) Criminal Trial Listing Directorate
Ph: (03) 9603 9384

The Adolf Beck Case

Julian Burnside

ON 16 December 1895, Adolf Beck was standing outside 135 Victoria Street, London when Ottilie Meissonier approached him. She accused him of having tricked her into parting with two watches and a ring.

Beck made a dash for it, and Madame Meissonier gave chase. He ran to a policeman, and denounced Meissonier as a prostitute who had accosted him. She, in her turn, accused him of having swindled her three weeks earlier.

They went to the police station. To Beck's horror, the police believed Meissonier's story, and disbelieved his. He had never seen her before that day.

Soon afterwards, several other women came forward who identified Beck as being the person who, during the previous six months, had swindled each of them out of small articles of jewellery.

Each woman told the same story. A man had approached her, mistakenly recognising her as "Lady Everton". He then apologised for his mistake, introduced himself as Lord Wilton de Willoughby, and struck up a conversation. With a combination of blandishment and rodomontade, he would persuade the lady to part with some jewellery in exchange for a worthless cheque drawn on a non-existent branch of a London bank. He claimed to be an English nobleman, with a substantial estate in St John's Wood. He told each that he wished her to live with him, and offered to provide her with jewellery and a wardrobe. To that end, he would borrow a number of articles of jewellery and clothing, to match the sizes. He promised to have these returned by a one-armed commissionaire later in the day. He then disappeared. The pattern in each case was unvaried, and most of the women who came forward were confident that Beck was the person who had defrauded her in the way described.

He was charged with 10 misdemeanour offences, and four felony offences. The felony offences depended on Beck having been convicted of similar offences in 1877. At the committal hearing in late 1895, police constable Elliss Spurrell gave evidence as follows:

> In 1877 I was in the Metropolitan Police Reserve. On May 7, 1877, I was present at the Central Criminal Court where the prisoner in the name of John Smith was convicted of feloniously stealing ear-rings and a ring and eleven shillings of Louisa Leonard and was sentenced to five years' penal servitude. I produce the certificate of that conviction. The prisoner is the man.
>
> There is no doubt whatever — I know quite well what is at stake on my answer and *I say without doubt he is the man.* (emphasis added)

This was profoundly significant for two reasons: the offences for which John Smith had been convicted in 1877 were identical in every detail with the offences alleged against Beck; and the four felony charges could not succeed unless Beck had previously been convicted.

Beck was sent for trial. Horace Avory (later Mr Justice Avory) appeared for the Crown, with Guy Stephenson. Charles Gill appeared with Percival Clarke for Adolf Beck. The trial took place before the Common Serjeant, Sir Forrest Fulton and a jury.

The defence, led by Charles Gill, was simple: mistaken identity. The defence evidence had two components: first, the fact that the person known as John Smith had been convicted of identical offences in identical circumstances in 1877. Second, that between 1875 and 1882 Adolf Beck had lived permanently in Peru. Those circumstances would wholly refute the proposition that John Smith and Adolf Beck were one and the same, as Elliss Spurrell had sworn at the committal.

Unfortunately for Beck, the Crown vigorously resisted every attempt to call evidence about the 1877 convictions.

First, they did not call Elliss Spurrell. Horace Avory later explained the reason for this: he could proceed with the misdemeanour charges, which did not require proof of conviction for the 1877 offences, or with the felony charges which did. He chose not to proceed with the felony charges, so proof that Beck had been convicted of the 1877 offences ceased to be necessary. That decision was made despite the fact that the prosecution was based wholly on the unstated premise that Adolf Beck and John Smith were the same person. The Common Serjeant refused to admit any evidence about the 1877 convictions.

Second, Avory objected to cross-examination which would have shown that the cheques and letters allegedly written by Beck had been written by Smith. He led evidence from a handwriting expert, Mr T.H. Gurrin. Gurrin had examined samples of handwriting from three sources: that in the exhibits in the Smith prosecution of 1877; the cheques and letters allegedly written by Beck in 1895; and true samples of Beck's handwriting. His evidence was that the 1895 documents were in the disguised hand of Beck. Avory led this evidence, but he successfully objected to cross-examination to the effect that the letters were certainly written by the same hand as had written the 1877 exhibits. Gurrin had given evidence to that effect at the committal.

Beck was convicted, and sentenced to seven years in prison. His prison number was DW 523. Under the system which then operated in English prisons, the D represented a conviction in 1877, and W represented a conviction in 1896. John Smith's prison number had been D 523.

Beck's solicitor ten times petitioned for a review of the conviction. On the second occasion (in 1898), he had the advantage of knowing that Smith (D 523) was Jewish and had been circumcised, whereas Beck (DW 523) was uncircumcised. The authorities wrote to Sir Forrest Fulton with this new evidence. Fulton wrote a minute dated 13 May 1898 in which he acknowledged that Smith and Beck could clearly not be the same person, but he added that he regarded the South American alibi "with great suspicion". This Delphic observation apparently lulled the authorities into thinking the convictions were still justified. However, Fulton's comment was quite irrelevant: whether Beck was in South America or Southampton in 1877, he was not the person who had committed the 1877 offences.

Apart from making an alteration to Beck's prison number, the Home Office took no steps in response to this petition or any of the others on Beck's behalf.

Whilst Beck was in prison, a journalist with the *Daily Mail*, G.R. Sims, began agitating for a review of the case. He was disturbed by the fact that the prosecution case clearly proceeded from the assumption that Smith and Beck were the same person, yet Spurrell had not been called at the trial. If Spurrell's positive identification could have been refuted, then the defence of mistaken identity was almost certain to succeed. It would have demonstrated the existence of a person with an identical method of operating who looked enough like Beck to mislead Spurrell.

Sims agitated vigorously in the press. Slowly, public opinion swung to the view that Beck had been wrongly convicted.

On 15 April 1904, whilst agitation for a public inquiry was at its height, Beck was again arrested and charged with identical offences. He was tried by Grantham J. on 27 July, and was convicted. However, the judge had doubts about the case and did not pass sentence. Less than a fortnight later, John Smith, alias William Thomas alias William Wyatt was arrested. Beck was pardoned on 27 July 1904, in respect of the 1895 offences and the 1904 offences. John Smith pleaded guilty to those offences on 15 September 1904.

Eventually a Committee of Inquiry was established, chaired by Henn-Collins MR. It heard evidence from the prosecutor Horace Avory, and from Sir Forrest Fulton. It concluded that, in its opinion:

> . . . there is no shadow of foundation for any of the charges made against Mr Beck or any reason for supposing that he had any connection whatever with them."

The reason for this finding was that the committee was completely satisfied that Adolf Beck was not John Smith. It also found that the prosecuting authorities had known that fact for at least the last five years of Beck's prison term. The Committee was trenchant in its criticism of Sir Forrest Fulton, and expressed the view that his minute of 13 May 1898 to the Home Office was ". . . hardly one which a trained lawyer could have written . . ."

