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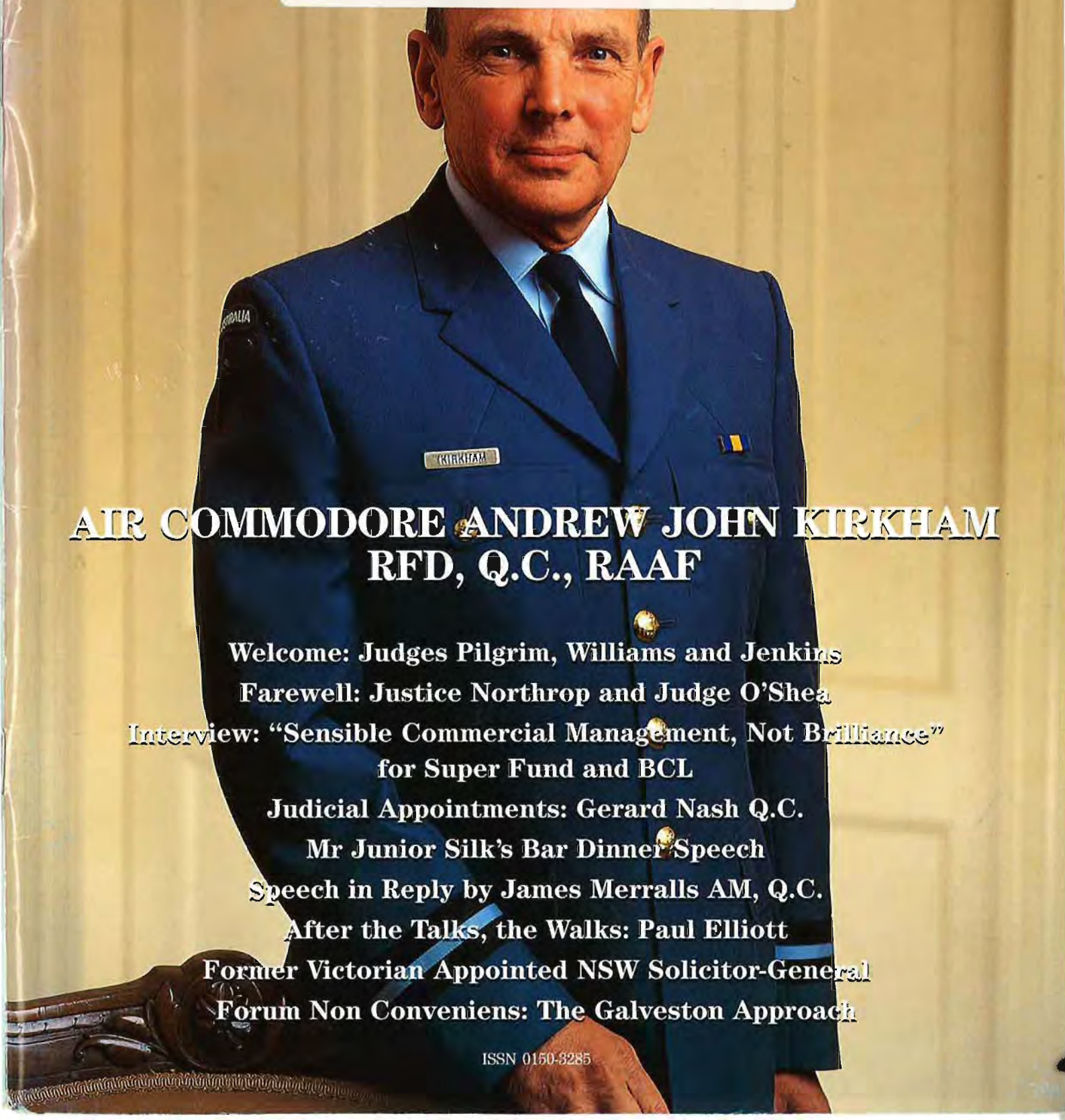
VICTORIAN BAR NEWS

No. 109 WINTER 1999



AIR COMMODORE ANDREW JOHN KIRKHAM RFD, Q.C., RAAF

Welcome: Judges Pilgrim, Williams and Jenkins

Farewell: Justice Northrop and Judge O'Shea

Interview: "Sensible Commercial Management, Not Brilliance" for Super Fund and BCL

Judicial Appointments: Gerard Nash Q.C.

Mr Junior Silk's Bar Dinner Speech

Speech in Reply by James Merralls AM, Q.C.

After the Talks, the Walks: Paul Elliott

Former Victorian Appointed NSW Solicitor-General

Forum Non Conveniens: The Galveston Approach

ISSN 0150-3285

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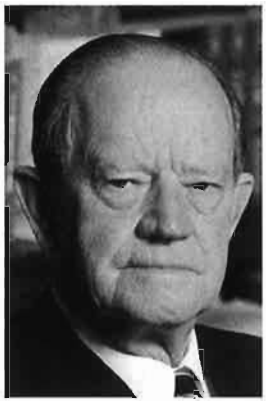
Welcome Judge Williams

Welcome Judge Jenkins



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Farewell Judge O'Shea

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Published by The Victorian Bar Inc.
Owen Dixon Chambers,
205 William Street, Melbourne 3000.
Registration No. A 0034304 S

Opinions expressed are not necessarily those of the Bar Council or the Bar.

Printed by: Impact Printing
69–79 Fallon Street,
Brunswick Vic. 3056

This publication may be cited as (1999) 109 Vic B.N.

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The GST and Others — What About Me?

VARIOUS public relations gurus hired by the Bar over the years have said that the Victorian Bar should not be seen to be promoting itself. When criticised or attacked it should not promote the welfare of its members but look at the effect of the attacks on society as a whole. There is some merit in this argument. But what about the question of taxation? Isn't it about time that the Bar began to promote the interests of its own in relation to taxation. The spectre of the Goods and Services Tax raises concerns for barristers. In particular, what effect will the imposition of the GST have on the payment of provisional tax by barristers?

Practically all of the discussion of the GST by the government in relation to small businesses has centered on those who manufacture or sell things. There has not been much analysis of the effect on that small and maligned group, the barristers of Australia.

The government's approach to the Bar in the past has been rather ambivalent. It has been asserted and legislated consistently that the Bar can no longer look at itself as a profession. Professor Fells continually tells us that we are part of the law industry, or in the business of the law. Therefore in relation to regulation we should be treated like any other trade or industry. However, when it comes to taxation things are different. If we are like any other trade why can't we incorporate, why can't we get the tax advantages of incorporation like many of the small businesses we represent as clients? Ah no, says the Taxation Department. You are not part of an industry or a business, you are a profession. Because you are a profession you must have very high standards above those in mere trade and therefore you must pay crushing provisional tax. Apart from these assertions, it has never been made clear by anybody why barristers should pay provisional tax and indeed why should anybody pay provisional tax at all?

But then a ray of hope appeared on the horizon at the last Federal election. On the front page of the newspapers blared the news that with the introduction of a GST, provisional tax would be abolished. But is this the case? The position remains very unclear. Nobody seems to know. The concern is that the word "provisional" might be removed. But the new system may well amount to the same dreadful thing under a new name.

Now that the government has done a deal with the Democrats, and those in the top tax bracket will not receive the promised tax cuts, will the introduction of the GST provide any benefit to barristers at all, or indeed, will it simply be an extra 10 per cent tax?

It was fascinating to read during the course of the debate between the parties, that those earning over $50,000 a year are considered "rich". It was said that 81 per cent of Australians earn less than $50,000 a year. But it is obvious that the figures used in these debates are meaningless. There are thousands and thousands of very rich Australians who pay either no or hardly any tax at all. Putting aside the question of tax cheats, there are many people who legally have arranged their affairs so that they pay no tax. One only has to look at the saga of the Max Green case, presently being fought out in the Supreme Court, to see the great extent to which this tax industry operates. Many of the plaintiffs have been examined in detail about their tax affairs. The evidence shows that there are many people with considerable wealth who have rarely paid any large amount of tax These people are not cheats and have not done anything of a criminal nature. They have used the system to arrange their affairs so as to not pay taxation. How many times do barristers see tax returns being put into evidence in courts whereby a person who drives a large car, lives in a huge house, holidays overseas, and has all the trappings of conspicuous wealth, earns the magic figure of $5,400 a year?

If there is to be an equitable tax system, either these people are made to pay tax, or those in the middle, especially the professional classes, or more correctly small businesses engaged in professional trades, should be allowed to arrange their taxation affairs in a similar manner to those operating companies and in general business. The key to much of this is the ability to incorporate.

Of further concern is the question of whether the Bar will be simply allowed to add on 10 per cent to its fees. Certainly large government institutions engaged in wide ranging briefing will

expect barristers to absorb the 10 per cent increase. Apart from this concern is the question of whether it will be legal for the 10 per cent to be simply passed on by barristers' clerks.

Some of these fears have been raised in the *Australian Lawyer* of June 1999 by the Law Council of Australia. That newsletter outlines the many submissions being made to the government concerning GST by the Law Council of Australia. Of particular concern was the Trades Practices Committee of the Council's Business Law Section which has lodged a submission that was highly critical of the draconian powers that the GST legislation would give to the Australian Competition and Consumer Commission over "price exploitation" in relation to the GST. The newsletter stated: "The submission was also critical of the retrogressive nature of some key provisions in the draft legislation, such as the reversal of the burden of proof against business people in respect of very serious and potentially ruinous penalty provisions."

Therefore, will the Bar be able to pass the full amount of the tax onto the "consumer", or will some body endeavour to prevent this happening? Will barristers be told that they must absorb some of the new tax, therefore receive less income, but still pay tax at the highest rates and receive no relief from the burdens of provisional tax?

The Victorian Bar held a seminar to discuss the GST earlier in the year. Unfortunately, because of the uncertainty concerning the law, this seminar really did not provide many answers.

The Law Council's further concern is that the government is using models relating to manufacturing in looking at the effects of the GST. Its concern is that the effect on solicitors firms have not been properly taken into account. But what about barristers? Are we allowed to talk about ourselves and our own incomes? We hope there will be some clarification as to what's going to happen and what the Bar Council is doing on our behalf.

We look forward to this, but not with great expectations. Perhaps one day somebody can explain why we can't incorporate and why we have to pay provisional tax.

COMMENDATORE BONGIORNO

On the eve of going to press we have discovered that on 22 June 1999, Bernard Bongiorno Q.C. received the award of Commendatore — Order of the Republic of Italy.

Congratulations Bonge! More of this in the next issue.

WE WERE WRONG

The Autumn issue of *Bar News* contained a number of errors for which the Editors apologise. We called Ross Robson Q.C. "Robinson"; we incorrectly spelt the name of Eleanor Connors in the caption to her photo as "Conners". These may perhaps be forgiven as "typographical errors" but the article on A.J. Myers Q.C. which was written by Ross Robson we attributed to G.T. Pagone. This was a serious error due to a break-down in communications. But we do acknowledge that it was one which should not have happened.

The Editors

The Rights A State of

CRIMINAL LAW REFORM

IT will not have escaped anyone's attention that Victorian Parliament has been sitting in recent weeks. As a result, a large part of the Bar Council's agenda has been dedicated to issues of law reform and, in particular, issues that touch upon the practice and administration of criminal law.

It is unfortunate that the Bar Council has found itself at loggerheads with the Government over so many aspects of criminal law. It need not be so. The Bar Council shares the view of Government that there is a need to make all litigation — including criminal litigation — as efficient as possible. We have always been willing to lend our expertise to any attempt to streamline criminal procedure. Indeed, the Bar Council has recently established a number of Litigation Procedure Review Committees to consider ways in which trials can be expedited in all jurisdictions.

However, the prevailing legislative zeal for efficiency in the running of criminal trials is laying waste to the rights of accused persons, undermining the basic principles of criminal liability, and all the time ignoring the most obvious way in which real efficiency could be attained: the provision of adequate legal aid funding.

CRIMES (CRIMINAL TRIALS) BILL 1999

The Bar Council made precisely this point to Government in relation to the Crimes (Criminal Trials) Bill. The Bill now passed, imposes harsh mandatory pre-trial defence disclosure requirements on a defendant, and allows for the drawing of inferences of guilt upon a departure from a defendant's pre-trial statement. These provisions have the effect of shifting the burden of proof and undermining the privilege against self-incrimination. They have a particularly harsh effect on unrepresented litigants. These problems have been identified also by the Parliamentary Scrutiny of

of the Defendant: Uncertainty

Acts and Regulations Committee.

The Bar Council urged Government to consider the simplest and most effective way to increase the efficiency of the presentation of the defence case: to ensure that there is adequate legal aid funding to allow a defendant to be properly represented.

JURIES BILL 1999

The Bar Council has, with the Criminal Bar Association, publicly opposed the introduction of legislation that would institute majority verdicts for murder and treason trials. Unanimity of verdict is a necessary part of proof beyond reasonable doubt. Again, economic efficiencies are being sought at the expense of the fundamental rights of an accused person.

MAGISTRATES COURT (AMENDMENT) ACT 1999

When in the form of a Bill before the Scrutiny of Acts Committee, the Bar Council opposed, in written and oral submissions, the provisions in this Act that limit the rights of defendants at committal, the provisions which relieve a County Court judge from an obligation to warn an appellant that a more severe sentence may be imposed on appeal, and the provisions that discourage criminal appeals under threat of costs orders and custodial sentences. Although many of the Bar's objections were taken up by the Committee in its report to Parliament, it is disappointing to note that the Bill was passed and assented to in May 1999.

CRIMINAL LIABILITY FOR SELF-INDUCED INTOXICATION

A greater degree of success was met by the submissions of the Bar Council to the Victorian Parliament's Law Reform Committee in relation to its review of criminal liability for self-induced intoxication. The Committee has recommended that the High Court's decision in O'Connor's case continue to state the law in Victoria. In O'Connor's case, the Court held that evidence of the defendant's state of intoxication may be relevant to the question as to whether he or she formed the required intention, whether the offence was one of "basic" or "specific" intent.

The Bar Council argued that a departure from the principles of O'Connor's case would be a departure from the legal principles of criminal responsibility and from the commonly held principles of ethical responsibility. The Law Reform Committee has also accepted the Bar's arguments that the problem of violence caused by alcohol and other drugs would be better addressed by the greater use of rehabilitation and treatment programs.

AUDITOR-GENERAL'S REVIEW OF VICTORIAN LEGAL AID

In response to a request from the Auditor-General's Office, the Bar Council has provided the Auditor-General with information relating to the impact of Commonwealth–State legal aid funding agreements on the provision of legal assistance in Victoria. Evidence presented by the Bar suggests that legal aid funding restrictions imposed by the agreements have led to a dramatic rise in the number of people who go unrepresented in our criminal courts, an overloading of our State and Federal courts, and a proportionate increase in the extent to which the Bar has been required to provide pro bono assistance to litigants who would, but for pro bono assistance, be denied legal representation. The Bar Council also stressed the need for detailed and objective research into the full effect of the legal aid crisis throughout the State.

We await the report of the Auditor with interest, and look forward to similar reviews in other Australian jurisdictions.

CONSULTATION AND CO-OPERATION

Given our vocal opposition to many of the Government's criminal law initiatives, I am pleased that the Government nevertheless appears to have adopted the practice of making the Bar Council privy to draft legislation which may affect the administration of justice in this State. In many cases — such as with the Juries Bill — we were given only 24 hours in which to formulate a response, and we were prevented by confidentiality constraints from consulting widely within the Bar. These constraints are difficult to work with. However, I firmly believe that the Bar must do whatever it can for Government, for the public, and for its members, by scrutinizing legislation as it is drafted. I hope that the Bar Council will always be in a position to make such a contribution. It is equally pleasing to see that our views are also being invited — and, apparently, well received — by the Scrutiny of Acts and Regulations Committee in relation to legislation which has been introduced to Parliament, and by the Law Reform Committee in relation to its references.

Finally, I must say I am delighted that the Bar Council has been able to work so closely and efficiently with the Criminal Bar Association across a wide range of matters which affect the rights and interests of participants in criminal trials. I am particularly grateful to Michael Rozenes Q.C., Roy Punshon, and Damian Sheales on the Criminal Bar Association, and to the many members of the Bar Council who have given generously of their time in relation to these matters. I thank, in particular, Mark Derham Q.C., Robert Richter Q.C., Ross Ray Q.C., Roy Punshon, Carolyn Burnside and David Neal.

David Curtain
Chairman

Wisdom of the Solomons

The Editor

Dear Sir

PROFESSOR Graham Fricke's article in your Autumn 1999 edition describing his misadventures in the High Court of Solomon Islands has just come to my attention. I am a member of the Solomon Islands Bar Association and a local lawyer who objected to Professor Fricke's appearance in our High Court without him having been admitted to appear in the case he refers to in this article.

The first thing your readers should be made aware of is that Solomon Islands is an independent country and not a suburb of Melbourne. To be sure ours is not a rich country and our roads, phones and electricity supply leave something to be desired as Professor Fricke was quick to point out. We have our own laws, our own courts and our own practice and procedure but we do have much in common with your legal system having inherited it from the same colonial power.

We also benefit from visits by distinguished judges from Australia and elsewhere who sit on our Court of Appeal and from those members of the Australian Bar who come here prepared to put up with our shortcomings, rather than patronising this country and its courts as Professor Fricke has done in his article.

Your readers may be interested to know that there are two official languages of the Courts in Solomon Islands, English and pidgin. The latter is a fast developing and most expressive language that can convey a lot in only a few words (for example, "hem frickem mi" meaning "he told me to get out of a place where I had no legal right to be").

There are only 30 or so Solomon Islands lawyers in this country, some in private practice and some in the Government Legal Offices.

The Chief Justice, a Solomon Islander, has the power under the Legal Practices Act to admit lawyers both local and overseas.

A few years ago when there was only a handful of lawyers in private practice, overseas counsel were admitted generally. However, with the growth of a local Bar, our Association and the Judiciary now take the view that overseas lawyers should be admitted on a case-by-case basis where there are no resident lawyers with sufficient experience to handle the case.

That is not, I suggest, unreasonable.

Solomon Islands judges and lawyers have seen enough overseas counsel who come here with their condescending attitude to our developing legal system to justify a stricter approach to overseas admissions.

I am sure that even Professor Fricke would have to agree that if I were to walk fully robed into a court in Victoria without having been admitted I would be lucky to escape being committed for contempt.

As many Australian counsel can testify we welcome visits by those of our overseas colleagues who are prepared to comply with our rules and who are willing to respect our country and courts, in spite of our shortcomings. If not they too will Get Fricked!

Yours faithfully

Andrew Radclyffe

Short of a Length

The Editors

Dear Sirs

I was delighted to read that appropriate recognition was given to the half century of Charles Francis. Your account of the gathering included a reference to an over bowled by Charles in a Bar XI Match in 1951. This brought back to me a vivid recollection of this truly remarkable over. I hope you will allow me to provide some further particulars of that singular event.

The Bar XI batted first and made a respectable score including a fluent thirty odd by our Captain Sir Edmund Herring, then nearly sixty. He was eventually caught in the deep by Sir Dallas Brooks' butler.

As Sir Edmund led us out to field he enquired, "Have we got a fast bowler?" Somewhat to my surprise (we had been to school together), Charles volunteered to assume that task. He was handed the gleaming new ball.

Each of the Governor's opening batsmen was a young ADC obviously fresh out of Winchester and Sandhurst. Each was immaculately clad in spotless flannels with a silken handkerchief at the throat. It was apparent that each was aware of the heavy responsibility of blunting the impending new ball attack. Sir Edmund, doubtless impressed by Charles' volunteering, set a field which would have satisfied Ray Lindwall, then at the height of his powers.

I occupied a position among the six or seven slip fielders. I was stationed between Sir Edmund and Sir Reginald Sholl. I waited expectantly upon events.

The batsman due to face the first ball looked around with obvious apprehension at the dense cluster of fielders behind the wicket. He gave the impression that he rather doubted the wisdom of having turned out for the match.

Charles carefully measured out a very long run before turning to business. His approach to the wicket involved much flailing of arms in the manner of Bill O'Reilly. The batsman crouched warily over his beautiful white English willow.

However, at the point of delivery Charles retained the ball too long and it landed a few feet from his left foot from whence it rolled towards point and came to rest.

The batsman was clearly puzzled. Nothing in his experience had alerted him to this novel form of attack. He cautiously approached the stationary ball. He clearly suspected a crafty legal trick. Instead of hitting the ball for four like a golf shot, he tapped it nervously a few yards and scampered through for a single to avoid further exposure to this bizarre onslaught.

We all looked at Charles to see if he regarded the incident as amusing. Not at all. His visage was one of intense determination.

The next delivery was a repetition of its predecessor except that on this occasion the ball came to rest near the square leg umpire.

Charles then took some corrective measure because the third ball flew on the full about ten feet over the wicket keeper's head and rocketed to the fence for four byes.

This third delivery prompted Sir Edmund to say, "What is this, Gray — some new form of frightfulness?" It must be remembered that the first atom bomb had been but recently exploded.

One of the later deliveries in the over was of good length and struck the batsman's pad about a foot outside the leg stump, whereupon Charles let forth an ear-splitting appeal for LBW but the umpire was unmoved.

To complete the over required Charles to bowl eight (in those days) lawful deliveries. This took a considerable time but at last it was all over.

Sir Edmund, rather brutally, removed Charles from the attack, thus making his opening spell one of the shortest but most memorable in cricket history.

I saw him a week or so later. He told me that he had been practising at the University nets and that he was now bowling a perfect line and length.

I feel Charles will forgive me for recalling this hilarious episode because he remains a very good and very old friend.

Yours faithfully

I. Gray

"However comma" Rebuked

Dear Sirs

ON a quiet May afternoon two pieces of reading matter arrived together in the mail: the May 1999 part of the ALJ, including ALJR 469–574, and Part 3 of [1998] VR. As I skimmed through the second of these, and arrived at the last case, *G.M. & A.M. Pearce & Co. Pty Ltd* v. *R.G.M. Australia Pty Ltd*, the first two sentences in the judgment of Callaway J.A. (at p.889) blazed from the page in the late afternoon like a supernova:

> The provisions of the Corporations Law that include s.553C are, as I observed in the course of the argument, drafted in the language of the pop songs. Section 435A speaks of 'maximis[ing] the chances' and s.435C of '[t]he normal outcome' and 'the deed's administrator'. Section 435C(3) begins with the word "However" and a comma, a style that, at least until recently, has been eschewed by good writers.

A lifelong exponent of the practice of placing "However" at the beginning of a sentence and following it with a comma, I was taken aback by this rebuke. Chastened, I turned to the May part of the AWR.

The first case reported in it is *Northern Territory* v. *GPAO* (1999) 73 AWR 470, heard before all seven members of the High Court. The style of beginning a sentence with "However" and a comma is adopted by Gleeson C.J. and Gummow J., in a joint judgment, at [14], [47], [60], [70], [83] and [90] (the references are to paragraph numbers), by Gaudron J. at [102], [109], [119],[130], [142] and [143], by McHugh and Callinan JJ. at [171], [177], [180] and [188], and by Kirby J. at [209], [210], [213], [219], [249] and [251]. Only Hayne J., in a short judgment, does not adopt it. Is this a sign of truly Victorian adherence to principle? Alas, no. In the next case reported, *Bass* v. *Permanent Trustee Company Limited*, 73 AWR 522, Hayne J. participates in a joint judgment of six members of the Court; the judgment contains sentences starting with "However" and a comma at [5], [42], [48] and [56]. The seventh member of the Court, Kirby J., does not dissent: see [69], [80] and [94]. This is no momentary lapse on the part of Hayne J.; his Honour participates in two other joint judgments where the style criticised by Callaway J.A. appears again: *Owners of the Motor Vessel "Iran Amanat"* v. *KMP Coastal Oil Pte Ltd* 73 AWR 559 at [19] and [22] and *Telstra Corporation Limited* v. *Worthing* 73 ALJR 565 at [7], [15], [17] and [34].

By now all at sea, grammatically speaking, I turned again to Part 3 of [1998] 4 VR, looking for dry land in the judgments of the Court of Appeal. Surely they wouldn't . . . But it soon hits home that one member of the Court of Appeal is a multiple offender, and another offends four times within the space of three pages in the same judgment.

What is the acceptable style? In *The New Fowler's Modern English Usage*, 3rd edition (1996), annotations to the word "however" include:

> 3 If the sense calls for *However* meaning "nevertheless" to be placed at the beginning of a sentence, it should be followed immediately by a comma: *I should be angry if the situation were not so farcical. However, I had a certain delight in some of the talk* — W. Golding, 1980 . . .
>
> 4 The placement of *however* meaning "nevertheless" is governed by the nature of the sentence in which it appears. It . . . is a matter of judgement, not of exceptionless rules, where the word is to be placed . . .
>
> 5 Avoid at all costs the illiteracy of using *however* as a simple substitute for *but*, or of allowing a sentence to run on when *However* should have had a capital H at the start of a new sentence . . .

Evidently the editor of *Fowler* regards placing "However" at the beginning of a sentence as just as acceptable as placing it elsewhere. The writer quoted in the annotation numbered 3 — William Golding, author of *Lord of the Flies* and winner of the Nobel Prize for literature — could fairly be described as a "good writer".

As you occasionally set competitions for your readers, may I suggest one?

1. Who is the multiple offender in the Court of Appeal who incorrigibly commences sentences with "However" and a comma, and on how many occasions in [1998] 4 VR 585–902 does he do so?
2. Who is the other member of the Court of Appeal who does it four times in the space of three pages in the same judgment?

Yours faithfully,

Alan Vassie

Crocodile Walk

The Editors

Sirs

RECENTLY my companion in life and myself were in North Queensland on holiday. We could have made a major contribution to the law of occupiers liability in that State by reason of the circumstances following:

We had walked along a path to a well lit jetty in the evening under cover of darkness. The next day, on making the same journey, we noticed a sign, which we had not seen the previous evening as it had been completely unlit: see attached photograph (below).

Had an untoward event occurred, would it have been a case of *ferae naturae?* (My copy of Osborn only refers to lions and monkeys). Would the municipality be taken to have been exercising dominion over the animals concerned? Or would their presence be regarded as transient?

What defences would have been raised in answer to a claim by the estate? If the claim had resulted in a judgment, what would its catchwords have been?

Yours faithfully,

Mark Mulvany

P.S. We are pleased to be back.

Legal Practice (Practising Certificates) Act 1999

THE *Legal Practice (Practising Certificates) Act* 1999 ("the Act") received Royal Assent on 11 May 1999. The purpose of the Act is to amend the *Legal Practice Act* 1996 ("the principal Act") to:

- alter the practising certificate year from a calendar year to a financial year;
- introduce a system of surcharges for late applications to renew a practising certificate;
- alter the timing of the lodgment by current practitioners of proof of professional indemnity insurance;
- change the manner in which practitioners nominate for inclusion on the roll for the purposes of electing the practitioner members of the Legal Practice Board; and
- allow for the appointment of additional deputy registrars to the Legal Profession Tribunal.

Parts 1 and 3 of the Act came into operation on Royal Assent and Part 2 will come into operation on 15 August 1999. Part 1 of the Act sets out its purpose. Part 2 deals with the amendments necessary to change the practising certificate period to a financial year and other consequential changes. Part 3 provides for the appointment of deputy registrars of the Legal Profession Tribunal and for the repeal of spent transitional provisions contained in the principal Act.

PRACTISING CERTIFICATE YEAR

The practising certificate period is to be changed to a financial year in order to bring it into line with that of most other States.

The change to a financial year will require consequential changes to the audit year for trust account purposes. In future, the audit year will end on 31 October rather than 31 March and the annual audit report will be submitted to the Recognised Professional Association ("RPA") by 28 February instead of 31 July. The change to the trust account audit arrangements will require changes to be made to the Victorian Bar's *Clerks' (Audit and Trust Money) Practice Rules*.

Special transitional arrangements have been made to effect the change to a financial year certificate. The change will occur through an eighteen-month practising certificate valid from 1 January 2000 to 30 June, 2001. The transitional arrangements will operate as follows for practitioners who hold a practising certificate on or before 31 October 1999:

- An application for the renewal of the practising certificate for the transitional period must be made on or before 31 October 1999.
- Proof of the holding of professional indemnity insurance for the eighteen-month period must be provided to the RPA by 30 November 1999. Note that special provisions have been made for regulated practitioners of the Victorian Bar RPA to enable them to provide proof of insurance in two stages — for the period 1 January 2000 to 30 June 2000, proof of insurance must be provided by 30 November 1999, and for the period 1 July 2000 to 30 June 2001 by 31 May 2000.
- The practising certificate fee for the transitional period will be 150 per cent of the annual fee.
- New practitioners who apply for a practising certificate after 1 January 2000 will pay a pro rata fee.

