VICTORIAN BAR NEWS

No. 113 ISSN 0150-3285 WINTER 2000

THE TRIAL OF NED KELLY

2000: Another Centenary Year!
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Bar Dinner Notes
New County Court
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Official Opening of the Joan Rosanove Chambers
PILCH Pro Bono Awards 2000

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The Philosophy of Barristers' Payments

A barrister is supposed to be paid within 30 days from the completion of his or her brief. "Payment within 30 days" is printed upon the barrister's fee slip, sent to the Solicitor.

Payment within 30 days, although not uncommon, is considered to be rather generous in commercial spheres. Ask a plumber to attend your premises and payment will be demanded immediatcly, usually in the form of cash. Go to the doctor or dentist and payment will be sought at the desk after the completion of treatment. The days of doctors' and dentists' bills are things of the past. God forbid if other bills are not paid within seven days. Public schools, in particular, are very quick to send reminder letters and follow-up phone calls should a school term bill not be paid on the due date.

So most members of society expect payment either immediately or between seven and 14 days. Therefore barristers should be paid within 30 days. But that is in theory only. There is an entrenched philosophy among solicitors that the barrister's fee slip is something to be filed away for consideration at a much later date. With the abolition of provisional taxation and the introduction of GST, will this philosophy of tardy payment continue? Can it be reversed?

This editorial is aimed at the majority of the Bar. Those golden folk entrenched in "out-reach" chambers, who appear to be well paid before they do any work, can turn away. This article is targeted at those barristers struggling with increasing overdrafts, multiple credit cards and various other loan facilities.

It appears to be an accepted fact of life that barristers will carry around with them the baggage of a large amount of elderly unpaid fees. It is a shock to be paid within 90 days, it is gratifying to be paid within six months. In some cases the real surprise is to be paid at all and that the statute of limitations has not been relied upon.

The introduction of the legal practice legislation should have changed this philosophy of tardy payment. The concept of detailed fees agreements made directly with clients should mean that no work is done until, in civil matters, the money is placed in trust. Alternatively, the solicitor may well offer to guarantee that the fees are paid. The question remains whether such an agreement needs to be in writing. But in many cases the change in regime does not seem to have changed the adverse attitude to prompt payment. Often barristers are asked to do work on short notice and it is often not possible for an agreement to be drawn up and thrashed out. Only after the work is done does this spectre of non or slow payment raise its head. Perhaps the overall change in philosophy will have to be that barristers will need to be armed with a standard form fees agreement which must be signed before any work is commenced. This goes against the present grain where the assumption always was that the solicitors would eventually make good the payment.

The legislation provides for interest to be payable upon unpaid fees. This is rarely relied upon. If there was a uniform insistence on payment of interest then this might change things.

In the criminal area of law the major problem with payment is the small fees granted by Legal Aid. But there are still many stories abounding about the difficulties in getting paid for long trials and complicated negotiations should there be extra reading or preparation involved.

In commercial cases much effort has to be put in, before any work is done, in clarifying the fee arrangements and making sure that a fee agreement has been entered into preferably with the relevant amount of money being held in trust by the solicitor. However, in many cases, this course is not followed and there is often dispute when the fees are not paid for many months and eventually a solicitor claims that the client has not paid and there is a refusal to pay at all.

In the common law it should be a lot simpler. The majority of plaintiffs' barristers have always operated on a no-win/no-pay basis. Therefore if you win you will have an order of the court whereby you will be paid on the appropriate scale. Further, if the case is settled the barrister is to be paid on the appropriate scale and there should not be any problems. If the barrister represents the defendant it should also be a simple matter. Most of the defendants' briefs are either come from insurance companies, the WorkCover Authority or the Transport Accident Commission. After the case is over, or has settled, the agreed costs of the barrister should in theory be paid within 30 days. They are easily calculated and there

is no dispute as to the amount.

