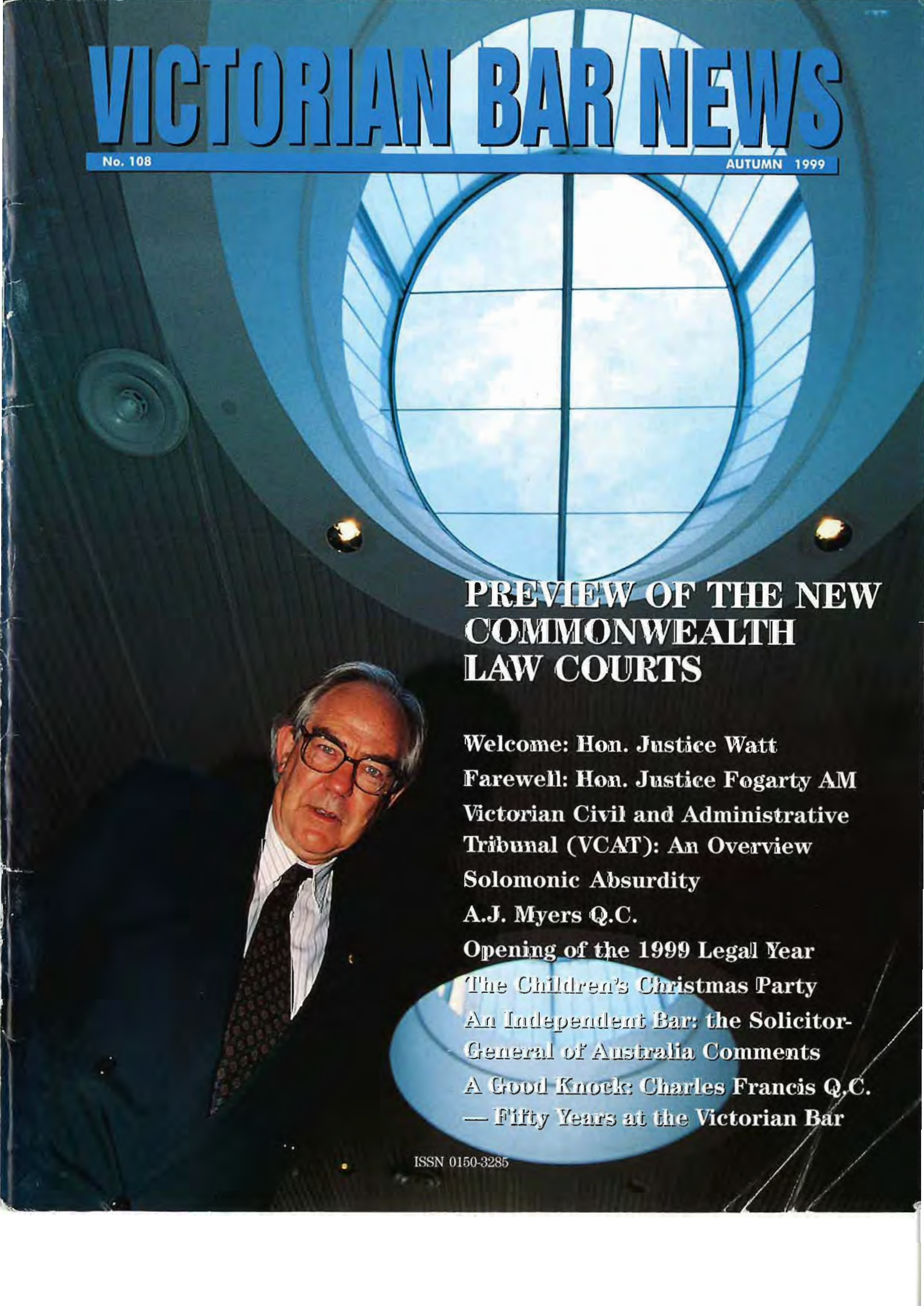
VICTORIAN BAR NEWS

No. 108 AUTUMN 1999



PREVIEW OF THE NEW COMMONWEALTH LAW COURTS

Welcome: Hon. Justice Watt

Farewell: Hon. Justice Fogarty AM

Victorian Civil and Administrative Tribunal (VCAT): An Overview

Solomonic Absurdity

A.J. Myers Q.C.

Opening of the 1999 Legal Year

The Children's Christmas Party

An Independent Bar: the Solicitor-General of Australia Comments

A Good Knock: Charles Francis Q.C. — Fifty Years at the Victorian Bar

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Contents

Welcome: The Hon. Justice Watt

Farewell: The Hon. Justice Fogarty AM

Opening of the 1999 Legal Year

Children's Christmas Party

Sport: Cricket, Yachting and Hockey — reports

Cover: *The Chief Justice of the Federal Court, the Hon. Michael Black CJ, took editor Gerry Nash Q.C. and photographer David Johns on a guided tour of the new Commonwealth Law Courts — see pages 21–25.*

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for the year 1998/99
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Moving the Deckchairs for the New Millennium

TEMPUS FUGIT

CHRISTMAS 1998 has been and gone. Father Christmas, a very benevolent gentleman in 1998, has distributed largesse according to the Christmas wish list canvassed in the last issue of *Bar News*.

The year 1999 is speeding us towards what the non-numerate describe as the new millennium.

The logic is totally unacceptable. Yet it is hard to avoid joining the rush to celebrate the year 2000 as the beginning of a new millennium. There is no magic in "2001".

Lawyers from the time they enter the first year of their law course are indoctrinated with the logic of the law and the way in which it develops. We tend to forget the Oliver Wendell Holmes' statement that "the life of the law is not logic but experience".

Experience seems to indicate that the transition moment for the millennium will be midnight on 31 December 1999. The Editors propose to celebrate the beginning of the new millennium twice: once on grounds of logic and once on grounds of experience.

We are concerned that our decision to celebrate the commencement of the year 2000 indicates a breakdown in principle. It will not be long before we use the word "they" as a gender-neutral singular pronoun, abandon the use of the subjunctive entirely, speak of something being "decimated" when it has almost been destroyed, and fail altogether to distinguish between the nominative and the accusative.

TIME TO MOVE THE DECKCHAIRS

There are things that can be left until tomorrow, or even next year, or which will be sorted out by the end of the decade. It is, however, not possible with equanimity to postpone anything until the next millennium.

Is it too late to bring our administration of justice up-to-date? Will the legal system as administered today be able to cope with the needs of society as it may exist in 50 years' time?

We have suggested on previous occasions: that a statement of claim should be verified on oath before a writ issues; that defences should not be permitted to contain the phrase "do not admit" unless the defendant swears that he does not know whether the allegation is true or not; that denials should be permitted only where the defendant swears that the allegation is false. We believe that such alterations to the rules would abort much litigation at a relatively early stage. But such reforms will not resolve the dissatisfaction with the present system.

Equally the "fashionable" restrictions on interrogatories and discovery constitute merely the removal of two very small straws from the camel's back. But the restrictions on discovery create a major burden not only on the parties in presenting their case but also on the court in arriving at the truth.

Too often the information necessary to establish the plaintiff's case, or the information necessary to establish that the plaintiff's case is based on falsehoods, is to be found only in documents held by the other party.

The other side's contemporary documents are an important and often vital tool for the determination of truth. The move towards more and more limited discovery is for this reason disturbing.

General discovery should be available in all civil litigation. If discovery is to be restricted in any way or not allowed at all it should only be in circumstances where the party opposing discovery can establish to the court's satisfaction that the discovery sought is oppressive and will not benefit the party seeking the discovery.

SOCIETY HAS CHANGED BUT THE SYSTEM HAS NOT

We have introduced computers, case management, video evidence and video submissions into the court system. Otherwise the system operates very much as it did on 1 January 1900. But the society the courts serve today is quite different from that which existed in 1900 (and by 2050 the difference will be even greater).

It is not just a difference between "the industrial age" and the "information age" or any other jargonistic difference. The change stems in part from (a) the increasing isolation of the

individual from the community in which he lives (created by larger cities, by the disappearance of small towns, by greater mobility of the individual, and by television, computers and other electronic devices which enable the individual to live in greater isolation), (b) a more complex commercial world, (c) a community more aware of — or more demanding of — its rights, (d) a plethora of regulatory legislation (both good and bad) and (e) the increasing cost of justice in relation to the incomes of those who now seek it.

We do not have any panacea. However, we believe the adversary system needs to be modified for the next millennium.

We do not have any panacea. However we believe the adversary system needs to be modified for the next millennium.

Judicial intervention needs to increase; the "docket system" needs to apply to all litigation in courts other than courts of summary jurisdiction. Perhaps the role of the "docket judge" should be expanded to enable him to probe more deeply into the case the parties are presenting or proposing to present prior to trial.

We balk at the adoption of an inquisitorial system which would take power away from the litigants and place it in the hands of "the system" even though the system be represented by an independent judicial officer. Any major inroad into the adversary system must strengthen the hand of the State against the individual. There already seems to exist a worldwide move by governments of every type and political persuasion to bring into existence (belatedly) an Orwellian society. It should not be encouraged or assisted.

LET THERE BE LIGHT

The new Federal Court complex designed to ensure that justice is transparent is about to open at the corner of Latrobe and William Streets. So far as our system permits, it has girded itself well for the 21st century. The judiciary and the architects are to be congratulated. A commentary on the new building in contained in the later pages of this issue.

OUR OWN JAG

It is rumoured that, when we make an Australian version of the detective-soapie-military epic which Channel 7 runs just before "Blue Heelers", the Bar will provide the leading man.

On 5 February 1999, Air Commodore Andrew Kirkham Q.C. was appointed Deputy Judge Advocate General of the Australian Defence Forces. This is a tribute to his capacity as a lawyer, his dedication to his role in the Air Force Reserve and to the wisdom of those who determine these things.

Congratulations Andrew.

CHERNOV JA

On 6 May 1997, Alex Chernov Q.C. was appointed a Justice of the Supreme Court of Victoria. Of his appointment *Bar News* then said:

> The pleasure in and approval of that appointment expressed by the Victorian profession at the welcome ceremony reflected the universal judgment of lawyers throughout Victoria and in other States and countries where His Honour has come to be known.

On 13 October 1998 the Honourable Alex Chernov was appointed to the Court of Appeal. Although His Honour spent only a brief period in the Trial Division, we suspect that his experience during those months was wide-ranging and full.

His Honour's knowledge and perspicacity combined with his courtesy and patience have been valued by those who appeared before him in the Trial Division. They will be equally valued by those who appear before him in the Court of Appeal.

We congratulate His Honour on his elevation.

THE PASSING OF A LEGEND

Alfred Thompson Denning, whose simple prose has delighted many lawyers and whose judgments over a period of almost half a century excited anger or admiration, passed away on 5 March 1999 at the age of 100.

Lord Denning, who believed that law should equate with justice, has directly and indirectly done more to change the face of the common law than any other judge this century.

His contribution will not easily be forgotten. His death is a loss to the common law world.

Editors

Equality of Opportunity

Dear Sirs

Re: Summer 1998 edition — Entre Nous advertisement (page 52)

NOW, just *between us*, I was a little surprised to find that the summer edition of the *Victorian Bar News* carried no less than three articles from women discussing equal opportunity for women at the Victorian Bar (pages 20–32), and only one very brief advertisement for an introduction agency, albeit providing access to "2000 ladies".

Could the editors please explain their policy position on advertisements? Is it intended to expand this advertising section in the interests of gender equality to include introduction agencies providing "gentlemen"; promote easy access to artificial insemination for those of us engaged in primary production; or assist those who wish to continue "dressing up" by carrying advertisements from like-minded members of the wider community?

Further, while addressing the issues of equality of opportunity, it seems appropriate to comment on the unnecessary reference to the ethnic background of the "Turkish immigrant" in the letters column on page 38.

Regards,

Kate Auty

We accept the reprimand in respect of the ethnic background of the defendant whose evidence was quoted in Verbatim. Certainly it was necessary to indicate that he was not a native English speaker. The reference to his nationality was inappropriate.

On the equal opportunity point, we have forwarded a copy of this letter to Ms Neville. We believe that the writer will find the Entre Nous advertisement at page 62 of this issue less discriminatory.

The Editors

Understanding the Victorian Bar's Practice Rules

THE BAR'S PRACTICE RULES

FORMER Chief Justice Sir John Young once commented that the rules which govern the professional conduct of a barrister are in part based upon a generally accepted standard of common decency and common fairness. Many of our Practice Rules would, one hopes, be observed by members of the Bar even if they lacked normative force. The duty of a barrister to advance and protect the client's interests to the best of their skill, for example, is a duty which does no more than reflect a widespread community expectation of professional conduct generally.

Similarly, the rule that a barrister should not make allegations or suggestions principally in order to harass or embarrass a person, simply reflects the ethical principles which control the behaviour of all members of the community. Barristers should not need to remind themselves of the existence of these rules.

Difficulties arise, of course, where it appears that Practice Rules of this sort come into conflict with each other. For example, a recent Queensland study, conducted by the Australian Institute of Criminology, suggests that some Queensland barristers when cross-examining child complainants in sexual assault cases see their duty to a witness as being incompatible with their duty to the client. The study indicates that barristers in that State may be causing unnecessary trauma for the children in those cases.

These findings are all the more disturbing because apparent conflicts of this sort could, and should, be resolved before any damage is done. Any contemplation of the standards of "common decency", for example, would suggest that a client's interests can be advanced skilfully without resorting to intimidation. A barrister in Victoria who had any lingering doubt about the issue could read the Victorian Bar's Practice

Rules, which indicate that a barrister's duty to the client does not extend to the harassment of witnesses. Where there is any uncertainty which arises during the trial, a Victorian judge could be relied upon to provide instruction, or correction. And if a member of the Victorian Bar sought advice from the Bar's Ethics Committee on the question of cross-examination of children in child sexual assault cases, the Committee would provide clear guidance on this point. A barrister's duty to a witness and their duty to a client are entirely compatible. It would be a breach of the Bar's Practice Rules, and of the Victorian Evidence Act, for a barrister to conduct any part of a case with the principal object of harassing or embarrassing a witness.

A less vexed but more commonly occurring difficulty with the barrister's rules of professional conduct concerns those rules which the former Chief Justice termed "conventional" — rules which a person could not be expected to know without inspecting the Practice Rules themselves. For example, the precise terms of the rule that a barrister must, in order to practice, have professional indemnity insurance in accordance with Part 8 of the *Legal Practice Act* 1996, do not derive from first ethical principles. Nonetheless, the failure to observe rules such as this can obviously carry serious consequences, for the barrister, for the client, and for the reputation of the Bar as a whole.

The record of Victorian barristers in relation to professional conduct is good, and members of our Bar can be justifiably proud. Nevertheless, the Bar Council is concerned to meet its obligations to its members, to the justice system, and to the public by ensuring that our standards remain high and are seen to be so. The reputation of the Bar in this respect may well be decisive in our efforts to secure or maintain rights which should be enjoyed by all Victorians — rights of judicial review, rights of legal professional privilege, the right to adequate legal aid, and the very right to vigorous legal representation in a non-inquisitorial legal system.

The Bar Council requires that all readers be given appropriate instruction in their professional obligations. The Ethics Committee, one of the most important of the Bar Council's committees, takes all complaints relating to barristers' conduct very seriously. From time to time the Bar Council will modify the Practice Rules to reflect contemporary needs and a changing legal environment. I would encourage all members of the Bar to familiarise themselves with the precise terms of the Practice Rules, which were revised in February 1998 in order to accommodate the new regulatory framework introduced by the Legal Practice Act and the move towards a national legal profession. Further, I would encourage all members of the Bar who have any doubts as to their professional obligations which arise in a particular situation to adopt the practice of contacting the Ethics Committee for advice.

The competitive nature of practice at the Bar in any criminal or civil jurisdic-

tion, and the heavy obligation to struggle for a client's interest, can never justify professional conduct which falls short of the necessarily high standards that those Rules have established. We must maintain those standards.

CHERNOV JA

The Bar Council is pleased to note the recent appointment of Justice Alexis Chernov to the Court of Appeal. Justice Chernov, a former Chairman of the Bar Council and President of the Law Council of Australia, was appointed to the Supreme Court in May 1997, and was elevated to the Court of Appeal in October last year without a formal welcome. The Bar Council congratulates his Honour on his new appointment.

GST AND THE BAR

On Thursday 11 March, the Bar Council presented a seminar on the potential impact of a GST on the business of barristers. The seminar was ably conducted by Mr Michael Evans, tax partner at KPMG, and was well-attended by members of the Bar. The seminar proceedings will, in due course, be published in a form which is accessible to all barristers. In response to positive feedback from members who attended, the Bar Council will organise similar events in coming months.

BAR DINNER

This year the Bar dinner is to be held on Saturday 29 May 1999, at Leonda by the Yarra, and invitations will be issued shortly. Those members who regularly attend the Bar dinner appreciate its importance as a Bar function and an opportunity to socialise with other barristers.

I encourage all members of the Bar, particularly junior members as well as those who have not attended the dinner for some time, to participate in this important aspect of the Bar's life. The cost for junior members will, as in the past, be considerably subsidised.

ADDENDUM

In the recent defamation case in which the premier was unsuccessful in his claim against *The Australian* newspaper, it is comforting to note that the Premier was "mightily impressed with the conduct of the case by Mr Justice Ashley". At a press conference he said:

> His application, his intellectual rigor, the amount of work that he must have done out of court hours in order to progress the case in the time that he did was extraordinary.

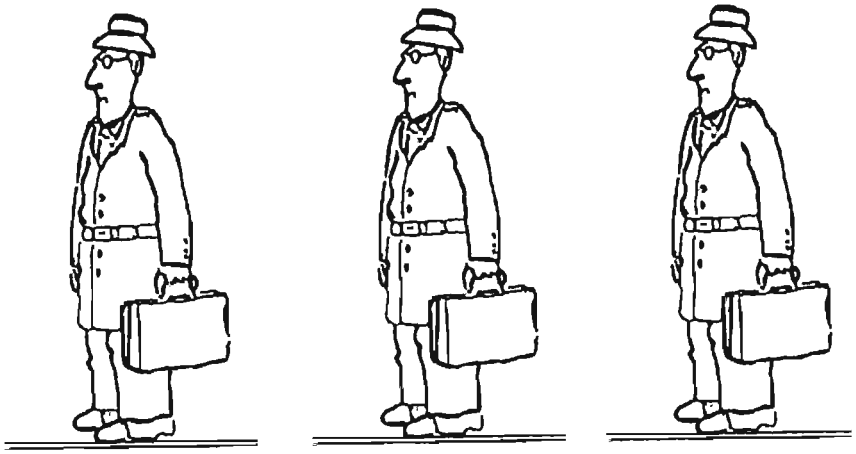
He went on to say:

> And I just say this because I think it can only give Victorians confidence in the calibre of the judiciary that applies here in Victoria.

He said his observation of the court case was very educational and very rewarding. Praise from the Premier under these circumstances was praise indeed.

David Curtain
Chairman

"The Barrister": Experience the Raw Gut-Wrenching Drama of Human Conflict



Preparing to do battle **The thrill of victory** **The agony of defeat**

"My Learned Brethren, the Arrogant Czarists . . ."

THE United States Supreme Court is no place for faint hearts. Debate is vigorous, as it should be, and the judges do not pull their punches. But to a lawyer accustomed to the polite language of Australian and English judges, the dissenting opinion of Scalia J in a recent case seems unusually blunt and hard-hitting. The case is of current interest because of its discussion of what is now called judicial activism, particularly in relation to "implied rights" in the Constitution.

The case was *Planned Parenthood of Southeastern Pennsylvania, et al.* v. *Casey et al.* 505 US 883 (1992). By a 5:4 majority, the court struck down parts of a Pennsylvania statute which regulated abortion in that State.

In a blistering dissent Scalia J accused the majority of:

- succumbing to the "temptation" towards "systematically eliminating checks upon its own power";
- adopting "outrageous arguments";
- supporting their decision "not [by] reasoned judgment" but by "personal predilection";
- adopting a principle of "undue burden" [of State regulation of abortion] which "has no principled or coherent legal basis" and which is a "jurisprudence of confusion";
- seeking "to maintain the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily";
- establishing an "Imperial Judiciary" with a "Nietzschean vision of us unelected life-tenured judges leading a Volk who will be 'tested by following' and whose very 'belief in themselves' is mystically bound up in their 'understanding' of a Court that 'speak[s] before all others for their constitutional ideals'";
- "almost czarist arrogance".

To some extent, the heat in the opinion reflects the heat in the abortion debate itself. However, the opinion is also a passionate argument against taking judicial activism too far. What lessons are there in this for the Australian courts?

Charles Scerri

Legal Profession Tribunal — Publication of Orders

UNDER section 166 of the *Legal Practice Act* 1996 ("the Act"), The Victorian Bar Inc., as a Recognised Professional Association, is required to provide the following information in relation to orders made by the Legal Profession Tribunal ("the Tribunal") on 27 November, 1998 against one of its regulated practitioners, Ivan Himmelhoch.

1) Name of practitioner: Ivan Himmelhoch ("the practitioner")
2) Tribunal Findings and the Nature of the Offence:
   The practitioner admitted that he was guilty of misconduct as defined by section 137 (a)(i) of the Act, in that by demanding payment of a debt for fees which the practitioner had admitted to be fictitious on 2 June 1998 the practitioner wilfully or recklessly contravened rule 4 (c) of the Rules of Conduct of the Victorian Bar (as at 2 February 1998) by engaging in conduct which was likely to diminish public confidence in the legal profession or otherwise likely to bring the legal profession into disrepute.
3) The orders of the Tribunal were as follows:
   (a) The practising certificate of the legal practitioner is cancelled, and the legal practitioner may not apply for any practising certificate under the Act until 1 July 1999.
   (b) Pursuant to section 160(2)(b) of the Act, the Tribunal refers the practitioner to the Supreme Court for the Court to determine whether the practitioner's name should be struck off the roll of practitioners. The Tribunal does not make a recommendation to the Supreme Court pursuant to section 160 (1) (c)(iv) of the Act.
   (c) The legal practitioner is to pay $5000 to The Victorian Bar Incorporated as its costs of these proceedings.

   All other charges were either withdrawn or dismissed by the Full Tribunal.
4) As at the date of publication, no notice of appeal against the orders of the Tribunal has been lodged. The time for service of such notice under the Act has expired.

Review of Victorian Community Centre Funding Program

THERE has been much discussion, particularly amongst the profession, regarding the recent release of Review of Victorian Community Centre Funding Program. Unfortunately, some comments made have sparked distrust and a misunderstanding of the review by some members of the public.

I would like to take this opportunity to inform members as to the nature of the review — its aims and desired outcomes — in an effort to alleviate some of this misplaced anxiety.

The current review of the infringement notices process may also be of interest to members.

REVIEW OF VICTORIAN COMMUNITY CENTRE FUNDING PROGRAM

On January 21 this year, with the Commonwealth Attorney-General, I publicly released the *Review of Victorian Community Centre Funding Program.* The report made a number of recommendations aimed at creating a more responsive framework for planning and delivering legal services to disadvantaged members of the community.

Contrary to the statements of some critics, the report was not designed to "cut the number of legal centres" nor "remove them from their local communities" but rather to enhance community legal services by ensuring consistent and equitable distribution of resources.

The current location of community legal centres is historically based and does not take into account the shifts in the target populations over the last 20 years. The review recommends regional boundaries with one community legal service per region. This would mean an Albury–Wodonga community legal service would be established for the first time. A legal service could operate at several different locations within the region.

Regional centres would operate in a similar fashion to existing health services. The relocation of some existing services could mean that those using the community legal services would be able to access them by using existing transport corridors.

Following submissions from the volunteers who felt the system could be better, the review suggests that a dedicated support system for volunteers be created and that training programs for all legal centre staff be extended to maximise the vital input of volunteers.

An Implementation Advisory Group is being established to formulate strategies to improve the community legal centres. It is intended that the group will have 11 members: five community legal centre representatives, two Victoria Legal Aid representatives and Commonwealth and State Government representatives.

The Committee will consult widely over a six-month period and develop a consultation agenda and timetable for reform. Following this process, recommendations will be made by the Committee to the Commonwealth and Victorian Attorney-Generals:

- ensuring an equitable distribution of resources;
- identifying core services which people in need can access, and appropriate eligibility criteria for use of those services; and
- proposing measures to enhance the efficiency and effectiveness of service delivery, such as strategies for maintaining and enhancing community and volunteer involvement and consideration of the viability of contracting out some administrative functions.

The review, in this sense, is still in its infancy and will endeavour to be as inclusive as possible when considering proposals to improve access to community legal centres in Victoria.

INFRINGEMENT NOTICES

A new Infringements Act to govern the infringement notices process from the issuing of an infringement notice to the enforcement of unpaid infringement penalties is currently under consideration.

There are currently over 50 Victorian Acts which contain infringement notices provisions. In the hierarchy of wrongdoing most offences enforced by infringement notice are minor and justify non-custodial sanctions, although the more serious offences enforced under the infringement notices system often carry ancillary penalties such as demerit points, licence suspension and, in some areas, a conviction.