SURCHARGE FOR LATE RENEWALS

A surcharge system will be introduced for late applications for the renewal of practising certificates. It is anticipated that the surcharge provisions will lead to a reduction in the number of late applications. The surcharge system will operate as follows (for a financial year certificate):

- The closing date for applications to renew a certificate will be 30 April.
- A surcharge of 25 per cent of the practising certificate fee will apply to an application lodged in May.
- A surcharge of 50 per cent of the practising certificate fee will apply to an application lodged in June.
- If the RPA considers that special circumstances apply, it may refund all or part of a surcharge.
- The surcharge system does not apply to a person who did not hold a practising certificate on 30 April in the relevant year.
- If a practitioner who held a practising certificate at the end of the previous practising certificate year applies for renewal of the certificate within the first three months of the new practising certificate year a surcharge of 200 per cent will apply. The surcharge can be avoided if the practitioner provides with the application a statutory declaration to the effect that he/she has not practised since the end of the previous practising certificate year, intended at the end of the previous practising certificate year not to practice in the first three months of the new practising certificate year and provides reasons why that intention has now changed.

PROOF OF PROFESSIONAL INDEMNITY INSURANCE

It will no longer be necessary for current practitioners to provide proof of professional indemnity insurance at the time of applying for the renewal of their practising certificates, i.e. on or before 30 April. Instead, proof of insurance must be provided by 31 May, i.e. by one month prior to the commencement of the practising certificate and insurance year. If proof of insurance is not provided by this date, the RPA will issue a notice indicating that the practising certificate previously issued for the coming practising certifi-

APPLICATION TO RENEW A PRACTISING CERTIFICATE BY A CURRENT PRACTITIONER

SUMMARY OF CRITICAL DATES FOR BARRISTERS

	Transitional Period 1/1/2000 to 30/6/2001	*Financial Years Commencing 1/7/2001*	*Original Timetable (as used in 1998)*
Apply for renewal of a practising certificate by:	31/10/1999	30/4/2001	31/10/1998
Provide proof of professional indemnity insurance for 1/1/2000 to 30/6/2000 by:	30/11/1999	not applic.	not applic.
Provide proof of professional indemnity insurance for the practising certificate year by:	not applic.	31/5/2001	31/10/1998
Surcharge[1] of 25% applies if application is made in:	November	May	not applic.
Surcharge[1] of 50% applies if application is made in:	December	June	not applic.
Practising certificate period commences:	1/1/2000	1/7/2001	1/1/1999
Surcharge[2] of 200% applies if application is made during:	1/1/2000 to 31/3/2000	1/7/2001 to 30/9/2001	not applic.
Provide proof of professional indemnity insurance for 1/7/2000 to 30/6/2001 by:	31/5/2000	not applic.	not applic.
Practising certificate period concludes:	30/6/2001	30/6/2002	31/12/1999

1. All or part of the surcharge may be refunded in special circumstances.
2. Surcharge may be avoided if S22(5) statutory declaration is given.

cate year will not take effect until proof of insurance is provided.

Commencing 2000, regulated practitioners of the Bar will need to pay for professional indemnity insurance by 31 May in order to be able to provide the required proof of insurance — one month earlier than in past years.

The schedule above summarises the critical dates for the renewal of a practising certificate.

ELECTORAL ROLL

A change has also been made to the manner in which a current practitioner notifies the Legal Practice Board of the roll on which the practitioner wishes to be included for the purpose of the election of practitioner members of the Legal Practice Board. The change will be to incorporate the nomination of the roll in the application form for a practising certificate instead of the nomination taking place on a separate form. The new system will be administratively easier for the Board and for practitioners.

SUMMARY

This report is a summary of the changes that have resulted from the Act. It is recommended that regulated practitioners peruse the *Legal Practice (Practising Certificates) Act* 1999 and familiarise themselves its content.

New Practising Certificate Year; Introduction of the Fair Trading Bill

A number of Bills have been introduced into this current session of Parliament.

Members of the Bar may be interested in the following reforms.

LEGAL PRACTICE (PRACTISING CERTIFICATES) BILL

This Bill was passed by the Legislative Council on 5 May and continues the process of reform commenced by the Legal Practice Act in 1996.

Since the end of 1997, the Government has been working closely with the legal profession in a review of the practising certificate system — a system which has been in place for many years.

The practising certificate year for lawyers in Victoria has been the calendar year commencing on 1 January. However, the financial year which commences on 1 July has become the standard operating unit for those carrying on a business as well as being used for other purposes such as the assessment of income tax. Some other Australian States use the financial year for their practising certificate regimes.

Under the changes, the Victorian Practising Certificate year for lawyers will commence on 1 July.

The new system will commence operation on 1 July 2001. In order to make the change, a transitional 18 month practising certificate period will be necessary — from 1 January 2000 to 30 June 2001.

The new legislation also contains various provisions that will streamline the process of applying for and issuing practising certificates. For instance, there have been situations in the past where lawyers have not applied for practising certificates within the required time frame and as a result, have practised unlicensed and uninsured.

This is not only a breach of the Act, it can also mean that some practitioners are not covered by their professional indemnity insurance, which is simply unacceptable for members of the public.

The Bill sets out the various steps required to ensure compliance with the Act. In return, the process for issuing practising certificates has been streamlined and lawyers will also have an extra month each year before they have to pay their practising certificates fees and an extra two months before they have to pay their insurance premiums.

Other amendments under the legislation also include:

- the appointment of additional deputy registrars to the Legal Profession Tribunal — due to the increased jurisdiction of the Tribunal conferred by the Act; and,
- the provision that all practitioners specify on their practising certificate application forms the roll on which they wish to be entered for the purpose of Legal Practice Board elections.

FAIR TRADING BILL

Members would also be aware of the introduction of the Fair Trading Bill which is currently before the House.

The Bill is the product of extensive consultation with industry and consumer groups and liaison with key agencies such as the Australian Competition and Consumer Commission and fair trading agencies around Australia.

The Bill represents a consolidation of three core fair trading acts: *The Fair Trading Act* 1985, *The Consumer Affairs Act* 1982 and the *Ministry of Consumer Affairs Act* 1973. These acts, similar in content and function, needed to be updated to improve their relevance in the marketplace.

The existing *Fair Trading Act* 1985 was introduced in accordance with an agreement between all States to extend the coverage of laws prohibiting a wide range of deceptive or misleading practices based on relevant provisions of the Commonwealth's *Trade Practices Act* 1974 to non-corporate traders (i.e. individuals and partnerships) trading within Victoria.

Both the *Fair Trading Act* 1985 and the Trade Practices Act cover corporate traders trading within Victoria and Victorian-based corporate traders trading outside Victoria. The new Fair Trading Bill continues this coverage.

The new Bill introduces regulation for the first time in Victoria in a number of areas such as:

- lay-by sales
- power to prescribe codes of practice;
- "non-contact sales" which are also known as "distance sales" and include sales over the Internet, sales by telephone and television marketing, and mail order catalogues;
- power to recall dangerous goods;
- undertakings provisions;
- prohibition against unconscionable conduct in trade or commerce; and
- prohibition against suppliers giving false testimonials.

The Bill also covers pyramid selling. The pyramid selling provisions in the existing Fair Trading Act are based on those in the Trade Practices Act and are similar to those in other jurisdictions around Australia.

The existing Act has been unsuccessful in combating such schemes as

the "Concorde Game", recently circulating in Victoria, and does not cover chain letters involving money.

The new provisions are necessary to discourage schemes that have operated in Victoria, which have duped Victorians out of thousands of dollars. Victoria will be the first jurisdiction to introduce significantly improved pyramid selling provisions.

Members will also note that the Bill contains provisions dealing with "unfair practices" — prohibiting undesirable commercial behaviours such as engaging in conduct that is misleading or deceptive and engaging in unconscionable conduct either in the supply of consumer-type goods or services, or generally in trade or commerce.

The unconscionable conduct provision mirrors section 51AA of the Trade Practices Act.

Other features of the new legislation are the power to impose an interim or permanent ban order on dangerous goods or services, the power for a supplier to voluntarily recall goods or services and a power for goods to be compulsorily recalled.

Members should note that another Bill is to be introduced in the House entitled the Fair Trading (Inspectors' Powers and Other Amendments) Bill which contains standardised inspectors' powers to be inserted into other Acts across the fair trading portfolio.

The end result is a Bill which implements our commitment to review the legislative framework relating to fair trading and consumer affairs and to enhance the concept of "fair dealing" in an efficient, informed and competitive marketplace

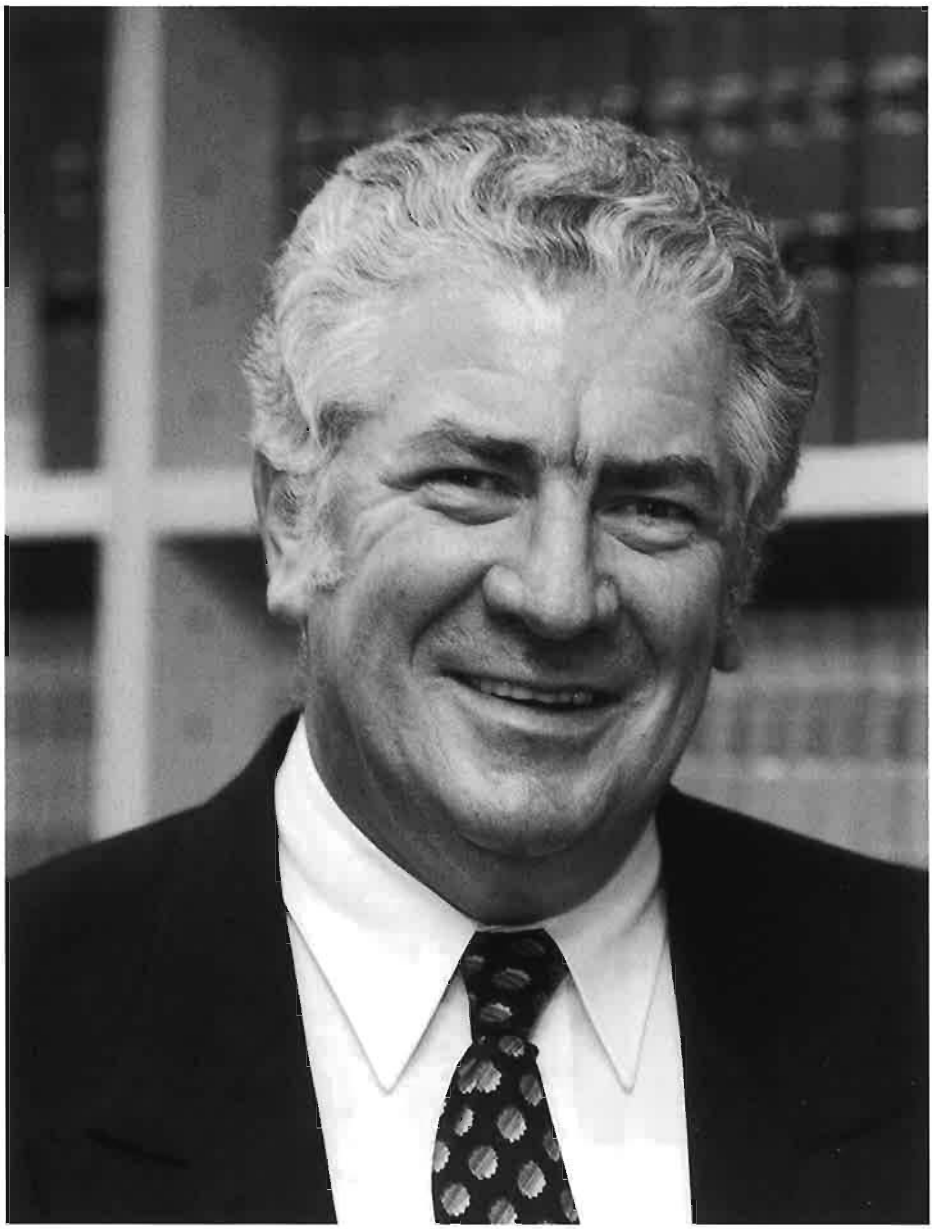
Jan Wade MP
Attorney-General

My Journey Through Loneliness

Walking through the cold, cold street makes me feel alone.
With lots of people gathered round but none of whom I know.
It's like this at my house too.
The only difference is
Outside there are people and inside there are none.
And where there are no people, there always, always is
A journey that creeps up behind you
A journey that's not nice
A journey of a lone man who always feels alone.

Judge Pilgrim

HIS Honour joined the public service in 1958 at the age of 16 and at once started his career in the law as a clerk of courts. His father was a senior policeman. When he joined the public service (some 40 years ago) he did so on the same day as Pat Street, a former well-known magistrate who retired in January this year. His Honour completed legal studies at the University of Melbourne and obtained the degree of Bachelor of Laws in 1975 while working as a clerk of courts and then worked in various roles including as a solicitor in a Crown Solicitor's office. His Honour was appointed to the bench of the Magistrates' Court in 1981 (once again on the same day as Pat Street) and served to 1984 at the city court as a coroner and as a relieving magistrate from 1984 as co-ordinating magistrate for the Gippsland region. His responsibilities as coordinating magistrate included jurisdiction in the Magistrates' Court, Coroner's Court, Children's Court and Crimes Compensation Tribunal. The wide-ranging experience to which he was exposed in both city and rural jurisdictions will serve him well as a judge of the County Court.



His Hon. Judge Pilgrim

As a magistrate, His Honour was both business-like and compassionate. So far as the conduct of the business of the courts is concerned, His Honour was generally the first to arrive and the last to leave. This may not be so unusual until it is noted that His Honour commuted each day from his home in the eastern suburbs of Melbourne to his place of work in Moe. He had a rapport with his staff and he was highly regarded by both them and the practitioners appearing before him. No doubt his practice of putting on a barbecue at the court house for the staff each Friday contributed. Those barbecues will be a little larger in the County Court!

So far as compassion is concerned, as co-ordinating magistrate in the Gippsland region, His Honour came into frequent contact with members of the Aboriginal community. In appropriate cases, His Honour would release an Aboriginal offender on a bond once he was satisfied that the elders of the particular Aboriginal community were prepared to provide supervision. His Honour showed practical intelligence and a great sense of humour. One member of the Bar has stated that His Honour has "a heart as big as Texas". His Honour is well known for his sympathy for the underdog and his concern for children and young people in the community. As a younger man His Honour's compassion even extended to playing football with the South Melbourne Football Club! A story demonstrating His Honour's concern for the young found particular expression when he was co-ordinating magistrate in Gippsland in a case arising out of the alleged theft by a student of a bow (it was the kind used for archery, not for tying up the hair!). The young person was

charged as a result of a complaint by the school of the theft of the bow. The defence was that the bow had been given to him, broken, by the sports master. The young person had worked hard to repair the bow and it was his pride and joy. The laying of the charges against the young man caused His Honour considerable concern. But, His Honour found an innovative solution to the case. Out of His Honour's own money, His Honour purchased the best bow that could be obtained locally and the allegedly stolen bow was returned to the school. The result was that the charges against the young man were dismissed – by His Honour. This story, no doubt one amongst many, illustrates His Honour's interest in and concern for the local community and His Honour's willingness to respond to local matters in a pro-active way.

His Honour brought this particular personal approach to the presidency of the Guardianship and Administration Board when he was appointed to that position in 1994. As President of the Guardianship and Administration Board, he oversaw many important changes, in particular the streamlining of listing and hearing procedures. This had the effect of reducing both delays and administrative costs. His Honour also restructured the Board in such a way as to increase its service to members of the community in rural and remote areas. As a result of his Honour's presidency of that Board (and with the assistance of members of the Victorian Bar — including the now Chief Magistrate) it is the most cost-effective and responsive body of its kind in Australia. Upon the establishment of the Victorian Civil and Administrative Tribunal in 1998, His Honour was appointed Deputy President in charge of the Guardianship List. Through his career on the bench he has been an active member of the Australian Institute of Judicial Administration, the Australian Magistrates Association, and the Victorian Magistrates Association.

His Honour may rely on the assistance of members of the Bar whenever it is called upon. It is already clear that, though His Honour has never been a member of the Bar, barristers in Victoria, many of whom have appeared before him in the Magistrates' Court and the Guardianship and Administration Board, regard his appointment as a good one.

On behalf of the Victorian Bar we welcome his Honour to the bench of the County Court and wish him every success in the years ahead.

ADVANCE NOTICE

Freedom of Information and The Right to Know Conference

The Communications Law Centre and the International Commission of Jurists (Australian section) are holding a conference on the right to know and freedom of information.

The conference will commence with discussion of fundamental issues such as the community's right to know, openness and access to information generally. It will then move into a detailed focus on Freedom of Information issues and developments in Australia and overseas.

Speakers will address topics such as proposals for reform of FoI; the effects of privatisation, contracting out and commercial confidentiality on access to information; new technology and the changing nature of information; journalists' use of FoI; the Blair government's white paper on FoI and FoI bill; Ireland's new FoI legislation; the FoI experience in Canada and New Zealand; information access developments in the EU; FoI and public interest work; issues for practitioners; and review processes.

Speakers include:

- Sir Brian Elwood, Chief Ombudsman, NZ
- Maurice Frankel, Campaign for FoI, UK
- John Grace, former Information Commissioner, Canada
- Maeve McDonagh, University College, Cork, Ireland
- Arnold Zeitlin, Freedom Forum, USA
- Eugene Biganovsky, Ombudsman, South Australia
- Madeline Campbell, Special Council, Australian Government Solicitor
- Roger Clarke, Xamax Consultancy
- Amanda Cornwall, Public Interest Advocacy Centre
- Judy Cox, Corrections Working Groups, Victoria
- Bronwyn Keighley-Gerardy, Information Commissioner, WA
- Justice Murray Kellam, President, Victorian Civil and Administrative Tribunal
- Judge Kevin O'Connor, President, Administrative Decisions Tribunal, NSW
- Rick Snell, Editor, *FoI Review*
- Phillip Youngman, FoI Practitioners Network, NSW
- Spencer Zifcak, La Trobe University.

The conference will be held at the Sheraton Towers Hotel, Melbourne, on Thursday 19 and Friday 20 August 1999.

Cost: $295 government/corporate
$175 community/organisations

For further information and to receive the conference program please contact Jenny Mullaly, tel: (03) 9248 1278; e-mail: melbourne@comslaw.org.au; website: http://www.comslaw.org.au

Judge Williams

WHILST the 45 bar readers signing the Bar roll in June 1988 were an eclectic and interesting lot — including, from a previous life, a pilot, a television journalist, a St Kilda footballer and a Miss Victoria — none of the group could claim a better academic legal background than Katherine Williams. Because of both her legal credentials and personal qualities, her appointment to the County Court has been universally welcomed, not only by that immediate peer group, but by the profession at large.

As Kathy Gorman she showed early that she was a quick learner having matriculated from Sacre Coeur, where she was Head Day Girl, to be able to start her law course at Melbourne University at 16. Her contemporaries there note that she breezed through her honours degree, picking up the exhibition in contract law along the way. She later completed her Masters.

Following articles with Maurice Ryan and Frank Green, she worked with Laurie Pentilla at Coburg before joining the Law Faculty of Melbourne University, where she tutored for many years, mainly in trusts and property. This was followed by a number of years at Monash. Accordingly, she can anticipate seeing many of her former law students appearing before her in the years ahead. In 1963 she married David Williams who became a partner with Purves & Purves. David has also made a significant change, recently starting out again in a new practice, Chessel Williams.

Her Honour read with Peter Hayes Q.C., with whom she has worked extensively since. She was junior counsel in both the Leigh Mardon and Ultra Tune cases, mammoth commercial litigation exercises which are doubtless testimony to her stamina and industry. Her new career will see her involved in differing robust jurisdictions, and predictably she will be the beneficiary of continuing advice in matters civil and criminal from her various brothers-in-law (David Brookes, Charles Williams and Bernie Balmer).

In addition to a busy commercial practice, she has raised four children, now teenage or tertiary, each moving through interesting phases of study, travel and abode. Her Honour has been an active contributor to Bar affairs, having served as a member and secretary of the Ethics Committee, and recently as a Director of Barristers' Chambers Limited. She was at the same time a Director of the Over 50's Building Society. Clearly, she has shown both the capacity and energy to successfully juggle a number of competing demands on her time.

Judge Katherine Williams

Various personal characteristics come to mind when considering the most important qualities required by a good judge — a determination to be even-handed, a sense of justice and fairness, a quick sense of humour, intelligence and a spirit of independence. These are qualities Her Honour has in abundance.

The Bar welcomes her appointment and wishes Her Honour a long and satisfying career.

Judge Jenkins

ON 29 April 1999 Her Honour Judge Jenkins was welcomed to the County Court by the President of the Law Institute and the Chairman of the Victorian Bar Council.

Her Honour comes to the Bench after a varied and unusual career. She has not featured in the mainstream of litigation and is probably little known to most members of the Bar. To give those who do not know her some feel for her personality, we have taken the liberty of quoting freely from Her Honour's remarks at her Welcome.

Pamela Dawn Jenkins is probably the only member of the judiciary in Australia who holds an Associate Diploma of Medical Nucleography. For several years she practised as a nuclear medicine technologist in major public hospitals in Victoria.

While so practising she commenced a law course; and in 1979 she graduated LLB with Honours from Monash. She was awarded the Flos Greig Memorial prize as the top woman student. She served articles with Frenkel, Berkovitch, Kefford and New, the firm now known as "Wisewoulds" and was admitted in 1980.

Until 1983 she worked as a solicitor at Rivers, Dickenson, Stirling & Munz, where it seems her interests were primarily tax and corporate law. At Rivers, Dickenson, Stirling & Munz she immediately became involved in "some complicated off-shore tax corporate structures". She did not, however, at that stage rub shoulders with criminal law because, as her Honour said at her Welcome:

> Phillip Munz so scrupulously practised within the law that he did not even countenance acting for someone charged with a criminal offence.

Her Hon. Judge Jenkins

After three and a half years with that firm she "felt ready to move into a big corporate organisation and concentrate upon just one client". Fate diverted her to the Corporate Affairs Office and, says her Honour, "the next three years were probably the most enjoyable and frantic of my legal life . . .".

Yet such is her industry and capacity that, whilst she was at Corporate Affairs she "managed to squeeze in the excellent diploma course offered by the Securities Institute of Australia". This course, which is both practical and pragmatic, is no pushover. It requires time and application, which, obviously, her Honour did not begrudge.

At her Welcome Her Honour harked back to her days at Corporate Affairs, saying that she felt "particularly indebted to the support and encouragement I received during those years from the now Attorney-General, the Honourable Jan Wade, and His Honour Judge Holt. They remain two of the finest

lawyers I know and have ever had the privilege to work for".

From Corporate Affairs her Honour went to the State Bank of Victoria, which was "just readying itself for its first foray into the Eurobond market. I managed to get involved right at the outset".

But she soon realised that to be taken seriously she needed to infiltrate the ranks of the bankers and not be seen as a mere "lawyer". At the first opportunity she moved into a position in the Treasury Division working for the head of that division, and subsequently she became chief manager of a newly created compliance group for the bank. Her Honour believes that she might still be there today "but for two momentous events, the birth of our children and the intervening take-over by the Commonwealth Bank".

For a short period (during 1991 and 1993) her Honour worked as a part-time sole practitioner and legal consultant.

In 1993 she took up a position as Ministerial Special Projects and Fair Trading Adviser for the Attorney-General and Minister for Fair Trading.

In 1997 she was appointed Crown Counsel. She found that that role gave her "the opportunity to often do what I like best, to meddle in whatever is most interesting and challenging". At her Welcome she expressed the hope that "from this and earlier experiences I have, at the very least, a keen understanding of statutory interpretation and the importance of a sound public policy basis to good law".

Her Honour is married with two children to whom she is obviously devoted. At her Welcome she described them as "our two totally gorgeous and brighter than bright children, Edward and Anna".

She is a keen amateur musician, astronomer and yachtswoman. The latter two interests she shares with her husband, a specialist in nuclear medicine.

Her Honour is a woman with an excellent academic background. She has had wide experience in the corporate and public law fields. She is a woman of courage with a capacity for hard work and who, on all accounts, enjoys a steep learning curve. She also, it seems, has a wry sense of humour.

To her children at her Welcome she said "Edward and Anna, I will remain your mum first and foremost. This Judge thing is just on the side."

Fortunately, as we all know, the children of professionals understand the pressures of practice and of office; and, for this reason perhaps, they value more than most children the time that we can give to them — as do we.

We are sure that Edward and Anna will be barracking for her Honour as she copes with the sometimes difficult days ahead.

We wish her Honour every success in her new venture.

Justice Northrop

THE Honourable Raymond Moyle Northrop retired as Senior Puisne Judge of the Federal Court of Australia on 31 August 1998, aged 73 years, and after 22 years' distinguished service as a Federal Court judge.

His Honour was first appointed to the Australian Industrial Court in March 1976. He was also appointed as a judge of the Australian Capital Territory Supreme Court and President of the Trade Practices Tribunal. On creation of the Federal Court by Parliament, in 1977 he was appointed to that court. Indeed, he is the last of the original appointments to retire from the Federal Court.

He has also held commissions as a judge of the Industrial Relations Court of Australia and as President of the Defence Force Disciplinary Appeals Tribunal.

His appointment brought a wealth of experience to the Bench. He had read in the chambers of Clifford Menhennitt and developed a broad general practice in almost all jurisdictions displaying high character, integrity and an enquiring mind. He is a man in whom a strong sense of principle is combined with a quiet and unassertive manner, but he is also remembered by the Bar as a barrister who was a fearsome opponent.

In 1963, whilst the inner Bar was preoccupied with the Royal Commission into the failure of Kings Bridge, he accepted a brief to appear in what was to him a new jurisdiction, the Commonwealth Industrial Court. In February, 1964, led by Lush Q.C., and his former fellow seaman on H.M.A.S. Arunta McGarvie Q.C., he appeared against his former master in the High Court.[1] This was one of many reported appearances in the High Court .[2]

Judge Northrop

He developed a formidable industrial practice, taking silk in 1970 and establishing himself as an undoubted leader of the industrial Bar, appearing frequently before the High Court, the Commonwealth Industrial Court, the

1. *R.* v. *The Commonwealth Conciliation and Arbitration Commission; Ex parte Printing Industry Employees Union of Australia* (1964) 109 C.L.R. 544.
2. *R.* v. *Gough: Ex parte B.P. Refinery (Westernport) Pty Ltd.* (1966) 114 C.L.R. 384; *R.* v. *Commonwealth Conciliation and Arbitration Commission: Ex parte The Australian Boot Trade Employees Federation* (1966) 114 C.L.R. 548; *R.* v. *Commonwealth Conciliation and Arbitration Commission: Ex parte The Transport Workers' Union of Australia (1967) 119 C.L.R. 529; R.* v. *Watson: Ex parte The Australian Workers' Union* (1972) 128 C.L.R. 77; *R.* v. *Clarkson: Ex Parte The Victorian Employers Federation* (1973) 131 C.L.R. 100; *R.* v. *Evatt: Ex Parte The Master Builders' Association of New South Wales [No. 2]* (1974) 132 C.L.R. 151; *R.* v. *Marshall: Ex parte The Federated Clerks Union of Australia* (1975) 132 C.L.R. 595; *R.* v. *Gough: Ex parte The Municipal Officers' Association of Australia* (1975) 133 C.L.R. 59.

Common-wealth Conciliation and Arbitration Commission and the Victorian State Industrial Appeals Court.

For the most part he appeared for employee organisations, but not exclusively so: at his welcome to the Australian Industrial Court on 22 March, 1976, the employers' representative present was heard to remark that they remembered the occasions he appeared for employer organizations with more pleasure than they did when the contrary was the case.

As a judge, he played a leading role in the Federal Court's ongoing interpretation and application of the *Trade Practices Act* 1974, the *Conciliation and Arbitration Act* 1904, the Corporations Law and federal administrative law. His judgments had a defining role for every aspect of the court's jurisdiction, including what the High Court eventually accepted as the accrued jurisdiction of the Federal Court.[3]

His Honour's judgments were always carefully considered, delivered promptly, frequently *ex tempore*, and always commanded the respect of appellate courts. He sat many times as a member of the Full Court of the Federal Court and, often in joint judgments, settled questions of legal principle and firmly established and applied proper doctrines of precedent in the Federal Court.[4] He was jealous of the exercise of judicial power.[5]

In addition to his judicial work, he was a judge who through sheer dedication put back into the community much of his own free time: Procurator of the Presbyterian Church of Australia, Chairman of the Stevedoring Industry Council, Chairman of the Council of Presbyterian Ladies College, President of the Austin Research Institute, a Warden of Convocation of the University of Melbourne, President of the Graduates, elected 1975 as their representative on the University Council, and Deputy Chancellor of the University from 1985 to 1993. In 1995 his Honour was awarded an Honorary LL.D. by the University of Melbourne in recognition of his long and distinguished service to the community in the fields of law and education.

In all this, he has been supported by his wife, Dr Joan Northrop, and his five children, one of whom, Christopher, is at the Victorian Bar.