This does not appear to happen in practice. Despite having settled the case, or having a court order for costs, plaintiffs' barristers find that months and months roll on before they are paid. The reason often given is that there is a dispute over the taxation of costs. However, it is difficult to see why disbursements in the nature of barristers' fees should not be paid promptly when in the overwhelming majority of cases the fee is set by scale and the number of refreshers is set by the court. One particular solicitor did not pay a barrister, even having gained a cost order, and then claimed that he was under no obligation to pay because there was not a fees agreement according to the legislation. This strikes at the very heart of the no-win/no-pay system and should sound alarm bells to many members of the profession who allow their fees to mount up in a fond expectation that they will be paid.

It is difficult to see why disbursements in the nature of barristers' fees should not be paid promptly when in the overwhelming majority of cases the fee is set by scale and the number of refreshers is set by the court.

Even defendants' barristers wait many months to be paid when there does not appear to be any valid reason whatsoever for late payment. There is no real reason why large institutions should not be able to pay through their solicitors within 30 days. The notable exception is the Transport Accident Commission, which perhaps by reason of its having its own in-house legal firm, is well known as being a prompt payer. One of the problems facing the new management in the WorkCover Authority is to iron out the long-running problems of late payment to barristers. Many members of the Bar have been involved in negotiations with the Authority in order to ensure that payments be made within 30 days. Despite all sorts of assertions and policy positions the fact remains that payment is not made for many, many months. Those members of the Bar, particularly in the WorkCover jurisdiction, who rely heavily on one institution are therefore permanently placed in a cash flow crisis and must borrow to fund the non-payment of fees. This is a totally unjust and unacceptable position.

Many members of the Bar are willing to accept this situation. In past years there have been particular firms of solicitors who notoriously run up large debts with junior barristers only to move on to another junior barrister and simply wait to be chased up for late payment. Many members of the Bar accept it as a fact of life that they are owed extremely large amounts of money which have remained unpaid for years and years. Even when litigation is totally finalised some barristers appear to be willing to not push for payment. It is hard to imagine how they are able to control their financial affairs under such a burden.

Without the weight of provisional taxation, and with the new Pay As You Go system, it is hoped that the philosophy of tardy payment will change within the profession. There do not appear to be any reasons why the large institutions, be they government or insurance based, should not be able to pay barristers within 30 days. Further, the tardiness of payment supposedly caused by taxation of costs could be cured by orders of the court making payment by the defendant to be direct to barristers. Terence Casey QC has written an article along these lines in this edition of the *Bar News* which deserves close reading. It is one way to change the entrenched position of continued late and non-payment.

Many of the clerks must spend their time chasing solicitors by letter, fax and telephone in order to get payment within even six months of completion of work. Payment at least within 30 days would mean that many of the financial problems faced by barristers particularly on 30 June of each year would be eradicated, and with a steady cash flow there would not be such a great need to rely on loaned funds. Essentially if there is to be a change it must come from the barristers and it will be interesting to see, with the many changes to the profession and the taxation laws, whether this antiquated approach to commerce will change.

CHANGE, CHANGE, CHANGE

There are to be many changes in the legal profession. Wigs are to be abolished. Queens Counsel are to be abolished. The oath of allegiance to the Queen will be abolished. These are all antiquated traditions not needed in a progressive and modern world. But the question that needs to be asked is: why in this multicultural society are the only traditions to be abolished those of the anglo-celtic section? Wigs, Queens Counsel and oaths to the elected Head of State are part of the British/Irish tradition. Much of the tradition came from Trinity College Dublin and not exclusively from England. Why should these reminders of our forebears and background be abolished?

Perhaps it's just part of the overall globalisation of the world. Or should that read Americanisation of the world? If the Westminster system of government is removed, and it is rapidly in the process of being removed, then the model that the "reformers" fall back on is America. Those people eagerly pushing to eradicate everything connected with England and the Crown simply turn their minds to America. Australia ultimately will be a warehouse filled with storemen selling products which have been manufactured or grown elsewhere. Ultimately what's left of the British tradition will be transformed into the Eddie McGuire/Shane Warne/dot com dot/corporate box society, which is being ruthlessly forced upon all.