An infringement notice gives a person the option of dealing with an offence by admitting guilt and paying a reduced penalty amount to the issuing agency. Alternatively, the alleged offender or the issuing agency may elect to have the matter heard in open court. Where the penalty is not paid, the offence is either prosecuted in open court or for some prescribed offences (including most speeding and parking offences) the infringement notice is registered with the PERIN venue of the Magistrates' Court.

It should be noted that of the 2.3 mil-

lion notices issued in the State each year, over 80 per cent are paid prior to registration with the PERIN court. While the system works well overall, each year there are approximately 370,000 un-paid and overdue infringement penalties registered with the PERIN court for enforcement.

The review has identified possible reforms designed to strengthen and improve the enforcement of infringement notice penalties. The PERIN system has been in operation for 10 years and the number of detected offences by the use of sophisticated roadside technology has increased exponentially.

In September 1997 the Public Accounts and Estimates Committee produced a report on outstanding fines and executed warrants. The 44 recommendations contained in the report cover administrative, policy and law reform issues. Since that time the Government has undertaken a review of the current system with the assistance of Professor Richard Fox, Professor at Law at Monash University.

The review has identified possible reforms designed to strengthen and improve the enforcement of infringement notice penalties.

The Government's review coincides with new legislation being introduced and implemented in New South Wales, South Australia, Queensland and New Zealand. Interstate and international developments are currently being considered with the assistance of Professor Fox. The best elements of these models have been incorporated into proposals for a new Infringements Act.

The objective is a new Act which will:

- improve the rate of voluntary compliance by defaulters at the earliest possible stage of the system;
- build upon community acceptance of the system by ensuring its fair operation; and,
- introduce robust legislation which will support the future needs of an infringement notice system in an era of rapidly developing detection technology.

Jan Wade
Attorney-General

The Hon. Justice Watt

ON 15 December 1990 the Honourable Justice Watt was welcomed to the Bench of the Family Court of Australia, seven months after the appointment of his Master, Paul Guest Q.C. With those two appointments, the Family Law Bar Association saw the loss of its two longest serving office-bearers.

Michael Watt was born in Scotland and emigrated to New Zealand with his parents in 1949. He was educated in New Zealand but came to Australia in 1965 where he obtained BA at the University of Western Australia. In 1967 he joined the Royal Australian Airforce under a four-year short service commission, and while stationed at RAAF base Point Cook, commenced studying law part-time at Melbourne University. He graduated LLB with honours in 1975. He served his articles with Hunt, Walsh & Co. at Mornington and worked as a solicitor with that firm from 1976 to 1978 and during that time tutored part-time in family law at Monash University and completed a Masters of Law Degree.

In 1978 his Honour signed the Bar Roll and read with Paul Guest, now the Honourable Justice Guest.

No one who has ever been his junior is in any doubt that Justice Guest demanded excellence, and it is testimony to Michael Watt's abilities that he appeared regularly as junior counsel with Justice Guest. The combination of their different skills and qualities created a formidable team, particularly in complex property matters.

It should not be thought, however, that His Honour was in any way overshadowed by his Master. His own particular talents were soon recognised and he became sought after both in Victoria and interstate for his intellect, the quality of his advice, his grasp of complex issues and his attention to detail. His reputation and skills were justly recognised in 1994 when he was appointed one of Her Majesty's Counsel for this State.

His already widespread reputation saw him in demand in family law matters throughout Australia and he was regularly briefed interstate, particularly

The Hon. Justice Watt

at appellate level. He was a particularly popular choice when there was a novel argument to be made.

On behalf of his client, whether in court or in negotiations, he was forceful, logical and always extremely well prepared. As an opponent he was sensible, and always courteous and fair.

His Honour had only one Reader, Diana Bryant, and it is perhaps a matter of some regret that other members of the Bar did not have the opportunity to share his Honour's qualities as a mentor.

But equally important as his Honour's role as a member of the practicing Bar, was his Honour's commitment to family law generally. In 1983 his Honour was appointed as a member of the Family Law Committee of the Law Council of Australia. When the Family Law Section of the Law Council of Australia was established in 1985, His Honour was appointed a member of the executive and continued to serve in that capacity with only a short break, until 1994 when he was elected Deputy Chairman. He would have been Chairman had not his appointment to the Bench intervened.

It was as a member of the executive of the Family Law Section that the Australian legal profession was served so well by his Honour's qualities, his intellect, acuity, incisiveness and thoroughness which were complemented by his drafting skills and his capacity for hard work.

Whenever there were important papers to be drafted or submissions made, his Honour's skills were always greatly in demand. His Honour was described by one of the speakers at his welcome, thus:

A consummate backroom boy while at the same time being an outstanding committee man, a leader and a doer, not a mere talker.

He obviously enjoyed this aspect of his professional life because he was the first editor of the Family Law Section flagship publication *Australian Family Lawyer*, and his wife Cecile followed him as editor. Later, together they launched the periodical *Current Family Law* which they initially wrote and published themselves.

His Honour was described by one of the speakers at his welcome, thus: "A consummate backroom boy while at the same time being an outstanding committee man, a leader and a doer, not a mere talker".

Any family law conference was adorned by his Honour presenting a paper. Attendees benefited from both the clarity of his presentation and the quality of his papers.

Despite his busy practice his Honour was committed to the Family Law Bar Association and was its longstanding Vice-Chairman prior to the appointment of Paul Guest Q.C. to the Bench. He was responsible during that period for the preparation of many submissions on its behalf.

At the Bar, His Honour was not a populist who actively sought the approval of others. Those who know him well enough to call him a good friend, know a side of him to which others have not been privy. He has an excellent sense of humour and a keen and sometimes acerbic wit. This is exemplified by the authorship of the rearrangement of the "Judges Song" from Gilbert and Sullivan's "Trial by Jury", (renamed "The Family Court Judge's Song") which he and Justice Kay co-authored in 1986 (and which is breathtaking in its prescience).

His Honour has two now adult children, Jennifer and Daniel, from his first marriage, whose lives he has always shared and of whom he is justly proud. He shares a remarkable partnership with his wife Cecile who has always shared with him professional as well as personal interests. She practised at the Bar with him and they co-authored and published *Current Family Law*. It thus came as no surprise to those who know them well, when his Honour announced that she would leave her position as an Associate in the Supreme Court of Victoria to become His Honour's Associate in the Family Court.

His Honour is an ardent supporter of the Victorian Bar. Finding himself as Mr Junior Silk in the year in which he took silk, in the course of his inevitable speech at the Bar Dinner, he said this:

There are three kinds of barristers: those who practice at the Victorian Bar, those who would like to, and those who have no ambition at all.

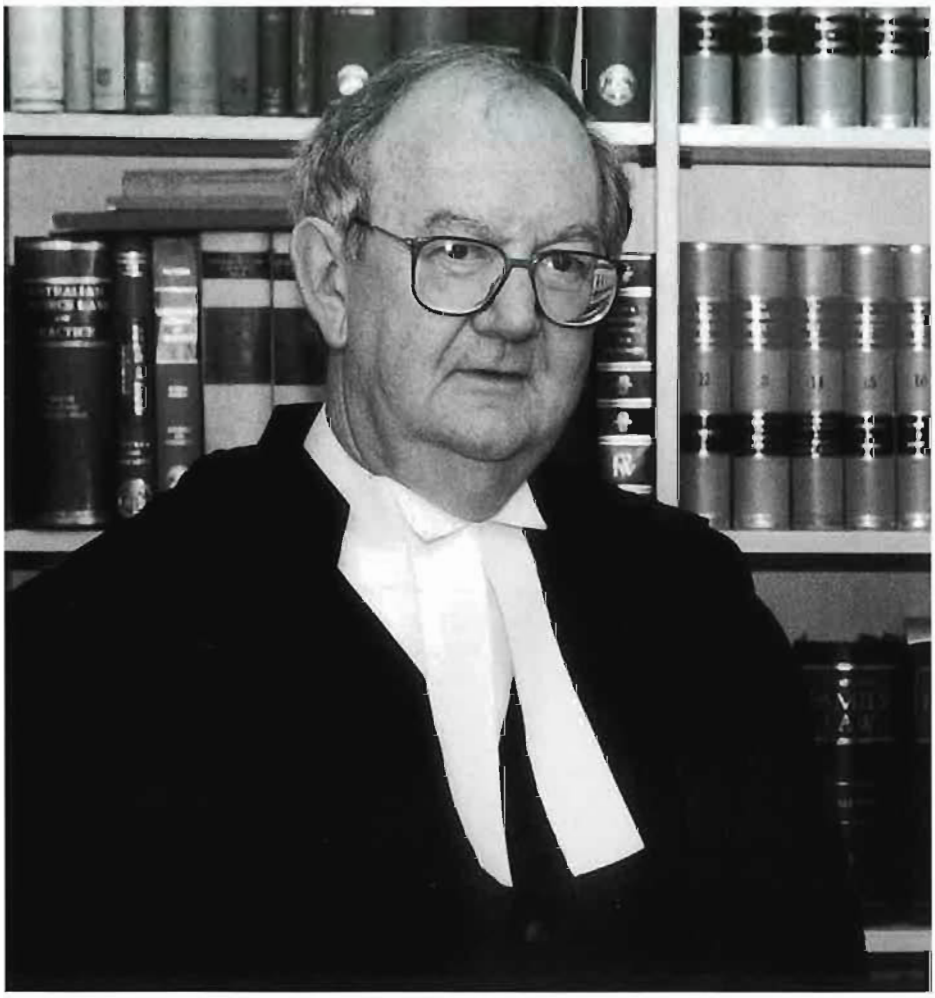
His Honour was an excellent example of a leader at the Bar and will be sorely missed by his colleagues and friends at the Family Law Bar. Their loss, however, is the Court and the public's gain, and all those who know his Honour, anticipate that at the end of his career on the Bench, his contribution to the court will be no less significant than his contribution to the profession.

The Hon. Justice Fogarty AM

Upon his appointment as Mr Justice Fogarty of the Family Court of Australia early in 1976, the *Australian Law Journal* (1976) 50 ALJ 318 tritely described his Honour's career to the time of his appointment in the following terms:

Mr John Francis Fogarty, aged forty-two, was educated at Christian Brothers College, East St Kilda, and the University of Melbourne, from which he graduated with the degree of LLB. He was admitted to the Victorian Bar in 1956, and specialised in matters of matrimonial law. He was a member for some years of the Matrimonial Causes Committee of the Victorian Bar Council, and succeeded Mr Justice Asche (Family Court of Australia) as Chairman of that Committee. He was also Editor of the Victorian Reports, and is the co-author of standard works on the Victorian law of maintenance, custody, and adoption and on the Victorian law as to police offences.

This rather pithy summary overlooked some of the more significant aspects of his Honour's career to the time of his appointment. As his Honour was keen to remind the overflow audience at his farewell, he won the First 18's best and fairest at CBC one year. Mark Derham Q.C., speaking on behalf of the Victorian Bar Council, also reminded the audience that his Honour won the Supreme Court prize for articled clerks in 1954. Derham described his Honour as "one of the great generalists of our Bar".



The Hon. Justice Fogarty AM

HIS Honour read with Sir Kevin Anderson and, in turn, had four readers, Cashmore M., Lovitt Q.C., Golvan Q.C., and Casey Q.C. His Honour was counsel assisting Sir Edward Woodward into his inquiry into Aboriginal land rights, and his Honour appeared as counsel in litigation which ultimately influenced the High Court's decision in *Mabo* (see *Milirrpum* v. *Nabalco Pty Ltd* [1971] 17 FLR 141 (the *Gove Land Rights case*).

If his Honour's career at the Bar had been brilliant, his elevation to the Bench in no way dimmed his stellar performance. The following matters appear on his formal CV:

Chairman of the Family Law Council, 1983–1986

Chairman of Australian Institute of Family Studies, 1986–1990

Chairman of Commonwealth Child Support Consultative Group, 1986–1991

Chairman of Victorian Family and Children's Services Council, 1988–1991

Member of the Order of Australia, January 1992.

Reports

Child Support Formula in Australia, 1988 and 1991

Report on Protective Services for Children in Victoria, 1989

Review of Intercountry Adoptions in Victoria, 1989 and 1991

Report on Protective Services for Children in Victoria, 1993

Additionally, from 1988 Nicholson CJ designated his Honour to be responsible for the business of the Appellate Division of the Family Court.

The work that John Fogarty did in reporting on the protective services for children in Victoria brought him into open and public conflict with the Premier. His Honour was unflinching in seeking to advance the interests of the children whose unfortunate fate saw them in need of the protection the State ought to have offered them. His Honour's unwavering and fearless views in this area did not always appear to please his political masters. Demands for more resources appeared to fall on less than sympathetic ears. If the message was less than palatable the government chose to "shoot the messenger". John Fogarty did not waver in his demands for something better for our children during this prolonged attack upon him. As citizens and parents we owe his Honour a great debt of gratitude for the steadfast manner in which he held the line.

The work that his Honour did as a judge of the Family Court of Australia, both as a trial judge and an appellate judge, was of the highest calibre. Upon opening any volume of the family law cases from 1976 to 1998, a reader will have little difficulty in finding landmark decisions written by his Honour, covering every facet of family law. The range is too wide to do justice to his Honour by picking out some of the cases because, no doubt, whichever cases are chosen, there will be significant decisions that will be overlooked.

However, how sweet the words of the High Court must have been to his Honour's ears in *Gronow* (1979) 5 Fam LR 719, when the High Court unanimously upheld an appeal against a decision of the majority of the Full Court (Fogarty J in dissent).

The Victorian Bar has been the professional home to many persons who can be properly described as truly great Australians. After 42 years as a member of the Victorian Bar (20 years on the practising list and 22 years on the judges' list), John Fogarty has earned the right to be counted amongst such eminent members of the Bar. His contribution to the jurisprudence of Australia and to the wider welfare of its members has been remarkable.

There hangs above the fireplace at the Fogarty's home, in pride of place . . . a certificate signed by several players on behalf of the Melbourne Football Club in recognition of his Honour postponing his retirement for one week just in case it clashed with a Demon's premiership.

Life is not always what it seems. Seemingly random events are, in reality, carefully planned. There hangs above the fireplace at the Fogarty's home, in pride of place, a gift he received upon his retirement. It is a certificate signed by several players on behalf of the Melbourne Football Club in recognition of his Honour postponing his retirement for one week just in case it clashed with a Demon's premiership. His Honour did not want to blur the emotional content of either event, should they have coincided.

In his farewell speech John Fogarty chose as his epitaph the words of Kirby J, who, in his farewell speech to the Court of Appeal in New South Wales, asked his audience to "judge me with charity but look to the future".

John Fogarty's career does not need to be judged with charity. Under the brightest spotlight or the most powerful magnifying glass it commends itself to any practitioner as being one thoroughly worthy of emulation. The community is the richer for having had his services and the poorer for his retirement.

Victorian Women Lawyers and The Victorian Law Foundation present the first

LESBIA HARFORD ORATION

Women in the Law, Progress and Challenge

to be delivered by

THE HON. JUSTICE HARBER PHILLIPS A.C., CHIEF JUSTICE OF VICTORIA

at Theatrette 385

Lower Banking Chamber Level, Commonwealth Bank Building, Cnr. Bourke and Elizabeth Streets, Melbourne

on Wednesday 21 April 1999 at 5:30 p.m.

Lesbia Harford (1891–1927)

Law Graduate, Poet, Fighter for Peace and Justice

R.S.V.P. to Suzanne Jukic on 9607 9390

A.J. Scurry Q.C.

A.J. "Bob" Scurry Q.C. passed away aged 74 years on 4 December 1998, leaving his widow Pat and six surviving children James, Genevieve, Tom, Sophie, Daniel and Veronica. Unfortunately his eldest daughter, Ann McDonald, Magistrate, predeceased him late 1998. Above all he was a devoted husband and father much loved by his wife and children.

Bob Scurry was a Second World War veteran serving as an AIF signalman initially undergoing training in Darwin and then service in New Guinea. He commenced a law course whilst in Darwin, taking some subjects by correspondence. After the war he became a resident at Newman College and gained his law degree. He was admitted to practice on 2 August 1948 and signed the Roll of Counsel on 9 September 1948 reading with H.T. Frederico — later Judge Frederico of the County Court — in Selborne Chambers. Thereafter he was to pursue a busy common law and occasional criminal practice taking silk on 7 November 1973 and being appointed effectively as the first Crimes Compensation Commissioner in or about June 1978.

Scurry soon established himself as a very capable common lawyer, fluent and quick to respond to the needs of his clients' litigation and able to compete with a bevy of talented common lawyers of that era such as Crockett, Mighell, Southwell, Somerville and Francis Q.C., to name but a few. He was regularly briefed by Slater & Gordon as junior to E.A. Laurie Q.C. (deceased) in a senior/junior combination as it took quite some time before Laurie's application for Letters Patent was granted. Together they formed a formidable combination.

Once he appeared for a paedophile alleged by the Crown to capture the attention of young boys at the Padua Theatre, Brunswick, by going to matinees and offering them icecreams and later pursuing criminal activities. At the end of the Crown case things looked so bad that Bob was able to tell him, "You'll certainly be convicted by the jury. You might be well advised to plead guilty and get some good character evidence about your hitherto unblemished record." However, no friends or business acquaintances were forthcoming

Bob Scurry Q.C.

so Bob asked whether a relative might be able to give evidence. Accordingly the defendant's mother was brought into conference the following morning. When asked by Scurry what she could say she said, "Well he contributes to my support, he does not bludge off me, he's good about the home sometimes, and sleeps in for long periods." Then she said he was generous. Scurry asked hopefully in what way was he generous. The answer was "Well, he used to give icecreams to little boys."!

Bob Scurry was always good company, wont to attend Menzies Hotel when it was situated on the corner of Bourke and William Streets in the days of six o'clock closing. He would go home by taxi with adequate supplies of beer, taking with him colleagues and instructing solicitors and provide hospitality for some hours, singing in an excellent baritone voice and recounting stories in his own inimitable fashion. He could always rely on his wife Pat to cook food for the assembled crew. Hospitality in the home was his expression of care for others.

His period in charge of the Crimes Compensation Tribunal saw a careful understanding approach to the many problems associated with the infliction of physical harm upon victims. The Tribunal under his careful guidance was well administered, and it must have been some satisfaction to Bob that his daughter Ann as a magistrate of recent times came back to act as a commissioner for a couple of years prior to her unfortunate untimely death.

Bob Scurry was always a man of riotous good humour. His personality was sought after and his opinions on life valued by those who knew him.

His funeral at Middle Park attracted a wide variety of friends who were privileged to hear a eulogy delivered by his eldest son in a most moving and "from the heart" delivery. The memory of a life that has affected so many will persist for a long time to come.

David Aronson

Left-wing Lawyer

2 November 1915 to 24 January 1999

DAVE Aronson, radical intellectual, champion of the cause of workers and bon vivant, died on 24 January 1999 at the age of 83 years. He was a most complex and delightful human being — of Jewish background but an atheist, a committed communist, but a "small l" liberal, a great intellect but tempered with humour and charm.

Dave was born in Melbourne on 2 November 1915 to a couple recently arrived in Australia from Israel. He attended Melbourne High School and then studied law and politics at Melbourne University. He was admitted to practice as a barrister and solicitor of the Supreme Court in 1939, and for 40 years practised as a solicitor in Ballarat — for most of that time in partnership with his first wife, Alice, in their firm D. & A. Aronson (now Saines & Partners). Following Alice's death in 1977 he married his second wife, Sandra, and shortly thereafter moved to Melbourne to commence practice at the Victorian Bar in April 1979, where he remained actively championing the cause of injured workers in the Workers' Compensation jurisdiction until December 1989 when he left active practice at the age of 74 years.

Dave attended his first political meeting at the age of 12 to hear a fiery 14-year-old activist, the now famous Judah Waten. Judah and Dave went on to become life-long friends and political comrades along with many others whom he met in the period leading up to World War II. They include a host of renowned artists, journalists, writers and other intellectuals, many of whom are featured in the famous Noel Counihan cartoon of April 1939 of the radical intellectual group which used gather at the Swanston Family Hotel. Dave was no political hack or party bully. He perceived politics from the individual up to the system rather than from the system down to the individual. He was a person of tremendous humanity who accepted everybody as his equal. He hated social inequity and injustice, particularly racism, and lived and worked in a determination to stamp them out. The instinct that made him as a student stand up on a soap box in Yarra Park to argue the rights of workers was the same instinct that he carried through his lengthy and worthy legal career and beyond into his retirement, that saw him not only prepare lunch for the gardener or plumber, but to insist upon them eating with him at his table. There was nothing forced, patronising or self-congratulatory about that sort of gesture. Like his decision to go into the army at the rank of private rather than captain (to which his law degree would automatically have entitled him). It sprang from a personal belief in equality and respect for the individual.

Dave Aronson

In Ballarat, a place of considerable conservatism, Dave's radical left-wing politics did not fit comfortably, and it is testimony to his great strength of character and his tremendous skill and dedication as a lawyer that he came to be regarded in the very high esteem with which he was regarded in Ballarat. By the 1950s, Dave was President of the Ballarat and District Law Society and a member of the Law Institute Council. He did all the work for the trade unions in Ballarat, and his tireless fight for the workers made him a force to be reckoned with. He was clever and tough but a person of enormous integrity and always acted as a gentleman. During the 40 years in which he practised at Ballarat, he used to brief the legendary Ted Hill (with whom he later read when he came to the Bar). Together, Dave and Ted were a formidable combination in ensuring that injured workers received their just entitlements. They were masters at combating any suggestion of recent invention, and on many occasions Ted would call Dave to the witness box to produce and give evidence from his immaculate notes of instruction and thus corroborate his client's evidence. Dave was a top-class plaintiff's solicitor and he carried on that top-class work into his work as a barrister. He was known to be relentless in pursuing his clients' rights and was never scared of a fight. When his opponent would make a first offer to him in the days of the old Workers' Compensation Board Dave would usually say in his gentle, laconic way, "But it's not even the arrears" and so he became known as "It's-not-even-the-arrears Aronson".

He was a tremendous inspiration to younger practitioners but was not shy of sharing his thoughts and strategies with an instructing solicitor by ringing them at five o'clock in the morning. Nor was he shy of "ticking off" an instructor if he thought he or she had not prepared the case properly — never in any malicious way but only to serve his client's interests. Although he was firm in his beliefs, because his beliefs were tempered by such humour, he was a most engaging human being. On finding one day that one of his friends was not appearing for a worker, with a twinkle in his eye and his tongue firmly in his cheek, he was heard to say, "Never mind, you might find that you can still do quite a lot of good for the cause this way anyway".

Throughout the course of his long legal career, Dave worked quietly behind the scenes with other members of the radical left as a force behind the High Court challenge to the Communist Party Dissolution Act. He also helped, advised and prepared a number of people, who were subpoenaed, for the ordeal of giving evidence before the Petrov Commission. Following the great division in the Labor Party in the 1950s, whereby it was determined that there was to be no "unity ticket" between Labor members and communists in trade union elections, Dave was probably unique in that he managed, in spite of his political leanings, to remain a member of the Labor Party and ultimately received a medal from the ALP for 40 years of service.

In his legal career, Dave so endeared himself to clients, particularly in his days as a solicitor in Ballarat, that he was often called upon to write speeches for weddings and funerals. He wasn't in law for the money. He was there to look after people and he practised on a "no win, no fee" basis long before it became the advertising slogan that it has become today. He truly used his talents to help people in need, and there cannot be a much greater accolade to any lawyer.

Although Dave retired from active practice as a barrister in 1989, he was far from idle in his retirement. He kept abreast of legal issues and was a walking archive on politics, music, theatre, films, novels and painting. He had a phenomenal memory, matched with an extraordinarily nimble mind and a fascination with what was currently happening in the world. He had a host of friends from all walks of life, and it said a great deal of Dave as a human being that his farewell service, held at Le Pines Funerals in Camberwell on 27 January 1999, was attended by a vast array of people, young and old, consisting of judges, barristers, solicitors, doctors, artists, musicians, journalists and trades people who had come to know and love him.

Other activities in which Dave was involved during his retirement included proof-reading witness statements to assist British servicemen who had been present at the Maralinga tests to achieve compensation, and organising the English translation of some stories written in Yiddish which had been his only language until he commenced school. Amongst his papers found after his death was an application that Dave had once made for a part-time position on the Social Security Appeals Tribunal. After giving a brief outline of his qualifications, his application concluded: "There is a down-side. I am 81 . . . I believe a young 81, and, I believe, I am genetically like my mother who lived to 92"!

The Swanston Family Hotel "putsch" as seen by Noel Counihan in 1939. Fitzpatrick is on the left, conspiring with Theo Moody, a journalist on the Melbourne *Herald* and one-time editor of the *Daily Telegraph*. At the back, left to right, Noel Counihan, Judah Waten, Mervyn Officer, Phillip Lasgourges, Pat Stanley (smoking), William Dolphin, Nutter Buzacott, Bert Jennings. *Front:* Norman Porter, David Aronson, Les Kelly, Dr Albie Phillips, Rafael Wysokier, John Gordon, Sam Sampson.