At his farewell, his nephew and Federal Treasurer, the Honourable Peter Costello, representing the Attorney-General, Dr Hughes on behalf of the Law Council of Australia, Neil Young Q.C. on behalf of the Victorian Bar, and Mr M. Gowler, Vice-President of the Law Institute of Victoria on behalf of the solicitors of Victoria, thanked his Honour for his contribution to the work of the court and for his very many other contributions to the life and community of the country.

It has always been a pleasure for a member of the Victorian Bar to appear in his court, and the Bar wishes the Honourable Ray Northrop a long and happy retirement.

3. *Adamson* v. *West Perth Football Club* (1979) 39 F.L.R. 199; *Moorgate Tobacco Co. Ltd* v. *Philip Morris* (1979) 145 C.L.R. 457; *Philip Morris* v. *Adam P. Brown Male Fashions* (1981) 148 C.L.R. 457; *Fencott* v. *Muller* (1983) 152 C.L.R. 570.

4. See *Wright* v. *McLeod* (1983) 74 F.L.R. 146.

5. *Re Kwiatek* (1989) 21 F.C.R. 374; *Clerical Administrative and Related Employees Superannuation Pty Ltd* v. *Bishop* [1997] 714 FCA (31 July 1997).

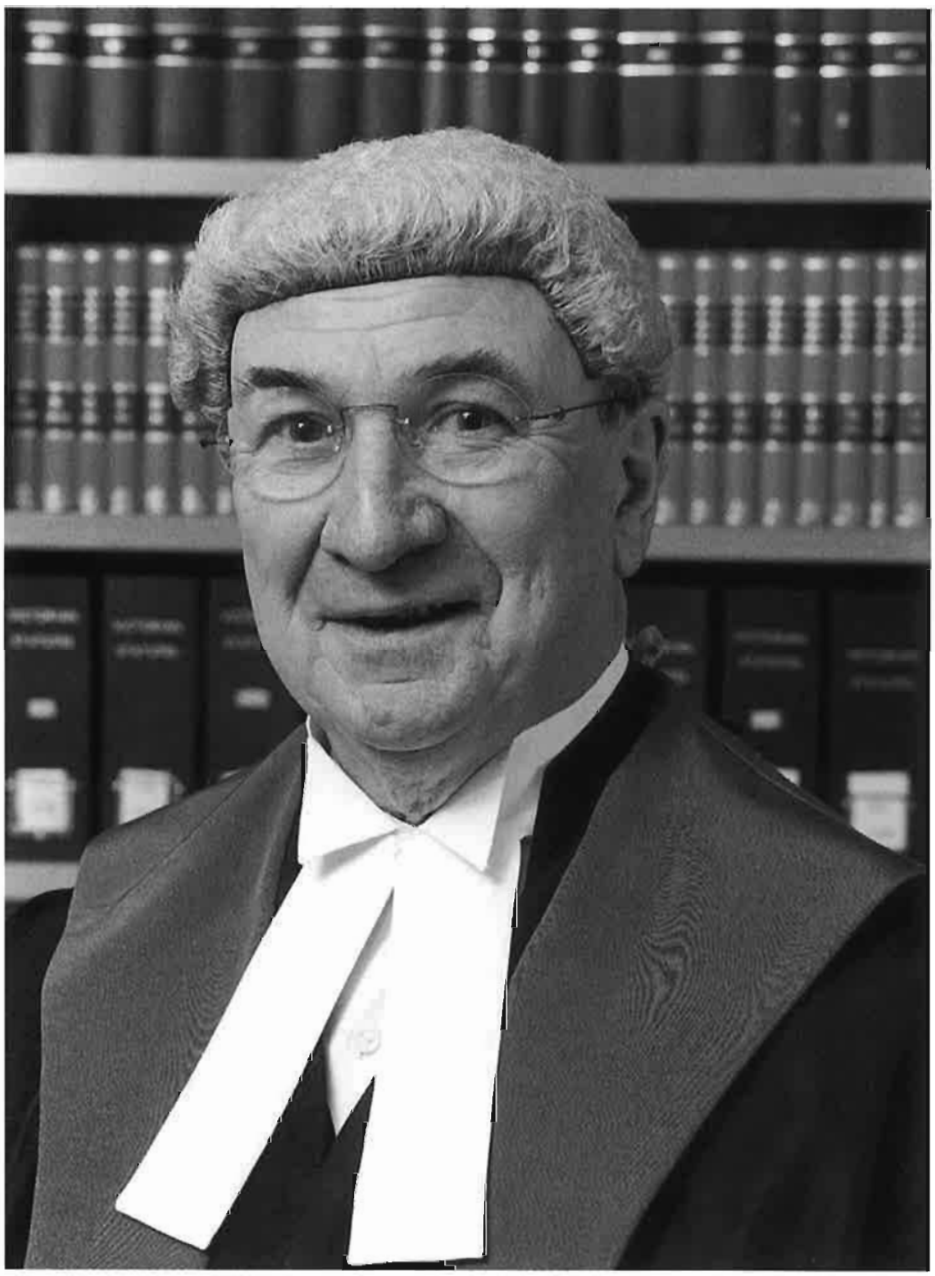
Judge O'Shea

HIS Honour Judge O'Shea's retirement was marked in the eighth court of the County Court on 30 March 1999, two days short of 30 years from his appointment on 1 April 1969. He was Australia's longest serving current judge. A packed court, including a jury box filled with family, heard farewell addresses given by the Attorney-General, Jan Wade, Mark Derham Q.C. for the Bar, and Andrew Scott on behalf of the Law Institute. His Honour was congratulated for his many years of service to the Bar, the County Court, the administration of justice and to the people of Victoria.

His Honour was admitted to practice at the age of 22 and signed the Bar roll two months later, on 5 August 1949. He read with Bill Fazio and took a room in Equity Chambers where he stayed until his appointment to the County Court Bench.

His Honour is well known for his razor-sharp intellect, swiftness in getting to the heart of a matter, his ready wit and habits of great industry. (One reader remembers that a large table in his chambers was always covered with briefs. But the content was not static — the briefs were constantly changing and being replaced with new ones.) It was not all work, however. Time was found for the singing of Irish ballads, particularly in his room after the Christmas parties held by Sir Eugene Gorman in Equity Chambers. As the Irish say, it was great craic!

At the Bar he built up a large general practice ranging over the fields of landlord and tenant, liquor licensing, crime, matrimonial causes, workers' compensation, wills, testator's family maintenance, insurance, and medical and other negligence. Over the years he took five readers. He was junior to Gregory Gowans Q.C. for the licensee plaintiff in the Dennis Hotels case in the High Court in 1959. He appeared before the Judicial Committee of the Privy Council in the same case. He was also before the Privy Council in the workers' compensation case of *Ogden* v. *Lucas*.



His Hon. Judge Joseph Raymond O'Shea retires from the County Court

On the Bench Judge O'Shea specialised in the Criminal jurisdiction, presiding over many notable trials. He was appointed Chairman of the Liquor Control Commission in 1975 and he was Acting Chief Judge from time to time. He also put much time into the general administration of the court. Fellow judges regularly consulted him and regarded him as a mentor.

On circuit at Bairnsdale, his favourite circuit, after court there was hospitality and singing. When a favourite restaurant

was being booked, mein host would ask if the singing judge was coming.

His Honour replied to the gathering saying he had been singularly fortunate in the cards which fate had dealt him and those he picked up as the game of life was played. "To be born in Melbourne, into a family where I had my parents and two brothers and five sisters, all of whom showered me with love, was a very rich blessing indeed," he said. He mentioned his education at St Patrick's College, East Melbourne, his obtaining five years' articles at Mahony, O'Brien and Harty, as the firm was then called, his part-time law course at Melbourne University and his friendship with John Mahony — "a friendship which endured for the rest of his life, even after I married his daughter, Denise".

Judge O'Shea recalled his long friendships with solicitors Ted Mulvany (instrumental in his reading with Bill Fazio, "a great mentor, a lovely man"), Rex Hodge, a fellow fisherman, and Ray Dunn, with whom he shared a high regard for the Richmond Football Club, not to mention doing most of his firm's civil work. We heard of outstanding lawyers he met in Equity Chambers: the great criminal lawyer Jack Cullity, Rob Monahan ("possibly the most powerful advocate of his time"), as well as Reg Sholl, Bill Coppel, Dick Eggleston, Ted Hudson, Lou Voumard, and the irrepressible Grattan Gunson, to mention a few. All of these had given freely of their time to help juniors like him. His visits to the Privy Council were recalled, one with Ted Hill, "a marvellous bloke and a very, very good barrister."

Much had changed since his appointment in April 1969. The present County Court building opened in May 1969 and he was then the most junior of 22 judges, some of whom had chambers elsewhere. Seventy-seven judges had been appointed since. Crown prosecutors used to be on the second floor. They have gone. The building has become crowded down the years.

All present were thanked for coming, as were past associates, tipstaves, secretaries, Sheriff's officers, members of the Bar, solicitors, fellow judges and particularly Judge Shillito and Judge Gray who had assisted him greatly upon his appointment. His Honour paid tribute to his wife, his son and two daughters for help, encouragement and inspiration over the judicial journey.

He had enjoyed all his time on the Bench. In 1969 the retirement date of 1999 had seemed so far away, but finally, in the way of things, it had been reached. With more thanks to everyone, his family, children and those who had joined his family, it was time to adjourn the court *sine die*.

His Honour will serve as a reserve judge.

The Hon. Basil Lathrop Murray Q.C., CBE

THE Honourable Basil Lathrop Murray Q.C., C.B.E. died on 3 May 1999, the day after his 82nd birthday and some 10 years after his retirement from the Supreme Court of Victoria which he graced with such distinction from 1974 until 1988.

According to Charles Francis, the Lathrop Murray family was a very early Tasmanian family, Lathrop being a family name used generation after generation. In the 1830s the magazine *The Tasmanian* was edited by a Lathrop Murray. The name "Lathrop" originally came, we are told, from a valiant soldier, a Captain Lathrop, who, although courageous, got into some sort of trouble in England which led to early migration to Tasmania, although he did not go there transported by Her Majesty.

Despite the names given to him at christening and despite the family tradition, Basil Lathrop Murray was always known as "Tony".

During World War II, Tony Murray served at sea as a lieutenant in the Royal Australian Navy from 1941 until 1946, mainly on corvettes. He commissioned *HMAS Benalla* and then served for a long period on *HMAS Whyalla*. As a judge and as an advocate he seemed to carry with him the characteristics one would expect of an officer on one of Her Majesty's corvettes. He was always calm, firm, polite and practical.

Above all, as a judge he was a gentle and compassionate man in whom confidence never trespassed into arrogance.

He was also a very private man as illustrated by the very short entry under his name in *Who's Who in Australia*.

When he was demobbed from the Navy in 1946, Tony, who had graduated from Melbourne law school in 1939, was admitted to practice and, after a few months as a solicitor, signed the Bar Roll later than year. He took silk in 1960. In 1964 he was appointed Solicitor-General for Victoria and served the State well in that role until his appointment to the Bench in 1974.

Tony Murray's contribution to the law went well beyond the professional services he rendered to the State. He was a member of the Bar Council from 1949 to 1952 and from 1961 to 1964. At the time of his appointment as Solicitor-General he was Vice-Chairman of the Bar Council. As Solicitor-General he was a very active member of the Board of Examiners; and he served on the Council of Legal Education and as a member of the Legal Education Committee which introduced and operated the law course for articled clerks at RMIT. That contribution to legal education continued after his appointment to the Bench.

At the Bar Tony Murray was a jury advocate par excellence. "Pre-constitutional Murray, the insurer's friend" figured in the list of great jury advocates to whom Stephen J referred at the annual Bar Dinner in 1971.

Although he gained his reputation as an advocate in civil jury cases, Tony consolidated it across the whole sphere of the law. As Solicitor-General he appeared in the leading criminal and constitutional cases of the 1960s and early 1970s.

It was Tony Murray who recommended the introduction of tape-recording of the interrogation of suspects. He did this as early as 1965. By the time he retired from the Bench the legislation that he had recommended had been introduced. If the wheels of God grind slowly, they are as lightning to the wheels of government.

As Solicitor-General he took very positively the view that he was independent of his political "masters". He was, as one Attorney-General said, "no mere servant of politicians". During the premiership of Sir Henry Bolte, the Queen visited Victoria. Sir Henry Bolte introduced Tony Murray to the Queen as "my Solicitor-General, Mr Murray". It is reported that Tony turned to the Queen and said, "Actually, Ma'am, I am *your* Solicitor-General".

After his retirement from the Supreme Court Tony gave an interview to the Melbourne *Herald*, and in that interview he recalled that when he started as a young barrister judges were a rather "imperious" lot. "I remember judges as being far ruder and more autocratic than judges would dream of being today," he mused.

As a judge he was never imperious, never rude, never autocratic. But he could be firm. He was courteous and considerate, but, at the same time, he insisted that one get to the point. He did not welcome obfuscation; he cut through it. But, if it irritated him, he did not let the irritation show.

The tragic deaths of his daughter, Jane, and of his first wife, Shirley, which occurred within twelve months of each other at an early stage of his judicial career affected him deeply. But he did not let his personal life affect the way in which he performed his judicial duties. His private life was just that: private.

His departure from the bench was a loss to the law. After his retirement, however, he continued to play a role as Chairman of the Barristers' Disciplinary Tribunal and the Solicitors' Board from September 1989 until April 1994. Unfortunately, in 1994 he was involved in a very serious car accident and fell into a coma, from which it was thought that he would not recover. He did recover, but over the last five years of his life the impact of that accident affected his capacity to enjoy to the full the pleasures of retirement.

At Tony Murray's farewell Charles Francis, who was then Chairman of the Bar Council, said:

> As a judge, your Honour was always firm, your Honour was always decisive, your Honour was always courteous and we also found a new side to your Honour which we had not always seen before: your Honour could be very compassionate and, in particular, your Honour was compassionate when your Honour had to consider family problems and, in particular the problems of children . . . Judges like your Honour are very hard to replace, we see your Honour go with great regret.

Not only as a judge but also as a human being, Tony Murray will be very hard to replace.

We see him go with great regret. His death is a loss to all who knew him.

"Sensible Commercial Management, Not Brilliance" for Super Fund and BCL

J.V. Kaufman Q.C. speaks to R.McK. Robson Q.C., Chairman of Barristers' Chambers Limited and Chairman of Barfund Pty Ltd, the trustee of the Victorian Bar Superannuation Fund

Kaufman: *Barristers' Chambers Limited and the Victorian Bar Superannuation Fund have come a long way since the days of Sir James Tait.*
Robson: I had the privilege of working with Sir James Tait when I was appointed a trustee of the Superannuation Fund in 1980. At that time he was coming to the end of his reign as Chairman of trustees. He and others had formed the Superannuation Fund in early 1960. He had also been the first Chairman of Barristers' Chambers Limited, being appointed in 1959 when the company was established. He resigned as Chairman of BCL in 1979. In 1981 Ian Spry succeeded Sir James as Chairman of the Superannuation Fund. One of the ways that BCL was initially funded was through the Superannuation Fund holding a large number of debentures. BCL came into being when it was decided that the time had come to move chambers out of Selborne over to the new site, which is now Owen Dixon Chambers East, and history has it that Sir Oliver Gillard, prior to his appointment, was one of the major forces in making that move.
Kaufman: *Sir Oliver and Sir Reginald Smithers were the chief persons who convinced the Bar that the move was essential.*
Robson: Yes, I understand that Owen Dixon Chambers East is on the site of an old warehouse owned by the Guests, whether it is Guests Biscuits I am not too sure, and that Sir Oliver, through his contacts, was able to acquire the site. I understand that in his normal fashion he acquired it before seeking the sanction of the Bar Council.
Kaufman: *The Superannuation Fund and Barristers' Chambers itself has grown quite dramatically.*

Ross Robson Q.C. (left) interviewed by John Kaufman Q.C., (right).

Robson: Well that is true. Initially both BCL and the Superannuation Fund were run by Sir James Tait with his secretary Dorothy Brennan from his chambers on the fifth floor. Dorothy Brennan remained Secretary to the Superannuation Fund for some considerable time after I became a trustee, even though Sir James himself resigned in 1981. Subsequently the then Secretary of BCL, Mr Ed Fieldhouse, also became Secretary of the Superannuation Fund and he remains Secretary of the Superannuation Fund to this day.
Kaufman: *Presently, BCL owns quite a bit of property with all of the new chambers around, or am I incorrect?*
Robson: BCL owns Owen Dixon Chambers East. It also owns Douglas Menzies Chambers. It also owns the vacant block of land in Little Bourke Street, which is virtually behind Owen Dixon Chambers West. That is a story in itself which we might come to later. It also currently leases chambers elsewhere such as Latham Chambers and Isaacs Chambers. It leases and in turn subleases out to the various barristers. Before we leave the history of the organisation, it is probably useful to mention that the Superannua-

tion Fund did have a large investment with BCL. The affairs of BCL and the Superannuation Fund were not seen as entirely separate. BCL drew comfort from the fact that it did have this investment from the Superannuation Fund. However, very early in the chairmanship of Dr Spry, it was the unanimous view of the trustees that it was prudent to separate entirely the affairs of BCL and the Superannuation Fund. The trustees took the view, and quite rightly in my view, that a barrister should not invest in her or himself for his superannuation and to invest in BCL seems akin to that. It seemed a prudent course for superannuation moneys to be invested entirely separately from one's activities as a barrister. When the Superannuation Fund redeemed its investment in BCL, another major innovation was that the investment of the trust moneys was handed over to fund managers. Of course great care was taken in the choice of managers. But the managers once chosen have a fairly wide discretion. Currently we have some five fund managers and their appointments are constantly reviewed. They do tend to invest in a similar class of investments although the choice within each class can vary significantly.

Kaufman: *So the trustees such as yourself would have little input into the particular investment as opposed to the choice of managers?*

Robson: It is probably best to give an example. Most managers, if not all, have bands within which they will invest in a certain class of investment. The Trustee pays careful attention to these classes. For example, a manager may invest between 35 per cent and 40 per cent in Australian equities. The particular equity stocks they choose, however, is a matter entirely for the manager. The other important change which brings us down to the present day, is that with the passing of the *Superannuation (Industry Supervision) Act* 1993, the Superannuation Fund became technically separated from the activities of the Victorian Bar in that the members of the Fund now directly elect the directors of Barfund Pty Ltd, which is the corporate trustee of the Fund. Prior to that the Fund had individual trustees, of which I was one. Those individual trustees were appointed by the Bar Council. But since 1993 the members of the Fund have directly elected the directors.

Kaufman: *So the Fund's activities are separate from BCL?*

Robson: The Superannuation Fund's activities are entirely separate from BCL. I believe I am the only common board member and that is by accident rather than design. The Superannuation Fund does not have any investment in BCL and its not likely to occur in the forseeable future. BCL is a wholly owned subsidiary of the Victorian Bar Inc.

Kaufman: *You were one of the trustees first, then you became a member of BCL?*

Robson: Yes, I was invited onto the Board of BCL in 1994. At that stage Allan Myers was the Chairman and BCL was going through a very difficult period. BCL had entered into a fairly complicated financing arrangement to build Owen Dixon Chambers West. BCL had owned the land upon which Owen Dixon Chambers West rests, but did not have the finance to build. At that stage interest rates were far higher than they are today so BCL entered into a complicated arrangement with Schroders Investment Bank whereby BCL would lease the site to Schroders at a peppercorn rent and Schroders would have the building constructed and sublease the building at a significant rent back to BCL. That was all well and good, but the unfortunate aspect of it was that the sub-lease to BCL provided for rent to increase without a provision for rent to fall. The position had been reached that in the late 1980s the rent had increased quite dramatically on ODCW in line with the way the market went generally. However, when property prices and market rents fell in the early 1990s, this left BCL paying too much rent on ODCW. There were all sorts of fears and threats that barristers would move out and take chambers elsewhere. At one stage, BCL consulted with Mr Lindsay Maxstead, an insolvency specialist. In the last *Bar News*, in an article on Allan Myers Q.C., I described in some detail the negotiations with Schroders and their successful outcome.

Currently we have some five fund managers and their appointments are constantly reviewed. They do tend to invest in a similar class of investments although the choice within each class can vary significantly.

Kaufman: *How does it look now?*

Robson: The future of BCL is a good one. However, BCL has two main problems. First is that Owen Dixon Chambers East, its main building, has reached the end of its useful life. That is presenting problems as to how a refurbishment is to be financed. The second problem is that a large number of BCL tenants are now in premises of which BCL only has a lease. BCL has to balance the demands for these rooms with these leases. BCL is unusual in that it is run on partially cooperative lines and partially commercial lines. However, BCL has to make a profit to survive and it has to conduct itself in an efficient and commercial manner. There is a delicate balance between the two requirements.

Kaufman: *I understand that some members of the Bar have moved away from BCL chambers?*

Robson: John, it was a disappointment to BCL when there was a move by BCL tenants to take up non-BCL chambers. It was particularly disappointing as BCL had vacant rooms and therefore barristers leaving had an adverse financial consequence on BCL. Many of those who moved could well afford to stay. On the other hand, I suppose in this day and age it is every person for her or himself. However, it was disappointing because BCL does have this cooperative nature and did have a strong tradition of sharing the common burdens.

Kaufman: *There appears to be a change in philosophy in that Barristers' Chambers now adopts a more sympathetic approach to applications for rooms rather than allotting them by seniority.*

Robson: That is true, John, the old rule was, and still is, the guiding principle that rooms are allocated on seniority. However, under the current room allocation policy, the seniority rule can be departed from in certain circumstances. In particular, if barristers are seeking to form a group with common facilities or a barrister is seeking to expand into the room next door. These are all circumstances which in the past would have fallen foul of the seniority rule. The good part about it is that this has satisfied the genuine demand by many to be able to form groups with other barristers. But there is a down side, however, and that is that a discretion is vested in

the Board of BCL to depart from the seniority rule. The seniority rule had the beauty that there was no discretion and rooms were merely allocated according to seniority. The discretion, John, gives rise to a problem in that as it is a discretion, not everybody is happy with the way it is exercised. Quite often we don't get unanimous decisions on the Board, which is understandable, and even where we do have a unanimous decision of the Board it does not always satisfy the barristers concerned. I think one of the interesting things I have noted about BCL is that BCL tenants can take a rather strong line in dealing with their landlord and they often have very little sympathy with the lot of the landlord's directors.

Kaufman: *The benefit of the Victorian Bar has been that it has an egalitarian approach in that you may be sharing chambers next to a senior silk, and it may be your first set of chambers as a junior.*

Robson: That is exactly right, John. When you and I came to the Bar we were required to take up debentures and unsecured notes. For some years now, there has been no requirement on a barrister taking up chambers to hold debentures or unsecured notes.

Kaufman: *It makes it much easier for a person coming to the Bar, say, than in New South Wales.*

Robson: John, that means today that a barrister coming to the Bar can take chambers without putting up any form of bond and obtain a lease of a room which the barrister can terminate on 30 days notice. The rentals are quite reasonable and the ability to be able to vacate chambers in the event of some change in circumstances is extremely valuable. It is particularly advantageous if a person wishes to retire from the Bar, for whatever reason. The barrister is not bound into a tenancy for five or six years, does not have to give guarantees to a landlord or for that matter does not have to find someone to take her or his chambers to fill in the gap. The thing I have noticed about chambers in Sydney, apart from the horrendous cost, is that the chambers initially taken by counsel inevitably become unsuitable for the practice of the barrister as time passes. We don't have that problem at all with people here constantly changing rooms and it is the sort of thing that one would not do if one owned one's own room. You would find that you may be stuck with this room for the whole of your working life. Barristers take bigger rooms as their practice expands and we find also the reverse occurs in the declining years of their practice.

If we can just return, John, to the Superannuation Fund. The Superannuation Fund has about $60 million under management at the moment. That may seem a very large sum of money. When I was first appointed, we had about $1½ million under management. The

growth has been solid. I cannot go into any individual figures, but I think it is fair to say that the average barrister has far less put aside in superannuation that she or he ought to. What I think is missing is some sort of regular contribution on a planned basis. It appears that towards the end of a barrister's career there is some planning. It would be good if barristers got into the habit of giving a certain percentage of their fees to their clerk to put into superannuation. In future, one of the things the trustee will be looking at is whether it can facilitate that sort of system. The Superannuation Fund has a great advantage over other superannuation funds. The administration and management fees are far less. The trustees do their duties for free of course and we don't have the expense of extensive offices, staff and such like. Another new feature, John, is that a few barristers are transferring their own superannuation funds into their own schemes. In many cases they have been advised to do this by their accountants. In theory, one cannot criticise such a move. Superannuation requires constant attention, and constant changing of investments and constant review. The difficulty we see in the long run is that barristers seem to give most of their attention to their practice and they cannot keep up with continual review of their own investments year after year. They may maintain their interest for a year or so but not for 20 to 30 years. We really think that it takes an unusual barrister to give her or his superannuation the proper attention it needs. Not many of us can do it. We believe the Fund should be a lot greater, not because we want to increase our responsibilities, but we believe that barristers are really not using superannuation as a proper means of saving for their retirement. I think the difficulty is that some times you don't see the necessity for it until you realise that you are fast approaching a stage in your career at which it may be too late to make proper provision.

Kaufman: *From all of this, Ross, the underlining feature, as I see both the Superannuation Fund and the directors of BCL, is that all of this work is done for nothing. It is all in your own time and it has all been for the benefit of the Bar.*

Robson: That is right. The directors of both devote a large amount of time to their positions. John, if I may add, I think that both the Superannuation Fund and BCL are like any sort of business enterprise. They each have a common thread and that is they require sensible commercial management. They don't require brilliance or spectacular investments. They really require sound and prudent investment. I think that the mistakes that can be made are those where people try to make too great a profit or make too smart a decision. Sound finance is really the art of preserving. The Superannuation Fund should be preserved in an environment which allows reasonable growth. BCL, unfortunately, in the past nearly lost its inheritance, through some unfortunate investments made in the late 1980s. The Superannuation Fund has had its ups and downs. As a trustee I am not too concerned about the ups and downs, because the underlying funds are prudently invested. It seems to me that the common thread to both of these enterprises is cautious and prudent management and investment. In any event, that is what I seek to do.

Judicial Appointments

First, do nothing inconsiderately, nor without purpose.
Second, make thy acts refer to nothing else than a social end.

Marcus Arelius: *Meditations*, XII, 20

CHOOSING A JUMBO PILOT

Qantas, which upgraded its simulator facilities recently, has announced the appointment of five graduates of the Beechworth Glider School to captain the Boeing 747s on its London run. According to usually reliable sources, each of these new Jumbo captains has performed extremely well in lengthy sessions in the simulator.

The Manager (Operations) of Qantas assures passengers travelling to London that each of these new captains has all the necessary academic qualifications and is eminently capable of doing the job. However, to ensure that the appointees do have skills and temperament suited to the responsibilities involved, the performance of each pilot will be reviewed at the end of 12 months. At that time, the services of any pilot found to be unsuitable because of lack of skill or lack of temperament will be terminated.

QANTAS has not in fact made any such announcement. But all of us would be nervous of flying in a plane captained by an inexperienced or non-experienced pilot. We would be even more concerned for our safety if we knew that the airline had so little faith in his or her capacity that it saw a need for a review and possible termination at the end of 12 months.

There are people who believe, however, that judges may appropriately be appointed from those who have not previously had any experience of litigation or the trial process. See Babette Smith, the *Australian Financial Review*, 7 May 1999.

No doubt there are some unusual people who can switch from the simulator to a 747 and (if they avoid disaster on the first three or four flights) can eventually become highly competent Jumbo pilots. One would not, however, recommend selection of pilots solely on academic results and simulator experience. It is too dangerous.

Despite the views expressed by Ms Smith most of us would also regard the choice of pilots on a "representative" basis as equally fraught with hazard.

Of course Ms Smith's comments are not directed to the appointment of Jumbo pilots — they are directed to the appointment of judges from persons with no trial experience, on a "representative" basis and on probation. It would seem that Ms Smith — and for that matter the Attorney — believes that there is no danger in such appointments.

JUDICIAL APPOINTMENTS

Judges (now that capital punishment has been abolished) do not make decisions which may result in a litigant's death. They do make decisions that may result in imprisonment for lengthy periods — up to and including the term of one's natural life — or in the loss of all one's assets. They make decisions which have a permanent effect on the lives of children (custody) and orders as to the distribution of matrimonial property. Perhaps most importantly in the present context, they make decisions affecting the powers of Government and the rights of the individual vis-à-vis the State.

In another age, appointment to the Bench was the crowning achievement of a barrister's career. Appointments were made on merit from amongst the leaders of the Bar (or at least from those who were prepared to accept appointment), those whom their colleagues would regard as the most able and experienced trial and appellate lawyers.

It is probably no longer appropriate that judges be — and it is certainly no longer the fact that judges are — appointed solely from the ranks of the Bar. There are many other practising lawyers amongst the solicitors' branch of the profession who have the necessary skills and experience.