Why is it so patently unforgivable to have a background from Britain and Ireland and which is based upon English law, the basis on which the Australian legal system has developed? Do you know anyone who has American forebears, relatives or any cultural heritage related to that country? The only Americans who choose to live in Australia are the overpaid CEOs who are running all the major companies in the continent. But it all appears to be wasted breath. Eventually are we to become like the American television legal shows such as "The Practice"? Why not? The "win at all cost and get as much money as possible" ethic seems to be the whole rationale behind those pushing for change. Perhaps the interests of the poor and an increase in Legal Aid are much more important subjects to pursue rather than the wearing of wigs.

THE EDITORS

A Busy and Rewarding Beginning

IT has been a busy and rewarding beginning to my chairmanship of the Bar Council. The Council continues to work harmoniously and well. There have been numerous (too numerous to mention) submissions to governments and other bodies, State and Federal, on law reform matters and legislation to which members of the Council and many volunteers from the senior and junior Bar have contributed. I thank them all.

The Victorian Attorney-General has put "wigs" back on the agenda. The Bar Council has not reconsidered its position since the result of the 1997 Bar-wide ballott, which was in favour of retaining wigs.

NED KELLY TRIAL

The Ned Kelly Trial was a terrific success and received extensive publicity. I thank all of those involved in the production of the trial, including Duncan Allen, Richard Bourke, Nicholas Harrington and Liz Ingham, as well as those members of the Bar who participated in the re-enactment and the re-trial.

Nick Harrington, director and producer of the Ned Kelly Trial, has written a wicked article that appears in this issue of *Victorian Bar News*.

VICTORIAN BAR'S PRO BONO SCHEME

As most members of the Bar will be aware, the Bar has had in place a pro bono scheme for the past 10 years or so. A large number of our members have willingly given of their time and expertise to assist needy members of the community who have required legal assistance but who lacked the financial means to obtain it. In addition, some years ago the Bar entered into a protocol with the Federal Court to assist with the provision of legal assistance to unrepresented litigants. The Victorian protocol has become the basis for the national scheme that is now enshrined in Order 80 of the Federal Court Rules.

In recent years, the Bar's scheme has been administered on a part-time basis by the Honorary Secretary and the Assistant Honorary Secretary. The diminishing amounts of legal aid available in recent years has led to a marked increase in the volume and complexity of applications for assistance from our scheme. These changes, taken together with the Victorian Attorney-General's recent announcement of the Government's expectation that those private practitioners wishing to receive Government legal work should be undertaking a significant amount of pro bono work, have caused the Bar Council to reflect on how better to streamline the operation of the Bar's scheme to meet these new demands and expectations.

After discussions with the Board and officers of the Public Interest Law Clearing House (PILCH), an agreement has been reached for PILCH to administer our scheme. The Bar will provide PILCH with a space on the first floor of Joan Rosanove Chambers and some basic infrastructure to enable it to run its operations as well as to administer the Bar's scheme. Under the agreement, which commenced on 1 July 2000, the autonomy of the Bar's scheme will be maintained. PILCH has developed considerable expertise in the area of providing legal services on a pro bono basis and it has agreed to provide that expertise to improve the administration of our scheme. We are also fortunate that a member of our Bar currently on special leave with PILCH, Samantha Burchell, will be taking a primary role in this new venture.

On your behalf, I express the most profound thanks to our Honorary Secretary, Garrie Moloney, and Assistant Honorary Secretaries, Samantha Burchell (until she took leave) and Richard Attiwill, for their selfless dedication to the administration of the scheme.

PRO BONO AWARDS 2000

On 6 June 2000 awards were presented to barristers, solicitors and community legal centre volunteers in recognition of their outstanding contributions in providing pro bono assistance to the community. The awards, initiated by the Public Interest Law Clearing House (PILCH) in 1996, are held biennially to recognise the voluntary work of lawyers in the community interest. The awards were hosted by the Attorney-General, the Honourable Rob Hulls MP, and presented by the Honourable Chief Justice J H Phillips AC and the Honourable Justice Branson of the Federal Court. I congratulate each of the Pro Bono Award winners and in particular the following members of the Bar: Michelle Quigley (PILCH Member Award) and Matthew Townsend (Advocates Award).