Adolf Beck was an ordinary person, chronically short of money, and perennially involved in hopeful, but unsuccessful, business ventures. He was no great ornament to the society in which he lived, but no disfigurement either. But the English legal system failed him utterly. Despite a dedicated solicitor and a skilled and determined counsel, Beck suffered from the miserable misfortune to look very like Smith/Wyatt/Thomas. That misfortune was compounded by the ineptitude of the Common Serjeant and the indifference of the Home Office. His case illustrates the danger of prosecuting authorities forming a fixed view of a person's guilt based on a compelling assumption, and failing to notice the significance of the assumption being disproved.

Beck died, a broken man, in 1909. He had been convicted on two separate occasions for crimes he did not commit, and spent years in gaol for those crimes. One direct result of the Beck trials and the subsequent inquiry was the establishment, in 1907, of the English Court of Criminal Appeal. History does not record whether Beck derived any comfort from that advance.

Pride and Prejudice: The Legal Fallacy

SINCE the great novel of Jane Austen (b. 1775 d. 1817 of Addison's disease) *Pride and Prejudice*, which she wrote in 1813, has recently again been shown in a televised version, it is worth remembering that the major background of the story (which is first and foremost a love story — perhaps the greatest and certainly the most entertaining ever written) is based on a legal fallacy.

The fallacy, of course, is that the entail (estate tail) of the Longbourn estate, of which Mr Bennet was the tenant in tail in possession, must, on his death, pass to his cousin (the Rev.) Mr Collins, for failure of heirs male of Mr Bennet, leaving his widow and five daughters out in the cold. Hence, on this basis, the imperative (in the novel) of the Bennet family that the daughters must marry and marry well (i.e., richly), and the fever-pitch excitement at Longbourn on the appearance of Mr Bingley who had five thousand a year (and, per Mrs Bennet, "very likely more") and (until pride and prejudice set in) Mr Darcy who had ten thousand a year (each of which were very large sums in 1813).

Originally, unbarrable estates tail had been created by the *Statute De Donis Conditionalibus* 1285. But by at least the end of the 15th century, there were no longer any unbarrable entails. Means had been devised of circumventing the Statute which had, long before Jane Austen was born, become entirely fictitious and standardised, though highly elaborate, very technical (requiring specialised expert attorneys and counsel) and very expensive.

There were two such methods: (1) the suffering of a common recovery, with a voucher to warranty and (2) a fine (final compromise); but only a common recovery would do in Mr Bennet's case, because a fine barred only the issue of the tenant in tail, not reversioners or remaindermen. (I have not heard of the expression "remainderpersons"). Here, by definition, since Mr Bennet's daughters could not take, the entail was an estate tail male, and Mr Collins could only take, on failure of heirs male of Mr Bennet, as a reversioner (that is, as heir of the original donor or grantor of the estate tail) or as a remainderman under a further limitation (whether in tail or in fee does not appear) in the original will or settlement, limited to take effect after the failure (for want of male heirs) of the estate tail that had descended to Mr Bennet.

The effectiveness of the then newly invented device of the common recovery to bar the entail (at least against issue) seems first to have been judicially recognised in *Taltarum's* (or *Taltarn's*) *Case* in 1472 in Y.B. 12 Edw. IV Mich. and 13 Edw. IV Mich. (see Kiralfy, *Source Book of English Law*, 1957, pp. 86–99).

The common recovery (with the necessary voucher to warranty to bar reversioners and remaindermen) consisted of colluded and fictitious actions pleading false, but untraversable, allegations and required two collaborators X and Y, where Y had to be a man of straw.

In a great oversimplification (and in more modern language), the steps were as follows:

1. Collaborator X (who was a friend or employee of the tenant in tail in possession or an intended purchaser in fee simple of the estate) brought a real action at law by writ of entry *sur disseisin* in the post (a form of simplified writ of entry allowed by the Statute of Marlbridge (or Marlborough) 1267) falsely claiming to be entitled to the estate in fee simple on the ground that the tenant in tail and his predecessors in title "had no entry" (had wrongfully entered) the estate by reason of some (fictitious) past wrongful *disseisin* of the Demandant's predecessors in title.
2. The tenant in tail then in defence admitted all the allegations in the Demandant's declaration and admitted that X should "recover" the land. The tenant in tail was thus said to "suffer a recovery".
3. The Court then gave judgment that X should recover the estate in fee simple, and this was enrolled of record in the recovery roll of the Court.
4. If the Collaborator X was an intended purchaser of the fee simple, he then paid the purchase money to the tenant in tail. If not, the claim made by X would be to recover the fee simple to the use of the tenant in tail so that, by operation of the Statute of Uses, the judgment automatically had the effect of vesting the fee simple in the former tenant in tail (thus eliminating any chance that X would renege on reconveying the fee simple).

So far, however, the result is only to bar the issue of the tenant in tail because the judgment binds only the parties and their privies. Another action is needed to bar reversioners and remaindermen by what was called a "voucher to warranty". The additional steps were as follows:

5. Another fictitious claim, pleading false but untraversable allegations was brought against a man of straw, collaborator Y, by the tenant in tail. The tenant in tail as plaintiff brought an action at law in covenant (or a claim in the writ of entry action) against Y alleging (falsely) that Y had granted the land to him by conveyance with a warranty of good title (which involved a warranty that if the title proved bad he would recompense the grantee with lands of equal value) and alleging (again fictitiously) that the title was bad and calling on X to defend the title or give the recompense in land of equal value (under the old law of warranty still in force in Jane Austen's time — as to which see *Blackstone's Commentaries*, Vol. II, 300–3). This was called the voucher (*vocatio* — calling on) to warranty.
6. The collaborator Y admitted all the allegations or defaulted in defence and suffered judgment against him for recompense. Notwithstanding that Y had no land and the judgment was

worthless, the device barred the reversioners and remaindermen because, as Megarry and Wade, *Law of Real Property*, 4th Ed. 1975, p. 86 say "Since this recompense was to be land which would pass to all concerned [on the same limitations] it followed that the reversioners and remaindermen were barred for otherwise they would take twice over". This is explained by *Blackstone*, II, 359–60. As Megarry and Wade also say (p. 86) the Court allowed the judgment on the warranty to be given against anyone nominated by the parties without further investigation so that a man of straw could be used "and when recoveries had become standardised the common crier of the Court [who was called "the common vouchee"] would obligingly fill this role for a small fee" (which is taken from *Blackstone*, II, 358–9).

7. In the developed and standardised version in use by at least the 18th century, a double (sometimes triple) voucher system was always used. On the known facts, a single voucher was sufficient in Mr Bennet's case, but a double voucher would have been used out of caution. As to the reasons for this, and how it was done, see *Bacon's Abridgment* (7th ed. 1832), Vol. 3, 691–2.

Furthermore, by the 17th century, all attempts by the creators of estates tail to make them unbarrable and proof against fines or recoveries were held void because the power to suffer recoveries or levy fines was held to be an inseparable incident of the estate (see Megarry and Wade, op. cit., p. 89).

If Mr Bennet lived until 1833, he could have barred the entail much more simply and less expensively under the *Fines and Recoveries Act* 1833, which swept away the old law and made all entails barrable against all possible claimants by simpler (non-fictional) means.