There may be an argument for appointing highly qualified academics to appellate courts where their ignorance of the realities of day-to-day practice has relatively little effect on their analysis of the legal issues before them. But, even there, experience of actual trial practice is important. Even long absence from the shop floor, of appellate court judges who practised there for years prior to their appointment, can result in their laying down rules which just won't work. One has only to recall the difficulties faced by trial judges seeking to comply with the directions laid down in *Viro* v. *R.* Whatever arguments may be advanced in respect of appointments to the appellate courts, in the trial courts there is no ground for appointing the inexperienced.

Trial judges are required either to preside over a jury trial or themselves to determine the facts in dispute between the parties. In the latter case they have to make evaluations as to the veracity and reliability of witnesses, to draw inferences from the evidence led and reach conclusions as to the facts, and to apply the relevant law to those facts. In the former case they are required to sum up the evidence and arguments to the jury, to explain the law to the jury and to explain the way in which that law may apply to the facts which the jury may find.

In either case they are required to make rulings on issues as to adjournment, amendment and admissibility of evidence, and are required to control, within the limits of the rules governing court procedure, the conduct of the litigants, their witnesses and their counsel.

The task of a trial judge requires a knowledge of the law, an experience and understanding of people, familiarity with the rules of evidence and procedure and familiarity with the practicalities and nuances of the litigation and trial process. All judges have to be impartial and to have the appearance of impartiality. An unsuccessful litigant should be able to leave the court knowing that he has had (to quote the late Sir Oliver Gillard) a "fair go" and that his case has been

dealt with competently by someone who knows what he or she is doing.

If judges are indecisive, arrogant, inexperienced in dealing with witnesses or facts, unfamiliar with the rules of procedure and evidence, gullible or over-cynical, lacking in compassion and understanding, not in charge (both objectively and subjectively) of their courtroom or appear to be partial to one side or the other, the unsuccessful litigant will not go away feeling he has had a "fair go".

From the point of view of the efficient and proper functioning of the whole judicial system, it is important that judges have the genuine professional respect of those who appear before them. It is also important that the best qualified people be attracted to the Bench. The downgrading of the judiciary, whether it be by not seeking to appoint leading members of the profession to the Bench, by giving "P-plate" status to new judges or by generally lowering the working conditions of judges, militates against both of these desiderata.

Appointment to the Bench has always had some "political" overtones. Herbert Vere Evatt, Lionel Murphy, Sir John Latham and Sir Garfield Barwick were all political appointees. Each of them was also a litigation lawyer of standing. Political appointments which by-pass the apparently most able and experienced potential appointees — whether the appointment be made as part of some broad policy of affirmative action or for more personal reasons — damage the system. If enough such appointments are made, the damage, whether intended or not, may be permanent.

PROBATION AND INDEPENDENCE

The appointment of judges on probation represents the most dangerous form of political appointment. A judge who has been in private practice prior to his or her appointment has, by the end of the probationary period, "lost" his or her practice. It is difficult, if not impossible, to return to practice and pick up the threads where he or she left off.

A probationary judge's continued tenure of office lies in the hands of the executive. He or she is required continually to adjudicate between the State and individuals or to preside over trials to which the State is a party. This occurs not only in disputes as to the powers of government, in administrative law tussles, in environmental disputes or freedom of information wrangles. It is also the case in every criminal trial.

When the Attorney or the Premier says "violence must be stamped out", or "shoplifting has become too prevalent", how does a probationary judge with six months to go react? Are his sentencing orders affected by what the Government has said?

The Police Minister makes a press statement about drug dealers being "acquitted on technical grounds". Does this affect the judge's direction to the jury?

From the point of view of the efficient and proper functioning of the whole judicial system, it is important that judges have the genuine professional respect of those who appear before them. It is also important that the best qualified people be attracted to the Bench.

Judges are honourable men and women. They are, however, also human. There is necessarily pressure on a judge whose appointment is probationary not to give decisions which upset his or her political masters, upon whose goodwill his or her future livelihood is dependent.

Ms Smith says that in opposing the appointment of acting and probationary judges "the legal profession apparently assumes that lawyers, functioning as judges, are incapable of upholding personal and professional ethics unless they have tenure, or constitutional entrenchment. If so, then it should immediately introduce mandatory continuing education courses on ethics for senior partners and silks in case they are appointed to the Bench".

The assumption that attending a course in ethics makes one ethical, immunises one from temptation and pressure, and ensures that one behaves honourably no matter what the personal cost, is one of the more naive assumptions implicit in her article.

It also ignores a more fundamental problem, that "the devil knoweth not the mind of man". Whenever a probationary judge — especially towards the end of his or her probationary tenure — gives a judgment that favours the interests of his or her political masters in a case where the findings of fact or the conclusions of law could go either way, the litigant will not know what factors influenced the decision. Even the judge may not be sure.

Even if the probationary judge feels no pressure to meet the wishes of the government, even if he or she is totally unconcerned about the views or needs of the executive, the litigants who appear in the judge's court will not know this. Those who are unsuccessful in litigation against the State will have a justifiable grievance — their case was determined by a judge whose independence and impartiality must be suspect.

THE NEED FOR EXPERIENCE AND INDEPENDENCE

None of us want to fly with a Boeing 747 captain who has never previously flown (whether as a first officer or otherwise) in a Boeing 747. Nor do we want to fly with a Boeing 747 captain whose continued tenure of his job may depend upon issues of fuel economy rather than the taking of adequate safety precautions. Equally, we do not wish to be operated on by a brain surgeon who has topped the medical school but has never been in an operating theatre before, or by one whose hospital tenure depends on the speed with which he operates.

The role of the trial judge is a complex and difficult one. It is also an important one if we are to remain (as we traditionally have been) a law abiding and integrated society.

A strong, independent and manifestly independent judiciary is not necessary for the existence of a democratic society. But democracy does not equate with freedom. As Fareed Zakaria points out (*The Rise of the Illiberal Democracy* Foreign Affairs, November/December 1997), although for almost a century in the West democracy has meant "liberal democracy — a political system marked not only by free and fair elections, but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property" — these freedoms, which we take for granted, are not a necessary characteristic of democracy.

Democratically elected regimes, often ones that have been re-elected or reaffirmed through referenda, are routinely ignoring constitutional limits on their power and

depriving their citizens of basic rights and freedoms.

To quote Zakaria again:

The tendency for a democratic government to believe it has absolute sovereignty (that is, power) can result in the centralisation of authority, often by extra-constitutional means and with grim results. Over the last decade, elected governments claiming to represent the people have steadily encroached on the powers and rights of other elements in society.

Our accepted freedoms depend rather on constitutional liberalism than on democracy.

To use Zakaria's words:

For much of modern history, what characterised governments in Europe and North America, and differentiated them from those around the world, was not democracy but constitutional liberalism. The "Western model" is best symbolised not by the mass plebiscite but the impartial judge.

The maintenance of a "liberal" democracy depends upon some balance of powers. If the executive controls parliament (as is the case at present in Victoria) the only fetter on the power of the executive is the power exercised by the judiciary.

If we are to maintain the present balance between individual and State it is important, both at a practical and philosophical level, that the power of the judiciary not be watered down in any way at all.

At a more "people-oriented" level, it is clear that suspicion or concern as to the competence or impartiality of the judiciary must weaken faith in the judicial system. If there is no faith in the fairness and integrity of the system, self-help becomes more socially acceptable.

When the people feel they no longer have government under the law but rather law under the government, the moral compulsion (or incentive) to obey the dictates of either is weakened. If it is sufficiently weakened, the very fabric of society is threatened.

Gerard Nash

Centre for Legal Education Finds Law Student Numbers Increasing

UNDERGRADUATE law student numbers in Australia grew by 10 per cent in 1998. The recently released *Australasian Legal Education Yearbook 1998* reveals that there are now just under 24,000 undergraduate law students in Australia. This compares to almost 19,000 in 1995. Numbers in recent years have increased at about 2000 per annum.

The Australasian Legal Education Yearbook has been published by the Centre for Legal Education since 1995. The Director of the Centre, Chris Roper, cautions that this apparent dramatic increase partly reflects that a number of new law schools are coming on-line. This rate of increase is unlikely to continue into the future.

The university with the largest number of undergraduate students was the Queensland University of Technology, with just over 2100 students. Nine law schools have enrolments in excess of 1000 students. New South Wales had by far the largest number of undergraduate law students — 7883, representing 33 per cent of total national numbers.

Fears that the legal profession risks being overwhelmed by this number of law students are probably unfounded, says Chris Roper. Even this number of students only represents 62 per cent of the number of lawyers in Australia with practising certificates. The proportion is a modest increase on the numbers in 1996 and 1997. In those years undergraduate students represented 57 per cent and 58 per cent respectively of the number of lawyers with practising certificates.

The Centre for Legal Education's national law graduates' career destinations study reveals that only about one half of recent law graduates are working in the private legal profession. Many graduates are in other types of legal work, such as in government. Whether this is by choice or circumstance is not clear. Despite the large number of undergraduate law students, the private legal profession is unlikely to be swamped with by increased intake.

Increasing student numbers also have an impact on teacher:student ratios in law schools. Law already suffers from high ratios compared to many other disciplines. On a national basis the ratio in 1998 was 1:26 compared to 1:24 in 1997 — reflecting a deteriorating situation in the law schools. This ratio is based on the law schools' equivalent full-time teacher numbers. In all there were 815 equivalent full-time law teachers in Australia with responsibility for teaching 23,760 undergraduate law students.

The State with the best ratio was Western Australia where there were 21 students for every full-time equivalent law teacher. The State with the highest ratio was the Northern Territory where there were 40 undergraduate law students for every equivalent full-time law teacher.

Women again outnumbered men in the law schools. In 1998, 56 per cent of Australia's undergraduate law students were women. In every university, except three, they outnumbered male law students. Looking back over four years, the gap between the number of women and men law students is increasing.

The Australasian Legal Education Yearbook, published by the Sydney-based Centre for Legal Education, reports a wide range of national, State and institutional statistics on many aspects of legal education. Apart from undergraduate students and academic staff; it reports on postgraduate student numbers, university law libraries, practical training, continuing legal education and admissions to practice.

Air Commodore Andrew John Kirkham RFD, Q.C., RAAF

DUE to publication deadlines, the report in the last issue of *Bar News* of the swearing in of Andrew Kirkham as Deputy Judge Advocate General of the Australian Defence Force on 12 February was all too short. As the accompanying photographs demonstrate for those of us lucky enough to be present, it was an intensely satisfying experience. Andrew's activities at the Bar are well known. He is a former Chairman of the Motor Accident Appeal Board, and a Victorian Legal Aid Commissioner. As President of the Australian Bar Association, he carried the organization of the ABA London Edinburgh conference in 1991–92. His chairmanship of the Bar Council in those years was the culmination of an illustrious career in the service of its members.

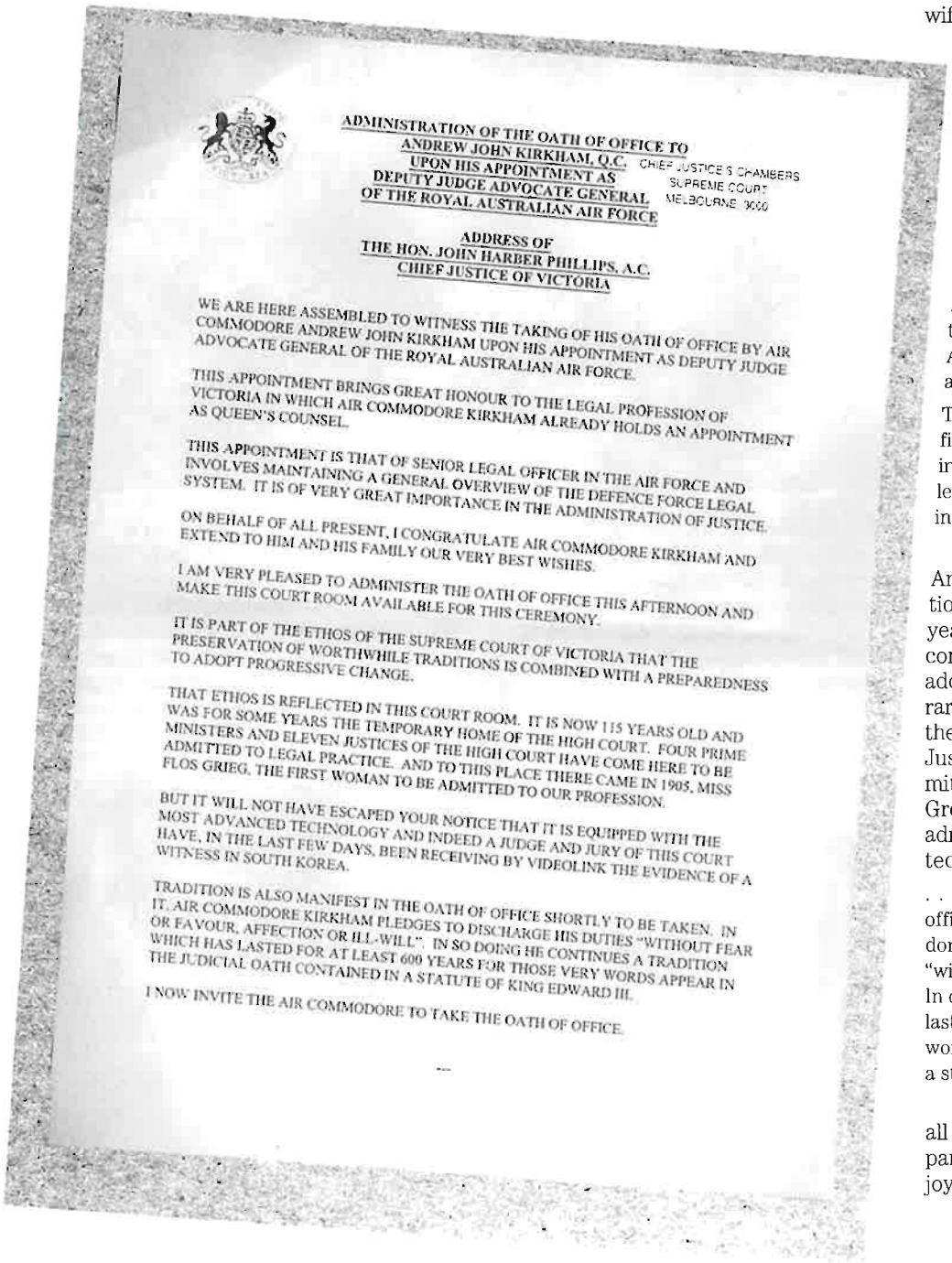
Andrew has an equally high calibre practice. Whether he likes it or not, he will be best remembered for his unstinting work as junior counsel with the current Chief Justice in the defence of Lindy Chamberlain. Nevertheless, other cases have given scope to his adept and tenacious performances. Some of these significantly wrought the Criminal Law. They included: *O'Connor*, *Apostoulidis* and *Kural*, in the High Court. Others bore more directly on our social fabric — *Terminals Limited* (Coode Island Fire) and more recently the Longford Royal Commission. More than one of our colleagues has benefited from his professional expertise and generosity in their defence.

Chief Justice Phillips AC with Commodore Kirkham Q.C.

Not so well known to members is Air Commodore Kirkham's military contribution to the law, and to the Services. He has long enjoyed the respect and admiration of military lawyers for his painstakingly thorough and invariably cor-

Martial Court

rect reviews of the products of the military justice system. It is difficult to judge whether his greatest effect was in correcting errors at first instance in military trials as a reviewing officer in his Section 154 Defence Force Discipline Act review reports; or in ensuring that they did not happen, in his capacity as a trial judge advocate and defence force magistrate. I particularly enjoyed the benefit of his expertise as the consultant to the committee constituted by Andrew and Mr Justice Kevin Parker of the WA Supreme Court in the 1996 review of the Defence Force Discipline Act Rules. Indeed, although I knew it not at the time, it was our joint assiduous non-application to rule 33 (order of voting in courts martial) that enabled me later, to successfully justify in the High Court, the maintenance of the status quo. His military prowess became more evident to civilian lawyers with Andrew's appearances as lead counsel in the Black Hawk and HMAS Westralia boards of inquiry. But his greatest achievement (and that as a flight lieutenant) was to convince an RAAF board of inquiry that the red light outside a certain Group Captain's door served an aesthetic, not nefarious purpose.



ADMINISTRATION OF THE OATH OF OFFICE TO
ANDREW JOHN KIRKHAM, Q.C.
UPON HIS APPOINTMENT AS
DEPUTY JUDGE ADVOCATE GENERAL
OF THE ROYAL AUSTRALIAN AIR FORCE

CHIEF JUSTICE'S CHAMBERS
SUPREME COURT
MELBOURNE 3000

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

WE ARE HERE ASSEMBLED TO WITNESS THE TAKING OF HIS OATH OF OFFICE BY AIR COMMODORE ANDREW JOHN KIRKHAM UPON HIS APPOINTMENT AS DEPUTY JUDGE ADVOCATE GENERAL OF THE ROYAL AUSTRALIAN AIR FORCE.

THIS APPOINTMENT BRINGS GREAT HONOUR TO THE LEGAL PROFESSION OF VICTORIA IN WHICH AIR COMMODORE KIRKHAM ALREADY HOLDS AN APPOINTMENT AS QUEEN'S COUNSEL.

THIS APPOINTMENT IS THAT OF SENIOR LEGAL OFFICER IN THE AIR FORCE AND INVOLVES MAINTAINING A GENERAL OVERVIEW OF THE DEFENCE FORCE LEGAL SYSTEM. IT IS OF VERY GREAT IMPORTANCE IN THE ADMINISTRATION OF JUSTICE.

ON BEHALF OF ALL PRESENT, I CONGRATULATE AIR COMMODORE KIRKHAM AND EXTEND TO HIM AND HIS FAMILY OUR VERY BEST WISHES.

I AM VERY PLEASED TO ADMINISTER THE OATH OF OFFICE THIS AFTERNOON AND MAKE THIS COURT ROOM AVAILABLE FOR THIS CEREMONY.

IT IS PART OF THE ETHOS OF THE SUPREME COURT OF VICTORIA THAT THE PRESERVATION OF WORTHWHILE TRADITIONS IS COMBINED WITH A PREPAREDNESS TO ADOPT PROGRESSIVE CHANGE.

THAT ETHOS IS REFLECTED IN THIS COURT ROOM. IT IS NOW 115 YEARS OLD AND WAS FOR SOME YEARS THE TEMPORARY HOME OF THE HIGH COURT. FOUR PRIME MINISTERS AND ELEVEN JUSTICES OF THE HIGH COURT HAVE COME HERE TO BE ADMITTED TO LEGAL PRACTICE. AND TO THIS PLACE THERE CAME IN 1905, MISS FLOS GRIEG, THE FIRST WOMAN TO BE ADMITTED TO OUR PROFESSION.

BUT IT WILL NOT HAVE ESCAPED YOUR NOTICE THAT IT IS EQUIPPED WITH THE MOST ADVANCED TECHNOLOGY AND INDEED A JUDGE AND JURY OF THIS COURT HAVE, IN THE LAST FEW DAYS, BEEN RECEIVING BY VIDEOLINK THE EVIDENCE OF A WITNESS IN SOUTH KOREA.

TRADITION IS ALSO MANIFEST IN THE OATH OF OFFICE SHORTLY TO BE TAKEN. IN IT, AIR COMMODORE KIRKHAM PLEDGES TO DISCHARGE HIS DUTIES "WITHOUT FEAR OR FAVOUR, AFFECTION OR ILL-WILL". IN SO DOING HE CONTINUES A TRADITION WHICH HAS LASTED FOR AT LEAST 600 YEARS FOR THOSE VERY WORDS APPEAR IN THE JUDICIAL OATH CONTAINED IN A STATUTE OF KING EDWARD III.

I NOW INVITE THE AIR COMMODORE TO TAKE THE OATH OF OFFICE.

Andrew has not been "just a lawyer", either at the Bar or in the RAAF. He received his first colours at Melbourne Grammar and a half blue at Melbourne University in athletics. His athletic prowess has stood him in good stead in his assault on the Kokoda Trail, and elsewhere where, with his delightful, entertaining and expertly gastronomic wife Jenny, he indulges his passion for travelling exercise. Wherever possible, he has joined in the purely military activities of the Defence Force.

It was entirely fitting then, that his one-time leader, our current Chief Justice, had this to say while swearing him in as a Deputy Judge Advocate of the Australian Defence Force:

> . . . This appointment brings great honour to the legal profession of Victoria in which Air Commodore Kirkham already holds an appointment as Queen's Counsel.
>
> This appointment is that of senior legal officer in the Air Force and involves maintaining a general overview of the Defence Force legal system. It is of very great importance in the administration of justice.

And then, after congratulating Andrew, and referring to the preservation of the one hundred and fifteen years of the tradition of the Court, in combination with a preparedness to adopt progressive change, its temporary accommodation of the High Court, the four prime ministers and eleven Justices of the High Court who were admitted to practice in the Court, Flos Greig the first woman practitioner to be admitted in 1905 and its modem video technology, he went on:

> . . . Tradition is also manifest in the oath of office shortly to be taken. In it, Air Commodore Kirkham pledges to discharge his duties "without fear or favour, affection or ill-will". In doing so he continues a tradition which has lasted for at least 600 years, for those very words appear in the judicial oath contained in a statute of King Edward III.

Congratulations Air Commodore, from all the members of the Service legal panels, particularly those who also enjoy membership of this Bar.

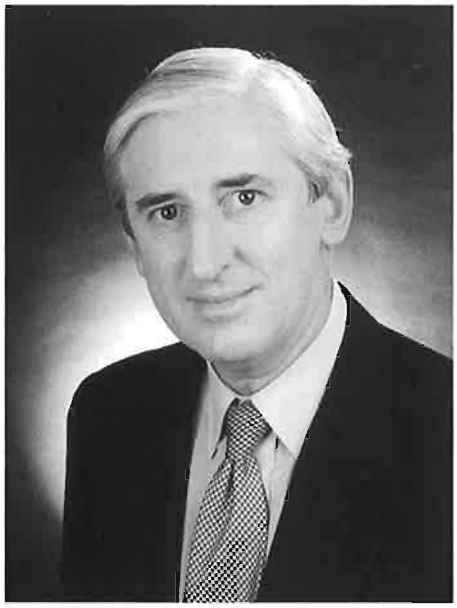
Commander P.A. Willee RFD** Q.C.

Former Victorian Appointed NSW Solicitor-General

WITH defamation actions by politicians in the news, New South Wales has turned to a former Victorian and co-author of the Australian text on libel law, Michael Sexton S.C., as its new Solicitor-General. He succeeds Leslie Katz S.C. who was appointed to the Federal Court.

Michael Sexton brings a wide and deep intellectual and public law background to an intensely political office. He was brought up in Surrey Hills, but for some unknown reason he fell to following the Geelong Football Club. Despite this handicap he excelled at the Melbourne law school and, after graduation and admission to the Supreme Court of Victoria, in 1969 was able to land jobs first as a legal officer with the federal Attorney-General's Department, and then as associate to McTiernan J of the High Court. After accompanying McTiernan J to the Privy Council in London he spent a few months exploring Europe in a campervan with some old colleagues from the law school, including the now Senior Crown Prosecutor John McArdle Q.C. and John Byrnes (there was much eating and drinking). America beckoned and in 1973/4 he completed an LLM at the University of Virginia. A stint in Washington during the Watergate scandal whetted his appetite for public law and the corridors of power. On his return to Australia he headed to Canberra to immerse himself in the final heady days of the legal reform agenda of the Whitlam Government, then under the stewardship of Attorney-General Kep Enderby. November 11, 1975, brought an end to all that and Mr Sexton retreated to the academy. For eight years he lectured at the University of NSW law school.

It was during this period that Michael Sexton's real flare with the pen began to emerge. In 1976 he published a well-received and insightful analysis of the Whitlam years with *Illusions of Power: The fate of a reform government.* From a perspective of one who had been involved, and knew the players and institutions, he essayed the key controversies of the Whitlam years: Connor, Khemlani and the loans affair; Senate obstruction; bureaucratic obstruction; the controversial period of Lionel Murphy as Attorney-General; and finally the dismissal and its aftermath. Many of his suggestions as to strategies for a reform government now seem dated: he suggested, for example, wider control over foreign investment, the exercise of influence on corporate investment decisions, and an increased role for government-owned corporations. His conclusion, however, that reform governments will always encounter ferocious opposition has been well and truly borne out. His final suggestion that any reform government must come into office with a comprehensive plan for the execution of its platform if it is to have any hope of triumphing over entrenched opposition both from within and without is close to the mark, if the experience in this State over the last generation is any guide.



Michael Sexton S.C.

At this time he also published a number of articles and a text on what was then a controversial and developing area of economic regulation, the regulation of foreign investment. In 1979–80 he spend a period at Georgetown University law school, Washington, and on his return to Australia wrote *War for the Asking, Australia's Vietnam Secrets (1992).* While the full details of our Vietnam involvement have now been released, this book was the first exposé, using many still classified Foreign Affairs Department records, of the duplicitous manner of our entry into that conflict.

The legal profession was the next target of the pen of the new second law officer. In *The Legal Mystique — The role of lawyers in Australian society* (1982) he joined forces with Laurence Maher, now of this Bar, to address, in a book essentially aimed at a lay audience, a wide-ranging critique of the legal profession. Something of the flavour of the tract can be gleaned from the catchy chapter headings, which included "The Secret Seven" (the High Court), "The Myth of Neutrality" (the establishment dominance of the senior Bar and judiciary), and "Wages at a Fee: Lawyers and Industrial Relations". One conclusion (shock! horror!) was that "there is a substantial element of self-interest in [lawyers'] resistance to certain proposals for change, most particularly those that would affect their financial interests, such as the loss of the conveyancing monopoly, or those that would diminish their control over the supply of legal services, such as regulation by an independent body of lawyers and non-lawyers". Sound familiar?

A critical view of the legal profession did not stop Mr Sexton joining the NSW Bar in 1984. He specialised in media law and libel, and administrative law. The former area is a lucrative patch in NSW. He held a retainer from the ABC and in 1991 he co-authored the leading loose-leaf service on defamation. He acted for the plaintiffs in the recent "Mr Bubbles" defamation case (*Deren* v. *New South Wales)* where a husband and wife wrongly named as paedophiles were awarded $450,000 and $350,000 respectively (the former verdict remitted on appeal, while the latter sustained). He

was also involved in numerous ABC defamation actions involving public figures. In administrative law he had a busy practice representing government departments before the many administrative tribunals in NSW. One major inquiry in which he was involved was that into the deaths as a result of deep sleep therapy at the Chelmsford Hospital.

In his spare time Mr Sexton commenced writing book reviews for the *Sydney Morning Herald* and in 1989 penned a spy novel, *Australian Eyes Only*. It contains no sex and only the odd murder, but the suitably racy plot concerns a hard-bitten journalist who asks the wrong questions about a bundle of secret documents. It is infused with language and situations that echo its authors' wide exposure to the corridors of power and ranges across Washington, Canberra, Paris and New York.

In the early 1990s Sexton commenced a regular commentary spot on the ABC Radio National breakfast show, where he was able to bring his views about politics and the law to a wider audience.

The NSW Government in 1996 appointed him to the political hot seat of head of the State Rail Authority. He saw it as an opportunity to put some of his knowledge of government and politics into actually delivering a public service. The trains kept running and in 1997 he was also appointed a member of the Public Transport Authority.

In October 1998 he was appointed senior counsel and in November took up his new post.

Michael Sexton does not have the conventional background often associated with appointment to the post of second law officer in a State government. His broad literary and intellectual talents mark him as a public figure also holding high legal office. His credentials as a black letter lawyer are solid. In what is conventionally seen as a "non-political" office, his wide experience in government and in political discourse is unconventional but refreshing. He is now in a position to bring this experience to advice and advocacy work for the largest State bureaucracy in the country. He will also be able to use it to inform the High Court submissions of the most intervention-prone State government. Good government in all its significations will benefit from his contributions. The Bar wishes him well on his appointment.

M.D. Murphy

175th Anniversary of the Opening of the Supreme Court of Tasmania

Left to right: Liz Bugg, Tim Bugg, Janina Gawler, Michael Gawler, Amanda Derham, Mark Derham Q.C. and Jan Martin, at the Gala Dinner.

ON 10 May this year the Supreme Court of Tasmania held a ceremonial sitting to mark its 175th Anniversary. On 10 May 1924, the Court, consisting of Chief Justice Pedder (who had been sworn in by Lieutenant Governor Sorell three days earlier) sat for the first time. It is significant to note that its first trial, two weeks later, was of a white man, William Tibbs, accused of the manslaughter of a Tasmanian Aborigine. Tibbs was found guilty and, presumably, hanged.