Dave was always very dapper in his dress, as depicted in the Noel Counihan cartoon. One morning, while walking to work in Ballarat, Dave struck up a conversation with a tailor who was standing outside his shop. Each morning for an extended period greetings were exchanged and Dave ultimately felt it was discourteous not to ask the man to make him a suit. He entered the dark shop, was measured and indicated a fabric in a dark grey suitably sedate for court. When the suit was ultimately completed, Dave took it home promising the tailor that he would wear it the next day.

The only problem was that the sedate grey fabric which Dave had selected in the darkness of the shop turned out to be shot silk which in daylight flashed first silver and then blood red making Dave look like a cross between an Elvis impersonator and a member of the mob. It is reported that a barrister new to the Ballarat circuit mistook Dave for an accused that morning. At lunch-time Dave sneaked home and changed. He never wore the suit again but he felt that he had at least satisfied the tailor's honour. That was the code by which he lived — that you would never knowingly hurt anybody's feelings.

Just as Dave showed courage in his work, so too did he show great courage with his health afflictions over recent times. He would never volunteer what was wrong with him, but if pressed he would just matter-of-factly and briefly say what was happening, and he showed tremendous dignity in the way he dealt with his suffering. He kept up his sense of humour to the last. Two weeks before his death he was admitted to hospital by a pleasant but slightly officious middle-aged nurse. She asked Dave all the usual questions then said, "And, now, what would you like to be called: Mr Aronson, David or Dave?" Dave gave his characteristic tilt of the head, paused, stared her straight in the eye and said, "Just call me darling".

Dave was an easy mixer who enthusiastically formed new friendships throughout his life while retaining his old friendships. Loyalty was his strong suit. He maintained a correspondence for years with people he had met on a train in Italy. He maintained correspondence with someone else he had met at a restaurant on the Champs-Elysées. He was always a bon vivant. Whenever there had been a Bar dinner or any sort of celebration, on being dropped home he'd say, "But you must come in, just one more cognac". In the midst of a dinner or party he'd raise his glass and turn in great merriment and say, "I say, isn't this bloody marvellous". Well Dave was bloody marvellous. He enriched many lives with his intellect, his compassion, his courage and his good humour, and long may his splendid spirit live on.

Dave is survived by his daughter Ruth, and sons Mark and Greg and their families.

Fran Hogan, in conjunction with
Mark and Linda Aronson

Michael J. Casey

MEMBERS of the profession gathered on the 13th floor on 4 February 1999 to have a drink in celebration and memory of Michael John Casey who died on 30 January 1999.

Eulogies were given by Richard Tracey Q.C. and John Smith, recounting with warmth and humour Mick's life.

I first met Mick in his later years at the Bar, fighting him by day on the Warrnambool circuit and dining with him at night when he returned from the Warrnambool club and when he would always choose with care a good red.

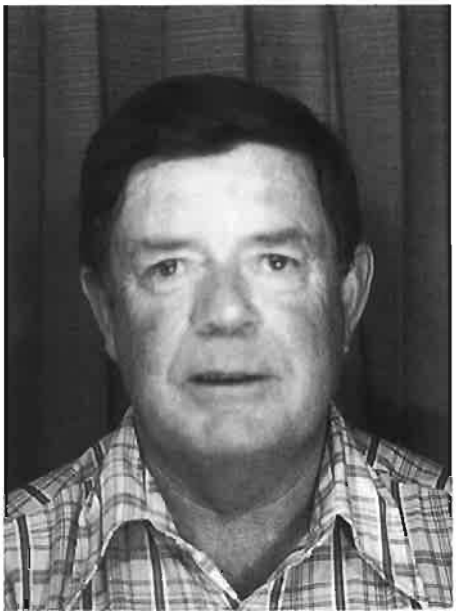
Mick was our Rumpole. He looked like him. He had a great love of red wine, cigars and of reciting poetry, and saw it as his duty to tell all judges that their charge to the jury was wrong and had done a great injustice to his client's case.

Mick was born at Swan Hill on 2 May 1928. He was the fifth of nine children brought up on a small Mallee farm at Bolger West before moving to Shepparton. He frequently spoke of his education at Bolger West Primary as one of thirteen students (many of whom were Caseys) where he obviously developed his great love for the Australian poets and writers, in particular Henry Lawson, Banjo Patterson and CJ Dennis.

Upon completion of his secondary education at St Brendan's in Shepparton Mick commenced his career in the law department, first at the titles office and later in the courts branch. He became the clerk of courts at Warracknabeal. It was at Warracknabeal his only child and pride and joy Gerard was born. It was also at Warracknabeal where Mick played in the premiership team and educated a raw-boned 16-year-old farmer's son Russell Crow in the ways of football, enabling him to later play for Fitzroy and Victoria.

Mick commenced his law course when a clerk and completed the six required law subjects to qualify as a magistrate but then resigned from the law department, to work for Lauri Pentilla at Coburg. In 1963 he graduated from Melbourne University, and was then articled to Mr Pentilla.

He later joined the firm of solicitors Tunnock Clark. Upon the death of Mr Tunnock he became a partner and the firm became Tunnock Clark & Casey. Mick did mainly personal injury work, particularly for defendants. He acted for Club Motor and the State Insurance Office.



Mick Casey

The rigours of legal practise never appealed to Mick so he opted to become a man of leisure by signing the roll of counsel in 1973 and reading with Jeff Sher.

Mick practised in the Magistrates Court and quickly progressed to the higher jurisdictions where he gained a reputation as a jury advocate. His deep grumbling and resonant voice, his rotund figure, his robes, which over the years developed a greenish hue, and his smoking of a large cigar in and around the court (even after the bureaucrats tried to stop him) inevitably led to the comparisons with Rumpole

In court he was aggressive and fearless. Out of court he was a genial and loyal companion. Advocacy led to many spirited arguments but he always ensured that such arguments between counsel remained in court and did not interfere with his personal relationships with colleagues. On one occasion Judge Ross became exasperated with Mick and I fighting heatedly for some period of time and made some comment to the effect that he wished counsel would leave their personal animosity outside the court room. This prompted Mick to take great umbrage and to immediately rise to his feet and tell the court with some passion that he and I were good friends, had firm mutual respect and only fought in court as was our duty to our respective clients.

Mick was particularly genial on circuit, more so-after dinner with colleagues. Mick was a great one to recite and so was his colleague, Jack Keenan Q.C. One evening they were at dinner at the Portofino restaurant in Port Fairy when Jack threw down a challenge, "Recite two pieces each — loser pays for dinner". Mick agreed. They set up a lectern inside the front door. Jack opened with Banjo Patterson's "A Bush Christening". Mick replied with "The Man from Ironbark". Jack followed with "Rio Grande's Last Race". Then Mick pulled his trump card, what else but "How McDougal Topped the Score". When Mick concluded, "And the folk are jubilating as they never did before; for we played Molongo cricket and McDougal topped the score" all in the packed restaurant rose as one. The applause was sustained and prolonged. Keenan paid for dinner.

On another occasion, some years ago, Mick and I went to a new restaurant in Horsham called the Outer Barcoo. When a waitress came to take our order he negotiated with her that if he recited "The Bush Christening", the opening line of which gave the restaurant its name, he could have his dessert without charge. He did so without difficulty to the whole of the restaurant at the end of the night.

Over his years as a lawyer Mick accrued various nicknames - usually bestowed upon him by his friend Stuart Campbell, these days Judge Stuart Campbell of the County Court.

On one occasion Mick was appearing at Warrnambool. It was a widow's case; the widow was suing following her husband's accidental death. The case involved the profitability of a farm and so on. Mick was being led by Pat Dalton Q.C.

Pat decided that he should take all the witnesses dealing with the farming enterprise and that Mick should deal

with the medical specialists. Stuart Campbell and Ron Meldrum Q.C. appeared for the plaintiffs. By the end of the case Pat Dalton was allocated the title of "Cowpat" whilst Mick was "Medical Mick" .

When acting for the defendant Mick hated handing out the money which he treated as if it were his own. Thus in the corridors he was known as "Mingy Mick". Mick personally was generous to a fault. He did, however, once complain that after Paul Jens when asked at the Middle Park Bowling Club bar one night whether he was acquainted with a new member Michael Casey said that he knew Mingy Mick well, that he had to shout the bar for a week to convince them that he was not.

When acting for the plaintiff he wanted the world and would fight until he was satisfied he had got the last penny out of the insurer. Juries found Mick an appealing advocate. He addressed juries forcibly but with a touch of Irish humour. He had great court presence. He got good results. But on the odd occasion when the plaintiff missed out Mick would always forego his fee.

In the 1980s Mick dabbled with the sport of kings. At the invitation of his friend Leo La Fontaine he joined a syndicate to race a slow animal called Live Albert. It was at Flemington on 3 February 1983 when Mick almost cleaned up. Live Albert was sent out at 12–1 but some had got on at 16s, some at 25s. The favourite was Tommy Smith's horse from Sydney, Lord Ballina. It was a large field. On reaching the home turn in a 1400-metre race Lord Ballina was out in front and well clear whilst Live Albert was running three lengths last. When they straightened up Live Albert decided to gather in the field, passing one horse after another. By the time they reached the judge, Live Albert had passed all but Lord Ballina. It was a dead heat. Sadly Mick's substantial winnings were reduced by half.

His next venture was with a horse called Sapphire Lad. There was one race which, if all went well, was going to provide for Mick in his retirement. It was the 1986 Schweppes Cup. It was another large field with the Bart Cummings horse, Noble Peer, the favourite. Half way down the straight Sapphire Lad joined Noble Peer and then went past as if Noble Peer were standing still. Sapphire Lad won by two and a half lengths running away. We hurried off to celebrate. Most were on their second drink, which was something a little stronger than Schweppes, when the siren sounded. Protest! The hearing took 30 minutes and the stewards deliberated for a further ten. The protest was upheld with Noble Peer declared the winner and Sapphire Lad relegated to second place. Like many judicial decisions Mick never accepted that one. He never raced another horse. I don't think he ever went to the races again save for the Warrnambool Cup.

Juries found Mick an appealing advocate. He addressed juries forcibly but with a touch of Irish humour. He had great court presence. He got good results. But on the odd occasion when the plaintiff missed out Mick would always forego his fee.

Mick visited Warrnambool as a circuit barrister for in excess of two decades. He is fondly remembered by many of the locals. He was a member of and regular at the Warrnambool Club and a good friend of many local practitioners, even though he often appeared against their clients. The court staff, restaurateurs and other locals enjoyed his good manners and character. The love of this character greatly worried me in my last jury trial against him at Warrnambool in November 1997 before Judge Murdoch. I became aware during the course of the trial that one of the jurors who used to run a restaurant in town had a painting of Mick which she had done from a photo taken by her some years earlier (hanging in her lounge). Mick won the case. He was very modest in his win and unfortunately because of his poor health over the last 18 months, I never had the chance to go one more round with him to reverse the score.

Mick was a keen and able sportsman. He played football and cricket for the East Brunswick YCW and played tennis with the VCLTA. When he retired from those activities he took up golf. His favourite club was Rosanna where he was a member for many years. When illness forced him from the course he took up bowls and performed well also. He was highly regarded at the Middle Park Bowling Club. Within a short time of arriving there he became Club President. When unable to continue bowling he became greatly frustrated, but took pleasure in playing draughts and chess with his grandson John who, too, was his absolute pride and joy.

Although Mick was a good friend who took a keen interest in one's daily joys and woes, he was himself an intensely private person who rarely, if ever, let his guard drop about his personal life.

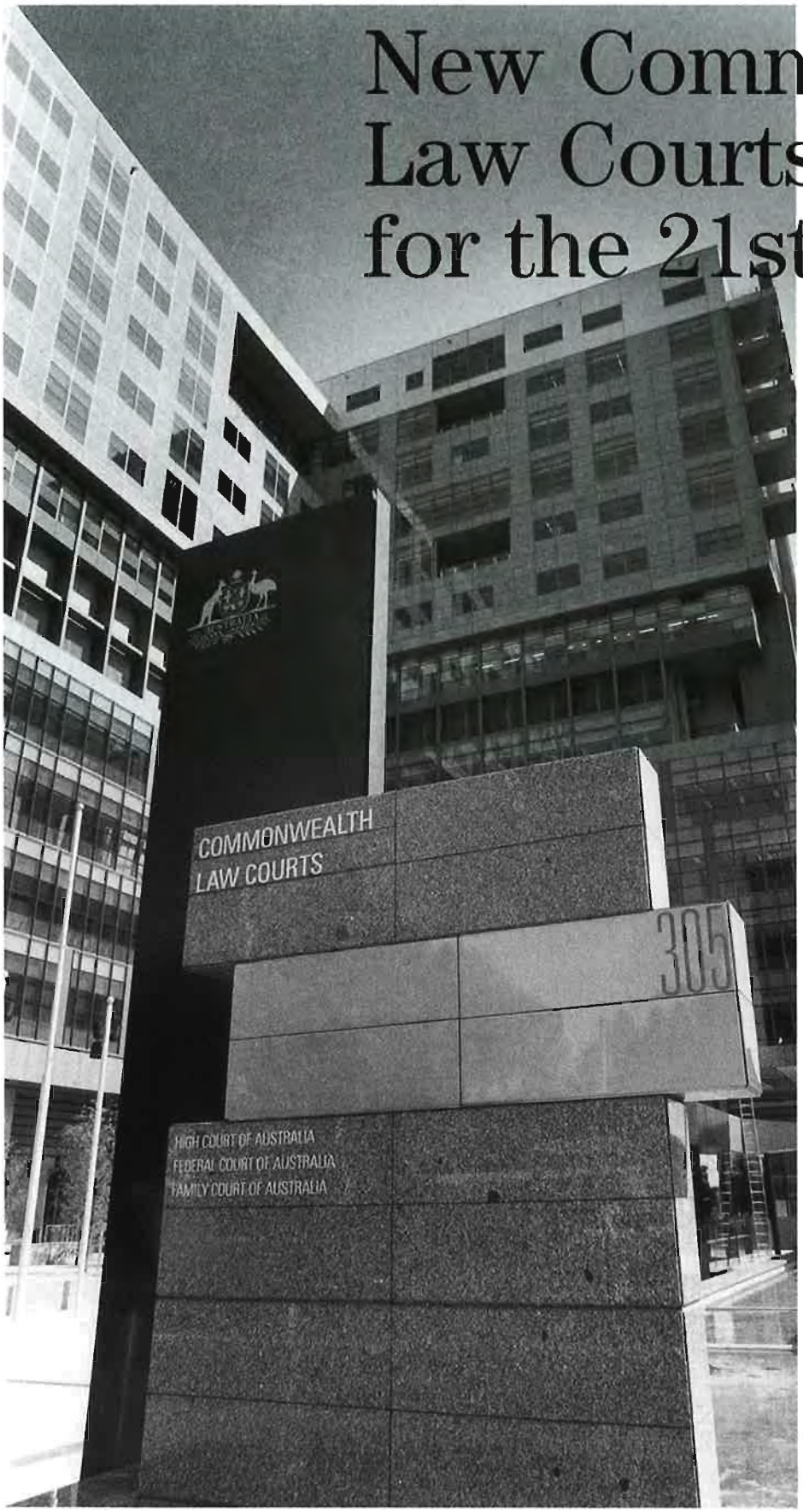
In the law Mick was known as a fighter. In the last ten months or so Mick fought his biggest fight with the loving and generous help of his family. He remained optimistic. Only the Thursday before his death he saw the orthopaedic registrar at the Alfred about his hip operation. The registrar said they would do it that month. Mick made him put it in writing. He was still fighting the good fight.

John Smith concluded his eulogy simply and accurately: "Mick was a good man. Farewell Mick. You leave us with many memories. You will be sadly missed."

Francis Denys Cumbrae-Stewart

FRANCIS Denys Cumbrae-Stewart signed the Bar Roll on 4 October 1934 and was allocated number 312 on the roll of counsel. In 1948 he became parliamentary draftsman in Tasmania and transferred to the non-practising list on 30 April 1957. Cumbrae-Stewart died on 5 August 1998.

New Commonwealth Law Courts: Justice for the 21st Century



THE Chief Justice of the Federal Court believes that justice should be transparent. Certainly, at a physical level, the new Commonwealth Law Courts building achieves this purpose. This building, which brings together under the one roof the High Court, the Federal Court and the Family Court, has 43 court rooms. It is modern, light, airy and in no way forbidding. Everywhere the emphasis has been on light. All court rooms have natural light.

Black CJ says of the building:

> This is an outstanding modern courthouse. It embodies a philosophy that emphasises light, access and visibility. Bright public areas, opening onto a park, and courtrooms with windows and abundant natural light reflect progressive ideas about the courts and access to justice.

The building is actually two buildings joined by a vast roofed open space, in the ceiling of which are four "light cannons" placed there for the purpose of "maximising the penetration of natural light".

The witness rooms (larger than most of us are used to) are actually habitable and do receive some natural light. Even the courts that abut the blank wall of the adjoining building achieve natural light.

A JUDICIAL USE OF MIRRORS

This last is the brainchild of the Chief Justice of the Federal Court. The result is achieved by the judicious (or judicial) use of mirrors. This may not come as a complete surprise to those who had the privilege of appearing against the Chief Justice during his days at the Bar.

The corridor along which Judges travel from their chambers to the

Exterior of the Commonwealth Law Courts building.

courts runs along the west wall of the building between the relevant courts and the neighbouring building. Windows let into the west wall of the relevant courts look into that corridor. Opposite the windows are mirrors so angled that light entering the passageway from a window

The building is actually two buildings joined by a vast roofed open space, in the ceiling of which are four "light cannons" placed there for the purpose of "maximising the penetration of natural light".

Left and right: The central concourse looking north towards Flagstaff Gardens.

at the northern end strikes the mirror and is reflected into the court giving those in the court a view through the window of Flagstaff Gardens.

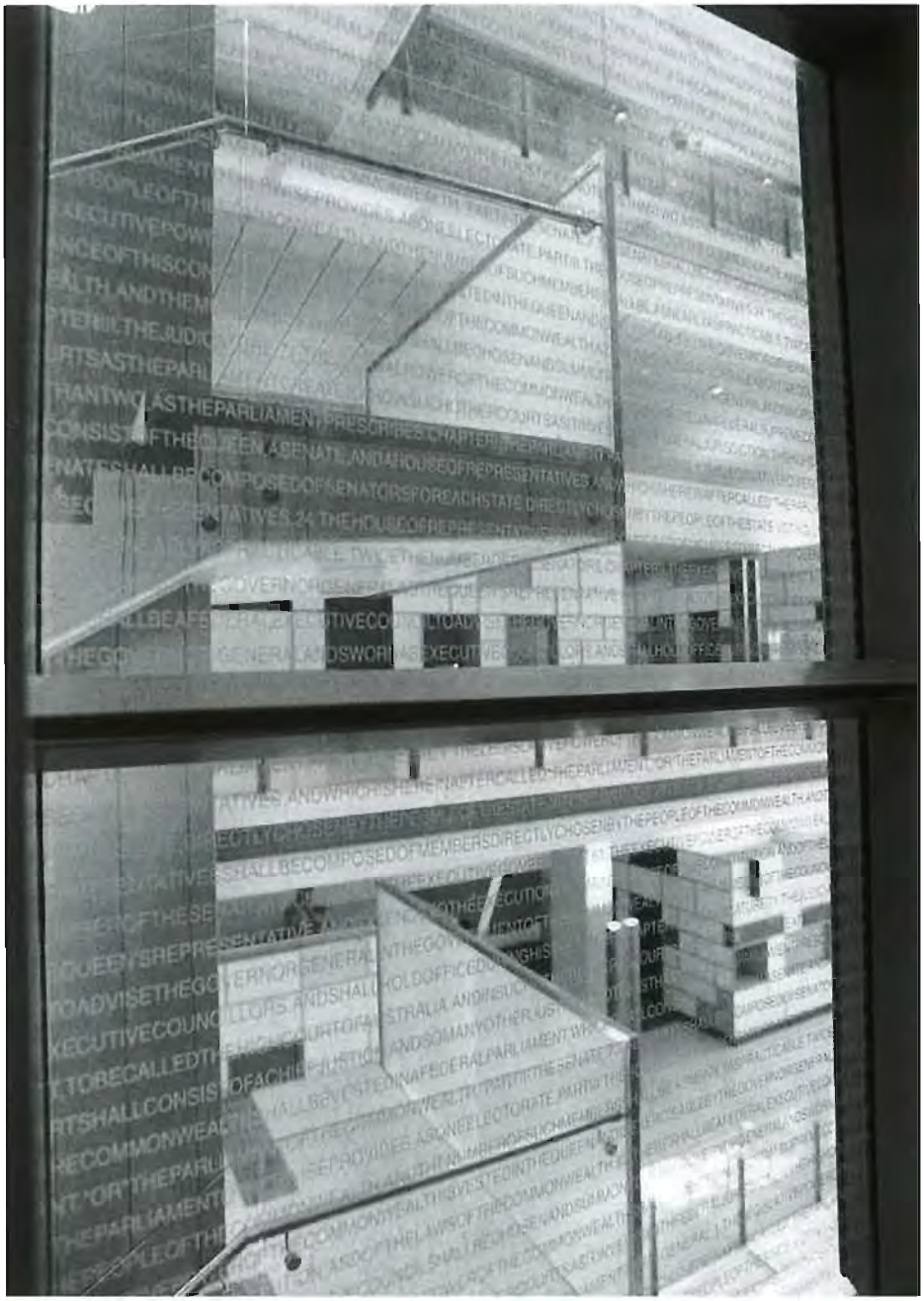
WINDOWS 99

But judges cannot walk the corridors of judicial power exposed to view by anyone who happens to be in the courts they are passing. Both from a security point of view and from the point of view of distraction, the windows on their face present a problem. Black CJ and a physicist from Melbourne University have solved this problem. Infrared sensors detect movement in the corridor and turn off/on a current which causes crystals in the window glass to form/dissolve in response to movement. Consequently, when anyone walks down the corridor, the windows become temporarily opaque.

THE SWINGING DOOR

The No. 1 Court is fitted with a front wall, much of which swings out into the

The central concourse looking south.



Internal windows have the Constitution etched into the glass.

The Courts and the complex are fitted up for computers, video conferencing and live television broadcasts. In this respect the facilities are ultra modern and streamlined. Every Bar table is equipped with cabling to enable all barristers at the Bar table to have direct computer access.

The new building may not be unique in being built on top of a railway station; but it is certainly unusual in this respect. Access to justice, at least in the physical sense, is relatively easy. The building itself is not forbidding. The view looking out into William Street from the foyer provides a classic city view, ornamented rather than encumbered by the purple air vents coming up from the station below. The view to the north is taken up by the trees of Flagstaff Gardens.

Federal Court room showing computer sockets under lift-up panels.

Federal Court room.

open corridor outside the court in such a way as to incorporate that end of the corridor into the court for ceremonial or celebratory occasions. This also is an idea dreamed up by the Chief Justice.

MODERN AND ACCESSIBLE

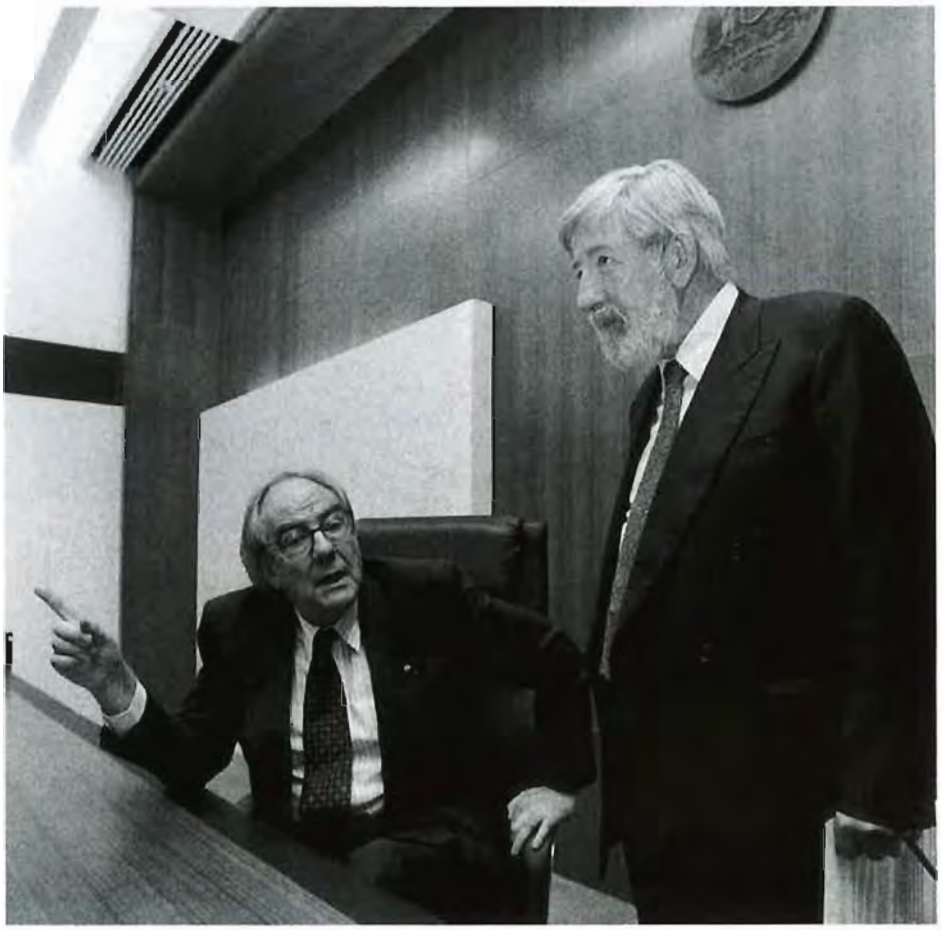
The Federal Court Media Officer claims that the Court complex "is unquestionably the most technologically advanced Court in Australia and even improves on other international state-of-the-art Court Houses".