(For a detailed account of the whole subject, see *Bacon's Abridgment* (supra) vol. 3, 677–711 and in less detail *Blackstone*, II, 116–19, 352–64 and the precedents in Vol. II, Appendix IV. For summaries, see Megarry and Wade, op. cit., pp. 85–90, and Cheshire, *The Modern Law of Real Property* (7th ed. 1954) pp. 169–71. As to the writ of entry used, see Maitland, *The Forms of Action at Common Law* (1954, pp. 42–4.)

John F. Lyons Q.C.

Poking Fun Without Fear

In *Berkoff* v. *Burchill* [1996] 4 All E.R. 1008 the Court of Appeal was concerned with an action for defamation arising out of two reviews published by Miss Burchill. In the first of these she had said "film directors, from Hitchcock to Berkoff, are notoriously hideous-looking people . . ."; and in the second she had reviewed a film called "The Creature" saying: "the creature is made as a vessel for Waldman's brain, and rejected in disgust when it comes out scarred and primeval. It's a very new look for the creature — no bolts in the neck or flat-top hair-do — and I think it works; it's a lot like Steven Berkoff, only marginally better looking".

In the Statement of Claim it was alleged that the two passages set out above meant and were understood to mean that Mr Berkoff was hideously ugly. The majority of the Court of Appeal held that the words pleaded by the plaintiff were capable of being defamatory and that an application for summary judgment by the defendant should fail. In his dissenting judgment, however, Millett LJ brings a large amount of common sense to what has become an unnecessarily complex topic.

MILLETT LJ. "Many a true word is spoken in jest. Many a false one too. But chaff and banter are not defamatory, and even serious imputations are not actionable if no one would take them to be meant seriously. The question, however, is how the words would be understood, not how they were meant, and that issue is pre-eminently one for the jury. So, however difficult it may be, we must assume that Miss Julie Burchill might be taken seriously. The question then is: is it defamatory to say of a man that he is "hideously ugly"?

Mr Berkoff is a director, actor and writer. Physical beauty is not a qualification for a director or writer. Mr Berkoff does not plead that he plays romantic leads or that the words complained of impugn his professional ability. In any case, I do not think that it can be defamatory to say of an actor that he is unsuitable to play particular roles.

How then can the words complained of injure Mr Berkoff's reputation? They are an attack on his appearance, not on his reputation. It is submitted on his behalf that they would cause people "to shun and avoid him" and would "bring him into ridicule". Ridicule, it will be recalled, is the second member of a well-known trinity.

The submission illustrates the danger of trusting to verbal formulae. Defamation has never been satisfactorily defined. All attempted definitions are illustrative. None of them is exhaustive. All can be misleading if they cause one to forget that defamation is an attack on reputation, that is on a man's standing in the world.

The cases in which words have been held to be defamatory because they

would cause the plaintiff to be shunned or avoided, or "cut off from society", have hitherto been confined to allegations that he suffers from leprosy or the plague or the itch or is noisome and smelly (see *Villers* v. *Monsley* (1769) 2 Wils 403, 95 ER 886). I agree with Phillips LJ and for the reasons which he gives that an allegation of ugliness is not of that character. It is a common experience that ugly people have satisfactory social lives — Boris Karloff is not known to have been a recluse — and it is a popular belief for the truth of which I am unable to vouch that ugly men are particularly attractive to women.

I have no doubt that the words complained of were intended to ridicule Mr. Berkoff, but I do not think that they made him look ridiculous or lowered his reputation in the eyes of ordinary people. There are only two cases which have been cited to us which are at all comparable. In *Winyard* v. *Tatler Publishing Co Ltd* (1991) *Independent*, 16 August, it was held to be defamatory to call a professional beautician "an ugly harridan", not because it reflected on her professional ability, but because some of her customers might not wish to be attended by an ugly beautician. I find the decision difficult to understand, since the reasoning suggests that the cause of action would more properly be classified as malicious falsehood rather than defamation, so that actual loss of custom would have to be proved.

The other case is *Zbyszko* v. *New York American Inc.* (1930) 228 App Div 277. A newspaper published a photograph of a particularly repulsive gorilla. Next to it appeared a photograph of the plaintiff above the caption: "Stanislaus Zbyszko, the Wrestler, Not Fundamentally Different from the Gorilla in Physique". The statement of claim alleged that this had caused the plaintiff to be shunned and avoided by his wife (who presumably had not noticed her husband's physique until it was pointed out to her by the newspaper), his relatives, neighbours, friends and business associates, and had injured him in his professional calling. The Appellate Division of the New York Supreme Court held that the caption was capable of being defamatory. The case was presumably cited to us as persuasive authority. I find it singularly unpersuasive except as a demonstration of the lengths of absurdity to which an enthusiastic New York lawyer will go in pleading his case.

The line between mockery and defamation may sometimes be difficult to draw. When it is, it should be left to the jury to draw it. Despite the respect which is due to the opinion of Neill LJ, whose experience in this field is unrivalled, I am not persuaded that the present case could properly be put on the wrong side of the line. A decision that is an actionable wrong to describe a man as "hideously ugly" would be an unwarranted restriction on free speech. And if a bald statement to this effect would not be capable of being defamatory, I do not see how a humorously exaggerated observation to the like effect could be. People must be allowed to poke fun at one another without fear of litigation. It is one thing to ridicule a man: it is another to expose him to ridicule. Miss Burchill made a cheap joke at Mr Berkoff's expense; she may thereby have demeaned herself, but I do not believe that she defamed Mr Berkoff.

If I have appeared to treat Mr Berkoff's claim with unjudicial levity it is because I find it impossible to take it seriously. Despite the views of my brethren, who are both far more experienced than I am, I remain of the opinion that the proceedings are as frivolous as Miss Burchill's article. The time of the court ought not to be taken up with either of them. I would allow the appeal and dismiss the action".

John Gould Essoign Club Art Exhibition

Attending the John Gould Birds of Australia exhibition opening at the Essoign Club were, left to right, Mabel Tsui, Mr Justice Peter Nguyen, Judge of the High Court of Hong Kong, Stuart Gerstman of the John Gould Gallery, Charles Gunst Q.C., Stephen Wilmoth, Peter Bustelaar of the John Gould Gallery, and Robert C. Evans from the faculty of Law at Melbourne University.

Time Base Puts Daily Legislation Online

Aunty Abha's Adopts New Name

TIME Base Pty Ltd (incorporating Aunty Abha's Electronic Publishing) announced an exciting new online strategy, which includes the daily update of consolidated legislation on the Internet.

At the same time the company announced it has changed its trading name to Time Base from Aunty Abha's Electronic Publishing.

"The availability of daily updates represents a major change for legal professionals and other people dependent on receiving up-to-date legislation," said Abha Lessing, Managing Director of Time Base Pty Ltd.

"While we have long led the market in timely and accurate information with our CD-Rom product, the online service will reduce the delivery time for consolidated legislation from weeks to days.

"It will save our customers time and effort, and it will mean they will have the most accurate and up-to-date information available," she said.

The new service will commence at the end of November.

Each day, updated consolidated Commonwealth Legislation will be posted at the Time Base Internet site (www.timebase.com.au). If an amendment has been passed, that fact will be immediately noted at the site. Then, the instant the Act or Regulation has been updated, the full consolidated legislation will be posted.