The ceremonial sitting of the Court on Monday 10 May was preceded on the Saturday by a Gala Dinner, to which representatives from the Bars and the Law Societies around Australia were invited. I attended, representing the Victorian Bar, with my wife Amanda. The Tasmanian Law Society gave us a very warm welcome to the Apple Isle. Tim and Liz Bugg entertained us to a very pleasant (and long) lunch before the Gala Dinner. The dinner was held at Moorilla, a winery overlooking the Derwent, and was exceptionally well done. Speakers at the dinner included Sir Guy Green (the Governor and former Chief Justice), Chief Justice Cox and Tim Bugg (the President of the Law Society of Tasmania, pictured above).

All of the Tasmanian lawyers we met expressed a much greater acceptance of Victorian lawyers practising in their State than lawyers from any other jurisdiction and were very proud that their Court's first sitting had pre-dated the New South Wales Court by a week (the Supreme Court of New South Wales celebrated its 175th Anniversary on 17 May). I am unable to report regarding the New South Wales celebrations.

Mark Derham Q.C.
Senior Vice-Chairman
Victorian Bar Council

Strange Plurals II

THE English language displays all its quirkiness in the matter of plurals.

The oddities are often disguised, because English is a relatively uninflected language, and mismatches of number can easily pass unnoticed. So, in the sentence *What odds do you suggest?*, there is no way of knowing — thus no need to decide — whether odds is a singular or plural noun. The *s* at the end is not necessarily a reliable guide, as I will show.

The hearty smorgasbord of English offers such delicacies as words which are plural in form but treated as singular; words which are singular in form but treated as plural. There are plurals which refuse to admit of a singular; and singular words which do not admit of a plural.

For example, *physics*, *mathematics*, *economics*, *linguistics* and *hydraulics* are all words which are singular in sense and are construed as singular, despite their form. They do not have plurals. *Politics*, and *ethics*, by contrast, are construed as plural but does not readily admit a singular form. *Arithmetic* and *logic* are singular in sense and form, but do not readily accept a plural.

Acoustics and *aesthetics* remain ambivalent: they look and act like plurals, but among the hard-edged chic they are also used in the singular: *The Playhouse has a very dry acoustic/pre-modern aesthetic*. Apart from the fashion statement implicit in the choice of form, however, the idea conveyed remains unchanged: the singular and the plural mean the same thing.

Pants, *trousers*, *breeches*, *scissors*, *shears*, *bellows*, *spectacles* and *glasses* are all plural in form and they need a plural verb: *These trousers are too small*; *these scissors are blunt*. The curiosity is that we often re-double the plural character of the things by referring to *a pair of* pants, scissors, etc. Yet the semantically identical *two scissors*, *two bellows* would be absurd.

In the fashion industry, where the quest for variety is ceaseless, it is common now to hear reference to *a nice pant*, *a smart trouser*. But although the gurus of fashion often treat us to a *spectacle*, they do not use the word in reference to eyewear. Perhaps that too will come, when the monocle reclaims its place as a fashion accessory.

By contrast, *news*, *mews* and *molasses* are plural in form but take the singular, whether the particular instance of the thing is one or many.

So, *the news is bad*, whether the news under discussion is a single item or the entire contents of a newspaper. It was not always so: even during the reign of Queen Victoria, it was common to say *the news are bad*. In modern French *les nouvelles de l'Angleterre sont tres mauvais* still.

Mews was originally plural: *mewing* is a synonym for *moulting*; a *mew* was a cage for a mewing hawk. The mews were moved to make way for the King's stables; the stables were later moved to make way for fashionable and expensive housing. As the stables gave way to desirable accommodation, the unequivocal plural became a collective singular, *a mews*.

Molasses derives ultimately from the Latin root for honey: *mell-*. It was introduced into English from the French *melasse*, but was originally introduced in the plural form as *melasus*. The fact that it is treated as singular is understandable: like many nouns of multitude, the emphasis is on the undifferentiated bulk rather than a specific portion. But the gratuitous use of the plural form is unaccountable.

What the lawyers call *fungibles* are often nouns of multitude: *wheat*, *barley*, *rice*, etc. Each is singular. To distinguish the individual example from the aggregate, it is necessary to refer to *a grain of wheat*, *an ear of corn*, etc. An exception to this pattern is *oats*, which is an orthodox plural of *oat*, although the singular form is rarely used. One grain of oats is just *an oat*. Compounding this curiosity, *porridge* has for a long time been regarded in English and Scottish as a collective plural: *These porridge are too cold* is correct, and in Scotland it is current, but (in Australia at least) it is rare.

Other nouns of multitude, such as *public*, *parliament*, *government*, *company* etc. can be treated as singular or plural, depending on whether the emphasis is on the collection or the individuals constituting it. The *government are considering changing the regulations* suggests that individuals within the govenment are doing the considering. This usage has an outdated air to it, perhaps because our system of govenment puts little store on individual thought among its members.

To add to the confusion, *parliament*, *government* and *company* can take a plural form, but the meaning conveyed is quite different.

Assets was, originally, construed as a singular word despite its form, because it was originally used adjectivally. It began life as the Latin *ad satis* (to sufficiency) and is reflected in the modern French *assez* (enough). In law, the French *aver assets* meant *to have enough* (i.e. to satisfy a judgement or demand). In particular, it meant "*Goods enough to discharge that burthen, which is cast upon the executor or heir, in satisfying the testator's or ancestor's debts and legacies*". Soon enough, the form of the word led to its being treated as a noun, construed as a plural, and it lost the connotation of sufficiency. To complain that you do not have enough assets would once have been nonsensical — indeed self-contradictory — but is now a common complaint, and well understood.

Although *assets* readily admits the singular *asset*, the corresponding *goods* will not. *She had not a good or chattel to her name* is a familiar idea but uncomfortable English. Why *goods* should not readily admit of the singular form is a mystery. In a different meaning, *good* can be used in the singular: *this is all to the good*. But it remains intractably plural in its commonest usage.

Some of the strangest contradictions are seen in the heartland of plurality: numbers. *One head of cattle*; *two dozen head of cattle*; *three hundred head of cattle*; *four hundred thousand head of cattle* . . . All these constructions are perfectly good English. Likewise, it is usual to say that *a country has a population of 18 million*. Why not *two hundreds*, *two hundred thousands*, *18 millions*? It seems that we readily treat numerals as collective nouns, although it is difficult to see any unifying principle to determine when this should be done.

By contrast, we readily speak of peo-

ple arriving in *ones and twos*, or being at *sixes and sevens*, or meeting for *elevenses*. These are all idiomatic. But when a plural form is logically suggested, we cling to the singular. The most striking exception to this the idiomatic expression *on all fours*. *On all four* would make perfect sense, but rendering *four* in the plural is inexplicable.

Most collective nouns retain their form regardless whether they are treated as singular or plural: *the public are dissatisfied with the taxation system*; *the public is disturbed by the increase in crime*. By contrast, some numbers readily take a plural form but are treated as collective plurals in either case. *Many thousands of people were seen at the rally/ten thousand people were seen at the rally.*

It is a curious thing that the formality of legal proceedings induces us to lapse into irregular plurals.

And while we are speaking of people, we lawyers have a strange ambivalence about the plural of *person*. In ordinary conversation we speak of *one person, many people*. But give us a document to draft or a judge to address, and it is *one person, many persons*. In the same way, we refer conversationally, with no risk of misunderstanding, to a person withdrawing all her *money* from the bank. But in Court, she deals with all her *monies*. It is a curious thing that the formality of legal proceedings induces us to lapse into irregular plurals.

Few would recognise *stamina* and *truce* as plurals, or *peas* and *cherries* as singular. Once it was so. The *stamen* is a thread-like structure in plants. It was also one of the threads spun for our lives by the Fates, in Roman mythology. These threads were thought to be responsible for our individual vitality. The plural of *stamen* is *stamina*.

Trewe/triewe was a Middle English word which meant *truth or fidelity to a promise, good faith, assurance of faith, promise*. It was generally used in the plural, spelt variously as *triews, trwys, trues* etc. until the spelling *truce* emerged in the 16th century and stabilized in the 18th century. Thus, *truce* is a plural.

What we now call *peas* are botanically *pisum sativum*. The word entered English as *pease* (singular) but was commonly supposed to be plural because of the form and because it is generally used as a collective noun. By backformation *pea* emerged as the singular. In a similar way, the cherry entered English at the time of the Norman conquest as *cyrs* or *ciris*, from the French *cerise*, which is still used in English as a colour. That old-fashioned girl, Eartha Kitt, wanted *an old-fashioned car, a cerise Cadillac — long enough to fit a bowling-alley in the back.*

The form of *ciris* drifted long before Eartha Kitt ordered her Cadillac, and in the 17th century it was *cheryse*. Sounding plural, it was treated as plural, and the singular forms *cherie, cherrie* and finally *cherry* emerged.

Means, in the sense of *method*, is sensibly understood as a singular notion, but only takes the plural: *The means he used were deplorable*. In the same way, *thanks* may refer to a single expression of gratitude, but only allows the plural form: *His thanks were gratefully received*. Neither *means* nor *thanks* has a singular form. *Alms, amends, bounds, confines, grounds, aerobics* and *hustings* all have the same characteristics. By contrast, *innings* in cricket can be either singular or plural depending on the intention of the speaker.

In a different way, *odds* will be either singular or plural, depending on the sense intended by the speaker. *Odds* means the difference between several things, the condition of being unequal, disparity in number. It is commonly encountered in the colloquial expression *to be at odds with someone*, i.e., to be in a position different to that of the other person. In this sense, it is singular despite its form. Another colloquialism preserves a hint of the singular: *What's the odds?* means *What is the difference?* It is otherwise for the *odds* in gaming, which is plural. It has no singular: even a single wager has plural odds.

Data and *media* are two words increasingly used by journalists and others as singulars. They are convenient in the singular, and well understood. This is currently causing irritation and anxiety among the learned, because they are unquestionably plural. The battle rages quietly in clubs and correspondence columns. But let me offer a word of advice to the learned: look at all the words discussed above, and give up the fight.

Julian Burnside

Young Lawyer Award Nominations Invited

Applications and nominations are now being called for the 1999 Australian Young Lawyer Awards.

A biennial event, the Awards aim to encourage young lawyers' associations, and individual young lawyers, to develop and implement projects for the benefit of the legal profession and/or the community.

The Awards are judged in three categories — professional issues, community issues and individual contributions.

Applications and nominations for the Awards will close at 5 p.m. (AEST) on Friday 3 September 1999. The recipients of each category of the Awards are expected to be announced at the 31st Australian Legal Convention in October.

For further information, application forms, and rules governing the Awards, contact Mr Gerard O'Neill at the Law Council Secretariat, on Tel. (02) 6247 3788.

The March 1999 Victorian Bar Readers

Back row: Tass Angelopoulos, Nicholas Harrington, Diana Harding, Christopher Hanson, Paul Lawrie, John O'Sullivan, Robert Thyssen, Paul Cronin, Stewart Bayles, Michael Galvin, Jonathan Evans, Philip Crennan.

Centre row: Barbara Walsh, James Gray, Bernadette McMahon, Elizabeth Brimer, Belinda Lim, Gregory Hughan, Randall Kune, Angus Frith, Timothy Luxton, Lydia Ruschena, Timothy Jacobs, Marietta Bylhouwer, Lyn Harrison, Melinda Carr.

Seated row: Timothy Puckey, Rodrigo Arellano, Carrie Romesievers, Caroline Korus, Daniel Wettao, Bernard Tomer, Pauline Mogish, Georgina Reyntjes, John Downie, Bernard Quinn, Ashley Halphen.

Front row: Michael Croucher, Matthew Collins, Brendan McIntyre, Jason Pennell, Robert Heath, Andrew Kirby, Irene Bolger.

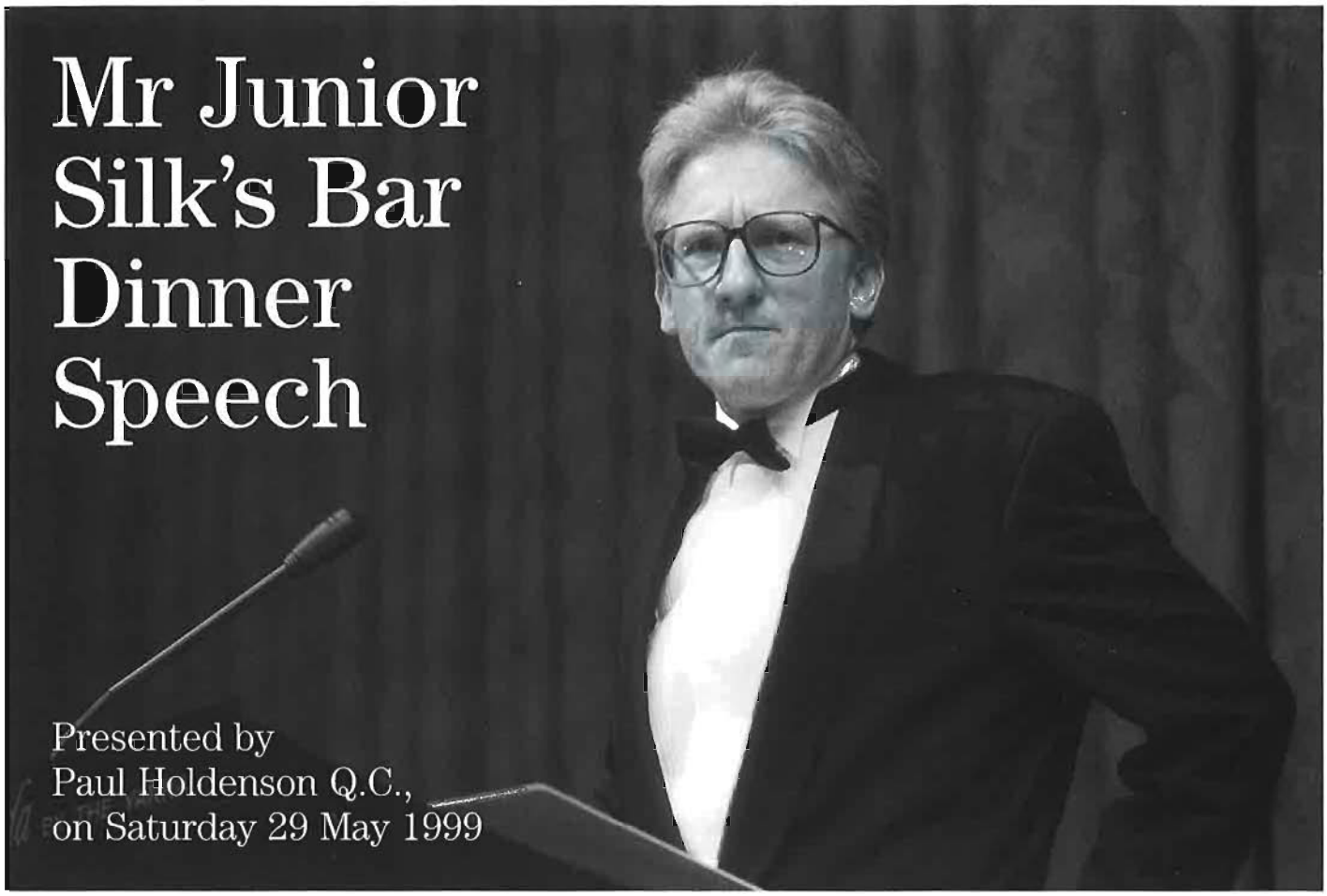
THE March 1999 intake of the Victorian Bar Readers' Course commenced on Wednesday 1 March 1999. On Thursday 27 May 1999, thirty-eight Readers signed the Roll of Counsel and four Papua New Guinea practitioners signed the Victorian Bar Roll for Overseas Lawyers.

The thirteen-week Course conducted by the Victorian Bar is regarded within Australia and other common law countries as of the highest standard.

The Readers' Course Committee again extends its appreciation to all members of the Bench and the Bar who so generously give their time and expertise to instruct each intake of Readers, thereby maintaining the standard of excellence of the Victorian Bar.

Barbara J. Walsh

Mr Junior Silk's Bar Dinner Speech



Paul Holdenson Q.C., Mr Junior Silk.

Mr Chairman, distinguished guests, members of the Victorian Bar:

Albeit feeling both humbled and honoured upon being appointed a silk, I regret to say that I have been subsequently hoping in vain that no further persons be appointed to any of our courts — in an effort to ensure that nobody be added to the List of Honoured Guests.

But when regard is had to the achievements and background of those appointed, all will agree that my time was poorly spent.

GAFFNEY

In June last year Master Jack Gaffney was awarded a Medal of the Order of Australia for service to the Victorian justice system as Registrar of the Court of Appeal, to the community and to sport.

To those many people who know Jack, this award came as no surprise; there could be no member of the community more deserving.

Jack has been the Registrar of Criminal Appeals since 1982, and in that office he has come to be universally loved and respected by each and every participant in the criminal justice system in this State.

But for Jack Gaffney, the system would grind to a halt. Jack Gaffney ensures that, in perhaps the most difficult of jurisdictions, matters proceed with no fuss.

From every member of the Supreme Court who has ever sat on the Court of Criminal Appeal or the Court of Appeal, through to the most hardened of convicted criminals, Jack Gaffney is trusted and commands the respect of all; whatever Jack says and does is invariably right — and accepted as such.

Jack is truly a compassionate man and that is perhaps best seen down in the cells when he converses with the unrepresented appellants, whose cases rarely have merit. He assists them in the preparation of their argument; he gives them the confidence to go up to the court and present their points to the judges. He sits in the body of the court to give them some reassurance.

But that is by no means the extent of Jack's good nature. Every member of the Criminal Bar who has appeared in that court — and not just for their first time — has been assisted by Jack. He invariably provides guidance and advice when needed. And in what can often be very onerous work, he provides much needed encouragement.

On many occasions he has taken the junior barrister aside at lunch-time and said: "Now son, that's not the way to do it, what you have to do is . . ."

I know only too well; Jack has often taken me aside in this way.

This work of Jack's in the court has been much observed and this is what no doubt led the Chief Justice, Chief Justice Phillips, to say to me just over a week ago:

He has combined total honesty, straight-talking and discretion in such a way as to obtain the complete confidence of the prisoners, particularly the unrepresented prisoners with whom he has to deal. His encouragement of junior and even more experienced counsel is beyond praise.

These characteristics have not just been displayed in the last 17 years. Through Jack's entire life, he has demonstrated such values.

He has, for example, always been most considerate. As a very young man in Broken Hill, having taken up the dangerous sport of professional boxing in order to supplement the family income, Jack boxed under the name of "Mick Flynn" so that his Mum would not find out.

By the way, Jack was never beaten, and on one occasion, he beat John E. Cann, the young man who, in 1952, won the Stawell Gift.

Moreover, he is humble; Jack was never too proud to seek advice. As a 16-year-old, in his first senior game of football in Broken Hill, Jack played on one Gorilla Jones, a big man who played football by reference to his name. Throughout the first half, Jack got the ball on many occasions, but on each occasion he was wrestled to the ground by Gorilla and grabbed in no uncertain terms below the waist.

At half-time, and very sore, Jack sought the advice of the coach. The coach advised that every time the ball approached, Jack was to embrace Gorilla, kiss him on the lips and tell him "I love you, Gorilla".

Jack took the advice, it worked, and in his first senior game, Jack was nominated "Best on the Ground".

These traits no doubt qualified Jack for his VFL football career when he came down to Melbourne in 1949 in order to play for Fitzroy. Jack became one of their best players. He was a colourful and outstanding half-back flanker. He played more than 80 games; he played in the 1952 finals at the MCG and was one of the best players on the ground in the winning team in the first semi-final; and in 1953 he polled more votes than any other Fitzroy team-member in the Brownlow medal count.

Some few years ago, Fitzroy named its best team since the war, and Jack Gaffney was named on the half-back-flank.

In 1970, Jack became a member of the VFL/AFL tribunal; he was a member of that tribunal for 18 years, four as Chairman. He served with one Jack Winneke Q.C., as His Honour then was, for in excess of six years.

In that role, he was perceived by all to be fiercely independent, reasonable and fair; he certainly understood the burden of proof, natural justice and what constituted a reasonable doubt. Jack was the champion of giving a bloke a fair go and he very quickly became know as "Let 'em off Jack".

In that role, Jack had some critics. The umpires soon declared that they knew more about football and more about the rules than he did. With the introduction of the video, however, they were forced to withdraw their declaration.

Although Jack was only a member of our Bar for some four or five years, he has indeed always been a big supporter of the Bar. As an employee in the then Crown-Solicitor's Office, and later as a solicitor, Jack was a "big briefer" and it was not unknown for Jack, on his way home, to deliver a brief personally to a barrister's home. On one such occasion, upon the mere delivery of a backsheet, Phillip Dunn enquired as to "the instructions". Jack simply replied that counsel needed "room to swerve".

Jack Gaffney (also once known as Mick Flynn), the Victorian Bar, and most especially the Criminal Bar, celebrates your award and most sincerely thanks you. We do wish you well.

MERRALLS

James Donald Merralls Q.C. was appointed a member of the Order of Australia for service to the judiciary and to the legal profession as the editor of the *Commonwealth Law Reports*.

James Merralls AM, Q.C., Joseph Santamaria Q.C. and Stephen McLeish.

Jim Merralls became the editor of the *Commonwealth Law Reports* in May 1969. He previously served as a reporter for some nine years, having commenced in 1960 along with his fellow reporters: one R.C. Tadgell and one J.D. Phillips, members of our Court of Appeal. At that time, although having already signed the Bar Roll, Jim was the Associate to the then Chief Justice, Sir Owen Dixon.

Upon taking over as editor, several tea chests containing the transcripts of argument and judgments in excess of 100 cases were dumped upon Jim. Jim's first task was to get rid of the backlog. This were merely the first of his achievements as editor.

He was then able to turn the *Commonwealth Law Reports* into the quality series of authorised reports that they are today. His task is not only to identify the *ratio* of the case, but also to ensure that the argument of counsel is faithfully

reported in precis form. Such requires an inventive reporter, for so often our argument is not at all clear. On occasions, of course, we have no argument at all. We thank you, Jim, for adopting a creative style and thereby attributing some legal foundation to our submissions in the High Court.

Jim Merralls became the Editor of the *Commonwealth Law Reports* in May 1969. He previously served as a reporter for some nine years, having commenced in 1960 along with his fellow reporters: one R.C. Tadgell and one J.D. Phillips, members of our Court of Appeal.

In 1994, upon the publication of Volume 180 of the *Commonwealth Law Reports*, the volume which reported those cases previously considered unreportable but which, subsequently, attained reportable status, Sir Anthony Mason, then Chief Justice of the High Court, paid tribute to Jim, Jim having then been the editor for 25 years. He congratulated Jim on his long service and tireless dedication to his task.

Jim Merralls has, however, contributed to publications other than the Law Reports.

Jim has been the editor of various film journals, a film critic, a theatre correspondent for *Nation* and the Australian correspondent to an English journal concerned with the breeding of thoroughbreds.

Thoroughbred breeding and racing are, of course, strong interests of Jim's which go back at least to 1970 — when Jim was the part-owner of the 1970 Caulfield Cup winner "Beer Street". That win ensured Jim's popularity with many members of the Bar who literally cleaned up in the betting ring. Not only did "Beer Street" start at the generous odds of 15/1 in the Cup, but it is said that a number of people here this evening took the 50/1 a week earlier, immediately prior to that horse winning the Herbert Power Handicap — also at 15/1.

Although recognised as a connoisseur of fine wines, the mild-mannered Jim was seen after the race at the horse's stall without restraint consuming champagne in copious quantities from the Cup. And that night, the Halls of Trinity College were awash with the wine and generosity of Gentleman Jim, as he was that night.

And it was of course some 24 years ago that, in his capacity as Mr Junior Silk, Jim Merralls relied upon this expertise concerning wine and compared the then six honoured guests to old bottles of wine. Jim described one of the then recently appointed Supreme Court judges as: "equable, individual, well-balanced, but loathe to reveal too much of

Wayne Martin Q.C., representing the Australian Bar Association.

David Curtain Q.C., Chairman of the Victorian Bar.

Phil Corbett, Stephen McLeish and Chris Boyce.

Daniel Star, Jacqueline Joran, Mary-Anne Hughson and Richard Wilson.

B. Thomas Q.C., The Hon. Justice Marks, The Hon. Justice Jenkinson and Neil Williams Q.C.

itself on first acquaintance, it makes good drinking now, and has just a suggestion of fullness in the middle palate to indicate that it will develop further subtleties of flavour when it settles in its new cellars after 10 years in government bondage".

It must be pointed out, however, that one judge was critical; he said that Merralls was there to honour the guests — not comment on the wine.

Jim, you are a great wordsmith, and on behalf of the Bar, we join in that plea made to you by Justice Sundberg and ask that you remain editor of the *Commonwealth Law Reports* until at least the year 2009, by which time you will have beaten Sir Frederick Pollock's almost 40 year record as editor of the *Law Reports*.

WARREN

Justice Marilyn Louise Warren was only the second woman to be appointed to the trial division of the Supreme Court of Victoria.

Upon being admitted to practice, Justice Warren was employed in many senior positions in the State Attorney-General's department, including solicitor to the Comptroller of Stamps and Senior Legal Policy Advisor to three Attorneys-General.

Subsequently, in 1984 and 1985, Her Honour held the position as Assistant Chief Parliamentary Counsel.

In 1985 Her Honour signed the Bar Roll and took silk in 1997.

As a member of our Bar, Her Honour was hard-working, organised, objective and independent of mind; she was acknowledged as a clear thinker. We note that these characteristics have been reflected in Her Honour's written judgments.

Those who shared chambers with Her Honour describe her dedication not only to the law, but also her commitment to both the community and her family.

The Victorian Bar wishes Justice Marilyn Warren well upon her appointment.

Judge Walsh, Paul Cronin, Brendan Murphy and Samantha Marks.

Karin Emerton, Jenny Davies, John Bleechmore and Bruce Geddes.

PILGRIM, WILLIAMS AND JENKINS

In very recent times, there has been a number of appointments to the County Court Bench; and I now have the pleasure of welcoming as honoured guests of the Bar those three appointments. They are: His Honour Judge Pilgrim, Her Honour Judge Kathy Williams and Her Honour Judge Jenkins.

Lance Pilgrim became known to many members of this Bar as a clerk of courts in various Magistrates' courts across the State from the late 1950s to the mid-1970s.

Having obtained his law degree, he worked as a solicitor in the Crown Solicitor's Office and, subsequently, was appointed to the magistracy. He became the co-ordinating Magistrate in the Gippsland region and occupied that position for nearly 10 years. Those of us who had the pleasure of appearing before His Worship, as he then was, will well recall his conscientious approach; he often sat beyond normal court hours in order to conclude a hearing and thereby suit the convenience of counsel from Melbourne.

In more recent years, His Honour was appointed the President of the Guardianship and Administration Board and, in turn, His Honour became a Deputy President at the Victorian Civil and Administrative Tribunal, in charge of the Guardianship List.

With His Honour's appointment to the County Court Bench, that Court has inherited a wealth of practical experience, and the Victorian Bar wishes His Honour well now that His Honour has been appointed to this State's primary trial court.

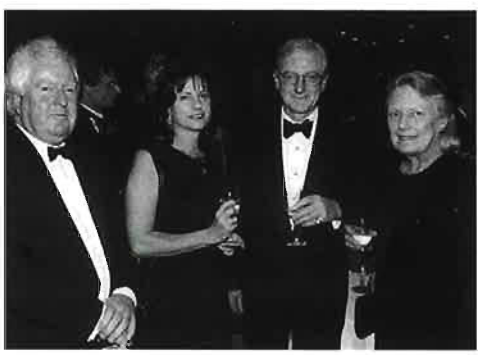
Kathy Williams, a member of our Bar, was appointed to the County Court Bench last month.

Although Her Honour was admitted to practice more than 25 years ago, Her Honour spent some 15 years as a tutor in the faculties of law at both the University of Melbourne and Monash University in the well-known and "stimulating" subjects of property and trusts.

Upon signing the Bar Roll in 1988, Her Honour read with Peter Hayes; he was the first to discover how knowledgeable and able was Her Honour. Her Honour

Lesley Taylor, Sharon Jones, Michael O'Connor, Sophie Panopoulos and Michael Bearman.

Ron Holdsworth, Judge Williams, Rod Cameron and Michael Hines.



Michael Dowling, Rachelle Lewitan Q.C., Mark Derham Q.C. and The Hon. The Attorney-Gerneral Jan Wade.

soon became a busy commercial junior; she was much sought by both the leading commercial solicitors and leading commercial silks at this Bar. There is no doubt that this appointment brings a wealth of knowledge and experience to the County Court.

Her Honour, prior to her appointment, made many contributions to the Bar and we are very much in Her Honour's debt. She was both Honorary Secretary and a member of the Ethics Committee, a member of the Equality of Opportunity at the Bar Committee and, more recently, she served as a Director of Barristers' Chambers Limited.

The Bar welcomes Your Honour's appointment and wishes you well in your being a member of a very busy Court.

Pamela Jenkins was appointed to the County Court Bench late last month. Her Honour had previously held the office of Crown Counsel for the State of Victoria.