The interior of the central "hall" is modern, with spacious, clean lines. Some of the use of colour on the walls of the rooms on the west side of the ground level of the building and the green tinting of the glass on the stairs tends to clutter the simplicity of the design, but at the same time as it takes away from the grandeur of the space, it renders it more human and less forbidding to the litigant.

From an aesthetic point of view it might have been preferable if the

Light wells in the ceiling in the central concourse looking south.

Black CJ with the sculptured knob on the entrance to the main court room.

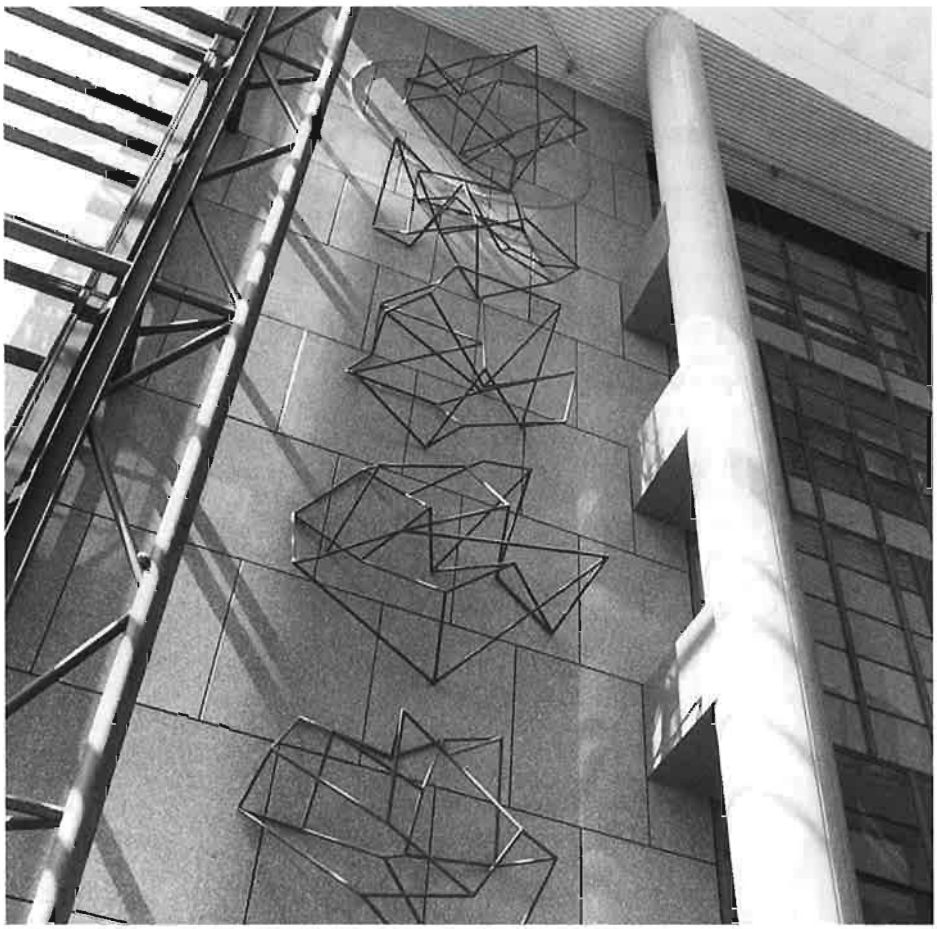


Chief Justice and Editor discuss the new baby.

A Federal Court room located in the centre of the building has natural light from "windows" thanks to a clever use of mirrors.

simplicity displayed by the northern part of the east wall with its superb purple sculpture could have been maintained throughout. From a human

The view from the bench of the main Federal Court room over-looking the Flagstaff Gardens.



The "superb purple sculpture".

point of view, it is possibly desirable that it was not.

There is no question that the Courts will be extremely functional in the best sense of the term. It is a bright and cheerful building and the judges and architects who worked so hard to create it deserve the congratulations of the profession.

Relocation of Melbourne Registry of the High Court

As of Monday 22 February 1999, the High Court of Australia Melbourne Office of the Registry has relocated to the new Commonwealth Law Courts Building on the corner of William and La Trobe Streets.

Please note the new address is:
Level 17
305 William Street,
MELBOURNE VIC. 3000

Tel: 8600 3000
Fax: 8600 3007

The hours of the Registry remain unchanged namely:
9.00 a.m. to 1.00 p.m., and
2.00 p.m. to 4.00 p.m.

Victorian Civil and Administrative Tribunal (VCAT): An Overview

By James Logan

ON 1 July 1998 the Victorian Civil and Administrative Tribunal (VCAT) commenced operations. It was established, on that date, under the *Victorian Civil and Administrative Tribunal Act* 1998 (the Act), to amalgamate some twelve former tribunals, boards and authorities which operated within the Department of Justice and to include the new retail tenancies jurisdiction under the one "umbrella". It is the first "super tribunal" to operate in Australia. The Attorney-General said, in introducing the Bill to the Parliament, that the development of tribunals in the past had been "piecemeal" and had taken place "without any real consideration of the overall system by which Victoria strives to administer justice". One of the major considerations in establishing VCAT was to provide accessible, cost-effective justice and an inexpensive method of dispute resolution.

VCAT is headed by a President — a Supreme Court Judge (Justice Kellam) — and divided into a civil division and an administrative division. Each division is led by a county court judge (Judge Davey and Judge Wood). Within each division there are a number of lists, performing the functions of former tribunals. Each list is controlled by a deputy president and has a pool of full time and sessional members to hear cases.

The divisional and list structure is as follows:

Civil Division

Anti-Discrimination List
Civil Claims List
Credit List
Domestic Building List
Guardianship List
Real Property List
Residential Tenancies List
Retail Tenancies List

Administrative Division

General List
Land Valuation List
Occupational and Business List
Planning List
Taxation List

Also on 1 July 1998 the Business Licensing Authority (BLA) was established by the *Business Licensing Authority Act* 1998. In addition, in order to properly establish VCAT and the BLA, the *Tribunals and Licensing Authority (Miscellaneous Amendments) Act* 1998 was enacted which contains necessary consequential and transitional provisions.

VCAT also assumes the licensing appeals functions and the inquiry and disciplinary functions of the following:

- Motor Car Traders Licensing Authority
- Prostitution Control Board
- Travel Agents Licensing Authority.

The BLA deals with the granting of licences and has replaced a number of bodies which formerly carried out licensing or registration functions.

These included the:

- Credit Authority
- Estate Agents Licensing Authority
- Prostitution Control Board
- Travel Agents Licensing Authority.

The BLA also administers similar functions under the *Introduction Agents Act* 1997 and the *Second Hand Dealers and Pawnbrokers Act* 1989.

Reviews of decisions of the BLA to grant or refuse to grant a licence will now be heard at VCAT.

VCAT can also hear disciplinary inquiries in respect of persons registered or licensed by the BLA. VCAT is able to suspend or cancel a licence, or impose other disciplinary measures such as conditions on the manner in which a licensee carries out business.

VCAT also has jurisdiction to hear small claims and now, following the amendments to the *Small Claims Act* 1973, has jurisdiction to hear claims of up to $10,000.00. The *Licensing and Tribunal (Amendment) Act* 1998 contains further amendments to the 1973 Act. The significance of these amendments is that as from 1 February 1999, the Tribunal in the Civil Claims List will be able to hear small business disputes between traders. The limit of the jurisdiction in "trader–trader" disputes is also $10,000.00, but that limit will not apply if the parties consent, in writing.

On 15 February 1999 an Office of Liquor Licensing was established which replaced the Liquor Licensing Commission, Victoria. Applications for liquor licensing or objections to such applications are made to the Director of Liquor Licensing. An aggrieved party may seek to review a decision of the Director by making an application to the Occupational & Business Regulation List of VCAT. Such an application for review must be made within 28 days after the day on which the decision is made, or, if under the Act, the day on which a statement of reasons is given or on the day a person is advised that reasons will not be given.

VCAT is located at 55 King Street Melbourne, telephone 03 9628 9700. VCAT alternatively can be contacted via e-mail: vcat@vcat.vic.gov.au A range of information is available on the Internet website which will be expanded over time: www.vcat.vic.gov.au

VCAT effectively creates a "one-stop shop" for dispute settlement. Although a common set of procedures applies to all matters, allowances are made for variations in procedure to reflect the specialist nature of some of the jurisdictions. Consistency in decision making for those who use the tribunal system will be

ensured and maintained by comprehensive in-house training of members and the reporting of decisions, amongst other initiatives.

Although a prime function of VCAT is to hear and determine disputes, the Tribunal in the first place encourages parties to attempt to resolve matters themselves. There are a number of procedures provided by the Tribunal designed to facilitate resolution of those disputes. They consist of mediation (s.88), directions hearings, compulsory conferences (s.83), appointment of experts (s.94) and special referees (s.95). These have resulted in a resolution of the majority of disputes without the need for the Tribunal to actually hear the parties and their witnesses and make orders to resolve the dispute. Mediation in particular has been responsible for an extremely high rate of settlement of cases, especially in the domestic building area. With the introduction of VCAT yet a further tool has been introduced in dispute resolution, namely the compulsory conference, which is in effect a "mini trial" of the proceeding. Its success has to date been beyond expectations; cases listed for 10 days or more have been resolved in just one day, with obvious cost saving to parties. (See article: *Law Institute Journal* "Compulsory Conferences at VCAT" by James Logan, November 1998). At this stage there has not been any major use made of special referees for the purpose of alternative dispute resolution, however, in time it is envisaged that this will change as more use is made of the Tribunal. Section 95(1)(a) of the Act enables an expert to decide a question, whilst s.95(1)(b) merely calls for an expression of opinion. The appointment and use of special referees is intended to operate in a similar manner to Order 50 of the Rules of the Supreme Court. The Tribunal has made directions in the Domestic Building List along the lines of that provision.

VCAT exercises original and review jurisdiction: s.40. Original jurisdiction (s.41) can, in the main, be found in the Civil Division, whilst review jurisdiction is to be found in the General Division. In exercising its review jurisdiction VCAT has all the powers and functions of the original decision-maker: s.42(1). In determining a review proceeding the Tribunal may affirm, vary or set aside the decision under review or may remit the matter to the original decision-maker for reconsideration. In its review jurisdiction the Tribunal takes on the role of the former Administrative Appeals Tribunal (AAT as it was known). Guardianship matters are part of VCAT's original jurisdiction: s.42(2).

VCAT is bound by the rules of natural justice: s.98(1)(a). However, it is not bound by the rules of evidence or by any of the practices or procedures applicable to courts of record: s.98(1)(b). The Tribunal may regulate its own procedure — s.98(3) — and may otherwise inform itself on any matter which it sees fit: s.98(1)(c). The Tribunal is obliged to conduct each proceeding with as little technicality and maximum speed as a proper consideration of the matters before it permit. This means that the Tribunal can work less formally than the courts. This is of major benefit to those who wish to make use of the Tribunal in that parties do not have many of the restrictions that can apply when they embark on court proceedings. Further, by virtue of the management of the various lists, parties can anticipate that their case will be brought on for hearing at a very early date.

With the establishment of VCAT there has been a significant departure from the normal rule as to the award of costs, that is, that costs shall follow the event. The general rule at VCAT is that each party shall bear their own costs, subject to certain exceptions. It is probably appropriate to recite the relevant section of the Act in its entirety:

Section 109. ***Power to award costs***

(1) Subject to this Division, each party is to bear their own costs in the proceeding.

(2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.

(3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to:

  (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as:

    (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

    (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

    (iii) asking for an adjournment as a result of (i) or (ii);

    (iv) causing an adjournment;

    (v) attempting to deceive another party or the Tribunal;

    (vi) vexatiously conducting the proceedings;

  (b) whether a party has been responsible for the prolonging unreasonably the time taken to complete the proceeding;

  (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

  (d) the nature and complexity of the proceeding;

  (e) any other matter the Tribunal considers relevant.

(4) If the Tribunal considers that the representative of a party, rather than the party, is responsible for the conduct described in sub-section (3)(a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.

(5) Before making an order under sub-section (4), the Tribunal must give the representative a reasonable opportunity to be heard.

(6) If the Tribunal makes an order for costs before the end of a proceeding, the Tribunal may require that the order be complied with before it continues with the proceeding.

The rationale behind this section and the spirit of the legislation is not to create a burdensome costs jurisdiction, and in so doing dissuade people from utilising the Tribunal to its full extent. There are some safeguards which have been

put into place in order to avoid inter alia the vexatious litigant and to prevent an abuse of process. In addition, where it is evident that the representative of a party incurs unnecessary costs on behalf of his or her client, or causes unnecessary delays, then the Tribunal will have no hesitation in ordering that the representative be personally liable for those costs unnecessarily incurred.

In dealing with the question of costs, of special significance are the provisions relating to settlement offers. These provisions are found in ss112 to 115 of the Act. I have observed that some practitioners have failed to fully understand the ramifications of these provisions, (which in effect, are no different to the Rules in the Supreme and County Courts with regard to offers of compromise), in that they have treated "settlement offers" in VCAT as if they were solely a form of negotiation. In reality those practitioners who are familiar with the jurisdiction, and being especially aware of the costs implications, are making settlement offers at a very early stage in the proceedings with the question of costs in mind. It must be also be appreciated that a settlement offer does not necessarily need to be in monetary terms, for example, it can simply be an offer to perform some part of the works within a specified period of time, or agree to an amendment to a plan. In order for a "settlement offer" to be given proper effect I would recommend that it be drafted as a formal document together with a request that it be acknowledged in writing. The Rules do not at this stage provide for any form of settlement offer or its acceptance, however, the following are forms which I have drafted specifically for the Domestic Building List. The forms can be used in any other list with the appropriate modifications:

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

DOMESTIC BUILDING LIST

BETWEEN 19 No.
Applicant

and

Respondent

SETTLEMENT OFFER OF THE RESPONDENT/APPLICANT

Filed on behalf of the
Prepared by Tel:
Fax:
Ref:

To the Applicant/Respondent:
Note that:

1. The Applicant/Respondent will pay to the Respondent/Applicant the sum of $ [amount] to settle the matter in dispute between the parties.

1A. The Applicant/Respondent is prepared to demolish the retaining north wall at its own expense within fourteen days of this date and within a further fourteen days to erect a retaining wall in accordance with the plans and specifications using oregon timber at its own expense.

2. This settlement offer is open for acceptance for a period of [specify not less than 14 days] days after the day on which it is served.
3. This settlement offer is made with prejudice/without prejudice.

Dated etc.

IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
DOMESTIC BUILDING LIST

BETWEEN 19 No.
Applicant

and

Respondent

ACKNOWLEDGMENT OF SERVICE OF SETTLEMENT OFFER

Filed on behalf of the
Prepared by Tel:
Fax:
Ref:

Take Notice that the Applicant/Respondent acknowledges service on him/her of a Settlement Offer on [insert date].

Dated etc.

Section 109 of the Act does not give any guarantee that a successful party will be awarded costs. In each case it is a matter of deciding whether to order costs or not. Clearly then costs are discretionary. The statutory provisions, of course, allow room for individual views, and it is in this light that the recent decision of the Tribunal given in the Retail Tenancies List must be seen.

VCAT has the power to make declarations and to grant injunctions: ss123 & 124. In the case of an interim injunction the power may be exercised by a judicial member or a member who is a legal practitioner: s.123(2). In any other case the power to grant such relief is only exercisable by a judicial member: s.123 (2)(b). Whilst the Tribunal is bound by the rules of natural justice, it is able to depart from such rules in a situation whereby an injunction is sought, that is, the Tribunal may hear an application for an interim injunction in the absence of a party whose rights may be affected. However, in granting an interim injunction in such circumstances the Tribunal may make conditions and would no doubt require an undertaking from the applicant as to damages.

The following persons have a right to be represented by a professional advocate: a child; a municipal council; the State or a Minister or other person representing the State; a public authority under the *Public Sector Management Act* 1992 and or any statutory office holder under that Act; a credit provider under the *Consumer Credit (Victoria) Code or the Credit Act* 1984; and an insurer under the *Domestic Building Contracts Act* 1995 — s.62(2). A professional advocate is defined in s.62(8) as a person who is or has been a legal practitioner; a person who is or has been an articled clerk or law clerk in Australia; a person who holds a degree, diploma or other qualification in law granted or conferred in Australia; a person who, in the opinion of the Tribunal, has substantial experience as an advocate in proceedings of a similar nature to the proceeding before the Tribunal. This section is not designed to oust the lawyers from the jurisdiction but is really designed in part to permit representation by persons with peculiar qualifications appropriate to certain Lists. Persons other than those referred to in s.62(2) are normally required to seek leave to be represented by a professional advocate, which in some cases may not be granted. It would, for example, be most unusual for a person to be granted leave to appear in the Residential Tenancies List. However, in most cases leave for a party to be represented will be granted, especially in matters of a complicated nature. Indeed representation by competent counsel is of great assistance to the Tribunal.

The establishment of VCAT is probably the most significant legal event in the last century or so in Victoria. It is intended to be a permanent initiative in the community. The legislation is pioneering and its implications are far reaching. VCAT's practices and procedures will no doubt prove flexible and adaptable and suited to the needs of litigants in all the areas of its authority. The initiative is one which is, in many ways, quite remarkable.

Solomonic Absurdity

By Professor Graham Fricke

IN late January 1997, I was preparing to teach Federal Constitutional Law for the second year running, having retired from the bench a year earlier. I was sitting in my office at Deakin University feeling somewhat bored — classes were not due to start for another month — when a fax arrived from the premier of Guadalcanal Province in the Solomon Islands. It asked whether I was prepared to represent the province on a constitutional law case listed before the High Court of Justice in the Solomon Islands.

At first I thought the message might have come from a mischievous friend intent on playing a joke. But it had an impressive seal on it. And the case seemed an interesting challenge for a law professor who had put his barrister's robes in mothballs nearly 15 years earlier. So I contacted the head of my law school and asked him if there was any problem about my arguing a case during the university vacation. He replied that there was none. On the contrary, the university encouraged its teachers to become involved in practice, particularly in the areas in which they were currently teaching.

I then became involved in the dreary task of getting myself admitted in the Solomon Islands. This entailed swearing affidavits and getting documents signed by the Chief Justice of Victoria and other officials setting out my background as a practitioner in Victoria.

The case raised questions concerning the interpretation of the Melanesian country's Constitution. Solomon Islands had been a British colony before it achieved independence in 1978. It consisted of a number of provinces including Guadalcanal. In 1981 the national parliament had passed the Provincial Government Act which provided for the election of members of the Provincial Assembly in each province — comparable to the State parliaments in Australia. For the next 15 years the system functioned in conformity with normal democratic notions. All of the provincial and national parliamentarians were elected by the voters.

Then in 1996 the national parliament passed a new Provincial Government Act which abolished the old provincial institutions and purported to introduce a radically different system. It provided for a system of Area Assemblies in each province — something like local municipalities. Only half of the members of each Area Assembly were to be popularly elected. The other half were to be appointed from among the chiefs and elders. Each Area Assembly was to elect a chairman, who could be either an elected or appointed member. Section 7 of the 1996 Act, then, provided that the provincial legislature (renamed the Provincial Council) "shall consist of the Chairmen of all the Area Assemblies in the province".

In 1996 the national parliament passed a new Provincial Government Act which . . . provided for a system of Area Assemblies in each province . . . Only half of the members of each Area Assembly were to be popularly elected. The other half were to be appointed from among the chiefs and elders.

This represented an astonishing departure from the previous democratic practice of having exclusively elected members of parliament. The parallel in Australia would be for federal parliament to provide that half of the members of each local council were to be elected and half appointed (from, say, the members of the local elderly citizens' clubs) and that State parliaments shall consist of all of the mayors of the municipalities in that State. It would be quite possible for all or most of the members of the new provincial legislatures to be chiefs and elders who had not submitted themselves to the democratic process.

Of course the Solomon Islands is very different from Australia. But, like other parts of Melanesia, it has been developing democratic practices for some years, in contrast to the aristocratic and sometimes oligarchic systems that prevail in Polynesian countries. Moreover, the Constitution of the Solomon Islands expressly contemplates that the country should operate in accordance with democratic notions.

The preamble to the Constitution provides that the "people of Solomon Islands, do now . . . establish the sovereign democratic State of Solomon Islands". It contains a pledge that the government shall be "based on democratic suffrage and the responsibility of executive authorities to elected assemblies", as well as provisions for upholding the principle of equality and the participation of the people in the governance of their affairs. And quite apart from the preamble, section 1 of the Constitution provides that Solomon Islands "shall be a sovereign democratic State".

The provincial governments were incensed by this attempt by the Mamaloni government to reduce their independence. To give the unelected elite — the chiefs and elders — greater powers seemed a backward step, contrary to decades of development of participatory democracy. So the Guadalcanal Provincial Assembly brought proceedings in the High Court seeking a declaration that the *Provincial Assembly Act* 1996 was unconstitutional. And I had been asked to present the argument.

I had no background in political science. But I was unaware of the nature of the library facilities in the Solomon Islands. So I borrowed a book on democracy by an English author called Dorothy Pickles. It was not a particularly erudite work. But it expressed in felicitous language some basic aspects of democratic principles. I was to be glad I had packed that simple text, for the library at the court at Honiara was woefully inadequate.

I had the luxury on this occasion of having ample time to prepare the case, for I flew into Honiara a week before the scheduled hearing date. Normally barristers worry about whether they have enough time to cover all aspects of their

High Court of the Solomon Islands

cases. This time I was concerned that I might become stale by the time the case was called on.

I even had the time to visit the court to observe the usual style of advocacy. I was glad I did that. Solomon Islanders may once have practised cannibalism, but today they seem very gentle folk. Their judges are rather reticent, almost deferential. They are not inclined to challenge counsel or to debate propositions with them. They just sit there and listen. And, because there are no recording facilities, they like to write down every word that counsel utters. Having observed this, I resolved to slow down my rate of delivery, which can be too fast when I am nervous. I made my submissions at dictation speed or even slower. I would pause at the end of each sentence and wait until the judge nodded before I moved on.

There are some quaint anachronisms about legal practice in the Solomon Islands. The judges are invariably addressed as "My Lord" (or the British "M'lud") and "Your Lordship". Thus my pre-trial visit to the court had the further advantage that I was able to take steps to curb no tendency to use the more democratic Australian form of "Your Honour".

One minute before the case commenced, I did indeed feel that a wig was an anachronism as I perspired in the hot court, wondering if my discomfort would affect my concentration. But the moment the judge walked in, the air conditioning was switched on.

I put my argument as succinctly as I could, citing passages from Dorothy Pickles' book as well as from various cases. The judge said little, but asked me at the end if he could borrow the book. I took that as a good sign, but I was concerned about the behaviour of the minister who had introduced the 1996 Act into the national parliament, and who was a defendant in our proceedings. He was reported in the local press as insisting that he would implement the new system in a month or two, even as the case was being argued in which its constitutionality was under challenge.

I felt that I had logic on my side, but I recalled the dictum of Oliver Wendell Holmes that the life of the law is not logic but experience. And I was not sure about the independence of the judiciary in this strange country. My concerns had been exacerbated when my opponent, the attorney-general in the national government, had at one stage loftily informed the judge that he would not be attending the court on the following day, since he had a cabinet meeting to attend. The judge cheerfully accepted this and adjourned the further hearing of the case for two days.

In addition to the argument that the 1996 Act was offensive to notions of representative democracy, I relied on provisions in the Constitution banning discrimination. One section specifically prohibited discrimination based on "race, . . . colour, creed or sex". Since all or practically all of the chiefs and elders were male, whereas 52 per cent of the Solomon Islands community was female, it followed that more than 50 per cent of the community was being discriminated against; that is, women were being denied the opportunity of becoming provincial legislators by the appointment pathway.

I returned to Australia on 18 February. A week or so later I learnt that our argument had succeeded. The judge had declared that the new legislation was invalid. To me, the judgment displayed not only the wisdom but also the strength and integrity of Solomon. But the national government, which was shortly to face an election, appealed to the Solomon Islands Court of Appeal. By then I had resumed my teaching commitments and I was unable to accept the brief for the appeal.