The Time Base service should not be confused with the SCALE and AUSTLII Internet services, which post some amendment information within a reasonable time frame, but often don't post the consolidated legislation until much later (usually many months later).

In the near future, the Time Base site will also include weekly updates of the New South Wales legislation, and by early 1999 all five jurisdictions will be available on the website. Currency and amendment information will be available, as will other value-added features such as numerical lists of all legislation. The site will also include the Federal Cases product.

Time Base has powerful technology backing up its online strategy, including several dedicated state-of-the-art servers and a fast, 10Mb Internet link.

"Our vastly upgraded website is part of a massive overhaul of our operation designed to take advantage of the obvious benefits of electronic delivery through the Internet," said Ms Lessing.

"Our data is just as accurate as ever — it is scrutinised by our editorial team of qualified lawyers who are also experts in legal publishing. The difference now is that customers have the choice of how to receive it. Ten CD-Rom updates will continue to be sent to subscribers each year, but if they want to see the most current information they only need to tap into our website," she said.

One of the long-term advantages of the Time Base strategy is that, as the data resides on the Time Base servers, there is no issue with customers' disk space or the capacity of a CD-Rom. Therefore unlimited amounts of data can be archived, and Time Base will progressively add more and more information to the site.

The online Internet service is free to all customers who subscribe to ten CD updates per year. Additionally, anyone can access the site to get currency and amendment information free.

NAME CHANGE

Aunty Abha's Electronic Publishing has adopted the name of its parent company, Time Base Pty Ltd.

"The new name better suits our position as leading innovators in the legislation publishing market," said Ms Abha Lessing.

"It also fits more closely with our new online strategy, and our reputation for timeliness.

"Our absolute commitment to premium personalised service will continue, and every product previously published under the Aunty Abha's name will continue to be published by Time Base," she said.

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Left Arm Quick Keeps Good Line and Length

MALCOLM Speed, the Chief Executive Officer of the Australian Cricket Board, was the notable guest speaker at the Cricket Cups Dinner on Thursday 12 November 1998 to celebrate the installation of the trophies presently held by the Victorian Bar.

The dinner, timed to take place at the beginning of the Ashes Series, was held in the Neil Forsyth Room at Owen Dixon Chambers, where a clubbable atmosphere was created by the congenially placed dining tables surrounded by the bookcases and an exquisite display of dada-like cricket art works and memorabilia curated by Tony Radford.

The "first ball" of the evening was the traditional Toast to Cricket, this year delivered by Daryl Wraith, whose witty reminiscences and banter with Harper J. helped to set the tone for the convivial night that followed.

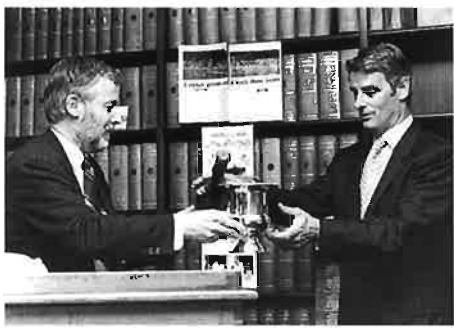
After the well-received main course and the even better received dessert from the culinary arts of Jayne Menesdorffer of the Essoign Club, John Jordan, with his usual panache, introduced the guest speaker.

Malcolm Speed's acceptance of the position of CEO of the ACB in 1997 followed his chairmanship of the National Basketball League. Before this, Malcolm was a practising member of the Bar for more than a decade, and had shown his expertise in Sports Law and related areas.

The guest speaker's topic was "Cricket in the Next Millennium". Malcolm discussed the ways in which cricket and the administration of the sport might evolve in the years to come after Bradman's century. He also noted the variety of the suggestions which the ACB regularly receives from "concerned" members of the public about the state of the great game.

Of more immediate delectation was his description of the involvement of some of the Australian cricket players in the anti-corruption enquiry in Lahore during the recent tour of Pakistan.

Malcolm Speed, CEO of the Australian Cricket Board, was the speaker at The Victorian Bar Cricket Cups' Dinner.



Tony Radford presents two cricket trophies, the 2nd XI "Grafter's Goblet" *v.* L.I.V. *and* Vic. Bar *v.* N.S.W. Bar, *to David Curtain Q.C. for the Victorian Bar.*

Malcolm took questions from the floor, and whilst answering many well-delivered sallies, such as the enquiry about the Board's reaction to umpires who, before retirement, write controversial cricket books, he was able to show that he had lost nothing of the impeccable line and length he displayed when bowling his left arm quicks not so many years ago.

Later during the dinner, presentations were made to several Bar cricket personalities including His Honour Judge Barry Dove and Phil Opas Q.C. for their long-standing involvement in Bar and Law Institute cricket matches.

David Curtain Q.C., as Chairman of the Bar, accepted the trophies recently won by the Bar's cricket teams in their matches against the NSW Bar and the Law Institute (2nd. Xl match).

The evening concluded with the spirited auctioning of a bat presented by the guest of honour which had been autographed by Australian test players. Tony Lupton was the successful and high-priced bidder.

The function was well attended by members of the Bar, and we were also pleased to welcome the attendance of some of our solicitor foes. All present were unanimous in their congratulations to Tony Radford for his outstanding skill in co-ordinating another successful cricket dinner.

Conference Updates

6–9 January 1999: Cortina D'Ampezo, Italy. Europe-Pacific Law Conference. Contact: Karen Prior. Tel: (07) 3839 6233; Fax: (07) 3358 4196. PO Box 843, New Farm, Qld, 4005; e-mail: helix@thehub.com.au.

5–7 February 1999: La Trobe University, Beechworth. 9th Annual Conference of the Law and Literature Association of Australia. Contact Marissa Ruiz. Tel: 9479 1901; Fax: 9479 1607. School of Law and Legal Studies, La Trobe University, Bundoora, 3083; e-mail: mruiz@latrobe.edu.au.

22–23 March 1999: Rydges Canberra Hotel. The 3rd National Outlook Symposium on Crime in Australia. Contact: Conference Co-ordinators, PO Box 139, Calwell, ACT, 2905. Tel: (02) 6292 9000; Fax: (02) 6292 9002; e-mail: conference@netinfo.com.au.

3–9 April 1990 (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.

17 April 1999: Taormina. 2nd International Conference of the Australian Italian Lawyers Association. Contact: Ms Lina Coco. Tel: (613) 9866 1544; Fax: (613) 9866 4857. C/- Camera Di Commercio Italia–Australia (Roma) Limited, PO Box 7540, Melbourne, 3004.

28 June–2 July 1999: Bali. Criminal Lawyers' Association of the Northern Territory 7th Biennial Conference. Contact: Convention Catalysts. Tel: (08) 8981 1875; Fax: (08) 8941 1639.

3–7 July 2000: Sydney. 9th Family Law Conference. Contact: Capital Conferences Pty Ltd. PO Box N399, Grosvenor Place, NSW 1220. Tel: (02) 9252 3388; Fax: (02) 9241 5282; e-mail: capcon@ozemail.com.au.

18–21 September 2000: Bath, UK. World Congress on Family Law and the Rights of Children and Youth. Contact: Capital Conferences Pty Ltd. PO Box N399, Grosvenor Place, NSW 1220. Tel: (02) 9252 3388; Fax: (02) 9241 5282; e-mail: capcon@ozemail.com.au.