Her Honour was a comparative late-comer to the law, having previously been engaged in a number of major public hospitals as a nuclear medicine technologist.

Her Honour then, in the late 1970s, obtained an Honours Degree in Laws at Monash University, obtaining a number of distinctions and prizes. Subsequently, Her Honour held a number of senior positions in the then Office of Corporate Affairs, worked in various roles at the State Bank, including the position of Senior Solicitor at the International Treasury Department of the Bank and then became a ministerial adviser to the Attorney-General and Minister for Fair Trading.

In the latter role, Her Honour played a significant part in the drafting of much legislation, including the legislation in respect of the control of domestic building and the regulation of both the Futures industry and corporate takeovers.

In responding to the speeches made at Her Honour's welcome, Her Honour made the point that she was proud that both the persons with whom she socialised and her professional contacts undoubtedly numbered more non-lawyers than lawyers and this was a matter of which she was unashamedly proud. We agree that this will surely stand Her Honour in good stead for the task which lies ahead.

The Victorian Bar welcomes to the County Court a judge with such distinguished experience in the public sector.

BENNETT

David (Michael John) Bennett Q.C. was appointed Solicitor-General of the Commonwealth of Australia for a five-year term in August 1998.

David Bennett practised as a member of the New South Wales Bar from 1967, taking silk in that State in 1979. He developed a broadly based practice and rapidly became one of Australia's leading appellate advocates. In fact, so constant was his attendance in Canberra, he had both a set of robes and his very own kettle kept in the Registrar's Office.

Mark Dreyfus, Susan Buchanan and Darren Bracken.

David Bennett has very much contributed to the maintenance and strength of the independent Bars in this country. He has actively served the New South Wales Bar Association in various capacities for more than 20 years, serving as its President in 1995–97. David also served as President of the Australian Bar Association in 1995–96. David Bennett has done much to resist the now persistent attacks upon both the legal profession and the independent Bars. We are indeed grateful.

We wish David Bennett well in his new office as Solicitor-General of the Commonwealth.

WATT

In December, 1998 Michael Watt Q.C. was appointed a judge of the Family Court of Australia.

To those of us who became familiar with his devotion to family law, and its reform, there is absolutely no doubt that that was a most deserving appointment.

His Honour, however, was not always destined for the law. Upon leaving school, His Honour was variously employed as a taxi-driver, an orderly in an operating theatre, a market research interviewer, a school teacher, a rugby coach and, finally, His Honour served as a member of the Royal Australian Air Force.

Whilst a member of the RAAF, he was stationed at Point Cook and, in 1967, commenced the study of law at the University of Melbourne.

Having then worked as a solicitor and tutored part-time in family law at Monash University, His Honour signed the Bar Roll in 1978, reading with Paul Guest, now His Honour Justice Guest of the Family Court.

His Honour soon became one of the very busiest of the practitioners at the Family Court and, in 1994, took silk, being Mr Junior Silk of that year.

As counsel, His Honour had a reputation in the family law jurisdiction as a great analyst with an attention to detail. His Honour possessed a retentive memory and, in respect of his advocacy skills, he had a flair for the dramatic.

None of this is surprising; in even his very first paid appearances, he showed those same characteristics when, during his teenage years, he was one of the Quiz Kids on New Zealand radio.

His Honour has always been generous with his knowledge, experience and expertise; he has consistently contributed to the law and the community.

For 15 years His Honour was a member of the Executive of the Law Council of Australia. In this role, His Honour represented the (Law) Council in making numerous submissions to government, the Family Law Council, the Family Court and the Australian Law Reform Commission.

In addition, His Honour represented the Law Council as its nominee on many committees convened by the Family Court, including those committees appointed to evaluate the practice and procedure of that court.

His Honour also served the Family Law Bar Association of the Victorian Bar as either Chairman or Vice-Chairman for many years. (And through those years, His Honour published extensively on

financial and property matters relating to family law.)

His Honour has clearly been active; in fact, His Honour has always been active for, as was disclosed at His Honour's welcome, he was as a child hyperactive which led to his being expelled from the kindergarten he attended as a young child.

Not only to those of us who were fortunate to share chambers with you, but the entire Victorian Bar, having observed your dedication, industry, balance, respect for others and service to the profession, we wish you a long and satisfying career as a member of the Bench.

WEINBERG

In July last year Mark Weinberg Q.C. was appointed to the Federal Court.

For many of us, Mark was our tutor or lecturer at Melbourne University, positions he held from the early-1970s to the mid-1980s. He subsequently held the Office of Dean of the Faculty of Law. Throughout these years, Mark authored or co-authored many of the seminal works on criminal law, criminal procedure and evidence.

Those who practice in the criminal jurisdiction owe a great debt to Mark Weinberg.

Coming to the Bar in 1975, Mark in his early years ensured that the then developing practice of the criminal law in this State as something intellectual was maintained, and played his part in ensuring that it was given the badge of respectability — something it very much deserved.

He then became one of the most gifted appellate advocates in this country; he appeared in more than 25 appeals in the High Court post-1980, almost every one of which changed the course of the criminal law in this country. He was also involved in a number of appeals of constitutional significance.

Mark took silk in 1986 and, in 1988, was appointed Commonwealth Director of Public Prosecutions, an office he held until 1991.

Whilst Commonwealth Director, he displayed a prodigious capacity for hard work and analysis. He was responsible for the formulation of many of the prosecution policies that are still applied today.

As an advocate in the High Court, albeit both able and fearsome by reason of his extensive knowledge, powers of analysis and ability to think quickly, he *was* able to admit his ignorance of the law.

During argument in *Mascantonio* in November, 1994, when Justice Dawson asked for an explanation of a passage contained in a judgment in a then fairly recent decision of that Court, Weinberg simply responded by saying: "I cannot assist your Honour. Why ask me? After all, you wrote it."

As an advocate in the High Court, albeit both able and fearsome by reason of his extensive knowledge, powers of analysis and ability to think quickly, he *was* able to admit his ignorance of the law.

It was on that trip to Canberra that, as a junior, I came to realise something of His Honour's insight. While having dinner the night before, and upon being asked a question by our instructing solicitor, Weinberg responded that he knew just how I was feeling — just as he had when he was a junior being led — namely, wishing that the leader would get food-poisoning so that the junior could do the case alone and not have it messed up by the silk.

Notwithstanding His Honour's appointment, he still displays many of the characteristics of a barrister. A few years ago, we appeared for separate defendants in a committal hearing. After much persuasion and cajoling, he was convinced to put a certain argument. The argument was mounted and duly rejected. He quipped that the rejection was inevitable.

Subsequently, at the trial some 12 months ago, the argument was again mounted; it again failed. Although he did not appear, when informed of the failure, he advised of the lack of wisdom in the putting of such an argument.

The point was taken to the Court of Appeal. Again the argument was put. When informed during the luncheon adjournment that it was meeting much resistance, His Honour said that he was not surprised for it was nothing other than "a load of bull".

The Court of Appeal reserved and on the day when judgment was delivered, upon being informed that the appeal had been allowed, His Honour spoke at length of how he had always known that *his* point was a good point and would *undoubtedly* be eventually accepted as such.

With His Honour's appointment, the Criminal Bar has truly lost one of its leaders.

His Honour always generously gave of his time to assist both the Criminal Bar Association in its work and its members with the preparation of their cases. He was a good friend to his colleagues and to those who were his juniors. He was always quick to pay tribute to their work, provide advice when sought and protection when required.

As is I think well known, I was, for some three years prior to his appointment, consistently briefed in criminal matters as Mark's junior. We developed a very close relationship.

It must be said, however, that it was not so close that I was able to act upon the advice proffered in September 1996 by my then three-year-old daughter Virginia.

Mark and I were working literally day and night in a matter and, on one Sunday evening, I had to leave home in order to come into Mark's chambers so that we might complete an advice.

As I was leaving home, I sought a goodnight kiss from my daughter; she refused, saying: "If you want a kiss, you get one from Weinberg."

Justice Weinberg, the Criminal Bar is especially pleased upon your being appointed. Your unerring sense of fairness and justice means that your appointment is not only most deserved but has the support of each and every member of our Bar.

Although, as was said at the time of your appointment, we no longer have anyone to ask if the point we have formulated is correct, we congratulate you, and wish you well in this phase of your career in the law.

CONCLUSION

The Bar extends its congratulations and best wishes to the appointees, the recipients of awards, and the holder of public office who are our guests here this evening.

Would you now charge your glasses for the toast to our honoured guests.

Our honoured guests.

Speech in Reply by James Merralls AM, Q.C.

Speech in reply by James Merralls AM Q.C., to the toast to the guests at the Annual Dinner of the Victorian Bar held at Leonda, Hawthorn, on Saturday, 29 May 1999.

WE tail-enders have all the fun. None of us can bat. Few can field. And those of us who bowl succeed more by good luck than skill. Some of us are such occasional players that we have to be introduced to our team-mates as we step on to the field.

Why should a tail-ender be asked to represent the side in this single-wicket match? I suspect that it is because 24 years ago I spoke at this dinner in the shoes now worn by Mr Silk. That speech seems to have been fondly remembered by many who did not hear it and to have been mercifully forgotten by those who did.

Its theme was wines. It led to another invitation to speak at a Bar function some time later. That was the dinner at which this Bar honoured Sir Harry Gibbs on his retirement from office. He said that he had a foreboding of the worst when he was told who was to speak. He feared that I had heard of Queensland's most famous wine: Romavilla sparkling sweet sherry. But he had nothing to fear but fear itself. I chose another theme. And tonight, I am happy to say, in the words of the youngest member of my household, there are zero green bottles.

I came to the Bar on April Fool's Day 1960. I signed the Roll of Counsel on 27 April. My number on the Roll is 616. Number 617 was Neil McPhee who signed the Roll three months later. Eleven members signed the Roll that year of whom, sad to relate, less than half still live.

I was admitted to practise in the morning and, after being lunched at the old Melbourne Fish Café, in Bourke Street, presented myself at Richard Newton's chambers to begin my career.

All but a handful of the Bar were housed in four sets of chambers. The flagship was Selborne, a long gallery structure running between Bourke Street and Chancery Lane, next to Menzies Hotel. There were also Equity, Saxon House and Eagle Star. The tenancy of Equity Chambers had been obtained early in the thirties by Eugene Gorman, otherwise known as Pat, who had led a breakaway group from Selborne. He still held court there in 1960, though for some years retired from active practice, in a room with walls covered by cartoons and racing photographs from which he railed at the plans to establish what were to become Owen Dixon Chambers. Saxon House was a rabbit-warren of a building near Selborne in Chancery Lane which had been leased in the fifties to house the junior bar. As an articled clerk I attended on Daryl Dawson and Jim Gobbo there. Eagle Star Chambers, where I read, had been obtained through the efforts of Maurice Ashkanasy to meet the pressing need for accommodation after the war. By 1960 it housed a group of juniors, senior to those in Saxon House, who had not yet graduated to one of the tightly held rooms in Selborne. As the sixth floor of an old insurance company building it was in a sense an outpost. But some outpost! On the Bourke Street front passage at one end was my master, Richard Newton, at the other John Young with whom Clive Tadgell was reading as a pupil of one month's standing when I arrived. Elsewhere were McGarvie, Murphy, Fullagar, Connor, Leo Lazarus, Norman Vickery and, in a converted broom-cupboard which might have been devised by Lewis Carroll, the young S.E.K. Hulme, fresh from Oxford in a duffle-coat. At the back, overlooking Bank Place, was the only silk, Keith Aickin. The floors of the passages were of bare boards. The rooms were surfaced with linoleum. Outside Newton's window a neon sign flashed alternately red and green Eagle/Star.

Richard Newton was the only son of Sir Alan Newton who was one of the founding fathers of the Royal Australasian College of Surgeons. Through his maternal grandmother he belonged to the Stephen family which spawned a shoal of lawyers, academics, administrators and writers in the last century. Richard Newton's great-grandfather, George Stephen, was a brother of James whose son, the Cambridge don Leslie Stephen, was the father of Vanessa Bell and Virginia Woolf. A great uncle James Wilberforce Stephen was a judge of the Supreme Court of Victoria. Sir Alfred Stephen was Chief Justice of New South Wales. Other relatives wrote *Stephen's Commentaries* and the *History and Digest of the Criminal Law*. It was a family full of talent. Eight members appear in the first series of the *Dictionary of National Biography*. Even when discounted for the fact that Sir Leslie Stephen was editor, this is a remarkable number.

I arrived at Newton's chambers at a quarter past two. In those days there was no readers' course and no period in which taking briefs was forbidden. But Newton imposed the condition on his pupils that three days were to belong to his work and two we could call our own. Richard greeted me and in his gravelly voice asked by what name I preferred to be called. "The custom here is to address everyone by his surname unless you know someone well enough to use his first name. Um, um, um, and I leave it to you to decide how to address Dr Coppel."

Newton kept his briefs in a plastic-covered wire stand intended for vegetables. He went to the stand and withdrew a brief from the bottom shelf. It was coated with dust. He banged it on his table and passed it to me. "You may care to look at this and perhaps prepare a draft." It had come from a country

solicitor and like many of his briefs at that time was typed on broadsheet brief paper. I remarked that it was dated two years before. "Yes, I know," he said. "Many of them are. But what does it matter. The customers are all stiffs." This was my introduction to an important facet of his character, his almost obsessive desire for perfection, and also to his sardonic sense of humour.

His practice, even then, was old-fashioned. It was almost wholly concerned with trusts — wills and settlements — and the various taxes associated with them. He was the undisputed leader in the field but his pre-eminence had affected his practice in two ways. He was ultra cautious by temperament and delayed taking silk for fear that the scope of his work would not expand. The two counsel and two-thirds rules then imposed a fearsome penalty on those who took silk without cause.

Secondly, as the leading junior he was invariably the first to be consulted for opinion on any matter in his area that was likely to reach court and so he usually found himself in the passive position of representing trustees. This disappointed him as he enjoyed pitting his wits in forensic contest.

His opinions were unique. Every argument for and against every relevant proposition was explored, and in those intended for trustees the case for each party was set out in detail. A story demonstrates the authority of his opinions. The court lists in Melbourne were crowded and so one solicitor arranged for an originating summons to be heard in a circuit town. It was called on after a day of running down. To save costs the common lawyers who had been engaged by day were retained. Mr Justice Sholl expressed surprise at their presence but was assured that he had no cause for concern because all parties had been equipped with an opinion of Mr Newton. "If that is so, gentlemen," he said, "there will be no need to detain you. Give the opinion to me and go and enjoy your dinner."

Newton kept his briefs in a plastic-covered wire stand intended for vegetables. He went to the stand and withdrew a brief from the bottom shelf. It was coated with dust. He banged it on his table and passed it to me: "You may care to look at this and perhaps prepare a draft."

Newton's opinion-writing was an example of his perfectionism. Yet his obsession with detail was not at the expense of relevance. He simply wished to leave nothing to chance. I heard him argue many cases. He worked from detailed scripts not unlike the written cases that are nowadays presented to appellate courts, but more concentrated. His style was didactic but the judges were apt pupils: his were the words of authority. Each proposition was rivetted in place.

He had a caustic wit which he managed to suppress in public.

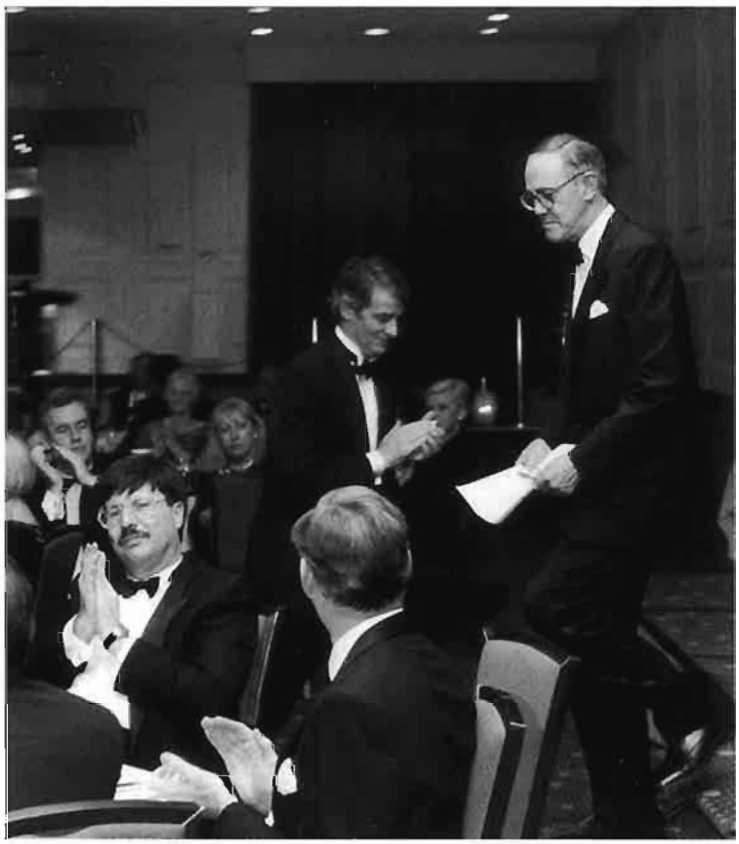
His judgment of others often did not match the world's. As his pupil I occasionally found myself briefed in matters in which he appeared. Even then a tailender, I usually appeared in the interest of unborn grandchildren. Unborn grandchildren were the spoilers whose concern it was to keep classes of beneficiaries open and to delay distribution. My task was to resist the application of a rule known as *Andrews* v. *Partington*. I remember one case, in the

thirteenth court, in which there were many parties. Newton, for the trustees, was at one end of the Bar table. I, in my usual role, was at the other. A prominent junior whose public reputation in Newton's eyes far outstripped his ability was in full flight. A folded dog-ear torn from Newton's note-book was solemnly passed along the row of counsel, addressed to me. I wondered whether a hitherto unsuspected fissure in *Andrews* v. *Partington* had occurred to him. I opened the note. It read: "They ought to pay dirt money to listen to this. R.N."

Newton indulged his sense of humour too in setting the annual examination papers for the University subject of the law relating to executors and trustees in which he was independent lecturer for many years. His independence extended to setting questions in which he attributed all manner of dishonesty and incompetence to a number of leading solicitors and barristers whose identity was barely disguised. I once remarked that it was a saving feature of those papers that he sometimes confessed to error himself. He seemed surprised and asked for chapter and verse. I referred him to the paper for which I had sat in which a barrister named Richard was shown to have given negligent advice which had set a series of breaches of trust in train. "You don't think that was me, do you? I think I know the rule in *Hancock* v. *Watson*. That was the Champ (his nickname for another leading equity junior)."

Newton's punctiliousness extended to vetting his pupils' notes for the conduct of the most humble of petty sessions cases. Though well-intentioned, this method of supervision had its drawbacks. It left the pupil bereft of training in any of the skills of examination and cross-examination and, because there was no place for extraneous intelligence-gathering, on one occasion close to my heart a tyro defending a public schoolboy charged with speeding in a sportscar in St. Kilda Street, Brighton, learned only after conviction of his client's two prior convictions for illegal use.

Strange to say, he was not averse to enlisting his former pupils to "devil" opinions. I had a contest with John Phillips — John David Phillips — who followed me in Newton's chambers, to be first to have a draft substantially accepted. It was a contest for which there could be no winner. Every draft was courteously rejected and an opinion totally composed by Richard himself was substituted.

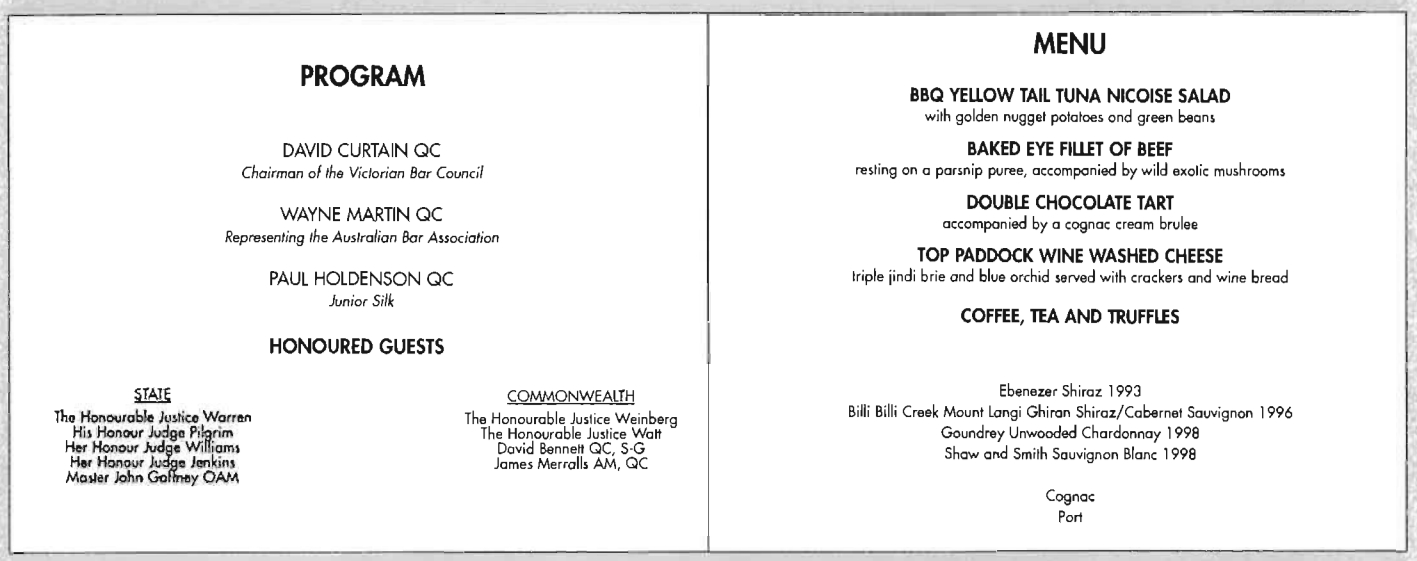


The Chairman David Curtain Q.C. and audience applaud James Merralls Q.C.'s speech in reply.

It was very different with Keith Aickin. Both Newton and Aickin had read with A.D.G. Adam. Adam was a real property lawyer who to the surprise of some became a confident and highly successful all rounder as a judge of the Supreme Court in the sixties. Though five years older than Newton, Aickin had followed him to the Bar. He had been Sir Owen Dixon's Associate at the outbreak of war. He went with him to Washington as third secretary in the Ministry and after the war held positions with U.N.R.R.A. in Europe and the United Nations in New York. He was 33 when he came to the Victorian Bar. The path of his practice diverged from Adam's and Newton's almost from the beginning, though he returned occasionally for trust and estate matters which required counsel of his eminence. The wool appraise-ment cases of the early fifties, which took him to the Privy Council, were a springboard for his career. He soon became involved in constitutional cases, patents, and what would now be described as "commercial" work at the highest level. He took silk after only seven years in 1957. He was not the youngest ever to take silk at this Bar but I suspect that he had the shortest term as a junior.

Like Newton, Aickin was by nature shy, but his working methods could not have been more different. In his opinions he was willing to trust his own judgment more than Newton. They were practical documents rather than works of art. In court he adopted the modern conversational style, usually speaking from a few pages of hand-written headings. I was once junior to both Aickin and Newton in a stamp duty case. Richard prepared a long typed screed which Keith adopted, but he delivered the argument from a single page on which he had jotted a few phrases. In the course of time I collaborated with Keith Aickin in a number of opinions. Opinion-writing with him was true collaboration. It began with a consultation in which the issues were identified and discussed at length. The junior was then entrusted with the writing. I do not remember Aickin making more than verbal changes to a draft. And he firmly believed that he was consulted to express his opinion, not his doubts.

He differed from Newton in another way too. Apart from war service in the navy Richard Newton never left these shores and because of his almost morbid fear of travel by air he seldom moved beyond Victoria. Aickin on the other hand had spent most of the forties in the United States and Europe. He often appeared before the Privy Council



PROGRAM

DAVID CURTAIN QC
Chairman of the Victorian Bar Council

WAYNE MARTIN QC
Representing the Australian Bar Association

PAUL HOLDENSON QC
Junior Silk

HONOURED GUESTS

STATE
The Honourable Justice Warren
His Honour Judge Pilgrim
Her Honour Judge Williams
Her Honour Judge Jenkins
Master John Gaffney OAM

COMMONWEALTH
The Honourable Justice Weinberg
The Honourable Justice Watt
David Bennett QC, S-G
James Merralls AM, QC

MENU

BBQ YELLOW TAIL TUNA NICOISE SALAD
with golden nugget potatoes and green beans

BAKED EYE FILLET OF BEEF
resting on a parsnip puree, accompanied by wild exotic mushrooms

DOUBLE CHOCOLATE TART
accompanied by a cognac cream brulee

TOP PADDOCK WINE WASHED CHEESE
triple jindi brie and blue orchid served with crackers and wine bread

COFFEE, TEA AND TRUFFLES

Ebenezer Shiraz 1993
Billi Billi Creek Mount Langi Ghiran Shiraz/Cabernet Sauvignon 1996
Goundrey Unwooded Chardonnay 1998
Shaw and Smith Sauvignon Blanc 1998

Cognac
Port

and once, as a member of the Middle Temple, appeared before the House of Lords. In particular he enjoyed American society (far more, it must be said, than one would expect of a former Associate of Dixon who was ambivalent towards Washington and all its works).

Richard Newton was appointed to the Supreme Court on 10 January 1967. In the fifties and sixties the selection of judges of the Supreme Court was predictable, and amongst the senior members of the Bar from whom they came acceptance of an offer was considered a duty.

Newton was appointed out of turn since he had been a silk but three and a half years. But the Chief Justice Sir Henry Winneke asked for him, believing that the Court needed his outstanding abilities as soon as they could be obtained. He became a master of all jurisdictions. Neil McPhee, who admired him greatly, was fond of telling a story of how he outfoxed the cunning John Mornane to gain possession of a piece of paper bearing an amount of damages at a time when counsel were forbidden to mention figures to juries. He died on 1 June 1977, like the foremost common law judge of the last century, by his own hand. He was 56. His published judgments are few because he was modest and also because he detested excessive publication. He longed to make a bonfire of *1 Weekly Law Reports*. Had he lived he would have developed pyromania. His early death deprived the Court of intellectual leadership when it was needed most.

It is generally believed that Keith Aickin was R.G. Menzies' first choice to succeed Sir Owen Dixon as Chief Justice in 1964. His imminent appointment was even reported by a Melbourne newspaper. But Barwick claimed the job. Aickin refused appointment on the death of Sir Alan Taylor four years later and would not confide his reasons for doing so even to Dixon. By then he dominated the High Court Bar. His practical wisdom also came to be applied as a director of a number of public companies, amongst them B.H.P. Much to his surprise, in September 1976 he was again invited to join the Court, to succeed Sir Edward McTiernan who had at last retired. His was the last appointment not subject to a constitutional retirement age. But he died, after a little less than six years in office, from the effect of injuries caused by a motor collision. I suspect that there is an inclination to undervalue his judgments. Unlike Richard Newton, who brought to judgment-writing the style and technique of his opinions, Aickin made adjustments for his new role. Reasons were now elaborated. Aickin had a stabilising influence on the Court which was lost with his death. He was succeeded by a much younger man who became an excellent judge but had to acquire authority over time. Meanwhile enthusiasm got out of control. It is interesting to note that he died on 18 June 1982. Sir William Deane, who filled the place made vacant by the resignation of Sir Ninian Stephen, was appointed one week later, on 25 June.

Aickin and Newton practised when the dominant legal culture in Australia was Victorian. They exemplified that culture at the Bar. In their different ways their arguments were thorough but always plausible. They did not aim above the horizon. In their judicial work they avoided the temptation to overcompensate in formulating and adapting legal rules and principles which has led to distortion in much of the law in recent years. Knowledge and wisdom were combined in judgment. The description by Menzies of Richard Newton's father aptly applied to them both: their characters had a simplicity and a nobility which no words could describe.

Zero green bottles.

I am honoured to have been invited as a guest of the Bar this evening. On behalf of my fellow guests and for myself I thank you Mr Chairman for the hospitality we have received and you Mr Silk for your kind words. I did not think those 24 years ago when I last spoke at one of these functions that one day I should be asked to do so again, on the other side of the record. I have spoken of two men who were my models when I joined the Bar. Memories of the great common law advocates are understandably more vivid than those of dialecticians. But for this tail-ender Newton and Aickin are "my Hornby and my Barlow long ago".

After the Talks, the Walks

IT was all rather like a Lions Club do, or the Rotary Club, or Apex, or even the Round Table.

There we were, small business people, members of the law industry, gathered together at beautiful Leonda to talk business. It was all dreadfully anti-competitive. There was not a restrictive trade practice in sight. It was full of affirmative action.