In the event the appeal was allowed, but by the time it was delivered the campaign for the national elections was

under way and the question of the 1996 Act had become a hot political issue. Instead of being fought in the courts, it was debated on the hustings. The campaign resulted in the defeat of the Mamaloni government and normal democratic practices were resumed.

Almost a year after my first visit to the Solomon Islands, I was asked if I could return to argue a matter which had arisen out of a gold mining application. A Queensland company wanted to provide its own electricity supply for a $69 million gold mining project on the island of Guadalcanal. It considered that the Solomon Islands Electricity Authority could not be relied on to provide adequate and sufficiently regular power for the project. (This suggestion would strike a responsive chord for anyone who has experienced blackouts at Honiara).

As a sequel to that dispute, a member of the Electricity Authority had been sacked and I was briefed to challenge the validity of his dismissal. When I looked at my admission certificate and read the fine print, I noticed that it said that I had been admitted to practice for the purposes of the 1997 case. This seemed extraordinary. In any other jurisdiction, when you go to the trouble of applying to be admitted to practice — and multiple documents are required — you receive an authority to practice generally.

But the Solomon Islands authorities had decided, under pressure from the resident practitioners, to have one rule for the locals and one for the outsiders. The locals are admitted once and for all, but outsiders have to seek permission and resort to multiple documents each time they want to appear. (This would be illegal in Australia.) I told my instructing solicitor about this, and he said that he would arrange with a local practitioner to fix things up. So I flew back to the Solomon Islands.

At 9 o'clock on the morning of the hearing, I called in at the court. An official told me that the documentation for my admission had not been completed. A petition had not been included. My solicitors' local agents began desperately to type up the petition. In the course of this operation, the power went off. This, of course, was ironical, bearing in mind the issues in the gold mining case.

The power came back on and the petition was finished. We were then told that the petition could only be dealt with by the Chief Justice. So we tried to visit him in his chambers. He was on holidays, we were told. When we discovered that he was still in Honiara, we tried unsuccessfully to arrange for him to deal with it at his home.

Thus it came as a pleasant surprise — the only one on that morning — when we arrived at the court to be met with a request from our opponents for

Nguzunguzu presented to author by Premier Usa

an adjournment for a week or two. In the circumstances we agreed to their request with alacrity.

We made our way into court intending to tell the judge that the parties wanted the matter to be adjourned. I suppose that if I had given the matter any thought, I would have asked my junior — who was a local practitioner unburdened by any restrictive rules — to mention the matter to the judge. But I had previously been admitted in the jurisdiction and there was no substantive argument to be advanced that day. It seemed a simple matter of courtesy to the court for me to acquaint the judge with the fact that the parties had agreed on an adjournment and request that the court sanction their arrangements. I began to do so.

This produced an extraordinary response from the local lawyer who represented the mining company. It was outrageous for me to appear when I had not been admitted to practice, he argued. He urged the judge not to condone this outrage. The judge seemed quite uninterested in this outburst, but the company's lawyer continued with his tirade, without any obvious judicial response. I explained my position before inviting my junior to take over in acquainting the judge with the details of the adjournment.

At this stage, public relations operatives took over from the lawyers. They examined court records and contacted my employers. The next day's issue of the *Solomon Star* had a front-page article with a headline to the effect that I had been "ordered from the bar table" — which was quite untrue. Before I left the Solomons, I received a telephone call from a gentleman employed by the Melbourne *Herald-Sun* inviting my comments. I was doubtful about the wisdom of getting into a public debate about the matter, but I provided a limited response and disabused him of the suggestion that I had been ordered from the bar table.

On my return to Melbourne after a morning flight from Brisbane, I was confronted with a page-seven article in the *Herald-Sun*, headed "Judge faces jail in mine wrangle". The article was accompanied by a photograph of me in a judge's wig. It was an absolute beat-up which ran to four overheated columns.

The next day the *Herald-Sun* managed to keep the matter on the boil. It became obvious that I had become entangled in the issue of development, in which my instructing solicitors were perceived by the Solomon Islands politicians as ogres. A further article on page nine of the *Herald-Sun* (this time with another photograph of me together with a facsimile of the previous day's article) quoted some comments of the premier of the Guadalcanal Province — the man whom I had represented a year earlier and who had farewelled me at the air-port with a gift of a nguzunguzu (a Melanesian artifact). Premier Usa did not attack me, but was critical of my instructing solicitors for "interfering with a national project that would greatly boost the island's economy". He said that they "were doing a lot of harm to this country and should be banned for ever from entering this country".

I could see where the premier was coming from. Solomon Islands is a desperately poor country. Its citizens have a per capita income of US$364 per annum. They have only 84 kilometres of (pot-holed) bitumen roads in the entire country, which consists of 922 islands. They enjoy one of the lowest population densities in the Pacific region. There is no postal delivery system, and power and

lighting are provided in only ten towns. There is only one set of telephone boxes in the nation, and these boxes, situated in a Honiara building, are reserved for overseas calls.

The politicians fondly suppose that gold mining will provide salvation for their desperate economy. And they may be right. But they are not experienced in handling such projects, and their response to the developers seems a little too enthusiastic.

I noted that the *Herald-Sun* article had quoted my limited response before my departure. I had said that I did not know what agenda other people had — whether it was the mining company seeking to create a diversion or local lawyers seeking to preserve their territory — but it all seemed very strange.

Nevertheless I decided each time the eager journalist made subsequent contacts with me that to respond again would simply provide more fuel for the already overheated debate. I declined to provide any further response and congratulated myself that I had never sought to enter politics.

One after another of my friends and colleagues greeted me with inquiries whether I was out on bail. I recalled a passage from Joseph Dean's *Hatred, Ridicule and Contempt* concerning the case of *Hulton* v. *Jones*. He said that, following the inadvertent libel, the barrister Artemus Jones, who was then on circuit, "met the same faces and heard the same monotonous joke. Wherever he went . . . the libel pursued him, and made his life a burden". The humour of such a situation tends after a while to wear a little thin.

EDITOR'S NOTE

Professor Fricke's concern at the limited admission granted to overseas practitioners in the Solomon Islands ignores the fact that many American jurisdictions have specific provision for ad hoc admission. Hawaii certainly, to my knowledge, is one such jurisdiction. It also ignores the fact that an overseas practitioner seeking admission in Victoria would have considerably greater hurdles to overcome than a Victorian practitioner seeking ad hoc admission in Solomon Islands.

A practitioner coming to Victoria from New Zealand was, until recently, required to pass examinations in Constitutional and Administrative Law before being admitted to practice in Victoria. An overseas practitioner from Canada or the United Kingdom is normally required to undertake a course of study in Constitutional Law, Administrative Law and Real Property.

In late 1990 or early 1991, Gail Owen and I, after a study of overseas admission practices, raised the desirability of Victoria adopting a provision, similar to the Solomon Islands provision, for ad hoc admission of overseas practitioners. Consideration of the proposal was deferred and it has not re-surfaced. If, however, the proposal had been adopted, it would have parallelled the practice adopted in Solomon Islands.

Gerard Nash

A.J. Myers Q.C.

By G.T. Pagone Q.C.

ON 27 October 1998 Allan Myers Q.C. resigned as a director and chairman of Barristers' Chambers Limited.

Allan was first appointed to the board on 11 December 1979. He was appointed chairman on 20 September 1994 succeeding David Habersberger Q.C. who was the acting chairman after the retirement of the previous chairman, the late Garth Buckner Q.C.

The Victorian Bar owes an enormous debt of gratitude to Allan for the service he provided to the company, particularly during its darkest hours.

In 1987 BCL entered into a complicated arrangement with the merchant bank Schroders for the financing of the construction of Owen Dixon Chambers West. BCL leased the building to Schroders for a peppercorn rent and took a sub-lease back at market rents. Unfortunately under the sub-lease, rents could not be reduced although they could be increased in line with the market: a typical ratchet clause. By 1994 the rent had increased by more than $2m per annum to reflect past market rent increases. Melbourne, however, along with the rest of Australia, was suffering a severe property recession and rents had tumbled throughout the CBD to well below the 1987 level. BCL was left bearing high rents for Owen Dixon Chambers West and having a large number of disgruntled tenants.

Some time previously, BCL had purchased the vacant block of land at 542–546 Little Bourke Street. This site shared a corner with Owen Dixon Chambers West, and it was envisaged the block might be used some time in the future for the construction of further chambers. The block was purchased for some $6m, but by the time of the property crash was worth significantly less. BCL had borrowed a large sum of money to buy that block of land. Matters were even worse. The price BCL had paid for the now Douglas Menzies Chambers was well in excess of current market value, and it also was significantly financed by debt. In fact, BCL owed some $15m. The company had a deficiency of assets over liabilities of some $3m. The rule requiring members of the Victorian Bar to hold chambers from BCL was to be abolished. Serious questions were being raised as to whether the company was solvent. In 1994 Mr Lindsay Maxsted, an official liquidator of KPMG Peat Marwick, advised the board on its options in this regard.

Allan Myers Q.C.

Drastic steps were required and BCL was extremely fortunate in having Allan to lead the board during this period. It is no exaggeration to say that Allan saved the company.

The key to the rescue operation was to convince Schroders that it was in their best interests to reduce the rent for Owen Dixon Chambers West. Schroders, for their part, were in a difficult position, as at that stage they were merely acting as trustee for the beneficial owners which included a superannuation fund.

After considerable negotiation, the matter came to a head in May 1995 at a meeting between the directors of BCL and representatives of Schroders. The meeting took place in the Bar Chairman's room. On one side of the table were the directors of BCL and on the other side were the representatives of Schroders. The directors of BCL were joined by Linsday Maxsted. The future of BCL hung in the balance. Allan in his usual style took firm control of the proceedings. He made it quite plain to the Schroders' representatives that unless a reasonable arrangement could be reached the company might have no alternative but to turn to Mr Maxsted. Mr Maxsted's presence added weight to the point. Allan's firmness and powers of persuasion won the day. The rents were substantially reduced. BCL was then able to offer the ODCW tenants a 40 per cent reduction in rent.

Schroders clearly acted in the best interests of their clients but it took a strong leader in Allan to have Schroders take the bold step of agreeing to a major rent reduction.

The National Australia Bank, who was BCL's landlord of Latham Chambers, followed suit and reduced the rents for Latham Chambers. Again Allan was to the fore in negotiating the terms with the National Australia Bank. Without that reduction Latham faced unacceptable rent increases.

The deal with Schroders involved BCL selling what little interest it had in Owen Dixon Chambers West to Schroders. The board made that agreement. It was Allan's strength and far sightedness that saw this achieved without the normal reference to a general meeting of the Bar, and all that would entail.

It took considerable strength of character to steer the company through this stormy period. Hanging over the chairman were the provisions of the Corporations Law concerning insolvent trading. On the other hand the well-being of one of the main institutions of the Victorian Bar had to be protected, and Allan would not be deflected from that task.

The renovation and conversion of Four Courts Chambers into Douglas Menzies Chambers was another project which Allan oversaw during his time as chairman. That conversion has been a huge success. The building and the chambers now look like proper barristers' chambers rather than like some tenement block stuck above a take-away cafe.

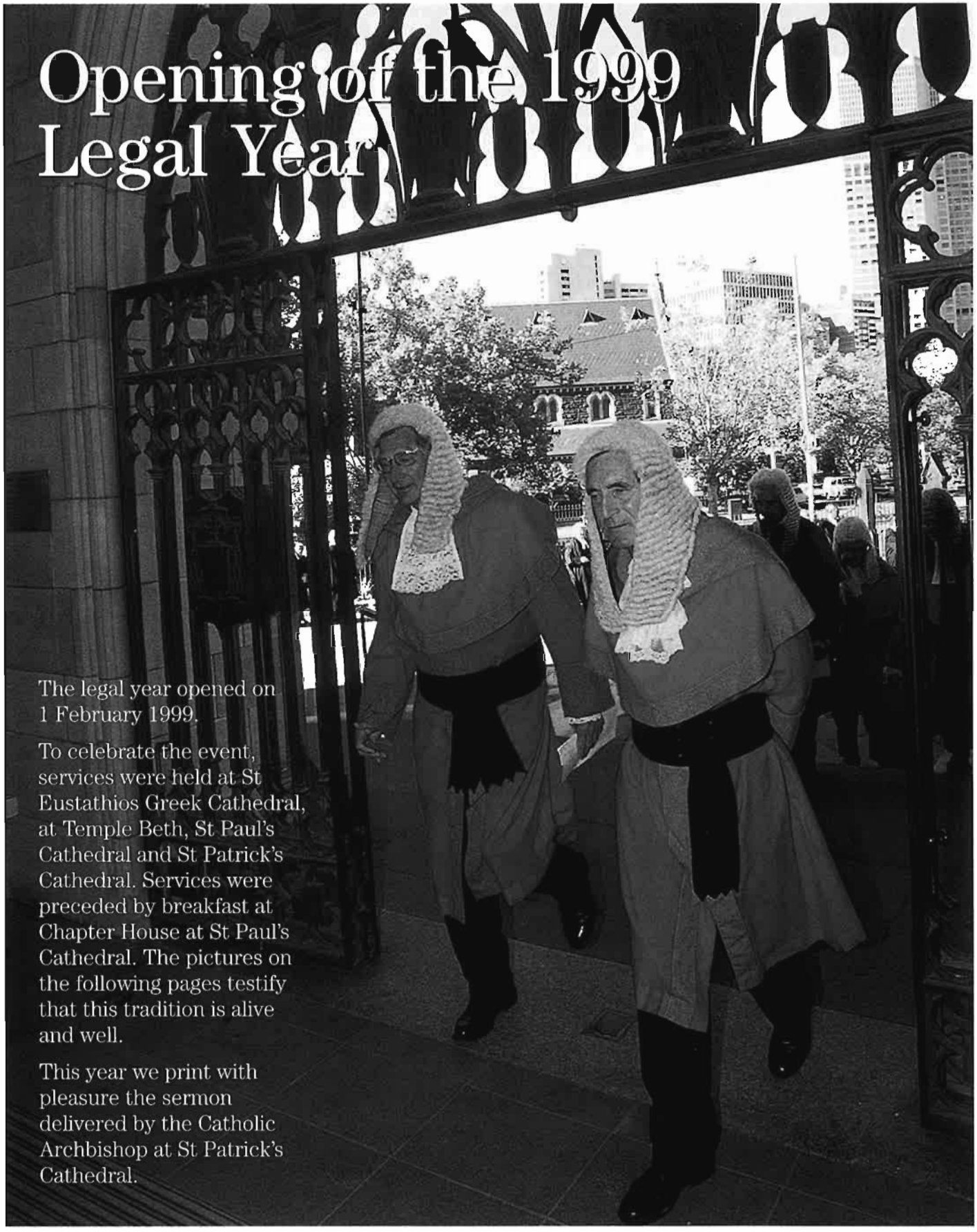
Allan's door was always open to any tenant. He constantly dealt with the most minor of matters along with the major matters. Despite his firmness, he was patient and compassionate.

Today, BCL has shareholder's funds in excess of $13m. It is trading profitably. The Victorian Bar Council is undertaking a program to further recapitalise BCL. This recapitalisation will, it is hoped, enable sufficient debt to be discharged to allow the renovation of Owen Dixon Chambers East. The building will remain in the ownership of BCL.

During the whole of his period on the board, Allan conducted an extensive legal practice, being one of the leaders of the Victorian Bar. Nevertheless, he devoted a considerable amount of time to the affairs of BCL. Board meetings were conducted efficiently. They started exactly on time and normally finished within the hour. Allan would always ensure that board discussions were directed to a particular motion or to deciding a particular issue. It was a great lesson for all concerned about the efficient and expeditious disposition of business. Those remaining on the board will miss Allan's hand being raised accompanied by "just a tick", as he took firm control of any one who would dare interrupt the smooth flow of business.

After almost 19 years of service, Allan decided to retire when it became clear that the essential task of saving the company had been achieved. He felt it was time for new ideas to shape the fortunes of the company. BCL and the Bar have been greatly enriched by the generous service of A.J. Myers Q.C.

Opening of the 1999 Legal Year



The legal year opened on 1 February 1999.

To celebrate the event, services were held at St Eustathios Greek Cathedral, at Temple Beth, St Paul's Cathedral and St Patrick's Cathedral. Services were preceded by breakfast at Chapter House at St Paul's Cathedral. The pictures on the following pages testify that this tradition is alive and well.

This year we print with pleasure the sermon delivered by the Catholic Archbishop at St Patrick's Cathedral.

Catholic Archdiocese of Melbourne — Red Mass

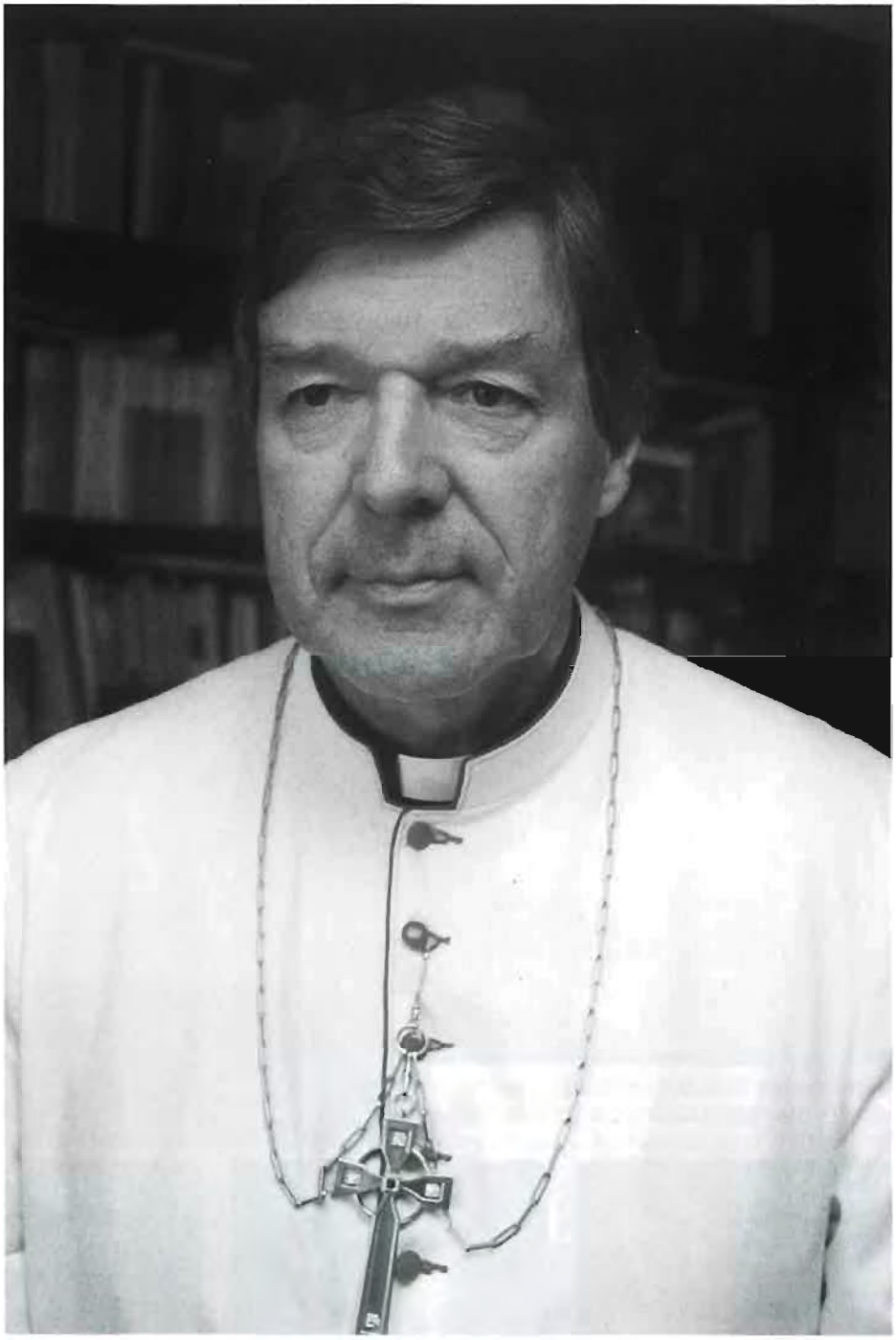
George Pell, Archbishop of Melbourne
Monday, 1 February 1999

TODAY on the first of February we clearly realise that the last or more accurately the second last year of the second Christian millennium is well under way. Many of us have taken some holidays and returned, at least temporarily refreshed, to take up our tasks again. It is time therefore to ask God's continued blessing on our work; and in this case on the mighty important work of judges, magistrates and the legal profession generally in the changing society in which we live.

Let me begin with my own focus of concerns as an archbishop, because I know that terrain better, but also because I believe that profound religious changes will eventually entail profound changes in society generally and particularly in the conduct of the law.

The one true God whom we worship in this cathedral (the same unique God worshipped by the other monotheist religions of Judaism and Islam) is under pressure in our society. Not just in the disputes about the gender of the pronouns and adjectives used in our terms of endearment for God, but because the percentage of Australians with no religion has risen from 2–3 per cent 40 years ago to 18 per cent nationally; an increase of 5 per cent or 6 per cent between the last two censuses.

What consequences in our daily living follow from this decline? Is it connected to the absence of religious strife, the tolerance, or indifference, which characterises Australian society? Is it connected to the fact that fewer are entering into marriage, more people are divorcing, that more babies are being born to single mothers, that fewer extended families are without someone adversely affected by soft or hard drugs? The answers to these questions are fiercely controverted in the culture wars of the Western world, but elements of the West's normative consensus are fraying — subject to deeply held and conflicting pressures, especially on the nature and value of human life. Look at the changes in attitudes to abortion during this century, where abortion in the eyes of many is no longer a crime but a right, a hard-won prize in the struggle for women's freedom and equality.



Archbishop George Pell

Christianity is stronger here in Australia than in many parts of Europe and it is even arguable that the voice of the Christian churches receives more attention in Australia than in the United States, which is much more religious and anti-religious than we are. Most Australians still support the moral framework of

St Patrick's Cathedral

a Christian culture (or much of it), although on particular issues they have a pick 'n mix approach; regarding the Christian package as a type of smorgasbord, with moral teachings as the main course and truths of faith for those who like sweets.

What Christians and conservatives and perhaps all people who value our present civic strengths need to ponder is how long this framework of law and morality might survive if the Christian collapse gathers pace or the understanding of God changes beyond belief? How long can a society flourish on a dwindling spiritual capital?

We all know that there is nothing automatic about the survival of the prevailing moral consensus, not least because many of us would like at least some elements to be changes. About 80

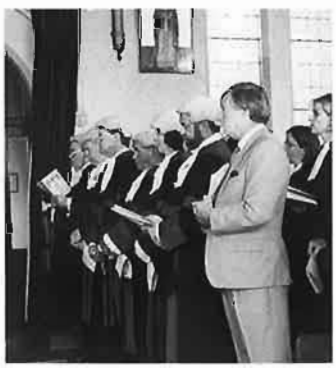
Temple Beth

Left to right: Tom Danos, Rabbi Fred Margaw, Mr Justice George Hampel and Mr Justice Phillip Mandie

Left to right: David Klempfner, Daniel Gurvich, Elizabeth Brimer and Jacyl Shaw

Left to right: Justice John Coldrey and Douglas Salek

St Eustathios Cathedral



Breakfast at St Paul's Cathedral

Left to right: Justice Hayne, Rowena Armstrong Q.C. and Bishop James Grant

per cent of Australian now believe in God. What if the situation ever changed and 80 per cent became atheist or agnostic? My surmise is that when most people in a government or society dump God, they also dump many of their obligations to their fellow man, humanity is redefined and the range of human sympathy altered. Nazism and Communism of Stalin, Mao and Pol Pot were the most extreme and grotesque but undisputed examples of this. Abortion is more controversial, as most still defend abortion by refusing to regard the embryo and perhaps even foetus as truly human. Pressures will continue to limit the humanity and therefore the human rights of the chronically and expensively ill.

It is one of the constant teachings of our present Holy Father, Pope John Paul II, that without an acknowledgment of the paternity of God it will prove impossible to defend a universal human fraternity.

St Paul's Cathedral

Late last year the English *Spectator* quoted an apparently well-known conservative thinker James Fitzjames Stephen who rejected the notion of fraternity as nauseous and unconservative. The only thing that could persuade him to love his brother, he said, was if he believed it was commanded by God Almighty.

Christian monotheism brought immense changes to the Roman Empire and Roman law. A radical decline of monotheism would bring equally momentous and different changes.

I happily concede that the scenarios mentioned are radical hypotheticals, and one of the aims of the Catholic Church is to ensure that such a collapse of faith never occurs. Short of this, we have, however, seen great changes, and much of this change is sure to continue.

In such times of change, Christians have an obligation in their different spheres of activity, while acknowledging the separation of Church and State and the separation of powers, to work towards a society where selfishness is curbed by the demands of the common good and the rights of others, where love, joy and peace can regularly flourish. This is the type of society Isaiah was extolling, one where there was true justice tempered with mercy, where the crushed reed is not broken; nor even the wavering flame quenched.