University of California International Law Programs

Copies of the 1999 International Law Programs are available from the Bar's Administration Office, 12th Floor, Owen Dixon Chambers East.

Effective Legal Research

By Irene Nemes and Graeme Coss
Butterworths 1998
pp. ixi, 1–368, Index 369–79

IF a week is a long time in politics, 10 years is a positive eternity in the law. In 1998, the legal research textbook recommended to LLB students at Melbourne University (*Legal Research: Materials and Methods* by Campbell et al., 3rd ed. LBC, 1988) was, no doubt, a product of its time. Its index and commentary contained nothing at all on database searching, CD Rom, or the Internet, and only one passing reference to a "computer-produced index", the then Social Sciences Citation Index. How things have changed in 1998.

In this offering on effective legal research, the authors assume, correctly, that the technological tools now readily available to legal libraries and practitioners will be and should be an essential resource, and therefore vital to come to terms with and understand. They proceed not only to detail the various search mechanisms available (for example, AUSTLII and OPAC — the On-Line Public Access Catalogue) but proceed to explain systematically how to conduct searches this way and get the results desired. In Chapters 4 and 5 on electronic searching and introduction to the internet, actual screen saves are shown to indicate what results a searcher can expect to turn up (very reassuring for a novice). Whatever type of source is being discussed — legislation, case law, secondary materials (textbooks, articles, dictionaries, encyclopaedias, reform publications, current avenues services) — on-line and electronic searching is given predominance of treatment, and step-by-step instructions are shown as to how to search for and find exactly what you might be after.

This is not to say that the authors eschew the importance of knowing how to undertake the conventional approaches to research. This too is fully treated. Nor is technology uncritically asserted to be the answer to life, the universe and everything. The authors do not even posit the superiority of the new media, but provide a candid assessment of the pros and cons of using computer-assisted legal research. The authors use this analogy: "Conducting legal research without the Internet is like being an artist and never having used a thick brush". (page 72).

Also included in this useful compendium are helpful chapters on citation, and strategy and technique to reinforce principles of good method and practice, because, naturally, good results in research mostly depend on the questions asked and the approach taken at the outset. The authors believe that it is better to start legal research of any kind with good habits but if you already have these, some positive reinforcement will not go astray. If you have to acquire good habits (having fallen through the net at law school) or unlearn bad or sloppy habits, this book will tell you how. Everyone can benefit in some way from these timely reminders, although exhorting barristers to be organised will be either otiose or a lost cause. "Knowing when to stop" (page 56) sounds like very good advice at any time!

There are numerous other helpful hints scattered throughout the book — and for anyone prepared to admit to themselves that they are slightly overwhelmed by the march of progress and its impact, or who recognizes the value of spending time and effort to become proficient will reap the rewards. Arguably one of the most basic and fundamental weapons in a barrister's armoury, this useful handbook will inform, enlighten, and equip a legal researcher for a pleasurable journey of discovery.

Proper acknowledgment is given to the contributions from organisations such as the AGPS, AGIS, AUSTLII, LBC Information Services, SCALE and others. Highly recommended.

Judy Benson

The Wik Case: Issues and Implications

Edited by Graham Hiley Q.C.
Butterworths 1997
pp. 230

MOST of this book (pages 129–296) is taken up by a reproduction of the full text of the Wik judgment, *Wik Peoples* v. *State of Queensland & Ors*; *Thayorre People* v. *State of Queensland & Ors*, as reported in (1996) 141 ALR 129. The first 62 pages comprise various chapters by a number of contributors, all of whom with one exception were directly involved in the Wik case either as counsel or instructors. The offerings are:

- The Wik Decision: Unnecessary Extinguishment, by Phillip Hunter (pages 6–18)
- *Thayorre People* v. *Queensland*, by John Bottoms (pages 19–22)
- Pastoral Leases and Native Title, by Paul Anthony Smith (pages 23–26)
- How Wik applies to Western Australia, by Greg McIntyre (pages 27–29)
- The Effect of Wik on Pastoral Leases with Provision for Access by Aboriginal People, by Raelene Webb and Kenneth Pettit (pages 30–34)
- The Farmgate Effect, by Mark Love (pages 40–44)
- Implications of the Wik Decision for the Minerals Industry, by Simon Williamson (pages 45–50)
- Sui Generis History? The Use of History in Wik, by Jonathan Fulcher (pages 51–56)
- Native Title and the Racial Discrimination Act, by Doug Young, John Briggs and Anthony Denholder (pages 57–62).

In the introduction to this collection of pieces, the general editor sets out briefly how and why Wik came before the court; what it actually decided; what the main legal arguments were; and what questions the decision left open. The stated aim of the publication is said to be to remove much of the misunderstanding and misinformation surrounding Wik in the early months following the handing down of the decision by the High Court on 23 December 1996.

When this book was first published in 1997, it would have been a useful, succinct and ready reference not only to the full text of the judgment but to the immediate issues of public concern and debate, comprehensively taken up in the commentary by the contributors to the book (outlined above). Since then, however, two developments have isolated this book firmly into a historical perspective, with the consequence that events have now largely overtaken it. One is the publishing industry which has grown up from Wik, with literally dozens of books similar to this one now on offer attempting to explain the judgment and its impact. The public and even professionals have been bombarded with information in the heat of the controversy, with various degrees of success as to whether any real light was shed on the issues legal or political.

The second is the Howard Government's introduction into parliament of the *Native Title Amendment Bill* 1998, its subsequent passage into law, and the public and political preoccupation for much of 1997 and the early part of 1998, which has apparently put to rest the aftermath of Wik for the time being.

Practitioners who subscribe to the native title service would already have received a copy of this book (provided by the publishers gratis as part of their subscription). For others, it is a record of how Wik was explained and argued immediately post decision. An index and table of cases would have enhanced the reference prospects of this easy-to-read title.

Judy Benson

Administrative Law

by Susan Streets
Butterworths Casebook Companions 1997
pp. i–iii. Table of Cases v–viii, Table of Statutes ix, 1–235, Glossary 237–8, Index 239–45

AS the series title suggests, this book is designed to be read alongside Butterworth's *Administrative Law: Cases and Commentary*, by Margaret Allars (1997). Students, even Bar readers unfamiliar with administrative law or from other jurisdictions without any recent or significant administrative law exposure would certainly benefit from the clear and structured approach to the subject, facilitated by the detailed contents and title pages preceding each section, and the numerous and additional suggested reading, questions and activity sections. The text is divided as follows:

Part I Overview and Administrative Structure;
Part II Administrative Law-Making;
Part III Judicial Review of Administrative Decision-Making;
Part IV Extra-Judicial Review;
Part V Access to Information.

For the practitioner, however, this offering is of limited immediate appeal. Very little is included that is either current or not otherwise readily available from more detailed and practical sources. There is also one significant omission which detracts from its overall utility, that is, any mention or discussion of the new Victorian *Civil and Administrative Tribunal Act* 1998, how it differs from the old AAT (Victoria), and what changes to the administrative law landscape this heralds. Similarly the section on dismissal from public office/employment (page 78) does not appear to have taken account of the way the Commonwealth's enactment of the *Workplace Relations Act* 1996 (commenced 31 December 1996 and on various dates throughout 1997) has radically redefined aspects of termination of employment, and reduced the scope for operation of natural justice concepts. The section on the Ombudsman (page 209ff) does not include remedies available at State level.