The debate concerning the length of Mr Junior's speech has got to the stage that bets were laid throughout the dining room. Leaks from the horse's mouth meant that much money was laid about a 30-minute speech. Wise money went either side of this time. However, great alarm went through the room when Mr Junior Silk, Holdenson Q.C. spoke about Master Gaffney, one of nine honoured guests, for over ten minutes. How could he cover the field in 30 minutes? Was there a punter in the room who had predicted a 90-minute speech? Would Holdenson set the all-time junior record?

The answer was "no". Holdenson ran to expected form. After spending ten minutes on Master Gaffney he spent another ten minutes on Mr Justice Weinberg and he wrapped up the rest in under ten minutes. The winner of the competition was Bongiorno Q.C. who predicted that the speech would be 35 seconds under 30 minutes. Some wondered whether Mr Junior Silk's speech reflected the fact that he emanates from the world of the criminal law.

As the photographs on these pages testify, most had an extremely enjoyable evening. The stand-out table was undoubtedly that of Brentley Hutchin-son. Brentley looked very sartorial in a silk brocade waistcoat which he described as being of the autumnal variety. He announced that his was "the mardi gras table" and indeed its members all appeared to be having fun.

Black again appeared to be the theme colour of the evening, although a delicate white doyley dress was sighted. Many stated that their dresses were truly designer brands. The names flew off the tongue as did the prices of the various dresses. Sequins floated about, but were very much in the minority.

There is no doubt that Leonda has improved the quality of its food. The starter of salmon was indeed delicate. The main course had that wonderful seared quality, criss-crossing the fillet steak. The dessert was overwhelming in its variety of chocolate, raspberry and other mousse-like substances.

Judge Pannam, Judge Douglas, Michael Gawler and Mary Anne Hartley.

Jeff Moore, Peter McLoughlin and John Simpson.

As to the wines, some sticklers stated that it was incorrect to have a sauvignon blanc and a chardonnay on the same table at the same time. These people were in a minority. The serious and proper drink of the night was of course the red wine.

James Merralls AM Q.C. gave an excellent speech in reply to the toast to the guests. His speech was somewhat nostalgic as it concerned clever people. In particular he spoke of the two great influences on him in the law, namely Mr Justice Newton and Mr Justice Aickin. His words are printed elsewhere in *Bar News* and should be read by all, especially those who have just come to the Bar.

Wayne Martin Q.C. spoke on behalf of the Australian Bar Association. He is a member of the West Australian Bar and the matters raised in his speech caused concern to us in Victoria, in particular, endeavours to prevent the West Australian Bar having rules that prevent its members going into partnership. Has freedom in Australia reached this stage yet?

After the speeches the real part of the evening began — the walk-the-room part — the time when most are feeling comfortable with themselves and feel the need to ambulate and speak of themselves to others and listen to others speak of themselves to them. This year was different in that we were not thrown out of Leonda until a civilised hour.

Katherine Bourke, Brendan Griffin, Anthea MacTiernan, Rachel Lloyd and Kim Galpin.

Ross Ray Q.C., Mara Ray, Gina Reyntjes and Joe Gullaci.

After the event the Chairman, David Curtain Q.C., was at last caught up by one of our avid reporters at the bustling Iris Bar in Toorak. Even at this late hour he was looking his usual fresh self. All agreed that it had been a very successful evening and the many assembled from the Victorian Bar ended it all with, of course, a toast to Australia.

The European Grill

KAYE'S On King has gone. It has been replaced by the European Grill. Kaye's On King was reviewed in this magazine in 1991 when it first opened. After that review it appeared to become highly successful. It got chef's hats. It seemed to be consistently full. But somehow or other it went out of business. The restaurant trade is a tough one.

But for every failed restaurant there rises phoenix-like a new one. In this case the European Grill appears to be a good one. If a restaurant is to succeed in King Street it needs to be good. However, if one walks down Lonsdale Street towards King one gets a shock. The Docklands Stadium has suddenly arisen a short walk away. This part of the city may also rise phoenix-like from the ashes of the King Street nightclub scene. Already apartments and boutique hotels are bobbing up. Friday and Saturday nights with the football crowd may provide some of the night-time trade that has been lacking for restaurants in this area.

But at the moment it is the lunch-time trade which is the key. Further, with so many barristers around the corner it is vital for restaurants within three blocks of Owen Dixon Chambers East and West to gain some of that trade.

The days of the regular Florentino/ Flower Drum lunch appear to be in the past. At best the cost of these restaurants means trips once or twice a year. So how does a restaurant tap into the legal market? It can't be too expensive but it has to be good. It has to have good service and some style so that the barros come back.

The European Grill may well be able to achieve this end.

In 1991 I lunched at the then Kaye's On King with my first reader. By 1999 I have had seven readers. As my first reader was busy in court, I could not recreate a touch of nostalgia. So instead I took a large Queen's Counsel along as a companion, a man for whom lunch is *de rigeur*.

The menu is interesting. Although the name "European Grill" conjures up the image of some large Eastern European grill place, replete with shasliks, schnitzels, coleslaw and potato salad, this is not the case with this establishment. Grills are a feature but of the rib-eye lamb, spatch-cock and continental sausage variety.

The menu is interesting as each course is matched with a suggested wine. This idea sometimes causes resistance.

Why should the restaurateur know better than you what you want to drink with what food you choose to eat? But in this case we decided to go along with it all and try different courses with the different wines.

My companion (who it must be noted is a male with whom I have only a platonic relationship) chose the gorgonzola risotto as a starter. This was matched with the 1996 Masi Valpolicella. This raises a word of warning for those who don't read menus closely. My companion remarked that the risotto was amazing value at $6.50, as that figure was shown in bold print close to the risotto. Unfortunately a reading of the fine print showed that it was the suggested Italian red wine which was $6.50 and the risotto was in fact $11.50 for a starter and $16.00 for a main course. But this was just a minor quibble. The risotto was excellent, having an almost sweetish flavour with the piquant gorgonzola well supported by strands of baby spinach.

The restaurant also provides tapas. But it would be wrong to associate it with the tapas bars which were of great popularity in the late 1980s. A tapas plate is available at $9.50 as a starter and excellent it was. The plate contained a Spanish medley of quail with a tamarillo glaze, some delicate roasted Jerusalem artichokes with balsamic pickled walnuts, an albondigas which turned out to be a Spanish meatball with a spicy tomato salsa, some oven-baked Swiss brown mushrooms filled with marscarpone and parmesan and topped with fried Spanish onions, a little crostini and finally a small amount of Atlantic salmon fillet cured in vodka and juniper berries served on a delicate salad. These dishes are also available on their own as starters from $4.50 to $6 and as entrees from $9 to $10.

Other types of tapas include fish cakes of blue eye; slices of white bread

filled with six-year-old fontina cheese served with a spicy poached plum sauce; assortments of olives; a terrine of duckling and calamari. These tapas dishes can be also enjoyed at the large bar in the restaurant which serves a cheaper menu that includes, joy of joys, a proper steak sandwich. The tapas plate was served with an excellent de Bortoli Gulf Station cabernet sauvignon at $6.00 per glass.

As well as the tapas there is a daily soup available. Amongst the pasta and risottos are a gnocchi tossed with parmesan on a creamy watercress sauce; linguini tossed with pan-friend tiger prawns, garlic, chilli and olive oil; and a risotto of braised chicken pieces and prosciutto.

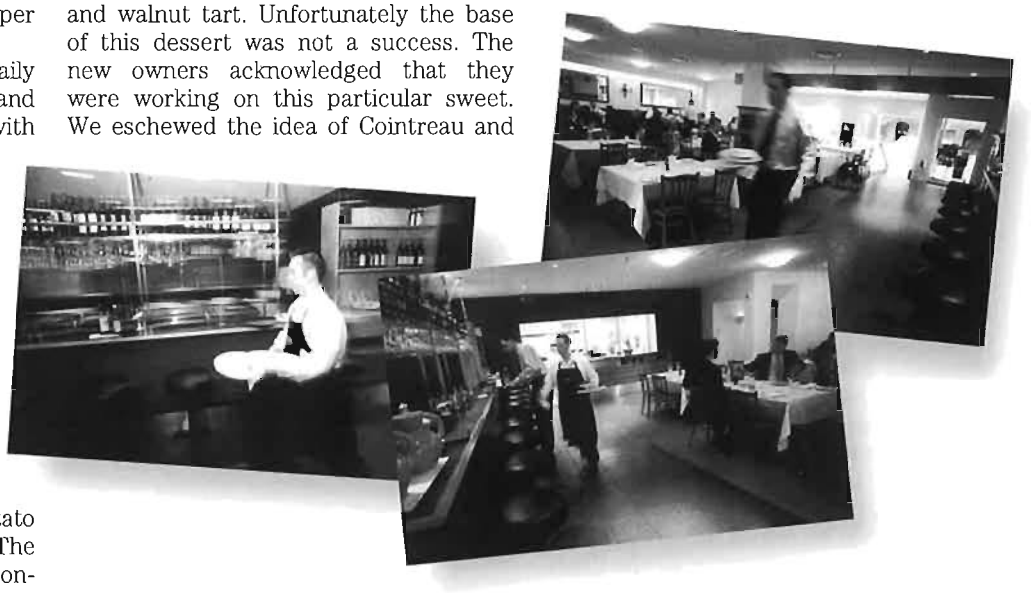
And then it was to the main courses. I went for the spatchcock while my lunching companion in his normal vegetarian, brown rice and carrot stick mode, went for a large rib eye. Having called yourself a grill, one would expect the grills to be good. Indeed this rib eye was excellent. It came served with a potato pie and a touch of rosemary jus. The word "jus" has now become as fashionable as salsa and things being served on beds. A jus is a thin gravy. Properly done, a very good form of thin gravy. But thin gravy it still is.

My spatchcock was described as a baby chicken marinated in chilli, lemon and olive oil, char-grilled with baked semolina tortini and a red pepper aioli. What arrived was an excellent flattened bird which had indeed been properly char-grilled with just enough hint of the char. The baked semolina tortini was unexceptional and rather stodgy. But all in all it was an excellent dish. We ordered a plate of mixed steamed market vegetables, which were acceptable. Greens, a Caesar salad and oven-baked potatoes with rosemary are also available as side dishes. However, unlike the trend in many restaurants the vegetables accompanying the dishes in this restaurant would be sufficient for most.

A glass of the Peter Lehmann shiraz accompanied the rib eye and as I had already partaken of the valpolicella, I was given an excellent Guigal Côtes du Rhone to accompany the bird.

Other main courses include blue eye, home-made sausages, veal, lamb cutlets and braised ox cheek with seasonal vegetables. Main courses range from $17.00 to $19.00.

Finally dessert — heaven, for those addicted to ice-cream. My friend, who was humble enough to say that he is not the greatest connoisseur of wine, will quickly assert that he is indeed a great connoisseur when it comes to ice-cream. The establishment is clever enough to make its own home-made sorbets and ice-creams. A selection for $7.00 kept him quiet. I partook of the golden syrup and walnut tart. Unfortunately the base of this dessert was not a success. The new owners acknowledged that they were working on this particular sweet. We eschewed the idea of Cointreau and instead partook of a 1998 Barak's Bridge botrytis semillon at $6.00 per glass. Other desserts included a warm chocolate pudding, a compote of warmed fruit, individual pear crumbles and what looked like an excellent cheese selection. Desserts are $7.00 and the cheese ranges from $7.50 to a larger selection which costs $9.50. Excellent coffee and biscotti finished a good meal.



As to the wine list, barristers always want to know which is the cheapest wine. In this case there is Leeuwin Estate sauvignon blanc semillon at $25.00, a Celtic Farm riesling from the Clare Valley at $25.00, Fonty's Pool chardonnay from Western Australia at $27.00 and a Mount Adam chardonnay at $45.00. Their Italian Bollini pinot grigio is $22.00 and a minor chablis is $38.00. As to the reds, the list includes de Bortoli Windy Peak pinot at $24.00, a de Bortoli cabernet sauvignon at $25.00, a Cape Mentelle zinfandel at $44.00 and the Peter Lehmann shiraz at $26.00. The Guigal Côtes du Rhone is amongst the European reds and is $34.00, the valpolicella being $25.00. There are also cellar selections at somewhat higher prices, including a Bannockburn shiraz at $55.00 and a Dromana Estate reserve chardonnay at $70.00.

The owners of this new enterprise are David Orbach and his wife Sandra. David, although only 29 years of age, is extremely experienced and would be well known to many, having worked with Guy Grossi at Caffe Grossi and Epoca and assisted with the setting up of the new Florentino. He has recruited as head chef Brian Jenkins, formerly of Marchetti's Latin and Marchetti's Tuscan Grill, who again is extremely young at the tender age of 26.

As the pictures on these pages testify, there has been an endeavour to lighten up the old Kaye's on King. There are wooden chairs and tapestries upon the cream walls.

Lunch is served from Monday to Friday with the bar and tapas menu from 11.00 a.m. On Thursday and Friday evenings the restaurant is open for dinner and has a happy hour from 5.00 p.m.

The European Grill is an excellent replacement for the old Kaye's on King. The service is professional and attentive. The atmosphere is comforting without being trendy. Whether it's for a medium to serious lunch, or a tapas snack at the bar, the European Grill should please.

Paul D. Elliott

EUROPEAN GRILL

225 King Street, Melbourne
Tel: 9642 0102
Licensed
Lunch — Monday to Friday
Dinner and Happy Hour — Thursday and Friday 5.00 p.m. to late

Verbatim

Who Said Tax Wasn't Sexy?

High Court of Australia

22 March 1999
The Commissioner of Taxation v. *Montgomery*
Coram: Gleeson CJ, Gaudron J, McHugh J, Kirby J, Hayne J and Callinan J.
Nettle Q.C. with Richards Q.C. and Davies for Appellant
Young Q.C. with de Wijn Q.C. and Murphy for Respondent

McHugh J: What is the distinction between the money received by the prostitute from clients and the mistress who has a very wealthy lover who gives her large sums of money on a very regular basis? Is it income in her hands?
Nettle: It is certainly income in the hands of a prostitute because what she is paid is paid in return for her services and one judges the receipt by the character of that which is given for the receipt, in her case, services. In the case with a mistress, depending on the facts, I suppose he could be but ordinarily one would expect not, the amount of money would be given out of love or affection, or some such thing . . .
Gummow J: Or to buy silence.
Nettle: Well, in that case there might be a further consideration, but putting that to one side, assuming the mistress would be like a wife, one would just give it because one like her. That would be a fit unless it was set up in order to provide a fund with the current payments of the kind about which the Chief Justice asked.
Callinan J: The distinction between a prostitute and a courtesan, is that what you mean?

Gift (or Trojan) Horse?

Federal Court of Australia

12 May 1999
Commissioner of Taxation v. *Consolidated Press Holdings*
Coram: Sackville J.

Sackville J: This isn't tax minimisation at all, this is the Commissioner using tax maximisation because the effect of what the Commissioner is doing is to double tax and you say that that cannot have been intended by the deeming provisions and therefore the deeming provisions, they being ambiguous, ought to be given the construction that avoids double taxation, that is something perhaps that one might say in a free and democratic society, that ought to be avoided unless specifically authorised by the Parliament.
Edmonds: Hopefully I can put it with more persuasion than that although that . . .
Sackville J: Chop off life lines and feel free.
Edmonds: One shouldn't get emotional about tax.

Hat Trick

Pearce cross-examining Witness

Pearce: What I want to ask you is this: When you went to the meeting on 14 August . . . ?
Witness: Yes
Pearce: What hat or hats were you wearing at that meeting?
Witness: Freemantle pastoral hat.
Pearce: Were you also on one occasion wearing your own hat, Reg's hat?
Witness: Me and myself were together.
Pearce: I'm just wondering whether you were at different times wearing different hats at that meeting?
Witness: I've got three different hats and I wear them all.
Pearce: You wear them at the same time or different times?
Witness: Different times.
Pearce: And you were . . . ?
Witness: I don't wear one to bed.
Pearce: You were doing that at the meeting on 14 August?
Witness: Beg your pardon.
Pearce: You were wearing different hats on 14 August?
Witness: Yes, that would be right.

Legal Gorillas

Supreme Court of Victoria

16 February 1999
Fremantle's Pastoral Pty Ltd v. *Hyett*
Coram: Smith J, Bigmore Q.C. and Barrett for Plaintiffs
A. Monichino for Defendants
M. Pearce for Third Party

Monichino cross-examining Witness
Monichino: When we read the correspondence, we can't take your words literally? . . .
Witness: What that letter means was we were asserting priority and we were asserting that Monte Paschi had prior knowledge. It doesn't mean that they thought they did or they in fact did.
Monichino: Have you seen the Woody Allen film Annie Hall? . . .
Witness: No, I don't like Woody Allen.
Monichino: There's a scene where they are having a conversation and there's subtitles of what they are really thinking. Is that how we should read your correspondence?
Witness: I think the way to describe this correspondence is normal correspondence between solicitors representing clients in dispute.
Monichino: Chest beating? . . . I was trying to think of the word before.

His Honour's Backyard

High Court of Australia

3 November 1997
Phonographic Performance Company of Australia Limited (First Appellant), *EMI Music Australia Pty Limited* (Second Appellant), *BMG Australia Limited* (Third Appellant), *Castle Communications Australia Limited* (Fourth Appellant), *Dino Music Pty Limited* (Fifth Appellant), *ETC Electrical Pty Limited trading as Subterranean Records* (Sixth Appellant), *Festival Records Pty Limited* (Seventh Appellant), *Hadley Records Pty Limited* (Eighth Appellant), *Larrikin Entertainment Pty Limited* (Ninth Appellant), *Midnight Records Pty Limited* (Tenth Appellant), *MCA Music Entertainment Limited* (Eleventh Appellant), *Polygram Pty Limited* (Twelfth Appellant), *Sonart Meca Pty Limited* (Thirteenth Appellant), *Sony Music Entertainment (Australia) Limited* (Fourteenth Appellant), *Stonebard Pty Limited trading as Natural Symphonies* (Fifteenth Appellant), *The Massive Recording Co Pty Limited* (Sixteenth Appellant), *Warner Music*

Australia Pty Limited (Seventeenth Appellant), *Moira McCourt trading as Girl Zone Records* (Eighteenth Appellant), *Martin Wright trading as Move Records* (Nineteenth Appellant), *Wayne Smith trading as Rigid Records* (Twentieth Appellant), *Neville Louis Sherburn trading as Swaggie Records* (Twenty-first Appellant) v. *Federation of Australian Commercial Television Stations* (Respondent)
Coram: Gaudron J, McHugh J, Gummow J, Kirby J, Hayne J.
Catterns for Plaintiffs

Mr Catterns: But the debate is when a film is broadcast and, of course, that does not just include feature films, it may include programs that are made by soap operas, all the series, even what is now called lifestyle programs such as Burkes Backyard and so on. They are pre-recorded — there is a film made. Say they . . .
Kirby J: Why is it called a lifestyle program?
Mr Catterns: I think that to improve your lifestyle, your Honours backyard, your Honours cooking skills, and so on.
Kirby J: That is what a lifestyle is?
Mr Catterns: Yes, your Honour.
Kirby J: Thank you.

Mr Catterns: Because "they" — my sounds in my pre-existing sound recording — is not the "they" referred to here because it is the sounds embodied in the soundtrack associated with visual images which we submit is focusing on the aggregate of sounds constituting a film soundtrack, including ours . . .
Kirby J: A few crashes — you are worried about the crashes and so on?
Mr Catterns: Yes, your Honour, and an hour and a half of dialogue. Americans shouting at each other. It is called acting, my learned friend says.

Tit for Tat

Coroner's Court

Inquest into the death of Gaye Elhosni.
Coram: J. Heffey (Coroner)
Snr. Constable Steward (assisting)
N. Crafti and M. Trevisiol (for the relatives other than the husband)
P. Darcy (for the deceased's husband)
Darcy (to Insurance Investigator)**:** And tell me is your statement in some sort of chronological order or is it all over the place?
Witness: No, it's like your cross-examination . . . all over the place.

Seeing the Light

High Court of Australia

14 May 1999
Salv Laurence Cachia v. *Catherine Mary Cachia*
Application for special leave to appeal.

Gummow J: Now, you realise the significance of this light that has gone on?
Mr Cachia: No, I do not.
Gummow J: It means there are only five more minutes.
Mr Cachia: Then, your Honour, I will turn to bring to your attention the arbitrary time limits that the judge had imposed.

Pen City Winner

The winner of Pen City's Pelikan M800 pen competition in the Autumn issue, Bill Stark, has written an apocryphal decision of Nathan J, which incorporates the three quotations. The "tax-gatherer" quotation comes from his recently overturned decision in *Sands & McDougall (Wholesale) Pty Ltd (in liq) and anor* v. *C of T (Commonweath)*, 22 ACSR 383.

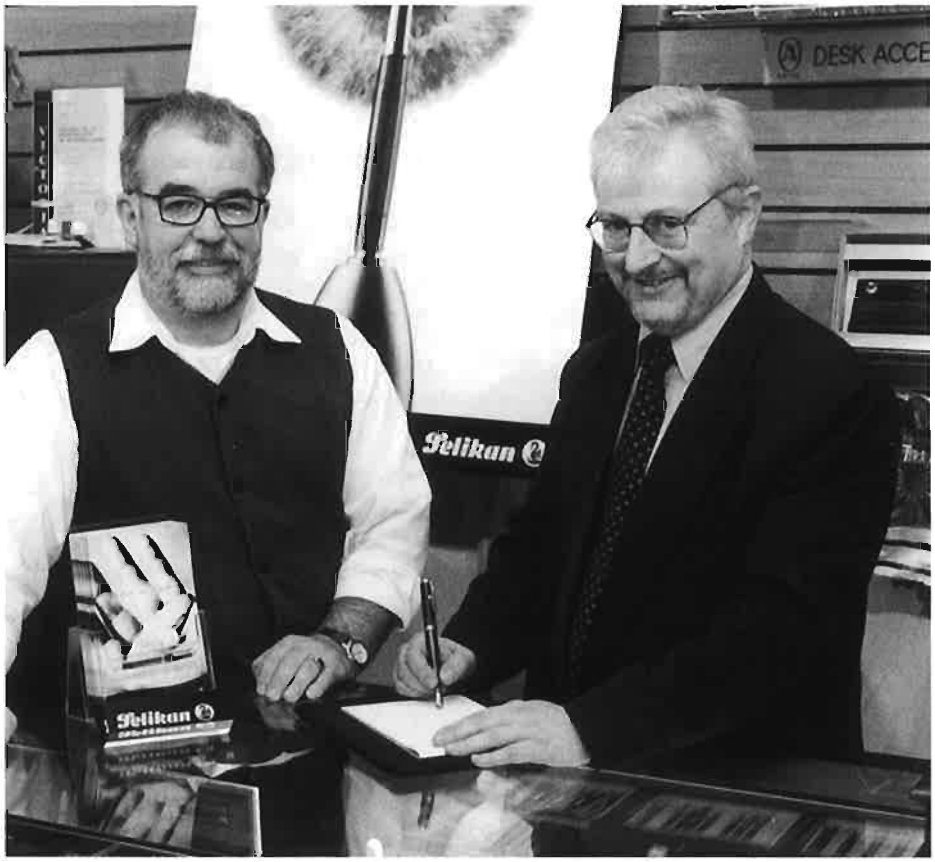
Judgment of Nathan J of the Supreme Court of Victoria in the matter of Deputy Commissioner of Taxation *v.* Nathan Howard:

THIS sad case has been brought before me for a decision on the issue of whether the appellant ought to repay the trustee in bankruptcy of the tax-gatherer in question, Tex Deductor.

BACKGROUND

The facts of the case, briefly stated, are as follows:

1. Tex Deductor, Q.C. (former M.P.), ("Tex") paid wages by virtue of his position as the employer of one typist, Miss X Quisite during the financial year ended 30 June 1998;
2. The wages paid during the financial year ended 30 June 1998 included income tax, which Tex deducted from the gross wages of X Quisite;
3. Tex therefore became the tax-gatherer, and was obligated to remit the tax he had deducted to the appellant (the "DC of T");
4. Tex remitted some of the group tax to the DC of T during the year ended 30 June 1998 ("the remitted tax");
5. Tex failed to remit the balance of the group tax to the DC of T;
6. Tex had two main interests in life: gambling and drugs;
7. As a result of his interest in gambling, Tex used to earn enough in winnings to support his other recreational pursuit, illicit drugs;
8. In the year ended 30 June 1998, Tex's gambling pursuits fell on hard times, and he apparently encountered a losing streak the likes of which he had never seen before;
9. Tex became bankrupt shortly after 30 June 1998;
10. X Quisite lodged a tax return, claiming that she was entitled to a refund because too much group tax had been deducted;
11. Tex's trustee in bankruptcy (Mr Nathan Howard) ("Howard") commenced these proceedings in the Tribunal below against the DC of T claiming that the remitted tax was a preference, and should be disgorged by the DC of T to Howard;
12. The tribunal found in favour of the respondent;
13. The DC of T has now commenced this appeal, seeking to have the determination of the tribunal below set aside, on the basis that once tax that is due has been paid, it cannot be refunded.



Terry Jones, left, of Pen City, presenting Bill Stark, winner of the Bar News *Pelikan pen Autumn competition with his prize.*

JUDGMENT

The Tax-gatherer

In my view the figure of the tax-gatherer is well known in history. The character predates 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 had soured.

In this case, Howard, who is the trustee in bankruptcy of Tex Deductor Q.C., asked the DC of T to return the remitted tax to him to enable him to conduct the administration of Tex's affairs in bankruptcy. As well as the DC of T, the creditors include Crown Casino Ltd, Tabcorp Ltd, Don Ralfeo Di Pizza and Don Mario Proscuitto, the biggest names in gambling (and allegedly drugs in respect of the latter two gentlemen) in this country.

Howard wants the tax gathered and remitted to be refunded in order that he can satisfy (at least in part) the claims of these creditors.

The amazement of the DC of T that the representative of this tax-gatherer asked for a refund of tax gathered, simply because his own businesses had soured, must have been great indeed.

I myself am more than amazed; I find the request to have been made with little more than tongue-in-cheek suggestion. That the request has been pursued (successfully) to this point is of even more amazement to me (as it must have been for the DC of T).

I find there is no merit to Howard's request, and accordingly I dismiss the claim with costs. However, the matter does not end there.

The legislation

Howard relies on the preference provisions of the *Bankruptcy Act* 1966 (Commonwealth), section 122.

An Australian Stendahl 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.

To say that the draftsperson of this piece of legislation was on a quest for simplicity is to underestimate the apparent drafting technique. However, the result of the attempt is an opaque piece of writing that in fact pays the price of vulgarity and ends in obscurity.

This deceptively simple section of the Act raises many questions in this case. For example, can tax gathered be "property" within the meaning of the section? I do not propose to delve further into the legislation in this matter.

Alteration to interpretation of the legislation

Howard submitted that the interpretation of the section by the courts over time favours him. Even if that submission were correct, *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 be become questionable by year Y and unsustainable by year Z.*

In the circumstances, even if the interpretation of this obscure legislation suggested by Howard were the unquestioned orthodoxy in the past, the time has arrived to question that interpretation, and point out that it is now unsustainable. In any event, I do not agree with Howard's submission.

Major crime unit

Finally, I cannot pass judgment without commenting on the total lack of character displayed by Mr Di Pizza and Mr Proscuitto during the course of this case. Not only did they attend each day of the court hearing, and heckle each witness called by the DC of T, but they apparently left several messages for me (including a severed human finger) that were no doubt designed to scare me into acceding to Howard's claim.

I have referred these matters to the Victoria Police major crime unit for further investigation.

Dated 5 May 1999

Nathan J

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

1. Who coined the expression "The Equitable Doctrine of Murder"?
2. To what did it relate?
3. Who said "Indeed, there is something a trifle comic in the spectacle of equity judges sorting felonious killings into conscionable and unconscionable piles"? To what was he or she referring?
4. From what judgment is the following extract taken? To what "principle" does it relate"?

   There have been numerous attempts by high-minded jurists, particularly in the United States of America, to modify the rule. One such attempt is to confine the principle to cases when there was an active intention to kill.

   That attempt was originally prayed in aid by the appellant in the present case. The evidence is not wholly consistent with an absence of intention to kill. The appellant's evidence describing the killing was:

   "When he turned the light on in the kitchen, he come to the front door, I pointed the rifle at him and fired. I re-cocked, I reloaded and shot the bastard again to make sure he fuckin' stayed dead."

A. Write a short charge to the jury dealing with apocryphal facts giving rise to "The Equitable Doctrine of Murder"; or

B. Write an apocryphal judgment which includes the statement in Question 3; or

C. Draft a written argument, based on apocryphal facts, for the relevant Court of Appeal in the case quoted in question 4.

Entries to Gerry Nash Q.C., c/- Clerk S, Owen Dixon Chambers East by 1 September 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.

Magistrates' Court: New Civil Procedure Rules

THE Magistrates' Court Civil Procedure Rules 1989 were due to sunset on 14 June 1999. New Rules, the Magistrates' Court Civil Procedure Rules 1999 (SR 58/1999) came into operation on 1 June 1999.