100TH ANNIVERSARY OF THE BAR COUNCIL

The election and first meeting of the original Bar Council took place in the chambers of Mr Box (later Judge Box of the County Court) in Selborne Chambers on 20 June 1900.

To mark the centenary, a special meeting of the Bar Council was held on 20 June 2000. In attendance were many past chairmen of the Bar, including the Honourable Xavier Connor AO, QC (1967–69), the Honourable William Kaye AO (1971–72), the Honourable Richard McGarvie QC (1973–75), Mr Leo Lazarus (1975–76), and the Honourable Kenneth Marks QC (1976–77). The Bar Council

also resolved to mark the centenary of the Bar Council by reprinting the Bar Roll and distributing it to members.

A special feature article concerning the 100th anniversary of the Bar Council appears in this edition of the *Victorian Bar News*.

REVIEW OF THE *LEGAL PRACTICE ACT* 1996

The Attorney-General, the Honourable Rob Hulls MP, recently released the terms of reference for a review of key features of the Legal Practice Act. The review will consider the effectiveness of the current system of regulation of legal practice and options for improvement.

The Bar welcomes the review and representatives of the Bar have already had preliminary discussions with the Crown Counsel, Professor Peter Sallman and Richard Wright, who have been appointed to conduct the review.

The Bar looks forward to receiving an issues paper and making submissions concerning the structure and operation of the Act. I suggest that any member of the Bar who wishes to raise any matters concerning the Act contact David Bremner, the Executive Director of the Bar.

GST

The booklet produced by the Australian Bar Association entitled "A practical 'GST' and 'PAYG' overview for members of the Australian Bar Association" has been recently circulated to all practising members of the Bar. The booklet was funded by the GST Startup Office. The booklet is a very useful guide to the new tax scheme and includes comment on the application of the new tax scheme to members of the Victorian Bar. Another useful booklet has also been produced by the Law Society of New South Wales entitled "The New Tax System: An essential guide to GST for Australian lawyers". They have both been distributed widely. I commend both booklets to all members of the Bar.

The Bar's GST Committee, chaired by Alexandra Richards QC, has been very active in issuing "GST alerts" on important and topical GST issues to members of the Bar. The GST Committee conducted twelve GST seminars in May and June at which the presenter was Michael Bearman, a member of the Bar. I thank all of those members involved in the preparation and presentation of the seminars. The seminars have been very well attended and have provided members of the Bar with an invaluable insight into the practical effects of the GST on the conduct of a barrister's practice.

BAR DINNER

The Bar dinner was a tremendous success. I would particularly like to thank Anna Whitney for organising the dinner. An article about the night's events, together with incriminating photographs, appears in this issue of the *Victorian Bar News*.

INTERNET

The Vicbar direct internet connection system has been growing steadily. There are now approaching 300 connections to barristers, clerks, Bar and BCL Staff. We have overcome most of the teething problems and everyone connected has found the speed and convenience of the system a real plus. We have recently installed an e-mail server in ODCE that operates the Vicbar e-mail service. This provides a number of important advantages to users, the most important of which are that the setting up of e-mail addresses is now done more quickly in-house and e-mail exchanged between Vicbar users no longer needs to go through the Internet and effectively remains in-house.

Vicbar is also in the process of establishing a web server to conduct websites within the Bar, including the websites of the Victorian Bar and BCL. The web server will provide faster access to websites conducted by the web server. It is also anticipated that the web server may be used in the future to conduct other websites, including those maintained by the clerks.

BAR READERS

I extend a warm welcome to the 39 March 2000 Bar Readers who signed the Bar Roll on 25 May 2000.

RENOVATION OF OWEN DIXON CHAMBERS EAST

The commencement of the renovation of the ground floor of ODCE has begun, as you have all no doubt seen. The renovation of ODCE has been the subject of a number of recent and not so recent articles and reports (see *Bar News*, Spring 1999, p. 20; Autumn 2000, p. 23). That renovation will include the relocation of the Essoign Club, Bar Council Chamber, administration offices, Library and Readers Course area to the first and second floors, making ODCE again the home of the Bar in a positive way.