As events have somewhat overtaken the area of administrative law since 1997 in some respects, this title cannot be recommended as an essential acquisition to your library.

Judy Benson

Annotations to the *Social Security Act* 1991

By Peter Sutherland with Allan Anforth
The Federation Press/Welfare Rights and Legal Centre 1998
pp. i–v, Table of Cases vi–xxxii, Table of Statutes xxxiii–xxxvi, Table of Parts xxxvii–xxxix, 1–942, Index 843–62

IN this fourth edition of the standard work, the authors bring their annotations of the *Commonwealth Social Security Act* 1991 up to date as at May 1998 by incorporating recent decisions of the Commonwealth Administrative Appeals Tribunal, the Federal Court and the High Court.

The scheme of the text is to proceed through the Act part by part, section by section, noting relevant cases and commentary as they arise under each section and sub-section. Those decisions which are still relevant under the now repealed *Social Security Act* 1947 are retained. Where significant sections of the Act are discussed, the legislation is reproduced in full or in part as appropriate for ease of reference. Of particular interest to practitioners will be the detailed treatment of the Act's provisions relating to definitions; qualifications; review of decisions; overpayments and debt recovery; assets and income testing; and compensation recovery.

Also included are early cases under the entirely new provisions of the Act relating to the waiting periods applicable to newly arrived residents (section 739A) and the reduction in rent assistance for single share accommodation (section 5A). There are useful appendices which outline the amendment history of the new Act (coming to seven closely set pages); current instruments of delegation and authorisation by the Secretary of the Department Social Security and the Chief Executive Officer of the Commonwealth Services Delivery Agency; and a cross-reference table of qualification and payability provisions for social security payments.

For practitioners in this field the latest edition of this text will be an essential compendium.

Judy Benson

Australian Evidence (3rd edn)

By Andrew Ligertwood
Butterworths, 1998
pp. i–lxvii, 1–678

THIS text provides an extremely useful and comprehensive analysis of the law of evidence in Australia. There is detailed discussion of the rules of evidence, with much emphasis on the principles underlying such rules of evidence. Indexing to the text is thorough and useful and there are extensive references throughout the text to case law and legislation in each of the Australian jurisdictions.

This third edition follows the same structure as earlier editions with the book primarily comprising two parts. Chapter one is an introduction and includes a philosophical and mathematical discussion of the basic principles relevant to the rules of evidence. The first part of the book comprises chapters two to four which explain the fundamental notions of the trial process and contain an in-depth discussion of character evidence and corroboration. The second part of the book comprises chapters five to eight which cover access to documents and information, the evidentiary rules which ensure that evidence is presented by the parties, the importance of oral evidence and the hearsay rule.

This third edition incorporates recent judicial determinations, with

particular focus on developments in the High Court. For example, there is detailed coverage of High Court developments in the areas of legal professional privilege, the fairness and public policy discretions and hearsay.

Importantly, this third edition also incorporates a thorough and detailed analysis of the 1995 Commonwealth and New South Wales Evidence Acts, which the author anticipates may have uniform application throughout Australia in the future.

Kerri Judd

Butterworths Concise Australian Legal Dictionary (2nd edn)

By Peter Nigh and Peter Butt (General Editors)
Butterworths, 1998
pp. i–xxxi, 1–512

THE *Butterworths Concise Australian Dictionary* is a shortened version of *Butterworths Australian Legal Dictionary*. It contains over 8000 entries with the focus of such entries being on Australian illustrations and sources. Wherever possible, the entries include reference to Australian legislative and judicial authority. Many of the entries are peculiar to Australia.

The dictionary includes:

- a comprehensive cross-referencing system;
- Latin translations, explanations and phonetic transcriptions;
- biographical entries for significant legal historians, scholars and jurisprudential figures;
- jurisprudential and criminological terms;
- Old English legal terms;
- international law terms, international treaties and conventions;
- brief descriptions of landmark decisions of the High Court of Australia;
- explanations of well known principles of law.

The dictionary also contains a number of useful appendices, namely:

- Table of Law Reports;
- Popular Australian Case Names;
- Commonwealth Constitution;
- Australian Prime Ministers;
- Justices of the High Court of Australia;
- Regnal Years of English Sovereigns.

The dictionary is an informative and useful work, particularly in light of the increasing development in Australia of its own distinctive legal system.

Kerri Judd

Butterworths Intellectual Property Collection

Butterworths 1998
pp. i–v, 1–630

THIS useful compendium might descriptively be subtitled "all you ever wanted to know about IP legislation and treaties but were afraid to ask or couldn't find anyway". In one single but manageably compact volume, the publishers have grouped together all the relevant legislation and materials relating to IP law in Australia. The collection is in two parts. The first part comprises the full text of the following Acts, consolidated and current to 1 July 1998:

- *Copyright Act* 1968
- *Designs Act* 1906
- *Circuits Layout Act* 1989
- *Trade Marks Act* 1995
- *Patents Act* 1990
- *Plant Breeders Rights Act* 1994.

The second part covers the full texts of treaties and international conventions:

- The Berne Convention (with an addendum listing States party to the Berne Convention as at 31 January 1998)
- Agreement on trade-related aspects of intellectual property rights (with an addendum listing members states as at 22 October 1997)
- WIPO Copyright Treaty.

The publishers have added value to the formatting of the legislative provisions in four ways:

1. by inserting after each amendment the history of legislative change in clear and abbreviated form;
2. by inserting an explanatory phrase in bold type describing the gist of each sub-section. For example, Section 51 of the Copyright Act is headed "Copying of unpublished works in libraries or archives". Sub-section (1) is styled "Unpublished works" and subsection (2) "Unpublished theses" before the text of the provision is reproduced, for ease of reference;
3. by highlighting definitions in bold throughout the text; and
4. by including repealed provisions (suitably highlighted with a vertical line down the nearest margin) when it is necessary to know what it was when it impacts on other ongoing provisions of the Act, for example, Division 5A of the Copyright Act.

The appearance of the typesetting throughout the book is clean and uncluttered, stripped of unnecessary and distracting punctuation — an appealing feature if your task is to peruse legislation for any length of time.

The inclusion of the international treaties and covenants is perhaps the most useful and novel of inclusions, being otherwise difficult to locate conveniently and quickly elsewhere. The Berne Convention material has been enhanced by the inclusion of a detailed preliminary table of contents listing the structure and substance of each article and the internal sub-headings of each article.

This collection does not pretend to be more than it is. It has defined its scope to be a source of essential legislation and documents, and does not therefore venture into the realm of commentary or exposition on case law, or particular decisions applied to legislative provisions. Other loose-leaf services, texts and references, not to mention electronic aids, provide this. They are listed on the back cover of the book (to the extent that any of them are published by Butterworths).