The new Rules vary little from the old Rules. There have been a few minor amendments. These amendments fall into five groups:

(1) Amendments which make personal pronouns gender neutral.

(2) Amendments which substitute the word "order" for the word "judgement".

(3) There has been some re-numbering of Rules and Sub-Rules as a result of earlier repeals.

(4) There have been the following minor amendments:

   (i) Form 24B — Application for Leave to Defend an *Instrument's Act* complaint now requires the applicant to state the date the complaint was served. The date of service is important as leave to defend can only be granted within a limited time after service.

   (ii) Appendix a has been amended so that claims for exactly $40,000 will attract costs on Scale E rather than on Scale F. Scale F was included to cover WorkCover claims and cases where the parties consented to the Court having jurisdiction in excess of the jurisdictional limit of $40,000.

(5) Sunshine is listed in the Schedule as a Civil Court.

The new Sunshine Court complex was due to open on the 28 June 1999. However, works have fallen behind. It is anticipated that the new Sunshine complex will open in late August. For the time being the present Sunshine Court is unable to accept civil process for issuing. Civil process still needs to be issued from the Broadmeadows Magistrates' Court. When the new Sunshine Court complex opens practitioners will be advised.

Forum Non Conveniens: The Galveston Approach

Jack Hammond's daughter, Marnie, who recently completed a year as Associate to Justice Heerey is the first exchange Clerk/ Associate to US Federal District Court Judge Woodlock in Boston USA. Pursuant to this exchange arrangement Heerey J. will acquire an Associate from the United States in September this year.

In the course of her duties as a Clerk/Associate, Marnie Hammond has obtained e-mailed copies of two judgments handed down by District Court Judge in the Galveston Division of the United States District Court. The first, *Smith* v. *Colonial Penn Insurance Company* is set out in full. In the second case, *Republic of Bolivia* v. *Philip Morris*, the citation of which is "1999 WL 123300", she has forwarded only the reasons for judgment.

943 F.Supp. 782
(Cite as: 943 F.Supp. 782)

Stephanie SMITH v. *COLONIAL PENN INSURANCE COMPANY*
Civil Action No. G-96-503.
United States District Court, S.D. Texas, Galveston Division.
6 November 1996.

In breach of contract case based on insurance contract, insurance company moved to transfer venue. The District Court, Kent, J., held that fact that nearest commercial airport was 40 miles away was insufficient to warrant transfer. Motion denied.

KENT, District Judge.

This is a breach of contract case based on an insurance contract entered into by Plaintiff and Defendant. Now before the Court is Defendant's 11 October 1996 Motion to Transfer Venue from the Galveston Division to the Houston Division of the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. s 1404(a). For the reasons set forth below, the Motion is DENIED.

[1][2] Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. s 1404(a). The defendant bears the burden of demonstrating to the District Court that it should, in its sound discretion, decide to transfer the action. *Peteet* v. *Dow Chemical Co.*, 868 F.2d 1428, 1436 (5th Cir.) (holding that the decision whether to transfer rests with the sound discretion of the District Court), cert. denied, 493 U.S 935, 110 S.Ct. 328, 107 L.Ed.2d 318 (1989), *Time, Inc.* v. *Manning*, 366 F.2d 690, 698 (5th Cir.1966) (holding that the defendant bears the burden of demonstrating that the action should be transferred). The Court weighs the following factors to decide whether a transfer is warranted: the availability and convenience of witnesses and parties, the location of counsel, the location of books and records, the cost of obtaining attendance of witnesses and other trial expenses, the place of the alleged wrong, the possibility of delay and prejudice if transfer is granted, and the plaintiffs choice of forum, which is generally entitled to great deference. E.g., *Dupre* v. *Spanier Marine Corp.*, 810 F.Supp. 823, 825 (S.D.Tex.1993); *Continental Airlines* v. *American Airlines*, 805 F.Supp. 1392, 1396-96 (S.D.Tex. 1992) (discussing the importance of the plaintiffs choice of forum in light of the policies underlying s 1404(a)).

[3] Defendant's request for a transfer of venue is centered around the fact that Galveston does not have a commercial airport into which Defendant's employees and corporate *784 representatives may fly and out of which they may be expediently whisked to the federal courthouse in Galveston. Rather, Defendant contends that it will be faced with the huge "inconvenience" of flying into Houston and driving less than 40 miles to the Galveston courthouse, an act that will "encumber" it with "unnecessary driving time and expenses". The Court certainly does not wish to encumber any litigant with such an onerous burden. The Court, being somewhat familiar with the Northeast, notes that perceptions about travel are different in that part of the country than they are in Texas. A litigant in that part of the country could cross several States in a few hours and might be shocked at having to travel 50 miles to try a case, but in this vast State of Texas, such a travel distance would not be viewed with any surprise or consternation. [FN1] Defendant should be assured that it is not embarking on a three-week-long trip via covered wagons when it travels to Galveston. Rather, Defendant will be pleased to discover that the highway is paved and lighted all the way to Galveston, and thanks to the efforts of this Court's predecessor, Judge Roy Bean, the trip should be free of rustlers, hooligans, or vicious varmints of unsavoury kind. Moreover, the speed limit was recently increased to 70 miles per hour on most of the road leading to Galveston, so Defendant should be able to hurtle to justice at lightning speed. To assuage Defendants worries about the inconvenience of the drive, the Court notes that Houston's Hobby Airport is located about equal drivetime from downtown Houston and the Galveston courthouse. Defendant will likely find it an easy, traffic-free ride to Galveston as compared to a congested, construction-riddled drive to downtown Houston. The Court notes that any inconvenience suffered in having to drive to Galveston may likely be offset by the peacefulness of the ride and the scenic beauty of the sunny isle.

FN1. "The sun is 'rize, the sun is set, and we is still in Texas yet!"

[4] The convenience of the witnesses and the parties is generally a primary concern of this Court when considering transfer motions. However, vague statements about the convenience of unknown and unnamed witnesses is insufficient to convince this Court that the convenience of the witnesses and the parties would be best served by transferring venue. See Dupre, 810 F.Supp. at 823 (to support a transfer of venue, the moving party cannot merely allege that certain key witnesses are not available or are inconveniently located, but must specifically identify the key witnesses and outline the substance of their testimony). In the Court's view, even if all the witnesses, documents, and evidence relevant to this case were located within walking distance of the Houston Division courthouse, the inconvenience caused by retaining the case in this Court would be minimal at best in this age of convenient travel, communication, discovery, and trial testimony preservation. The Galveston Division courthouse is only about 50 miles from the Houston Division courthouse. "[I]t is not as if the key witnesses will be asked to travel to the wilds of Alaska or the furthest reaches on the Continental United States."

Continental Airlines, 806 F.Supp. at 1397.

As to Defendant's argument that Houston might also be a more convenient forum for Plaintiff, the Court notes that Plaintiff picked Galveston as her forum of choice even though she resides in San Antonio. Defendant argues that flight travel is available between Houston and San Antonio but is not available between Galveston and San Antonio, again because of the absence of a commercial airport. Alas, this Court's kingdom for a commercial airport! [FN2]. The Court is unpersuaded by this argument because it is not this Court's concern how Plaintiff gets here, whether it be by plane, train, automobile, horseback, foot, or on the back of a huge Texas jackrabbit, as long as Plaintiff is here at the proper date and time.

Thus, the Court declines to disturb the forum chosen by the Plaintiff and introduce the likelihood of delay inherent in any transfer simply to *785 avoid the insignificant inconvenience that Defendant may suffer by litigating this matter in Galveston rather than Houston. See *United Sonics, Inc.* v. *Shock*, 661 F.Supp. 681, 683 (W.D.Tex.1986) (plaintiff's choice of forum is "most influential and should rarely be disturbed unless the balance is strongly in defendants favour"); Dupre, 810 F.Supp. at 828 (a prompt trial "is not without relevance to the convenience of parties and witnesses and the interest of justice").

FN2. Defendant will again be pleased to know that regular limousine service is available from Hobby Airport, even to the steps of this humble courthouse, which has got lights, indoor plummin', 'lectric doors, and all sorts of new stuff, almost like them big courthouses back East.

For the reasons stated above, Defendant's Motion to Transfer is hereby DENIED. The parties are ORDERED to bear their own taxable costs and expenses incurred herein to date. The parties are also ORDERED to file nothing further on this issue in this Court, including motions to reconsider and the like. Instead, the parties are instructed to seek any further relief to which they feel themselves entitled in the United States Court of Appeals for the Fifth Circuit, as may be appropriate in due course.

IT IS SO ORDERED.

Republic of Bolivia v. *Philip Morris Companies. Inc.*

KENT, J.

*1 Plaintiff, the Republic of Bolivia, brings this action to recover from numerous tobacco companies various health care costs it allegedly incurred in beating illnesses its residents suffered as a result of tobacco use. This action was originally filed in the District Court of Brazoria County, Texas, 239th Judicial District, and removed to this Court on 19 February 1999, by certain Defendants alleging jurisdiction under > 28 U.S.C. s 1331 and > 28 U.S.C. s 1332. For the following reasons, the Court exercises its authority and discretion pursuant to > 28 U.S.C. s 1404(a) to sua sponte TRANSFER this case to the United States District Court for the District of Columbia. This is one of at least six similar actions brought by foreign governments in various courts throughout the United States. The governments of Guatemala, Panama, Nicaragua, Thailand, Venezuela, and Bolivia have filed suit in the geographically diverse locales of Washington, D.C., Puerto Rico, Texas, Louisiana, and Florida, in both state and federal courts Why none of these countries seems to have a court system their own governments have confidence in is a mystery to this Court. Moreover, given the tremendous number of United States jurisdictions encompassing fascinating and exotic places, the Court can hardly imagine why the Republic of Bolivia elected to file suit in the veritable hinterlands of Brazoria County, Texas. The Court seriously doubts whether Brazoria County has ever seen a live Bolivian . . . even on the Discovery Channel. Though only here by removal, this humble Court by the sea is certainly flattered by what must be the worldwide renown of rural Texas courts for dispensing justice with unparalleled fairness and alacrity, apparently in common discussion even on the mountain peaks of Bolivia! Still, the Court would be remiss in accepting an obligation for which it truly does not have the necessary resources. Only one judge presides in the Galveston Division — which currently has before it over 700 cases and annual civil filings exceeding such number — and that judge is presently burdened with a significant personal situation which diminishes its ability to always give the attention it would like to all of its daunting docket obligations, despite genuinely heroic efforts to do so. And, while Galveston is indeed an international seaport, the capacity of this Court to address the complex and sophisticated issues of international law and foreign relations presented by this case is dwarfed by that of its esteemed colleagues in the District of Columbia who deftly address such awesome tasks as a matter of course. Indeed, this Court, while doing its very best to address the more prosaic matters routinely before it, cannot think of a Bench better versed and more capable of handling precisely this type of case, which requires a high level of expertise in international matters. In fact, proceedings brought by the Republic of Guatemala are currently well underway in that Court in a related action, and there is a request now before the Judicial Panel on Multidistrict Litigation to transfer to the United States District Court for the District of Columbia all six tobacco actions brought by foreign governments, ostensibly for consolidated treatment. Such a Bench, well-populated with genuinely renowned intellects, can certainly better bear and share this burden of multidistrict litigation than the single judge division, where the judge moves his lips when he reads . . .

*2 Regardless of, and having nothing to do with, the outcome of Defendants'

request for transfer and consolidation, it is the Court's opinion that the District of Columbia, located in this Nation's capital, is a much more logical venue for the parties and witnesses in this action because, among other things, Plaintiff has an embassy in Washington, D.C., and thus a physical presence and governmental representatives there, whereas there isn't even a Bolivian restaurant any where near here! Although the jurisdiction of this Court boasts no similar foreign offices, a somewhat dated globe is within its possession. While the Court does not therefore profess to understand all of the political subtleties of the geographical transmogrifications ongoing in Eastern Europe, the Court is virtually certain that Bolivia is not within the four counties over which this Court presides, even though the words Bolivia and Brazoria are a lot alike and caused some real, initial confusion until the Court conferred with its law clerks. Thus, it is readily apparent, even from an outdated globe such as that possessed by this Court, that Bolivia, a hemisphere away, ain't in south-central Texas, and that, at the very least, the District of Columbia is a more appropriate venue (though Bolivia isn't located there either). Furthermore, as this Judicial District bears no significant relationship to any of the matters at issue, and the judge of this Court simply loves cigars, the Plaintiff can be expected to suffer neither harm nor prejudice by a transfer to Washington, D.C., a Bench better able to rise to the smoky challenges presented by this case, despite the alleged and historic presence there of countless "smoke-filled" rooms. Consequently, pursuant to > 28 U.S.C. s 1404(a), for the convenience of parties and witnesses, and in the interest of justice, this case is hereby TRANSFERRED to the United States District Court for the District of Columbia.
IT IS SO ORDERED.

S.D.Tex.,1999.

Conference Update

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.

6 August 1999: Adelaide. AIJA Annual Court Administrators' Conference. Contact: AIJA Secretariat. Tel: (03) 9347 6600; Fax: (03) 9347 2980.

6–8 August 1999: Adelaide. 17th Annual Conference of the Australian Institute of Judicial Administration. Contact: Plevin & Associates Pty Ltd. Tel: (08) 8379 8222; Fax: (08) 8379 8177.

27 August 1999: Corporate Law Conference. Contact Di Rooney, Leo Cussen Institute. Tel: 9602 3111; Fax: 9670 3242.

25 September–2 October 1999: Heron Island. Pacific Rim Medico-Legal Conference.

7–12 November 1999: New York. USA Pacific Legal Conference

14–19 November 1999: Florence. Europe Oceania Legal Conference.

9–16 January 2000: D'Amplao, Italy. Europe Pacific Legal Conference.

22–28 April 2000: Venice. Europe Pacific Legal Conference.

30 April–5 May 2000: Stratford Upon Avon. Britain Pacific Legal Conference. Contact: Rosana. Tel: (07) 3236 2601; Fax: (07) 3210 1555.

8–18 October 1999: Istanbul. "The Practically Compleat Lawyer in the 21st Century": Conference of Australian Practitioners. Contact: Margot Cunich. Tel: 1800 633 131; Fax: (02) 4232 2345.

3–7 November 1999: New Delhi. 43rd Congress of the Union Internationale des Avocats. Contact: UIA, Paris, France. Tel: 33 (0) 1 45 08 8234; Fax: 33 (0) 1 45 08 8231.

3–7 July 2000: Sydney. 9th Family Law Conference. Contact: Capital Conferences Pty Ltd, P.O. Box N399, Grosvenor Place, NSW 1220. Tel: (02) 9252 3399; 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, P.O. Box N399, Grosvenor Place, NSW 1220. Tel: (02) 9241 5282; e-mail: capcon@ozemail.com.au.

Outline of Employment Law (2nd edn.)

By Nii Lante Wallace-Bruce
Butterworths, 1999
pp. v–xiii, Table of Cases xv–xxv, Table of Statutes xxvi–xxx, 1–249 including index

IN this new edition, the publishers and author offer a precise yet comprehensive statement overviewing the essential principles of employment law. Coverage of the topic is from the placing of the job advertisement, to the establishment of the employment relationship, through awards and enterprise agreements to termination of contract and post-employment restrictions.

What distinguishes this new edition is the incorporation of a number of significant changes to the law at both State and federal level. For example, at the federal level, the emergence of the concept of "minimum conditions of employment", which has arisen to reflect the new Part IVA of the *Workplace Relations Act* 1996 (Cth) governing minimum entitlements. The book also covers those states who have followed in adopting minimum entitlements (see page 92).

Also included in the new edition is a discussion of some of the consequences of the Patrick Stevedoring dispute on the waterfront in 1998. One issue that arose highlighted the effects of bankruptcy, receivership or liquidation of a corporate employer on the employment contracts of workers. Another line of enquiry discusses the Patrick case as a comparatively rare instance where employers were found to have engaged in conspiracy by unlawful means with the intention of replacing the unionised workforce with non-union labour, contrary to the *Workplace Relations Act* 1996.

It is apparent from reading the new edition that the dynamism of employment law is mirrored in the dramatic changes in employee relations itself. This has led to what the author describes as an "identity crisis" in this field of law. Whereas in the last it was once possible to distinguish between the individual and the collective aspects of employment, arguably the current evolution has and will blur the distinction for all time.

The coverage of topics in this text is national with focus on particular State decisions and legislation of particular interest or idiosyncratic value. Each chapter contains numerous sub-headings detailing the essential elements of the topic, providing examples of the law in action, e.g. under Employees Duties in chapter 11, one finds discussion of dobbing in your mate (p. 150), duty to hand over inventions (p. 146), duty to obey employers' orders (explaining the qualifications to this) (p. 134), conflicting orders (p. 136), moonlighting (p. 145) and whistle-blowing (p. 154). In chapter 17 on Post Employment Restraints there is mention of the "blue pencil rule' (p. 234); under Occupational Health and Safety in chapter 10 there is a section on the duty of occupiers (p. 126), refusal to work in certain situations (p. 128) and protection of the injured employee (p. 131).

A valuable feature of this book is a list of references and further reading at the conclusion of each chapter, where interesting and useful additional resources can be found. However, it would have been a bonus if the publication had included a Bibliography at the end consolidating all the citations together and alphabetically for ease of reference. The index could have been more extensive and better cross-referenced.

This book is a most useful first port of call text for either students or practitioners new to the field to find a starting point for a line of enquiry, or the principles to be developed along the path the developing or solving a problem. I suspect that more experienced labour or employment law specialists would also find a gem or two in it for them. It is methodical and well set out and contains a great deal of helpful and clearly expressed information.

Contents:

1. The history and development of the law of employment in Australia
2. The sources of employment law in Australia
3. The nature of the contract of employment
4. Types of contract of employment
5. Other work relationships
6. Formation of a contract of employment
7. Terms of the contract of employment
8. Performance of the contract: joint duties
9. Employers' duties to the employee
10. Introduction to occupational health and safety
11. Employees' duties to the employer
12. Duties to third parties
13. Variations to the contract of employment
14. Bringing the contract to an end
15. Dealing with automatic termination
16. Industrial action
17. Post employment restraints

Judy Benson

The Varieties of Restitution

By I. M. Jackman
The Federation Press
pp. i–xxvi, 1–186 (including index)

IN the foreword written by the Honourable Justice Gummow, His Honour writes:

The author tackles questions of doctrinal and practicable importance which have set the discussion of restitution for unjust enrichment for the last century.

Goff and Jones' first edition of the *Law of Restitution* was published in 1996. Mr Jackman's book on the same topic has the advantage of considering the Australian authorities. Whilst the book does discuss the doctrinal basis of the various facets of restitution, it is a book of practical importance for the practising lawyer.

There are nine chapters which consider the concept of restitution with respect of mistaken payments, duress, undue influence and unconscionable bargains; payments made on a total failure of consideration; voluntary and non-voluntary provision of benefits in kind; restitution for wrongs; proprietary claims and proprietary remedies and defences.

Of particular interest is a section on anticipated contracts, which highlights the difficulties for those who perform work in anticipation that a contract shall be made. This work may have been performed at the pretender stage or pursuant to a "letters of intent". The other party may retain the benefit of the work if the contract fails to come into effect. Mr Jackman discusses the circumstances by which the hapless person who has performed the work may recover for the benefit the other party has received.

In his chapter on restitution for wrongs, the author examines the circumstances in which a person will be liable for a pecuniary remedy for conduct that has not caused the other actual harm. This may arise when a

plaintiff seeks disgorge benefit that was acquired by a defendant through the latter's wrongful act. An example has been given of a trespasser who has benefited by using a track across the plaintiff's land even though it has not reduced the value of the land. Mr Jackman discusses the right to bring an action for restitutionary rather than compensatory damages, coupled (if necessary) with the alternative remedy of an account of profits. For example, damages for detinue might be assessed according to a reasonable hiring charge for the period of the unlawful detention. This has nothing to do with whether the plaintiff would have used the property during that period or would have hired it out. Similarly in the case of fiduciaries, a person who stands in a fiduciary position cannot profit from that position. Equity will require an account of any profits that have been made.

The concluding chapter to this book concerns two of the defences that are available to a restitutionary claim. Mr Jackman discusses the defence of change of position and reference is made to the David Securities case.

Likewise, Mr Jackman discusses the defence of illegality; namely, that the plaintiff needs to prove the illegal nature of a particular transaction in order to establish his or her cause of action. The book clearly explores the juristic basis of restitutionary claims and enables the reader to attain a better understanding of the remedies that are available.

John V. Kaufman

Federal Constitutional Law: An Introduction (2nd edn.)

By Booker, Glass and Watt
Butterworths 1998

THIS is the second edition of a student introductory text about Australian constitutional law. It is concise and comprehensive. It has frequent reference to the High Court decisions which are the real core of our constitutional law, and tells the story of the evolution of the various doctrines in them well. Because it is historically based, it is an easier book for someone unversed in the area to understand than many of its competitors. Since most of the important doctrines in our constitutional law grew out of historical circumstances and the views of the judges who had to deal with them, a historical approach makes sense. The book is also a good read, with the stories making it more interesting than a dry exposition of the current state of some constitutional doctrine.

The book covers the history of the colonies and the making of the Commonwealth Constitution; approaches to interpretation; legislative, executive and judicial power; the vexed area of taxation constitutional rights; State, Commonwealth and Territory government relations; and legislative interaction and judicial review. It is well set out and organised. I found the index easy to use. It is a good way to find out quickly the nub of the case law and debate about a particular constitutional issue, and get an overview of current trends in the area. Reading this book gave me a useful refresher on a number of areas I had either forgotten about or never knew in the first place.

At times I found the prose style a bit dense and hard to follow. Then again, that is a criticism one could level at most legal textbooks one comes across. One might also attribute it to the subject matter or even the reader. All in all, Booker, Glass and Watt is a useful contribution to the area, and I am sure this edition will give as much guidance and comfort to those who have to deal with constitutional issues (whether as students or practitioners) as the first edition has. I look forward to seeing it mentioned and quoted in as many future undergraduate "con and admin" essays as it has been in the past.

Michael Gronow

Negotiation — Theory and Techniques,

By Spegel, Rogers and Buckley
Butterworths, 1998
pp. ix, 1–212 pp

AS we are all told at negotiation workshops, negotiation is something we do all the time, especially if we are lawyers. Selling your point to a court or tribunal can be as much an exercise in negotiation as settling a case. Understanding the techniques and theory of negotiation may not turn one overnight into a Nelson Mandela or a Gandhi. It does, however, assist in knowing what is going on in a negotiation, in analysing the other party's behaviour and tactics, and, over time, in improving one's own performance.

This book is another in the excellent Butterworths skills series. It has chapters on the framework for negotiation, how to introduce a constructive approach, preparation, what to do in the negotiation itself, how to deal with different types and styles of people, how to live with (and even benefit from) conflict, communication and persuasion, and also on the law and ethics of negotiation. An understanding of all these things is useful mental equipment for any negotiator.

The information in this book is well set out, with clear headings and subheadings, and a list of contents at the beginning, which made it easier to find what I wanted and to retain what I read. Each chapter also has a summary and a list of references for further reading and research at the end, as well as comprehensive footnotes referring to research and other sources.

The book also contained a series of diagrams entitled "mind map", the utility of which escaped me, though there were lots of interesting-looking branches and labels. Perhaps the need was felt to break up the text still further with some attractive illustrations. I flatter myself that my own mind only looks like the maps after large quantities of alcohol, so I may have been unfit to appreciate them when I read the book.

Apart from the text, there are several practical exercises and questions that are useful for a course or a group learning session, which the book is designed for. Like advocacy, negotiation is best learned by doing it rather than by hearing about it. Nevertheless, the text is of sufficient quality and scope for the book to be used as a source book for the things one needs to know about negotiation as a practitioner as well as a student.

This seemed to me to be a good basic text on negotiating. Indeed, I think it is the best one I have yet read. Apart from the mind maps, it is written in an unpretentious style that will be refreshing to those who have read other works on this and other psychology-related subjects. The book contains a lot of information, and its statements and contentions are always well backed up by reasoning and references to other writings and research. Much of the advice is useful and wise. It assumes little or no knowledge of negotiation, or of its psychology, but

imparts a lot of information about both. It is well worth a look.

Michael Gronow

De Facto Property Proceedings in Australia

By Kovacs, Dorothy
Butterworths, 1998
pp. xvii, 1–182

AS someone whose knowledge of family law is about as extensive as Mr Clinton's sense of truth, I was diffident about reviewing this book. On the other hand, property disputes are grist to every lawyer's mill, including mine. And I was comforted when reading this book to find it more about the latter than the former.

It is a treatment of an increasingly important subject in practice: what happens to the assets of people who were living together without being married and who have split up. The old days when the legal system did not properly recognise the rights of unmarried couples at all are thankfully behind us. The system still has some way to go: among other things it has not yet made proper recognition of the rights of homosexual couples. As this book says, they are not covered by the legislation, along with "other relationships which lack the attributes of a marital union". Still, things are better than they used to be.

The book is divided into two parts: an account of the State de facto relationships or property law Acts, and a treatment of the relevant parts of the general law. The first part covers which relationships and property are covered by the legislation; time requirements; court powers to order just and equitable contributions and compensation and other relief; the position with superannuation; cohabitation and separation agreements; what happens when a party dies; and the relationship between the statutory and general law regimes. The second part covers relevant parts of other areas of law, such as contract, trusts and constructive trusts, the equity of acquiescence, charges, other remedies and stamp duty exemptions.

Practical considerations, such as taxation implications of various situations and resolutions to them are also considered where appropriate. The book seemed to me to be written with the interests and needs of practitioners in mind rather than students, for most of whom it would be too detailed and technical. That is not a criticism as the book does not purport to be a student text.

I found the exposition of the relevant principles comprehensive and clear, with a good statement of the general principles underlying the practical operation of the law. As a result, sections of the book will be useful to those considering property disputes arising other than from de facto relationships as well. There is some interesting and stimulating discussion of the results and reasoning of some of the more important decisions.

There are "digests" of some cases, which make it easier to see how the principles have been applied in them, and to understand the results of the decisions in the context of the fact situations in which they arose. The emphasis is, of course, on Australian cases, though decisions and materials from other British Commonwealth countries are also included. There are also examples of fact situations in the text that assist in explaining how the rules work in practice.

All in all, in spite of my previous lack of acquaintance with the subject matter, I found this book enjoyable and interesting to read. I know a lot more about de facto property law than I used to, and a few other things as well.

Michael Gronow

Consumer Credit Law

By A.J. Duggan and A.E. Lanyon
Butterworths 1999
pp. i–lii; 1–542, index 543–70

UNIFORM consumer credit laws were introduced (I suspect largely unnoticed) in Australia in late 1996. Knowledge and understanding of the Australian law is necessary to provide appropriate legal advice covering a myriad of everyday transactions.

Practitioners, banks and other credit providers and students are fortunate that two of the foremost authors in this field have written *Consumer Credit Law* which provides an academic approach together with practical analysis of the new consumer credit regulatory regime.

After an introductory chapter providing a useful overview of the position in relation to credit regulation prior to the uniform Consumer Credit Code, the work guides the reader through the current position. Chapter 2 deals with the scope of the uniform legislation including fundamental questions such as "what is credit?" and "to whom does the Code apply?" and exemptions from the operation of the Code.

Chapter 4 deals with contract documentation while securities (including guarantees) and insurance are dealt with in Chapters 6 and 8 respectively. Matters such as variation and assignments (Chapter 5), the supervision and regulation of credit providers (Chapter 12) and unjust contracts (Chapter 9) are all given comprehensive treatment in discrete chapters. The chapter on unjust contracts contains a comprehensive analysis of both the position regarding re-opening a credit transaction pursuant to the Consumer Credit Code and related rights that arise under the unconscionability provisions found (for instance) in Part IVA of the *Trade Practices Act* 1974, and includes discussion on how those provisions apply to guarantors.

The authors in their preface note that "writing about the Code is like shooting at a moving target". New legislation is likely to benefit from and evolve with scrutiny, judicial interpretation and academic analysis. The Consumer Credit Code, although deceptively simple at face value, poses for all those who must work within its legislative framework difficulties of applying what appear to be the relatively straightforward words of the statute to the multitude of forms and vagaries of everyday transactions. As Justice Callaway recently observed (although in reference to sections of the Corporations Law):

> . . . the quest for simplicity . . . [in drafting legislation . . . pays the price of vulgarity and ends in obscurity". (*Pearce & Co* v. *RGM* Australia [1998] 4 VR 888 at 889).

One hopes the Consumer Credit Code will escape such stinging criticism. In any event *Consumer Credit Law* will assist all those needing to understand and apply the import of the new legislative regime.

Practitioners, lenders and consumers together with those charged with the regulation of consumer credit will benefit from the publication of this comprehensive text. *Consumer Credit Law* is a work which can usefully find a niche on the bookshelves of lawyers, credit providers, regulators and students. The authors' scholarship and clear discussion of complex issues and concepts makes this work a necessary acquisition for many libraries.

P.W. Lithgow