In such a society, good laws, accessible to the poor also, administered by just and wise judges and magistrates, are an essential constituent, just as there can be no genuine religion without a set of commandments to channel genuine love and protect especially the poor and powerless.

About thirty years ago the Englishman Kenneth Clark put together a brilliant series of television shows entitled *Civilization*, focused mainly on the art and the underlying ideas of the Western world. A wily old Jesuit remarked that Clark's treatment was radically deficient because he said so little about law. You cannot talk about civilization, he claimed, without more talk about law! Naturally this comment provoked a lively discussion at dinner, but his general point was surely correct.

Christians believe that the scales of justice will balance out in eternity, not least because of our belief that Christ will return to reward and punish, to separate the good from the evil at the end of time. Human justice is imperfect, but the faithful poor are always consoled by the Christian teaching that everyone, the judges and the judged, religiously and civilly, will eventually answer to the same all-wise, all-seeing Divine Judge.

Following Jesus, Christians call God father, a tribute to human paternity. We also call on God as a just judge, an equally significant tribute to human judges and human justice.

The Children's Christmas Party

Santa arrives

IT is now official. For many years the Bar Council has believed that the editors of the *Bar News* deserved a reward for their efforts. To implement this policy, a motion was passed that as an added bonus to the job of editorship one of the editors will have the honour of being Father Christmas for the annual Bar Children's Christmas Party. Unfortunately this honour caused much squabbling among the editors. Who would be the first to carry out this treat? It was apparent to all, that the concept of the Editor-Father-Christmas would become part of the rich fabric of the traditions of the Victorian Bar. After many sessions of counselling and conciliating using the new conflict and/or harassment process, a compromise was reached. To avoid hurt and upset the identity of the editor playing the first Father Christmas is to remain secret.

Both editors are confident that no one will be able to identify which of them is pictured on these pages. Those concerned that Simon Wilson Q.C. is no longer playing Father Christmas can but set their minds to rest. Simon's stress at losing the most important feature of his career at the Bar has also been treated by the new stress therapy centre situated at the Bar Mediation Centre. Many will be relieved to find that Simon's ongoing post traumatic stress syndrome and agoraphobia have now been treated by Simon undertaking the famous Rickshaw Inn Yum Cha Diet. Large portions of chicken feet and wong moon gai are the key to stress alleviation.

As part of the Bar Council's innovative new image for the Victorian Bar it has also decided that, at every Bar Christmas party, Santa will be assisted by Twister the Clown. There was much jockeying amongst the in-crowd at the Bar to play the part of Twister. Unfortunately all the photographs taken of Twister's performance at the Botanical Gardens in December, somehow or other, were over exposed. Therefore, as part of the on-going competitions regularly held in the *Bar News*, the question for the next competition is — Who played Twister

Santa gives . . .

. . . and gives . . .

. . . and gives

Santa departs with his helpers

the Clown at the Bar Christmas Party in December 1998?

The best 25 words describing Twister and the person who played him will receive a famous Essoign Claret. Unfortunately Twister and Santa did not get on too well this year, as Twister commandeered Santa's golf cart causing him to walk back from the party in the rain. Naughty Twister.

Alas the expectations of a new Santa were dampened by the weather. It not only rained, it continuously poured. Consternation beset the organisers. How could the parents and children enjoy their picnic in the Botanical Gardens and welcome Santa, when all was damp and soggy? Luckily the organisers knew someone in control, and despite the presence of several other Christmas parties, a pavilion was organised to shelter all from the inclement weather.

And then Santa arrived! It was evident that this brightened up the spirits of all on this dull day. The children flocked around his golf cart as he stepped from it with his trusty elf assistants. Lollies were showered in the path of the children. Their eyes lit up.

Then there was the handing out of the presents. The photographs on these pages testify to the pleasure that many of the children showed in telling Santa what they really wanted on the big day.

And so after Santa had chatted with child and parent alike, had given the presents, had scattered the sweets, said

A motion was passed that . . . one of the editors will have the honour of being Father Christmas at the annual Bar Children's Christmas Party.

farewell, he was horrified to find that there was no golf cart to take him back to the gates of the gardens. Twister had taken the cart for his own purposes. So Santa was forced to walk the long walk back with his helpers holding an umbrella over his head.

Many strangers and non-believers looked at him as he strode towards the Herbarium gates. But a certain magic takes hold when a person dons a Santa suit. A wave from Santa, a smile, a yo ho ho and a boiled lolly can even bring joy to the face of the most cynical adult. So many hours after the Bar Children's Christmas Party had finished, Santa could be seen at the gate of the Herbarium smiling and waving to the traffic and shaking the hands of all around him.

Such is the joy of Christmas, such is the charisma of Santa Claus.

The tradition of the Children's Christmas party will continue. Many thanks must be given to those who spent a great deal of time organising this function and in particular, Fiona McLeod. She is the one who must hire the Santa suit, organise the venue and collect the presents. Next year the weather will be better and it will be the other editor of the *Bar News* who goes forth to spread goodwill and cheer. Look out Twister.

Santa Claus

An Independent Bar: An Extract from the Solicitor-General's Speech

The guest speaker at the 1999 Graduate Program launch at The University of Melbourne was David Bennett Q.C. Mr Bennett is a leading silk at the Sydney Bar, who recently took up the position of Solicitor-General of Australia. In an entertaining speech, Mr Bennett spoke about the advantages of the independent Bar and how fusing the professions of barristers and solicitors would destroy what he believes is one of the best systems of justice in the world. Mr Bennett outlined four factors in favour of an independent Bar.

SPECIALISATION

"ADVOCACY is a specialisation," said Mr Bennett. "As much I suppose as lecturing is. It's something that one does better if one does it all the time. We all know how difficult it must be to be a practising solicitor, seeing clients and ducking off to court occasionally. If one does do that one is not going to appear in court as much. "American lawyers tend to appear in court once or twice a year. Even those who call themselves trial lawyers appear in court very few times a year. Compare that with a barrister in Australia who, assuming any sort of practice, is in courts several times a week for the first few years, and after three years has more experience than an American lawyer has after 30 years. Who's going to be better?"

A LEVEL PLAYING FIELD

"The only way a solicitor in Seymour or Warrnambool or Sale or the suburban solicitor can compete with the big firms in the city is because that firm has the same access to the leaders at the Bar as the big firms have. That's terribly important," Mr Bennett pointed out. "Compare the choice you get. The client of the one-man firm in Sale is going to have access to all the top barristers if they are required for the particular case. And he or she gets the full choice both horizontally and vertically — by horizontally I mean in different areas of specialisation, by vertically I mean in different degrees of experience and cost. If it's a case involving $5000, one can go to someone who's been at the Bar a year. If it's a case involving a billion dollars, one goes to the top silk, one goes to a team of barristers. But either way, one has the choice of the right person."

David Bennett Q.C.

COST

"If you look at the costs of the mega firms compared to the costs of the Bar, they are actually much higher. The daily cost of the individual at the top of the Bar may be high, the cost at the bottom of the Bar is very low indeed. And one has the full range," explained Mr Bennett. "There is no range in the mega firm. You get the six-pack whether you want it or not. And it's worse than that . . . Some years ago I got a brief from one of the big firms in Sydney and three solicitors turned up. It was a commercial matter which had become litigious. One solicitor had been handling the matter commercially, he was a commercial solicitor — fair enough — he had become involved to keep an eye on the litigation. One was the litigation partner who'd come in — fair enough — the litigation partner takes over when it becomes litigious. The third was introduced to me as being from litigation liaison, and what her department did was enable commercial solicitors and litigious solicitors to communicate with each other because otherwise they had some trouble talking the same language and realising what each others' concepts were. I thought that said it all about the costing in those areas."

INDEPENDENCE

"Most firms of solicitors who work in a particular area specialise in one side or the other — the union firms, the management firms, the plaintiff firms or defendant firms or so on. Indeed I got a membership document recently from the Trial Lawyers Association in America where members were in two categories — plaintiff lawyers or defendant lawyers — there is no box for lawyers who do both. It doesn't exist," said Mr Bennett. "And that, it seems to me, must make one less able to look impartially at the sort of work one is doing. The Bar is not totally free of that, of course, but by and large, barristers who practise in most areas do tend to appear on both sides."

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Michael O'Loghlen Q.C. Wins First Pelikan M800 in Pen City Competition

The winner of the competition in the Summer issue, Michael O'Loghlen Q.C. has chosen to write an apocryphal judgement based on the statement by Mason J in *A* v. *Hayden* (1984) 156 CLR 532: "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.*" See his winning entry below.

What the winner responded to:

"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*."

Michael O'Loghlen Q.C., right, receives his Pelikan pen from John Di Blasi of Pen City.

The winner's Pelikan M800 winning entry:

The Court 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.* Upon evidence yet to be concluded and facts yet to be determined, the relevant park bench may or may not have been responsible for the almost complete destruction of much of the inner city area ("the disaster"). Equally, as counsel for the bench submitted, another agency or perhaps a sinister organisation may have been involved. On a case stated, of course, this Court will not give advisory opinions in circumstances still hypothetical: *Schnabel* v. *Gange* [1974] VR 286. As I indicated in argument, that is enough to dispose of this matter. Yet I was pressed with more, as the transcript shows:

His Honour: Don't tell me there's something else that I must consider.

Counsel: There is, Your Honour.

Notwithstanding my none too thinly veiled imprecation, counsel insisted that very recently enacted legislation was of crucial importance in the resolution of matters connected with the disaster. I was informed by counsel that the *Park Bench (Suppression of Evil) Act* 1999 ("the 99 Act") received Assent this morning and represents the Parliament's considered response. I ought to say, at once, that the 99 Act seems replete with unusual notions. Its purview was explored before me with as much rigour as the half hour, less the usual breaks, set aside under the Courts

Management (Peak Efficiency) Act, permitted. Unusual notions aside, the 99 Act raises difficult questions of construction going to causation, and is couched in language that seems at least novel if not impenetrable. It does so in steps which, had they emanated from a less august body, might have been regarded as shuffling and curious. This stated case is not a suitable vehicle for the resolution of these thorny questions, no matter how interesting some may find them. As to the 99 Act, I gratefully adopt *mutatis mutandis* observations made some years ago by Judge Hart who said, "I have no aspiration to be to the Act what Champollion was to the hieroglyphics of ancient Egypt or Rawlinson was to the cuneiform texts of ancient Assyria, but having wrestled with the Act I have a better appreciation of their achievements". Like His Honour in that case, "I add that any hope that the report in *Hansard* of parliamentary speeches preceding the introduction of the Act would serve the function of a Rosetta stone unlocking the mysteries of the language used in the Act has proved forlorn." See *ACC* v. *Raif* (1986) 1 Vic ACR 15 at 16. Further, this Court should not deny anyone the aid of the law on the hypothesis that the general welfare of the State would thereby be advanced. To do so would be "artificial in the extreme and reminiscent of mid-Victorian hypocrisy", as Winneke CJ remarked in *Mills* v. *Baitis* [1968] VR 583. I would observe that such a result should be avoided in Melbourne, as well as in central Victoria. In the circumstances, the proper course is to remit the stated case, with its questions unanswered, to the ruins of the court below.

New Autumn Issue Competition — Same stunning prize. Read this and enter!

Identify the author of at least one of these judicial statements and write an apocryphal judgement based on that statement.

An apocryphal entry which marries all three quotations will be considered very favourably by the judges.

1. "An Australian Stendhal would not refresh his spirit or purify his style by dipping into legislation where the quest for simplicity pays the price of vulgarity and ends in obscurity."
2. "In my view the figure of the tax-gatherer is well known in history. The character pre-dates the Bible and reference is made in Sumerian and Babylonian literature. For example, one could imagine the amazement of the central Ottoman authorities, or for that matter, the feudal kings of England, if any of their tax-gatherers asked for a refund of tax gathered, simply because their own businesses has soured . . ."
3. "I regard the progressive development and refinement of public and professional opinion at home and abroad . . . as an important feature of this case. A belief which represented unquestioned orthodoxy in year X may become questionable by year Y and unsustainable by year Z."

Entries to Gerry Nash Q.C., c/- Clerk S, Owen Dixon Chambers East by 11 June 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

Extra-sensory Perception?

County Court Practice Court

9 November 1998
F.B. Lewis J

Application being made to set aside judgment. Writ served after the defendant had died. Probate had not yet been granted.

Corrigan arguing that the writ had "come to the attention" of the estate.

Judge: "Well, it didn't come to the defendant's attention. Unless of course by extrasensory means."

Robing and Disrobing in Court

Federal Court

21 December 1998
Merkel J

Wardell on an application for final order before His Honour. Being a final disposition, Wardell robed, but His Honour dealt with the matter as a practice matter, therefore unrobed.

Wardell: I'm sorry, Your Honour. I thought I had to robe.
Merkel J: That's alright Miss Wardell, it's not an offence yet.

Murphy's Law

County Court

18 June 1998
Dicker v. *R* on appeal from Magistrates' Court
Coram: Judge McInerney
Appellant: Mr B. Murphy
Respondent: Mr M. Jones

Expert on PBT being cross-examined and giving evidence concerning the resources at Traffic Alcohol Section:
Murphy: At Traffic Alcohol Section there is a free flowing of information between all the technical staff and the police isn't there?
Expert: Yes.
Judge: Is there a Murphy file there?
Expert: There has to be, Your Honour.
Murphy: Yes — it is filed under "I" for innocent.
Expert: There is a Murphy filing cabinet.
Murphy: I am overwhelmed, I'm getting hot and flustered now."

Mis-hearing!

Federal Court of Australia

14 August 1998
EMCL Ltd v. *Esanda Finance Ltd*
Coram: Heerey J
P.K. Searle for applicant
K.S.W. Hargrave Q.C. and Gilbertson for respondent

Mr Searle: Your Honour's reference on Tuesday to *Chitty* on contracts was really quite apposite.
His Honour: I beg your pardon.
Mr Searle: Apposite.
His Honour: I thought you said absurd.
Mr Hargrave: That's what he said to me.

Pull the Other One

Supreme Court of Victoria

27 November 1998
Kevin Francis Meloury v. *E.A. Negri Pty Ltd*
Coram: Eames J
J. Philbrick with P. Coish for the plaintiff
J. Gyles for the defendant

Philbrick: Do you remember the prosthesis that was tried?
— Yes.
Philbrick: What could he do with that?
— It was about as useless as tits on a bull, if you'd excuse the expression.
Philbrick: Yes, thank you.
His Honour: Any re-examination?
Philbrick: Not about that issue, Your Honour.

Voice from the Past

I have been told by my mother, and I believe that she spoke with the deceased after the deceased's funeral.

Legal Profession in Transport(s) The Bus was Driven by a "Coal-face"

It has been drawn to the Editors' attention that in the November 1998 issue of the *Australian Lawyer* the President of the Law Council of Australia pressing for reform from within the profession said this:

"It is crucial that the Law Council and its constituent bodies drive reform of the legal profession, because if that reform isn't driven from the 'coal-face', the profession will find itself on the back seat of a reform bus being driven by the National Competition Council the Australian Competition and Consumer Commission and State and Federal Governments, each of which is already driving reform in respect of some other professions."

New Words

THE urge to invent words is almost as powerful as the language instinct itself. Children freely invent words; lovers develop a private language; most families have a few invented words of their own.

Shakespeare famously invented a huge number of words, or pressed existing words into service with an altered meaning. Advertisers invent and distort words, albeit with enough restraint to avoid alienating their audience. New occupations and altered social circumstances generate a vocabulary to deal with novel ideas and phenomena associated with them.

Here are some new words which are gaining currency, especially in the USA.

404 (noun). An obstacle or barrier, preventing attainment of a goal. It derives from the error message returned on the Internet if a specified file cannot be found at a site. The message reads: "404 file not found". It is a common irritation, which has passed naturally into the everyday speech of computer nerds.

411 (noun). Information or informative details, usually about a planned event or activity. Sometimes said as 4-1-1. It derives from the fact that, in the USA, 411 is widely reserved as the telephone number for information lines. An equivalent construction in Australia is 0055, as an oblique reference to something sordid or salacious, from the fact that phonesex services use the 0055 phone block: *"He had a night of 0055"*.

BFE (adj.) Very far away. (Beyond Fucking Egypt).

Blamestorming A group discussion, the purpose of which is to determine whose fault caused the problem or disaster which now has to be fixed or paid for. Anyone who ever lost expensive litigation will understand it. Blamestorming sessions may have to be conducted by sub-groups: the solicitors and associates, to blame the articled clerks or barristers; the lawyers collectively, to blame the witnesses; the clients and their consultants, to blame the lawyers; and so on.

Chainsaw consultant An external consultant whose job is to reduce the size of the workforce brutally, leaving the board and management blameless.

Cube farm A office where the partitioning reaches just above head-height, dividing the open area into a series of open cubicles.

Ego surfing The practice of scanning the Net and searching electronic databases looking for references to one's own name.

e-mail electronic mail. The most-used facet of computer networks including, notably, the Internet.

Fashionista A person fanatically devoted to the extremes of high-fashion.

Fun (used as an adjective) e.g.: *"We had a fun time"; "She has a fun job"*.

Further-fetched Beyond far-fetched.

Going postal The reaction of a person with a low stress-threshold who is pushed beyond endurance by relatively trivial events, and goes crazy; a reference to postal employees who have snapped and gone on shooting rampages. The character Newman in the *Seinfeld* show was a stereotype of such a character.

Keyboard plaque The disgusting film of dark-grey material on a computer keyboard.

K-Mart express A girl of easy virtue and limited discernment.

Losingest In last place, worst off, lagging behind the rest. (First spotted in the *Wall Street Journal* in 1989, when the former high-flyers of Wall Street were among the losingest of the corporate fall-outs).

Mallrats Groups of feral children, generally dressed in oversized trousers, big-name sports shoes and reversed baseball caps, who hang around shopping malls. Where possible, they travel by skateboard.

McJob A service job, with low pay and limited prospects; a horizontal career path for losers.

Midair passenger exchange Air-traffic control euphemism for a collision between two aircraft. It is followed by aluminium rain.

Mouse potato Computer nerd.

Ohnosecond The instant during which you realise that you have made a catastrophic, irreversible mistake.

Percussive maintenance The art of hitting an electronic device to make it function.

Prairie dogging The result of making a loud noise in a cube farm: co-workers stand up and peer over the partitions to see what is going on.

Rubber-chicken circuit The succession of obligatory lunches and dinners attended by politicians and professional fund-raisers.

Seagull manager A manager who flies in, makes a lot of noise, shits on everything and then leaves.

Shopgrifting Obtaining short-term use of an item by buying it on credit and returning it within the warranty period for a refund.

Snail mail Standard mail, as opposed to e-mail.

Spam Sending the same e-mail message to huge numbers of e-mail addresses. Junk e-mail.

Swiped out The condition of a credit card which has become electronically unreadable.

Umfriend An undeclared sexual partner. *"This is Morton, my . . . um . . . friend . . ."*.

Way (used as an adjective) Very, extremely. *"The party was way fun"; "He is way cool"*.

Web rage Road rage on the information superhighway; the result of slow Internet access speeds turning the Infobahn into the World Wide Wait.

Whatever (as absolute pronoun) Expression of indifference or equanimity when faced with various possibilities *Q: "Would you prefer tea or coffee? A: "Whatever"*; (as verb) to induce a sensation of indifference; to leave an indelible blank in the mind: *"That person whatevers me"*.

****

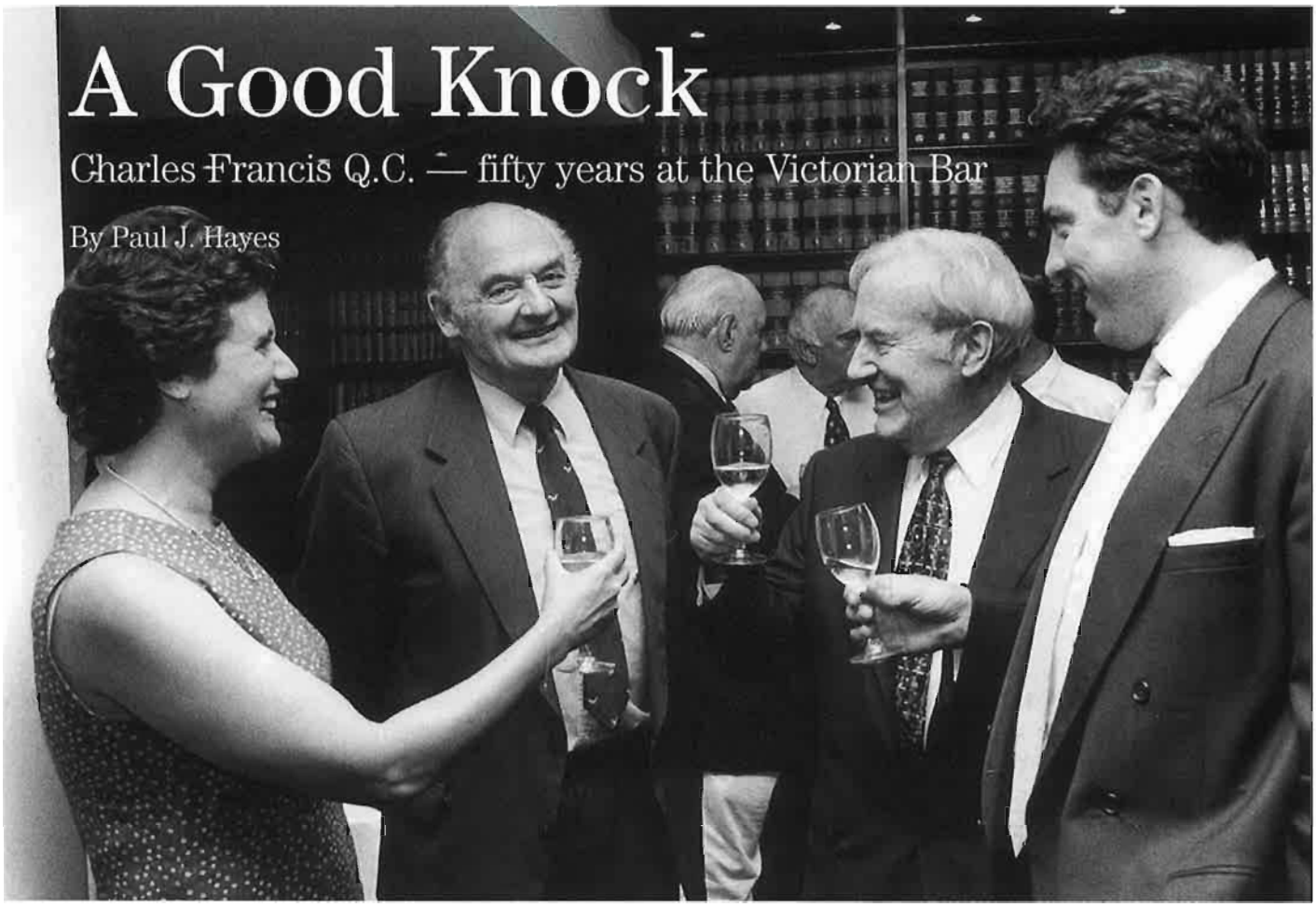
In my last *Bit About Words*, I referred to two common English words which contain six consecutive consonants. They are *catchphrase* and *watchstrap*.

Julian Burnside

A Good Knock

Charles Francis Q.C. — fifty years at the Victorian Bar

By Paul J. Hayes



Charles Francis, second from left, being toasted on his 50th anniversary at the Bar, by his daughter Rowena Keen, left, Peter O'Callaghan Q.C. and M.C. Paul Hayes, right.

ON Thursday, 4 February 1999, Charles Francis Q.C. scored a fine unbeaten half-century and celebrated 50 years of practice at the Victorian Bar with a gathering of friends and associates for drinks in the Neil Forsyth room of Owen Dixon Chambers the following evening.

Toasting Francis was O'Callaghan Q.C., who, amongst other anecdotes, related the story of one of their first professional encounters, which was before the State Liquor Licensing Inquiry in 1964.

The Inquiry (which was chaired by P.D. Phillips Q.C.), was considering whether the State of Victoria had reached a sufficient degree of civilisation amongst its native constituents in those then modern times by doing away with the "6 o'clock swill" and extending the trading hours of public houses from 6 to 10 p.m.

O'Callaghan at the time, led by Campbell Q.C. and supported by McPhee, was appearing on behalf of interests associated with the Hoteliers Association, while Francis was retained by interests who were clearly associated with the Temperence movement.

Needless to say the issue was determined on its merits (an outcome to which all counsel appearing were sympathetic), and Victorian drinkers were subsequently able to leisurely imbibe until the late hour of 10 p.m.

One of the remaining mysteries of the Inquiry, though, is whether Francis's client at the time was aware of what is arguably his single greatest sporting achievement, when he was crowned drinking champion of Melbourne University in 1947, after consuming what legend records as 56 (yes, this is not a typo) 6 ounce beers in a space of approximately three and one-half hours.