The publishers have gone to some trouble to add value to these materials to make the searching and reading pleasurable and largely rewarding, so that references are easy to access. It is therefore all the more disappointing to see some lapses into sloppy editing. In the table of contents on page v, the list of legislation starts out by including the year of enactment of each Act, but only manages to keep this up for two entries; the year then falls by the wayside. There is also no index included for the book, not than an index is a standard inclusion with legislation. The advantages and benefits for this offering is that an index would have linked and drawn together into each entry the elements of legislation and the related parts of the treaties, a task I would prefer the publishers to have undertaken than attempt to do myself.

That said, the book is useful for having all materials located together conveniently and compactly, a bonus for the student or the practitioner alike.

Judy Benson

The Law of Defamation in Australia and New Zealand

by Michael Gillooly
The Federation Press 1998
pp. i–xix, Table of Cases xx–xxxii, Table of Statutes xxxiii–xliv, xlv–xlix, 1–350, Select Bibliography 351–2, Index 353–364

THE Law of Defamation in Australia and New Zealand by Michael Gillooly is a concise and up-to-date account of the current law. The overwhelming thrust of the work considers civil liability for defamation although there is a brief consideration of potential criminal liability (at pp. 18–20) for defamation.

There is significant divergence between the law of defamation in the various States of Australia and New Zealand. This book analyses both the areas of difference and those areas where there is convergence. It is a comprehensive account of the law.

Part II of the work deals with the elements of the causes for defamation of action and specifically discusses relevant differences between libel and slander, identification of the plaintiff including the position of corporate and government plaintiffs, the determination of what imputations arise from the allegedly defamatory matter and the meaning of "defamatory". A separate chapter is devoted to the question of "publication".

Part III deals with defences and includes chapters on matters such as truth, fair comment and honest opinion, absolute or qualified privilege, and various statutory defences available for re-publishers of allegedly defamatory material. There is a chapter dealing with miscellaneous defences which includes consideration of the position of Internet service providers amongst other matters.

Part IV is devoted to remedies, principally damages and injunctive relief, and includes analysis of matters that need to be pleaded such as aggravating and mitigating factors.

The final Part and chapter deals with the question of reform, and discusses in the Australian context the prospect of uniform defamation laws. In relation to New Zealand there is discussion and analysis of the interplay of the *Defamation Act* 1992 and the *New Zealand Bill of Rights Act* 1990, particularly in relation to freedom of expression.

The work is detailed and covers both the common and divergent threads between the various jurisdictions of defamation law in Australia and New Zealand. To this end, the text is conveniently sectioned by headings that enable the reader to identify the relevant law in each jurisdiction, and by reference to the comprehensive footnotes and index find relevant cases or statutes where appropriate. The work has a practical orientation in that it discusses pleading and forum/jurisdictional considerations in various parts of the text.

The work is sure to be of particular use to those lawyers, writers and publishers who require a good general text on defamation law that also provides detail and the basis for further research if necessary. The author is to be commended for producing this practical and complete coverage and analysis in this specialist area of law.

P.W. Lithgow

Immigration and Refugee Law in Australia

by Mary Crock
The Federation Press 1998
pp. i–xvii, 1–300

THIS is an excellent text for the student, registered migration agent, solicitor or barrister. It is of particular relevance to contemporary Australian politics, given the current controversy regarding multiculturalism and the economic effects of immigration.

The book begins with the early history of migration to Australia and charts the development of migration policy over the ensuing years of colonisation. It traces the "White Australia policy", from the first laws in Victoria in 1855, to its abandonment in 1973. The use of the "dictation test", to effectively exclude non-English speaking immigrants, is well documented. To complete the historical picture the author examines the significant changes in immigration policy and decision making in the last decade.

The benefit of the first few chapters is that they provide a succinct history of a particularly complex and emotive area of the law. An understanding of the role of the High Court in apparent support of the right of the government of the day to determine who will enter Australia can be seen in the context of the development of modern international and administrative law. An awareness of this background helps the reader follow the more recent progress of the Immigration and Refugee Review Tribunals and the Federal Court in this most litigious area. The controversial policies of the detention of illegal entrant asylum seekers and the existing (and proposed further) restriction of access to the judicial review in the Federal Court can be seen in its historical perspective.

The balance of the text is devoted to specific areas of interest to the reader. An early chapter deals with general visa and entry requirements. For many practitioners the main areas of interest will be the detailed chapters covering Family Reunion, Skills Based and Business Migration, Refugee Status, and Students and Visitors. Important chapters are also Unlawful Status, Enforcement of Decisions and Deportation of Permanent Residents. The review and appeal process is dealt with in the final chapters.

The book is well researched. Principles of law are simply woven into the text, with easy reference to the relevant Immigration or Refugee Review Tribunal decisions and numerous Federal Court or High Court cases. Many fact situations relevant to the practitioner are set out and easily located under relevant sub-headings. The tables of cases, legislation and index are comprehensive.

Guy Gilbert

Government Law and Policy, Commercial Aspects

Editor: Bryan Horrigan
The Federation Press
pp. v–xlii, 1–446 (including index)

THIS book has been published in association with the Centre for Commercial and Property Law and the Research Concentration in Public Law, Queensland University of Technology.

The book is divided into two parts, namely Commercial Dimensions of the Framework of Government and the Commercial Dimension of the Liability of Government. A number of people have contributed to the various chapters in

this book. Messrs Horrigan and Fitzgerald, in their chapter on International and Transactional Influences on Law and Policy Affecting Government discuss, amongst other matters, the implication of Teoh's case on government policy making. The discussion is concerned with the interplay between public administration and international law. The role of the executive declarations, in cases where Australia becomes a party to an international treaty, but the treaty is yet to be legislated directly into domestic law, can give rise to great difficulty. It may cause a party to have a legitimate expectation, which is founded upon a ratified convention. One of the consequences of Teoh's case is that there has resulted a joint statement made by the Minister for Foreign Affairs and the Attorney-General in 1995 by the then Labor government and again in 1997 by the then coalition government, in relation to the proper role of parliament in implementing a treaty into Australian law. The later joint statement is set out at pages 52 and 53 of the book.

Mr Dominic McGann writes on Corporatisation, Privatisation and Other Strategies. In this chapter, whilst considering a contracting party's relationship with the Crown, he includes a very interesting section on tenders for government contracts, which increasingly form an important part of our commercial life. Running parallel to the practice of the government in relation to tendering is its liability that may rise out of the tender or contractual process, for example, misleading and deceptive conduct which Mr McGann discusses. In chapter 5 Mr Simon Fisher, when discussing Government Rights Protection in a Commercial Context, includes a very interesting section on "whistle blowing" as well as some useful references on the various literature on that topic. He discusses the legislation that has been implemented in New South Wales, South Australia. Queensland and the ACT.

Ms Tina Cockburn writes on the Personal Liability of Government Officers in Tort and Equity, the latter including a discussion on breaches of fiduciary relationships. In parallel, there is included a chapter by Professor Duncan on Reliance and Government Information, the latter being most important for those who have cause to rely upon governmental rulings, such as from the Taxation Commissioner and the like.

I have found this a very interesting book to read, particularly as it deals with various aspects of government relationships, whether one is considering a question of immigration, native title, tendering or rulings that are handed down from time to time. The book provides some interesting answers and directs the reader to the various relevant authorities. With the increasing role of government in day to day life, this book is a very useful tool in the lawyer's library.

John V. Kaufman

A Cartoon Guide to Corporations and Partnership Law

by Short and Cane
Butterworths, 1998
pp. v + 74 (paperback)

CARTOON treatments of "serious" subjects tend to be treated with suspicion. You may recall the outbursts of horror which met the announcement about ten years ago that Shakespeare's plays were to be published in cartoon form. Despite an assurance that the text of each play would be reproduced complete and unaltered, there was speculation that Lady MacBeth's utterance "Out, damned spot!" would be accompanied by a picture of her walking a dog. While some may query whether corporations and partnership law should be regarded as serious, many people will treat this book with reservation on the same grounds. At the risk of seeming a fuddy duddy, I confess to being among them.

The blurb says the work is intended to be used as a companion to standard company and partnership law texts, and to assist students to remember the main principles in those areas. While the book is a bit of fun, I would not recommend anyone to attempt a university law exam on the basis of it. The principles it deals with are complex, and require more than an outline treatment. Just as a little learning can be a dangerous thing, so an oversimplified explanation of company and partnership law can be worse than none at all.

The expositions of the relevant principles are often truncated to the point of being hard to understand. The treatment accordingly confuses rather than clarifies. For example, one can only grasp the explanation of *Regal (Hastings) Ltd* v. *Gulliver* ([1967] 2 AC 134) on page 40 if already familiar with the concepts of fiduciary relationships and being called to account. Yet a reader who knows those things has no need of a book like this.

While the issues raised by the cases are usually stated accurately, the reader is sometimes left in doubt as to the result and effect of the decision. They are important things to remember if you want to impress the examiners. Some cases are cited in full, but usually only the name and year of the relevant authority are given. That can make it hard to follow a reference up. Nor is there an index.

The only people who can use the book with safety are those of us who have scraped through company and partnership law, and already have a rudimentary grasp of the relevant rules. Others, including both students and intelligent lay people, could well be led into error. Accordingly, though the bunny who appears in many of the drawings is cute, and it probably beats Ford on corporations law as bedtime reading, this book must be used with caution.

Michael Gronow

Credit Handbook — Consumer Rights under the Credit Laws throughout Australia (4th edn)

by Paul Bingham and David Niven
Leo Cussen Institute, 1998

THE authors bring together a wealth of experience in consumer credit law in this handy practical manual.

Its loose-leaf format is easy to use and the handbook is well indexed, and referenced. As such, it is likely to appeal to both lawyers and non-lawyers.

The handbook is divided into four parts. The first sets out the conceptual framework, the second the Consumer Credit Code, the third the Credit Act, and the fourth various lists and appendices. The text is simple and clearly expressed. Separate indexes deal with Parts 1 and 2, and Part 3. The case list is current at 1 July 1998 and the legislation includes all States and Territories.

An interesting feature after the

introduction is the inclusion of a series of five flowcharts, which, whilst appearing to be a little daunting at first glance, are actually relatively simple tools in determining whether a particular contract is regulated or not.

This publication is a worthy addition to any bookshelf, particularly those who have an interest or involvement in consumer credit law.

Franz Holzer

Australian Evidence (3rd edn)

by Andrew Ligertwood
Butterworths, 1998
pp. lxvii + 678 (softback)

THIS is a new edition of the leading Australian evidence text which is not based on an English work. With the spread of the uniform evidence legislation, our law will depart more and more from England's, and specifically written Australian texts will become more and more important. But lest it be thought that having our own evidence book is like having our own airline, let me say that this book also makes a worthwhile contribution in its own right.

The book breaks its vast subject up thematically, with broad chapters. There are chapters on Fundamental Principles, Trial Process, Character Evidence, Unreliable Evidence, the Adversary System, Presentation of Evidence by different parties, Testimonial Evidence and Hearsay. While this is a good approach from a theoretical point of view, it can make specific pieces of commentary on issues that arise in court harder to find than in books that treat the topics more individually, at least until one is familiar with the layout. On the other hand, the table of contents and the index are both detailed and easy to use.

The text is clearly written and emphasises Australian authorities. It has historical explanations where necessary to understand the development and application of a rule, but does not overburden practitioners with long superseded common law principles. While a view of general principle emerges from the author's arrangement of his material, the emphasis in the text is on what the law is, and how it is currently applied in Australia.

This book may not yet have the authority of Cross (of which there is an excellent Australian edition), Phipson, Wigmore or other foreign texts — after all, the author is still alive. It is nevertheless a good book to have around and to consult, particularly if you need to know the Australian authorities and legislation. Its treatment of them is usually comprehensive and thorough. The explanations make sense, and are easy to follow, especially if you are on unfamiliar ground in some areas of the subject. The book is also well written. I would accordingly recommend its purchase.

Michael Gronow

Advocacy in Practice
(being the Third Edition of Cross-Examination: Practice and Procedure)

by J.L. Glissan and S.W. Tilmouth
Butterworths, 1998
pp. v–xxi, 1–138

THIS is a very good book.

Many books have been written about advocacy. Arguably the worst is *Cross Examination of Witnesses* by Asher L. Cornelius (Bobbs–Merrill, 1929). The third edition of Glissan and Tilmouth's work is among the best.

As the change in title suggests, the third edition covers the full scope of advocacy, from preparation and paperwork to submissions on appeal.

The book correctly identifies, and dispels, the myth that hostile cross-examination is the principal (if not the only) true exercise in advocacy. It makes the point in many places and in different ways that the real keys to advocacy lie in preparation, purpose and practice.

The scope of the book can be judged from its table of contents. The chapter headings are as follows:

Chapter 1 — Preparation and Case Analysis;
Chapter 2 — Opening;
Chapter 3 — Examination;
Chapter 4 — Cross-Examination;
Chapter 5 — Re-Examination; Rebuttal and Reply;
Chapter 6 — Objections;
Chapter 7 — Closing Address;
Chapter 8 — Appeals;
Chapter 9 — Etiquette and Ethics;
Chapter 10 — Elements.

Navigating through the work is made very much easier by the fact that each chapter is broken into a number of components, logically organised and clearly identified at the start of each chapter. This hierarchical approach to the subject makes it very easy to find the precise topic sought, without impairing the work's readability.

The essential points made in each chapter are summarised in point-form at the end of each chapter. The essential points made throughout the entire work are distilled in chapter 10, in which the elements of each phase of advocacy are simply and clearly identified.

The book is very well organised, and clear enough for beginners. But it would be a mistaken conceit for experienced advocates to imagine that this book holds nothing for them. It offers guidance on obscure problems, and fresh insights into familiar ones. Its precepts are supported by discussion of authority, where relevant. It is liberally illustrated with examples, both from the real world of trials and from world of imagined trials where witnesses always behave as required.

Advocacy being what it is, this is not a book to take to court: if you need to refer to it on your feet, you probably should not be on your feet. Fortunately, it is a book which makes easy, even enjoyable, reading. Everyone who reads it is likely to learn something useful from it. I recommend it to anyone with an interest in improving their advocacy.

Julian Burnside