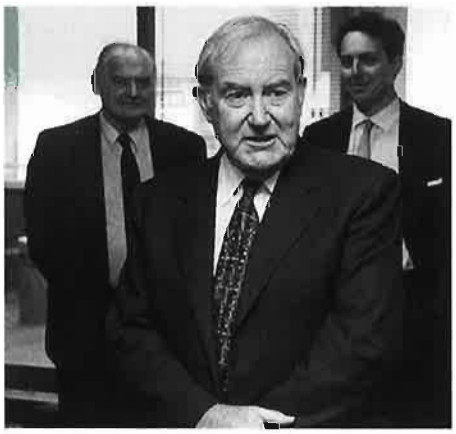
This does force one to consider that if Francis had ever risen to the sometimes dreamt of heights as a cricketer and doffed the "baggy green" for his country, Boonie's place in Australian sporting folklore would be by no means assured.

Somehow, it is difficult to imagine Francis's musical talents stretching to leading the team chorus in a rousing rendition of "Beneath the Southern Cross", despite being referred to in an article recording his admission to practice, published in the the *Herald* on 1 October 1948, as a young Melbourne composer.

Unfortunately, though, like most other young Aussie lads of his day, Francis's childhood ambition of perhaps one day taking the new ball and getting stuck into the Poms at the G on Boxing Day never quite materialised.

Indeed it is Francis who still to this day is credited with having bowled the worst over ever in the history of Bar cricket, when in 1951, in a match against

Charles Francis with his wife and three of his eight children at his 50th anniversary function. Left to right: Geoffrey Francis, Rowena Keen, his wife Babette, Charles, and Prudence Stewart and baby Anna (eight months).



Peter O'Callaghan Q.C. who proposed the toast to Charles Francis, behind left, and Paul Hayes, right, who was the M.C. for the evening.

Charles Francis addresses a function held at the Essoign Club to celebrate his 50 years at the Bar.

the Governor's XI, he bowled six wides in the one over. In fairness to Charles, though, he did only concede three runs off the over.

Francis did eventually find success, however, in his chosen profession, practising in the rough and tumble arena of criminal and common law advocacy, after returning from service with the RAAF as an air gunner during the Second World War and graduating from Melbourne University law school.

Four February 1949 could always be viewed as a watershed in Victoria's recent legal history, as the Bar Council's records reveal not only the name of Charles Hugh Francis but also the names of Keith Arthur Aickin and John McIntosh Young as aspiring juniors having signed the Victorian Bar Roll.

While Sir Keith was destined for the High Court and Sir John was later to become Chief Justice of Victoria, Charles would always remain on the front foot as a fearless advocate, never afraid to take on hard cases.

Many of Francis's more notable cases have been "just causes" and this is reflected in his long recognised interest and activism in the field of human rights

and his lively sense of sympathy for the underdog. This comes as no surprise to those who know him, as after all Charles does barrack for Collingwood.

Some of Francis's more memorable innings at the Bar table include:

- appearing in the Lowe Royal Commission into Communist Party activity in Victoria in 1949 (referred to recently at (1999) 73 ALJ 126)
- *Kakouris* v. *Gibbs Burge & Co. Pty Ltd* [1970] VR 502 (authority for the proposition that inadvertence or lack of judgement of an employee can constitute contributory negligence in an action for damages against their employer, overruling the decision in *Mannu* v. *Ford Motor Co. of Australia Pty Ltd* [1962] VR 464)
- *O'Donnell* v. *Reichard* [1975] VR 916 (a novel application of the rule in *Jones* v. *Dunkel*)
- *Fagan* v. *Crimes Compensation Tribunal* (1982) 150 CLR 666 (appearing on behalf of a child who was ultimately successful in receiving an award of compensation after suffering nervous shock by reason of the murder of his mother)
- appearing as counsel for the accused, in the Farraday kidnapping trials (1973), the South Yarra bombing trials (1988–1989) and the RSPCA murder trials (1990–1991)
- *H.G. & R. Nominees Pty Ltd* v. *Fava and Others* [1997] 2 VR 368 (authority on almost everything from contract, mortgages, guarantee and surety to negligence of solicitors, professional indemnity insurance and real property law)
- having appeared in 46 murder trials with a highly impressive proportion of successful outcomes.

After marrying Babette in 1953, the Francis household expanded as rapidly as Charles's practice at the junior Bar. Faced with the prospect of having to raise and educate eight children (four sons and four daughters), Francis wasted no time in taking silk in 1969, where his practice and reputation continued to prosper.

The enduring success of his marriage to Babette and the fact that all of their children completed their respective terms at University, graduating with the minimum of Honours degrees in a variety of disciplines, with some even excelling at Masters level, is living testament to a life of worthy achievement off the ground, as well as "out in the middle". Charles's rewarding family life was clearly reflected at his "50 years celebration", with his wife Babette in attendance and his daughter Rowena speaking with pride and affection on behalf of all of the Francis family.

But wait there's more . . .

Like Guthrie Featherstone Q.C. MP, C.H. Francis Esq. Q.C. MP entered politics and was elected to the Victorian State Parliament in 1976 as the Liberal member for Caulfield.

Four February 1949 could always be viewed as a watershed in Victoria's recent legal history, as the Bar Council's records reveal not only the name of Charles Hugh Francis but also the names of Keith Arthur Aickin and John McIntosh Young as aspiring juniors having signed the Victorian Bar Roll.

Unlike Featherstone, Francis's high regard for matters of principle saw that his parliamentary career was only short-lived, as in the best traditions of Sir Thomas More, while loyal to Premier Sir Rupert Hamer, Francis had a greater loyalty to his constituents, even if this meant taking a stand against the Premier and the Liberal Party.

In a speech to Parliament addressing the Government's conduct with respect to the 1976 Beach Report into police corruption, Francis was concerned that corruption was not confined to the police force, but was also present within the Government. Accordingly, he launched a scathing attack on the Premier for a miscellany of indiscretions that included the failure to initially table the Report in its entirety and to properly implement all of the Report's recommendations.

His speech to the Legislative Assembly on 13 September 1978, recorded in *Hansard*, contains the following passages (slightly amusing now in hindsight) which colourfully illustrate the vigour and passion with which Francis customarily tackles any justiciable cause.

I have served under a number of leaders and have lived close to leaders, and I say that the Premier lacks the very first quality of leadership. The first quality of leadership is that a man who is a leader looks after his men, and I do not mean by that obtaining cheaper meals in the Parliamentary dining room or free overseas trips.

A man who is a true leader in the political context will help his men to develop their full potential so that they can serve the State to the best of their ability. The Premier does not want under him men of strength and independence; he wants bootlickers. For that very reason he is no leader.

I have found the Premier to be a man who is completely untrustworthy. One cannot believe his word, whether he is answering a question in the House, speaking to the public or giving evidence under oath before the Privileges Committee. Victoria is confronted with precisely the same problem that confronted the American people and the Republican Party after the Watergate scandal. This State now has a leader with no credibility whatsoever.

Ironically, the Government then foolishly went about proving Francis's point, when it abused the parliamentary process to its own advantage and "applied the gag" to Francis, forcing him to abandon his speech long before its intended conclusion. Finally, for the record, the Premier failed to respond to this speech.

In addition serving the constituents of the Caulfield electorate, Francis has also served his colleagues at the Bar. Francis was Chairman of the Bar Council (1987–1988) and was a member of the Council of the Australian Bar Association (1987–1989). Also, Francis continues to serve his country. He is still a consultant to the Australian Defence Force, where he holds the rank of Group Captain in the RAAF Reserve.

But, this is not the end of the story, Francis is very much still at the crease and not a working day passes on the 11th Floor of East without Charles being in court or chambers, attending to his busy practice and telling us all really average jokes.

If "life" is 25 years, then Charles has served two terms at this Bar. Fifty years is a long time and it's all that more remarkable when you look at what Francis has squeezed into them.

Makes you think. There is no doubt at all that Francis has been a prolific run scorer in the legal game, but he has scored even more runs again in a bigger game. Life.

The Victorian Bar Superannuation Fund's Annual General Meeting

Chairman R.McK Robinson Q.C. addesses the meeting held on 25 November 1998

LADIES and Gentlemen: May I welcome you to the 39th Annual General Meeting of the members of the Victorian Bar Superannuation Fund.

Prior to last year's AGM, elections were held for directors of Barfund Pty Ltd the trustee of the Fund. The directors elected in September 1997 were:

Dr I.C.F. Spry Q.C., R. McK. Robson Q.C., P.J. Kennon Q.C., R.A. Brett Q.C. and J.B.R. Beach. M. O'Loghlen Q.C., D.S. Levin Q.C. and M.C. Hines were appointed by members of the Board as alternative directors.

On 7 November 1997, Dr I.C.F. Spry resigned as Chairman and a Director of Barfund Pty Ltd. Previously Dr Spry had indicated to the Board of Barfund Pty Ltd that he may not serve his full term if re-elected. Mr M.C. Hines, his alternate director, was elected by the Board pursuant to the memorandum of articles to fill the casual vacancy.

Dr Spry resigned shortly before the last AGM on 19 November 1997. A motion of appreciation was passed at the meeting. However, little was said of the extraordinary service that Dr Spry provided to the Fund.

It is therefore appropriate that I make some remarks about the service provided by Dr Spry to the Fund.

I happened to be a trustee of the Fund when Dr Spry was appointed as a trustee of the Superannuation Fund on 8 November 1981. Dr Spry replaced Sir James Tait Q.C., the founding Chairman, as Chairman of trustees on 21 December 1981.

At the time Dr Spry was appointed as Chairman of the Fund, the Fund stood at approximately $1.5m. Today it stands at some $56m.

The contribution that Dr Spry made to the Fund was enormous. Let me indicate a few of the momentous decisions and steps that were taken under his stewardship.

When Dr Spry commenced as Chairman the practice of the trustees was to personally select shares on the stock exchange for investment. A trustee would suggest a stock, it would be discussed by the trustees and it would either be invested in or not. The advice of brokers would be sought from time to time. Sir James Tait's approach was "take the broker's advice and do the opposite".

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Dr Spry ushered in a new regime of prudential investment. The Fund decided to appoint professional fund managers to handle its investments. A lengthy selection procedure was undertaken. Many firms were interviewed. Finally, the Fund elected to have its own share portfolio managed in part by Capel Court Ltd and to invest in a pooled investment fund with AUC Ltd. Thus, the choice of particular investments passed from the trustees to professional fund managers under the supervision of the trustees. A consequence of this was that the range of investments increased dramatically and a better return was achieved for members.

When Dr Spry took over as Chairman, the Fund had a significant investment in BCL. In fact one of the reasons for establishing the Superannuation Fund was to provide a means of financing the construction of Owen Dixon Chambers. The trustees under the stewardship of Dr Spry took the sensible decision that members of the Bar should not, in effect, invest their retirement funds in themselves and the trustees decided to terminate the investment in BCL. Thus, despite objections from the Bar Council and from BCL, the superannuation fund withdrew its debentures from BCL. These were then able to be invested in higher growth earnings. Further, the Fund was then insulated from the affairs of BCL.

The 1987 share crash presented the Fund with a major problem. The value of the Fund fell significantly in line with the market generally. After the crash, the Fund took the prudent course of converting its investments into cash and then into bonds through a pooled fund which invested solely in bonds. Thus the Fund was able to take advantage of the significant fall in interest rates which followed thereafter and which increased bond prices.

At one stage BCL was seeking to obtain funding to buy Four Courts Chambers now known as Douglas Menzies Chambers. Dr Spry presided over the trustees when the decision was made not to invest in that real estate.

The decision was a sound one as the value of the property subsequently fell significantly. The Fund does not directly invest in real estate but only through pooled funds which place a small portion of their funds in real estate and in listed property trusts.

The greatest threat which faced the Fund during Dr Spry's office was the introduction of the new government regulation of superannuation funds under the *Superannuation Industry (Supervision) Act* 1993. The initial advice received by the Fund was that the Fund would not receive the appropriate approval as a Public Offer Fund. The advice received was that the Fund would have to be wound up or its affairs transferred to a superannuation fund run by an insurance company or the like.

Dr Spry played a pivotal role in successfully obtaining approval from the Insurance and Superannuation Commissioner for the Victorian Bar Superannuation Fund to operate as a Public Offer Fund. Of course, as you well know, this involved the replacement of the trustees by a corporate trustee Barfund Pty Ltd. The work involved in having the Fund comply with the requirements of the Commissioner were enormous. Memoranda and Articles had to be drawn, submissions made and complaints procedures and other manuals had to be prepared. The amount of work was staggering and Dr Spry carried out the bulk of it.

I think I can say without any fear of contradiction that but for Dr Spry the Superannuation Fund would have had to be wound up or its affairs transferred to a major insurance company.

I think I can say without any fear of contradiction that but for Dr Spry the Superannuation Fund would have had to be wound up or its affairs transferred to a major insurance company.

Dr Spry was acutely conscious of expenditure and kept the expenses of the Fund to a minimum. We today have inherited a very efficient and well run organisation. The Fund provides a significant benefit to many members of the Bar. The members of the Bar and the Fund owe a large debt of gratitude to Dr Spry.

R *v.* Rattenbury & Stoner, and the Power of Advertising

SIXTY-FIVE years ago this September, Alma Rattenbury advertised in the Bournemouth *Daily Echo* for a "daily willing lad, 14–18, for housework. Scout-trained preferred". The successful applicant was George Percy Stoner.

Two months later, Rattenbury and Stoner had become lovers; six months after that, they were charged with the murder of Alma's husband. Their trial was poisoned by the prudish morality of its time, and its aftermath shows what tragic nobility can flourish in the meanest ground.

Alma Victoria Rattenbury was born in British Columbia, Canada, the daughter of a printer. She showed considerable musical talent, and later had a number of songs published. She saw service as a nurse in France during the First World War. She had been once widowed and once divorced when, at the age of 31, she met Francis Mawson Rattenbury.

Francis Rattenbury was 61 when he met Alma. He was a prominent and successful architect. His courting Alma created a scandal, which increased greatly when he moved her into his house, and moved his wife upstairs until she eventually agreed to divorce him.

Such was the scandal caused by the Rattenburys' romance and wedding, that Francis Rattenbury's practice suffered as much as his social life. In 1928, he decided to leave Canada, and he and Alma migrated to England. They settled in Bournemouth, where they rented a house at 5 Manor Road, called Villa Madeira.

By 1934, the passion which had so scandalised Canadian society had largely evaporated from the Rattenburys' marriage. They lived in amiable companionship. Francis found his comfort in a bottle of whisky each day. By all accounts, he was a pleasant and kindly man, worried about money and slightly disappointed in love. Alma was impetuous and emotional; she wrote sentimental songs and longed for fame and romantic love.

George Stoner was 18 when he took employment at the Villa Madeira. He was a simple, uneducated and inexperienced lad. His position as chauffeur and general factotum was quickly overtaken by a passionate romance with Alma who, it is clear, initiated their romantic, then sexual, relationship. Whilst the initial impetus for their romance came from Alma, there is no doubt that Stoner soon fell in love with Alma; and, although they were very different in many ways, Alma fell in love with Stoner.

On 19 March 1935, Alma took Stoner to London for a four-day weekend. They registered at the Royal Palace Hotel, Kensington, as brother and sister. It was Stoner's first time to London. It was their first chance to be together, away from the chance (always present at Villa Madeira) of being discovered. Alma took him to Harrods, where she bought him silk pyjamas and hand-made suits. During that weekend, Alma exposed Stoner to a life he had never experienced, and perhaps never imagined.

At the subsequent trial, Mr Justice Humphreys betrayed the moral judgment of the times when he described this weekend as "the orgy at the Royal Palace Hotel". He also echoed the prevailing sentiment, which now seems astonishing, in suggesting that an active sex-life was unnatural and harmful to an 18-year old boy. He blamed Alma, as an older woman, for having led Stoner into such harmful ways.

When Alma and Stoner returned to Villa Madeira, life for both of them was irrevocably changed. Stoner was now obsessively attached to Alma. Francis Rattenbury suggested a visit to his friend Jenks at Bridport. Alma agreed enthusiastically, because Jenks was in a position to advance money for a building project which Rattenbury had conceived. However, the trip would entail an overnight stay. Stoner was maddened by the idea that he would be driving Alma and Rattenbury to a place where (as he imagined) they would share a bedroom as husband and wife. Alma assured him that she and Rattenbury would have separate rooms at Jenks' house.

The Bridport trip was arranged on the evening of 24 March 1935. They were to set out the next morning. Alma went up to bed at 9.30 p.m., leaving Rattenbury to his nightly bottle of whisky. After a short while, Stoner came to her bed. According to Alma's evidence, Stoner was highly agitated, and told Alma he "had hurt Ratz". Alma did not take this seriously, it seems, because she stayed in bed ". . . until I heard Ratz groan, and then my brain became alive and I ran downstairs . . ."

When Alma ran down to the drawing room, she found Rattenbury lying in his chair, with blood on his head, and a pool of blood on the floor. She then took a large glass of whisky, and soon vomited it up. She continued drinking whisky, and by the time a doctor had been summoned, she was drunk. After a cursory examination, Dr O'Donnell realised that Rattenbury had been seriously injured. He asked Stoner to drive him and Rattenbury to a nearby hospital. Stoner did so, and waited in the car for two hours whilst Dr O'Donnell attended to Rattenbury.

When PC Bagwell arrived at Villa Madeira at 2 a.m., Alma made the first of several admissions. He gave evidence that Alma said: ". . . About 10.30 I heard a yell. I came downstairs into the drawingroom and saw my husband sitting in the chair . . . I know who done it. (he cautioned her) I did it with a mallet. Ratz has lived too long. It is hidden. No, my lover did it . . ." At 4 the next morning, Dr O'Donnell gave Alma half a grain of morphia, and put her to bed.

At 6 a.m., Det-Inspector Carter was present when Alma awoke. She said things then, which she repeated in substance at 8.15 a.m.. What she said at 8.15 a.m., in a statement which she signed, was: ". . . About 9 p.m. on Sunday 24 March 1935, I was playing cards with my husband when he dared me to kill him as he wanted to die. I picked up the mallet. He then said 'You have not guts enough to do it' I then hit him with

the mallet. I hid the mallet outside the house. I would have shot him if I had a gun."

Later, at the police station, when Carter formally charged Alma with attempted murder, she said: "That is right; I did it deliberately and I would do it again."

Francis Rattenbury died the next morning. Alma was charged with murder.

Stoner was also charged with murder. He said only "I understand".

The trial at the Old Bailey before Mr Justice Humphreys began on 27 May 1935. Alma was represented by T.J. O'Connor K.C.; Stoner was represented by J.D. Casswell, whose task was made exceedingly difficult by his client's instructions that he should not say anything to suggest that Alma was guilty.

Alma gave evidence which exculpated herself, and implicated Stoner.

Stoner did not give evidence. He instructed his counsel to admit that Stoner had struck the fatal blows, but that he had done so under the influence of cocaine. He led medical evidence intended to convey that Stoner was addicted to cocaine, but the force of the evidence was diminished by the fact that no-one had ever seen Stoner use cocaine, Stoner gave no evidence of it, and it appeared that what Stoner thought to be cocaine was probably black pepper.

The trial judge summed up heavily against both accused, and was trenchantly critical of Alma for her dominating influence in Stoner's life.

At the end of the fifth day of the trial, the jury returned a verdict of guilty in Stoner's case. He was sentenced to death. The jury found Alma not guilty.

However, the truly remarkable aspect of the case was yet to come.

The public reaction to the verdicts was sharp: Alma was publicly reviled for the role she had played in Stoner's fate; her friends deserted her; her husband was dead, and her lover was sentenced to die. On 3 June 1935, just three days after the verdict, Alma went to a place on the River Avon called Three Arches Bend. There, she wrote a series of passionate letters, in one of which she said: ". . . every night and minute only (prolongs) the appalling agony of my mind . . . If I only thought it would help Stoner, I would stay on, but it has been pointed out to me only too vividly that I cannot help him. That is my death sentence. . ."

She took a carving knife out of her bag and stabbed herself in the chest six times. She was dead when she fell into the river.

At the inquest, it was revealed that three of the knife blows had penetrated her heart.

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On 24 June, Stoner's appeal was heard and dismissed. The following day, his sentence was commuted to life imprisonment. He served seven years.

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A number of books have been written about Alma Rattenbury and George Stoner. Opinions vary about Alma: some say she was a calculating and intelligent woman who was certainly implicated in her husband's murder, and deserted Stoner to save herself. Others say she was not involved, and tried to sacrifice herself to save him. It is true that for a time she tried to take the blame for him; but at trial, when it really counted, she blamed him alone.

Whatever the truth is, her death reveals a strength of character which few mortals could claim; and (in view of Stoner's reprieve three weeks later) it lifted a squalid domestic tragedy into a realm worthy of Sophocles.

Julian Burnside

Conference Updates

3–9 April 1999 (Easter week): Shanghai/Beijing, China. East-West Legal Conference. Contact: Karen Prior. Tel: (07) 3839 6233; Fax (07) 3358 4196. PO Box 843, New Farm, Qld, 4005; e-mail: helix@thehub.com.au.

9–10 April 1999: Agadir. Morocco. Union Internationale des Avocats. GIobalisation and its Consequences on the Legal Profession in Southern Countries. Contact: J.W. Robinson. Tel: (03) 9670 8951; Fax: (03) 9670 2954.

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.

23–24 April 1999: Santa Cruz de Tenerife, Canary Islands. Union Internationale des Avocats. The Processes of Harmonization of Regional Legislation in Terms of Insurance Law. Contact: J.W. Robinson. Tel: (03) 9670 8951; Fax: (03) 9670 2954.

June 1999: Barcelona. Union Internationale des Avocats. Current Developments in Environmental Law. Contact: J.W. Robinson. Tel: (03) 9670 8951; Fax: (03) 9670 2954.

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.

August 1999: Sydney, Australia. Union Internationale des Avocats. Australia as the Banking and Financial Sector of the Asia–Pacific Region. Contact J.W. Robinson. Tel: (03) 9670 8951; Fax: (03) 9670 2954.

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 1990 International Law Programs are available from the Bar's Administration Office, 12th Floor, Owen Dixon Chambers East.

Cricket 1st XI

Left to right, front row: Denis Gibson, Neville Keyton, Mordi Bromberg, Geoff Chancellor. Back row: Dan Christie, David Neal, Joe Forrect, Rowan Skinner, Andrew Dickenson, Lachlan Wraith.
Chris Connor (Capt) was listed MIA, can't organise his court dates.

THERE is something very genteel about watching cricket from the Victorian-era Pavilion at the Albert ground. Unfortunately, this gentility hasn't inhibited the Law Institute from handing out beating after beating to the Bar in this annual gesture at engendering good relations between barristers and solicitors. You have to go back to 28 March 1993 to find the last time the Bar beat the Law Institute at cricket. On that day John Jordan took 4 for 14 on a wet pitch to get the Law Institute all out for 58. The Bar cruised to 4 for 404 to win the game.

Nevertheless, hope springs eternal and on a very pleasant Monday before Christmas, the Bar team, led by Geoff Chancellor, won the toss and batted first. Andrew Dickenson (20), and your correspondent (don't ask) opened the batting. At 4 for 34, gloom started to descend. However, Lachlan Wraith led the Bar's recovery with a sparkling 62 not out. He was supported by a feisty Neville Keyton (21) and some handy runs at the end from Rowan Skinner (9) and Jeff Gleeson (10). By the end of its 40 overs, the Bar had built a competitive score of 146. Brent Lodding (3/29) and (speaking of ageing superstars) Ron Laird (1/19) and Jim Ryan (1/19), led the Law Institute's bowling figures.

Opener, David Neal

Opener, Lachlan Wraith

Cheering, left to right: Mordi Bromberg, Denis Gibson, Geoff Chancellor, Dan Christie, Rowan Skinner.

The question was whether the Law Institute's batting could deal with the Bar's attack. Rowan Skinner was the most impressive of the Bar's bowlers with 1 for 29 for his 8 overs, while Geoff Chancellor, seeking to reinvent himself as an off-spinner, sent down 6 overs for 32 runs. Dennis Gibson surprised himself, the opposition, and his team mates by taking 2 for 15. Dan Christy with 1 for 23 from 8 overs provided some much needed backbone in the Bar's attack. Joe Forrest and Andrew Dickenson needed more time in the nets.

Unfortunately, the sprinkling of current cricketers in the Law Institute team proved too strong for the "coodabeen" and "woodabeen" champions in the Bar's bowling. The Law Institute passed the Bar at 6 for 151 with 4 overs to spare. Brent Lodding (38), D. Last (37), Charlie Brydon (16) and Mick Long (18) all seemed to enjoy providing the Bar with fielding practice for the afternoon.

While the Bar team would not want to upset the almost Greek dramatic structure of these games, there are some Bar cricketers sworn not to give up until the year the solicitor's captain, Bob Carpenter, has to give the speech presenting the cup back to the Bar. Just one or two opening bowlers in next Bar Readers' course should relieve them of their heavy burden.

David Neal

A December Walk in Fawkner Park

Left to right: Jamie Singh, Tony Southall, Tony Radford, Damien Maguire, Adrian Ryan, Tony Cavanough, Bill Gillard, Philip Trigar.

THE Bar 2nd XI sauntered to Fawkner Park on Monday, 21 December 1998 for its annual joust against the LIV.

Some difficulties encountered along the way were (variously): finding parking and the ground, knowing the time, coping with a flood of last-minute briefs (especially post-Longford gas explosion) and suffering from the cricket dinner aura (five weeks earlier).

Meanwhile one Salter (of Phillips Fox) cleared out all but one of his losing 1997 side and at 9.00 a.m. (so it seemed) prowled the boundary and marshalled his 2nd or 3rd (or 1st) District level players, into a side, by 9.45 a.m.

At 10.40 a.m. there were six Counsel present.

Another slight problem was four games in the Season 1998/99 amongst the selected 11 Bar players.

But the day was fine.

By default of numbers, the Bar was forced to bat first.

Problem no. 8 was the pitch, a surprising green top, at least for the first 10 overs. However, the Bar only lost one wicket in that time. Nineteen overs and two hours later it reached a miserly 74.

Deano Curao had stood alone for a bold 30 (as he has promised), amidst the rusty chaos at the other ends.

Lunch of hearty open sandwiches and fresh fruit (Vic Health please note) was, mercifully, consumed.

Damien Maguire and Tony Cavanagh began the Bar bowling attack in steady fashion.

Two for 43, then became 3 for 93 and then 7 for 220 off 27 overs and stumps.

Thumping drives had sailed all over the big Cordiner Oval, metres over the heads of some keen outfielders. The pitch had become benign after lunch and offered no turn for off-cutters or spinners.

By 7/220, the opposition had begun to bat with great uncertainty not knowing whether there would be a (9th) dropped catch.

Few fieldsman were immune from the "buttery fingers" syndrome with one player (who is aware of his nomination) nominated unanimously for the "Golden Glove" award. His was a conspicuous and constant display at deep mid-off. Two consecutive catches were dropped, a third about four balls later, all off the skipper.

(The latter was not immune from buttery fingers, either).

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The team will look forward to better results in 1999.

The weather, the lunch and the outing itself were most pleasant.

Our opponents at the end of the day were a little nonplussed at the inept cricketing display, but were gracious in victory.

Tony Neal, bowled out

Adrian Ryan, out — no score

Dino Curao

Garry Moore Wins First Neil McPhee Q.C. Trophy

Wigs & Gowns Commodore Peter Rattray Q.C. and Captain of Boats James Mighell assist Melanie Sloss and Janine Wylde present the Neil McPhee Q.C. Trophy to Garry Moore.

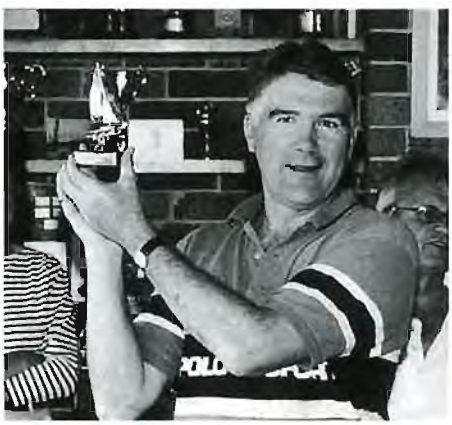
AS a result of the generous support of the Estate and friends of the late Neil McPhee Q.C., the Wigs & Gowns Squadron contested for the first time the Neil McPhee Q.C. Trophy. Needless to say it attracted the cream of sailors from the Victorian Bar and Bench.

After a pre-match briefing and provisioning at the Royal Yacht Club of Victoria jetty, it became immediately evident that the crews that had assembled had a thirst for competition and were sniffing the air for the smell of cordite.

A large fleet set sail in a 20 knot s/s.w. breeze to contest a short course laid off Hobson's Bay. The handicapping committee were kept on their toes by the wide variety of boats that included the magnificent steel ketch "Rosamond Duncan" owned by Judges Campbell and Wood.

The race saw a tightly bunched fleet complete the course without major incident and, in a day of switching breezes, Garry Moore picked a nice little easterly shift to turn the race inside-out and take out line honours.

A presentation and lunch was attended by about 70 people including the skippers, their crews and friends at the Royal Yacht Club. The Perpetual Thorsen Trophy went to Boyes Q.C. (and



Winner handicap, John Richards

Second, Ross McCall Q.C.

Third, Judge Tim Wood

Best seamanship, John Bingeman Q.C. and Lyn Boyes Q.C.

Crew of "Run Like You Just Stole Something", Mike Stevens, Peter Rattray Q.C., Steve Russell

Couta boat "Pearl", skippered by James Mighell crossing the finishing line.

"Ruffian II", Dianne Farlow-Weir, Ken Liversidge, Leigh Norgate, Robin Warlord, Jeff Otter, Barry Rollinson

"Ruffian II"

Judges Wood and Campbell aboard "Rosamund Duncan"

"Rosamund Duncan", Ellen-Nora Conners, Pru Innes, Jane Ackman, Mango Moylan, Judge Tim Wood, Judge Stuart Campbell, Bob Monteith, Zdzislaw Chicmakuch.

Bingeman Q.C.), whilst Richards was the winner on handicap.

It is proposed that the Neil McPhee Q.C. Trophy will be mounted in the Essoign Club and it is expected that the competition in 1999 will be even tougher.

James Mighell

Bar Hockey

Solicitors Win "Comfortable, but Overwhelming"

THE annual game against the Law Institute team was played on 21 October 1998 at the State Hockey Centre. This year we abandoned the traditional preliminary practice match against RMIT because experience showed that the Bar team's collectively ageing physiques are not capable of sustaining even one fully active game let alone two.

This year's contest was marked by unfortunate absences in that Brear, Coldrey, Collinson, Hawking, Sexton, Sharpley, Wood and Young were unable to play.

Faced with such a significant reduction on the pre-existing paucity of talent, it might have been expected that the Bar would have set new records in the margin of defeat. Such forebodings were rapidly apparently confirmed when the Law Institute team coasted to a two-goal lead within the first five minutes of the game.

Thereafter, however, the Bar, notwithstanding the late withdrawal of its usual centre half, Wood, got its game together and goals by Goldberg (2!) and Andrew Tinney got the Bar back to 4–3 shortly before half time.

An inspired, or possibly flukish, reverse stick sweep by Michael Tinney ensured that we went in at half time at 4–all.

At this point a cosy spirit of self-indulgence might have been observed in the ranks of the Bar team. Might have, but wasn't. Everybody in the side knew that we were all absolutely stuffed. The solicitors, as they had shown in the first half, were full of vigour and running.

In the second half we narrowly missed a number of goals with sterling endeavours by Robinson, Dreyfus, the Tinneys and the rest of the usual suspects, but none of this availed against the fact that the solicitors scored three more goals and ran out comfortable, if not overwhelming, victors.

The administrative arrangements were less efficient than usual owing to the absence of Richard Brear in Tasmania, and there are therefore no photographs to show the state of debilitation of the Bar team during and after the match. This is no doubt just as well.

The J.R. Rupert Balfe trophy for the best player was awarded by the umpires to Stephen Parmenter from the Law Institute team and the solicitors will retain the Scales of Justice Cup for at least another year.

The game this year was played in a particularly good spirit, and it is fair to say that notwithstanding the result, all of those involved, not excluding the Bar team, had a thoroughly enjoyable evening.

A motion to refer Stuart Wood to the Ethics Committee for dishonourable conduct in cancelling late was unanimously passed by those with enough breath still to register a vote, but on further consideration was not prosecuted — after all we need him to play next year, and he's our best player.

Those who played for the Bar this year were Burchardt, Burke, Dreyfus, Goldberg, Gordon, Lynch, Niall, Riddell, A. Robinson, A. Tinney, M. Tinney and L. Wraith.

Philip Burchardt

Government Law and Policy, Commercial Aspects

Editor: Bryan Horrigan
Federation Press
pp. v–xiii, 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 the *Teoh* 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 expectation is founded upon a ratified convention. One of the consequences of the *Teoh* 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 five 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 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 caused 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 lawyers library.

John V. Kaufman

Australian Schools and the Law

Edited by Jane Edwards, Andrew Knott and Dan Riley
LBC Information Services, 1997
pp i–ix, xi List of Contributors, xiii–ix Table of Cases xxi–xxiii Table of Statutes xxv–xm Bibliography 1–292, Index 293–305
Paperback

THIS is a collection of 18 chapters contributed by 13 professionals from the fields of teaching, educational administration, academia and the law, organised in three parts as follows:

Part A: **Rights and Responsibilities of Teachers and Schools**

1. Teachers and the management of legal risk
2. Recovery of compensation by teachers for work-related stress
3. The rights and duties of teachers as employees
4. Legislation to outlaw discrimination and promote equal opportunity
5. Indirect discrimination and female teachers
6. An outline of the law of negligence as it applies to school accident cases
7. Educational malpractice
8. Termination of employment

Part B: **Students' Rights and Responsibilities**

9. Teachers and the rights of the child
10. Bullying in schools
11. Schoolchildren and sports law
12. Family law and the school
13. Suspension and expulsion from school

Part C: **Legal Regulation of Activities in School**

14. Health and safety
15. Schools and access to information — freedom of information legislation
16. Industrial relations, labour law and State school teachers: The Victorian experience
17. Rights and duties of school boards
18. Education and the Constitution

Over one half of the text is taken up with Part A; Parts B and C comprise approximately half each of the balance.

The stated purpose of the collection is to provide the staff of schools — administrators, teachers, ancillary staff or volunteers — with an overview of the major contemporary and emerging legal issues which can and do relate to their activities in a day-to-day school context. Its intention is to raise awareness within the school community of the potential legal problems which might arise — and in some cases are just waiting to happen if they haven't already. As the contributors to this collection provide a national perspective and flavour to the collection, it is not possible to deal in a comprehensive way with the law as it relates to any one State. Therefore the focus is on consciousness-raising, dealing with aspects of policy and procedure as practised in schools with a view to describing circumstances which may give rise to problems requiring a legal solution.

Implicit if not explicit in the collection is the fact that the local school is now no longer — if it ever was — merely a stand-alone community organisation with local focus. Schools are either quasi de facto or actual corporations, organised on business principles with strategic goals and mission statements, often with tentacles stretching out to inter-city, national and international reach. Along with trends in the community generally, everyone in schools is aware of the law and its potential for enforcement. There is greater general awareness of risks;

changing attitudes towards liability and accountability; awareness of increased regulation and the complexity of the laws and rules impacting on schools and indeed all organisations in business; and arguably a decline in the resort to conflict resolution techniques over more adversarial ones.

The environment in schools is a dynamic and changing one reflecting general community trends. This timely collection provides a practical checklist — for teachers and practitioners alike — for the many pitfalls of school life. It then suggests pointers to the principles which might allow the problems to be unravelled and thus a workable solution to be found.

For Victorian practitioners, there is much of value in this collection. I suggest the following:

- the contemporary significance of the issues in the book, although the law is stated only to 1997
- topics are explored from a "legal" (i.e. black letter and statutory) perspective, but also from a practical one. For example, the difficulty of pursuing legal rights when there will be a prejudicial effect on relationships within the school or the loss of professional "face"
- the varied perspectives given to problems by different professionals
- a useful chapter (16) on the Victorian experience in labour relations over five years when the Kennett government took on the teacher unions and the State school teachers in offering them individual employment contracts, and the process whereby the teachers effectively became covered under federal awards
- a useful chapter (17) on the rights and duties of school boards, relevant to many parents and practitioners
- the importance of dealing with the problem of perceptions when dealing with professionals, as well as the facts
- the Victorian case study of *Empson* v. *Monash University* (pp. 88–91) describing the difficulties in succeeding in indirect discrimination claims in the educational context
- a discussion of the dismissal of teachers at non-government schools (pp. 141 ff) and Victoria's unique approach
- useful lists of further reading and references are supplied throughout where relevant
- numerous practical and typical scenarios are outlined throughout (especially useful in Chapter 3) to highlight how to identify the relevant issues, the importance of focusing on the particular circumstances and the permutations and possibilities inherent in each case
- highly recommended as a good first base reference to any problem in an educational or school context, with scope and coverage indicating essential State legislation and cases for initial research.

Judy Benson

An Introduction to the Law of Contract (3rd edn.)

by Stephen Graw
LBC Information Services 1998
pp. i–xxvi, 1–381, Index 383–399

THE preface to *An Introduction to the Law of Contract* notes that this work is:

> *. . .written for and aimed mainly at the general reader, those studying contract in other than a formal law degree and law students who may find it useful as preliminary reading, a quick reference or, in extreme cases, a pre-exam crammer.*

The work is an excellent example of a book fulfilling that genre.

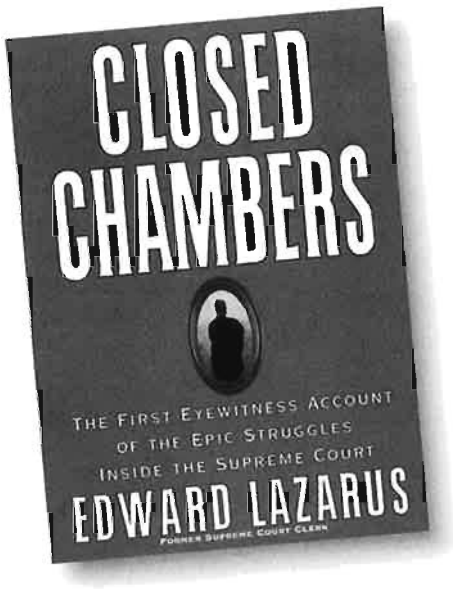
Clearly the work is aimed at students, with each chapter containing a list of questions (but not answers). However, other than this minor distraction, *An Introduction to the Law of Contract* provides an excellent overview of all major aspects and issues in relation to contract law.

To this reviewer's mind, the greatest interest and strength of this work lies in its excellent and frequent reference to cases. The cases are referred to by way of succinct summary of the facts and the decision of the court. A drawback, however, for the "serious" lawyer is that there are no footnotes and scant references to other cases within the text. However, this would seem to be a somewhat harsh criticism given that the work is introductory in nature and by design aimed for the general reader and not the specialist.

Accordingly the author is to be commended for providing in a readable form and style a text ideally suited as an introduction to all the various issues and themes in contract law. For other than those requiring a detailed and comprehensive analysis, *An Introduction to the Law of Contract* will provide an easy-to-use explanation and analysis of contract law that is highlighted and given a practical feel by the frequent reference to summaries of actual cases.

The author is to be commended for this simple and practical text on an essential area of law.

P.W. Lithgow



Closed Chambers

by Edward Lazarus
Times Books
pp. 576
US$27.50 (hard cover)

THE thesis of this "eyewitness account" of the US Supreme Court, by Edward Lazarus, a clerk to Justice Blackmun* during the 1988–89 term, is that the Court is hopelessly politicized, highly fractious, hypocritical and disregards precedents whenever it suits.

Much of the book is the stuff of an overly long law review article. The author analyses the opinions of the Court in *Roe* v. *Wade*, *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* and a number of death penalty and race discrimination cases. He offers his views about the nominations of Robert Bork and Clarence Thomas, the decline in the role of the Solicitor-General and the changes in the Court that followed the

*Justice Blackmun died on 4 March 1999.

forced resignation of Justice Fortas. Lazarus tackles the question of what can be done to "save" the Court. There is, we are assured, "no miracle cure". "The remedy, the power to restore the character of the Court and to repair its inner processes, lies only in the souls of the Justices themselves . . ." Lazarus also opines that the most important qualities in choosing future judges "will be open-mindedness and intellectual integrity". It is difficult to think what Lazarus imagines he is contributing with such triteness. They are certainly not the musings of a profound mind.

The central thesis of the book — that the Court is highly political, fractious and so on — is highly exaggerated and the cases Lazarus writes about have been the subject of any number of books and scholarly articles. More important than its unremarkable thesis is that much of the book is founded upon a fundamental breach of the ethical duties owed by the author to the Court. Ultimately, the book is a very disturbing one, although not for reasons Lazarus intended or is likely ever to understand.

The author makes much of what he says are the "controversial" parts of the book. These "controversial" parts are based on Lazarus' own experiences and observations as a clerk, conversations he had during his lengthy research for the book with "many, many" ex-clerks, and documents shown to him by these clerks.

The real question confronting the reader is whether, and to what extent, Lazarus' tales can be believed. In assessing that question, it is important to bear in mind not only that the "marketable" part of the book is the product of a serious breach of confidence and ethics, but that the author also has an undoubted motive to sensationalize — money. Lazarus stands to gain not only from book sales, but from Hollywood, too. He has sold the rights to the screenplay for an undisclosed sum.[1]

Since the publication of his book, Lazarus, forced to address his ethics, insisted that he had not broken any ethical or legal rule and that the most he owed was "a duty of circumspection".[2] The difficulty with that protestation is that it flatly contradicts the Code of Conduct for Court Clerks, by which he and his ex-clerk informers are bound. Canon 3 of the Code, for example, states that "a law clerk should never disclose to any person any confidential information received in the course of the law clerk's duties . . ."

Lazarus anticipated criticism from the start. In an introduction to the work he asserts that the book "is mainly a work of research and reportage", although it is in part "written as a memoir". He continues:

> At the same time, in describing the private decision-making of the Justices, I have been careful to avoid disclosing information I am privy to solely because I was privileged to work for Justice Blackmun . . . I have reconstructed what I knew and supplemented that knowledge through primary sources . . . and dozens of interviews conducted over the last five years. Indeed, some of the more controversial revelations in the book are things of which I was unaware — or dimly aware — at the time.

This is the only explanation that the author provides of the process he engaged in to produce the book without breaching his ethical obligations. It is both disingenuous and unconvincing.

One of the most troubling aspects of Lazarus' work is that nothing vaguely controversial is attributed to a source. The author asserts, without apparent embarrassment, that the "sacrifice" of non-disclosure of the identity of the interviewees was necessary "in order to further shield the identity of those who helped me". His debt of gratitude, the author is anxious to reveal, does not extend to Justice Blackmun. Justice Blackmun, it is hardly surprising to know, had nothing to do with the book.

Acknowledging that "this approach makes it more difficult for the reader to evaluate some of my assertions" he avers:

> I can only add that, in deciding what confidential source material to use, I have done my best to sift out information that was not independently corroborated *or* inherently credible in light of my own experience. (emphasis added)

The author's use of the word "or" in the passage quoted above is a significant limitation on his assurance that we should trust him. What Lazarus effectively says is that, absent "independent corroboration" (itself an unknown quantity because no source is attributed to anything that calls for corroboration), he has nonetheless included the material in the book if it is "inherently credible in the light of [his] own experience". The author's experience is therefore crucial in evaluating his claim that his stories are to be believed. The problem is that Lazarus does not make clear what experience he drew on in deciding what he accepted as fact. The possibilities include the fact that he graduated from the Yale Law School, his one-year as a clerk to Justice Blackmun and his ten years as a "freelance writer".

It is clear that Lazarus does not have good judgment. Lazarus loathes Justice Kennedy. He takes a dim view of Kennedy's judgment and writing ability because Kennedy once asked a law professor to "find him a clerk who could write like Oliver Wendell Holmes". To Lazarus, the remark demonstrated that Kennedy "yearned to be a phrase maker, an articulator of timeless and profound truths". A less partisan view of the conversation between the professor and the judge would surely characterize the remark as light-hearted and wholly inconsequential.

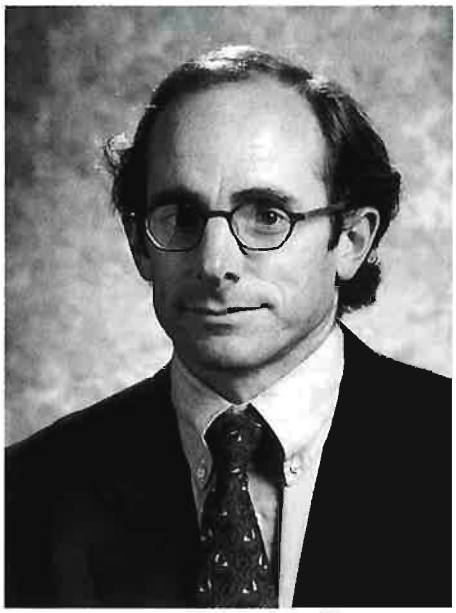
Lazarus also tells a story (uncorroborated, needless to say) that Justice Kennedy is so gullible that Kennedy's clerks tricked him into voting to deny an application for a stay of execution by getting him to vote early. The trick, we are asked to believe, was that Kennedy was more likely to vote for a stay of execution if he was the last judge to vote, and the other judges were split 4–4. The conservative "cabal" of Kennedy's clerks who, according to Lazarus' version of events, wanted nothing more than to see the prompt and efficient execution of every death row inmate in the United States, therefore conspired to ensure that Justice Kennedy voted early and thus inevitably to refuse a stay. It is hard to imagine how such a story could have been "independently corroborated". Given the author's constant carping at the conservative "cabal" of clerks, it is unlikely that Justice Kennedy's clerks spoke to Lazarus. One can only assume that whatever information Lazarus relied upon was, so far as he was concerned, "inherently reliable in the light of his own experience" and passed muster under his own self-imposed criteria. Yet even Lazarus' own descriptions of Kennedy in other parts of the book ("a selective memory", "not a dazzling intellect"), though not flattering, hardly suggest the gullibility and complete lack of self-awareness that Lazarus attributes to him by accepting at face value some story he was told from an anonymous

1. See *The Wall Street Journal*, 13 April 1998, A23.
2. See Edward L. Lazarus, "Rush To Judgment", *California Lawyer*, September 1998, 96.

source outside Justice Kennedy's chambers.

Lazarus shares a not uncommon trait of clerks — an exaggerated and unrealistic sense of self-importance. It is far less common to see it live on for as long as it has in his case. Lazarus recalls a conversation he had with Justice Blackmun about a race discrimination case. Lazarus claims he "had to advise the Justice about whether he should go on the public record joining Marshall's published dissent as Justice Brennan, Marshall's closest ally on the Court, had done soon after it circulated". We are spared the details of the conversation, but it is not unreasonable to believe that the notion that a fledging clerk could "advise" a judge as senior and experienced as Justice Blackmun about such an issue is improbable. In another passage, having summarized again what he sees as the woes of the Court, Lazarus states: "These lamentable developments are in significant part a legacy of my term and what we, Justices and clerks together, wrought". His attempt to attribute blame to the clerks and "his term" for the current ills of the Court is absurd, particularly in light of his "inside" stories about the behaviour of some clerks.[3] In any event, "his term" was probably one of the least notable in the Court's recent history.

Lazarus' world is clearly divided into the good guys and the bad guys. The good guys include Chief Justice Warren, and Justices Brennan, Marshall and Blackmun. Brennan was "the closest thing the law knew to a living demigod". Blackmun was "the most empathetic Justice in recent times and very likely in the history of the Court". Warren "even as he pursued a far-reaching agenda, was usually vigilant in nurturing the Court's institutional integrity". What such accolades mean is less certain than the impression they leave — these are my heroes. The bad guys are Chief Justice Burger, Chief Justice Rehnquist and Justices Scalia, Thomas, O'Connor and Kennedy.



David J. O'Callaghan

Lazarus maintains, without citing evidence, that the Chief Justice lied three times during his confirmation hearings and that he is "deceitful and surreptitious". O'Connor is "far from the most intellectually secure justice". Scalia is "brash, didactic [and] outspoken". Thomas is dismissed in the words of another author, who quotes the judge proudly asserting in defence of a position he insisted upon against the odds: "I ain't evolving". Burger was "an intellectual lightweight whose pomposity, pettiness, and outright dissembling had alienated his colleagues, even his natural allies". The conservative clerks were, to a person, "brash, snide [and] dismissive". Of the current judges, only Justices Souter and Stevens receive praise. His characterizations of the judges are highly exaggerated, predictable and simplistic. They are not a fair assessment of the respective strengths and weaknesses of the justices.

Lazarus will probably succeed in making money from the book. What effect it will have on his legal career is less clear. Judge Alex Kozinski of the US Court of Appeals for the Ninth Circuit, who sits in Los Angeles where Lazarus now works as a Federal Prosecutor and who Lazarus described in his book as one of the "the smartest members of the Federal bench", has publicly announced that he will remove himself from any case in which Lazarus is involved.[4] One imagines that his chances of ever being able to appear in the United States Supreme Court are nil.

To the extent that the book is not "controversial" it says little, if anything, new. To the extent that it is "controversial", it is a disgrace and the product of a serious violation of the trust placed in him by the Court. The sad thing is that it never seems to occur to Lazarus how deeply disappointed in him Justice Blackmun must surely have been.

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3. The stories include those about drunken clerks fighting in the Court's courtyard fountain and an extraordinary plan by a group of female clerks, who decided that one of them should fake an (unwanted) pregnancy and break down in earshot of Justice O'Connor to persuade her not to meddle with *Roe* v. *Wade*!

4. See *The National Law Journal*, 13 July 1998 at A5.
Since this review was completed, Judge Kozinski has published a lengthy review of *Closed Chambers*. See (1998) 108 Yale L.J. 835. The review and Lazarus' response may be found at www.lawnewsnetwork.com/opencourt.