To assist BCL reduce its debt and to enable the company to continue to perform its role as Australia's premier provider of Barrister's chambers and associated services, the Bar has continued the recapitalisation of BCL, which was announced in 1998 during the chairmanship of Neil Young QC. This financial year the Bar has subscribed $500,000 to BCL's capital.

The renovation of the first to thirteenth floors of the building is a long-term project that is dependent on long-term funding. BCL has asked the Bar Council to extend the current program for the recapitalisation of BCL, and for a firm commitment to that extended program, to enable the full renovation to commence in 2002. The Bar Council will provide members with information concerning this matter and consult with members before making the commitment.

CARNIVALE 2000

The coincidence of the centenary of Federation, the centenary of the Victorian Bar Council and the new millennium deserve to be celebrated. On 14 October 2000 the Bar will host "Carnivale 2000" at the ballroom of the Regent Theatre in Collins Street. "Carnivale 2000" will be a night of surprises, food, drink, music and explosive colour. There is an advertisement in this edition. I encourage all members to promote and attend the event.

Mark Derham QC
Chairman

The Review of the *Legal Profession Act* 1996 has Commenced

THE Parliamentary recess provides a welcome opportunity to take a look at the program of justice issues in Victoria, as well as the plan for the next few months.

I have always held the view that broad consultation is critical to achieving effective and relevant reform. Accordingly, I welcome and encourage the valuable input of the legal profession. It is clear that such consultation contributes greatly to the debate in relation to necessary and long overdue reform.

The Review of the *Legal Profession Act* 1996 has commenced and will be undertaken by Crown Counsel, Professor Peter Sallmann, and Richard Wright, Associate Director of the Civil Justice Project. The legal profession has repeatedly voiced its concern over the inadequacy of the current legislation to provide a proper regulatory system. The Review will address the effectiveness and efficiency of the current system and will examine the responsibility for complaint handling, for reviews of ethical conduct and a range of related matters. The Review will have regard to best practice models of regulation of legal and other professions, worldwide. Very importantly though, the Review will be based on the premise that the Victorian legal system be as accessible to the community as possible. It is anticipated that the Review will report by 20 December 2000. I strongly encourage all members of the profession to work towards meaningful and workable reform of the *Legal Practice Act* 1996.

Furthering my commitment to modernising the legal profession, legislation was passed, last session, which removed the obligation to swear allegiance to the Queen prior to entitlement to admission to practice. This legislation was enacted in response to the strong statement by soon to be admitted practitioners that the current practice was outmoded and irrelevant. The irrelevance is such that, even in the UK, practitioners undergoing admission aren't required to swear allegiance to the Queen.

Many of you will be aware of my fervent wish to make the legal profession as accessible as possible to the Victorian community — for both lawyers and non-lawyers.

I have openly expressed my view that counsel should no longer wear wigs in court. While I recognise the importance of tradition, I believe that consumers of legal services have a right to engage fully and openly with counsel, without the imperious device of the wig. I am advocating change for everyone's sake — for clients, for the profession and for the community at large. I welcome debate around this issue, through the consultative process and I encourage all members of the Victorian Bar to discard the trappings of tradition and to embrace a vital, modern and visible role in the community.

The development of the whistleblower protection legislation has been greatly assisted by the submissions received during the first round of community consultation. As a result of these submissions, a number of changes have

been made to the draft legislation to improve the clarity and effectiveness of the scheme. For example, time limits have been included which require public bodies to respond to complaints within 45 days. In addition, police whistleblowers, and those raising concerns about local government and councillors, have been brought within the scheme.

Time limits have been included which require public bodies to respond to complaints within 45 days.

The revised draft of the legislation has been released for a final round of community consultation, prior to the introduction of the legislation in Spring. The closing date for submissions is 21 July, 2000. I look forward to receiving further valuable input from the legal profession, and the wider community, on the improved protection scheme.

One of the most significant achievements of the Bracks Government has been the introduction of legislation that reinstates compensation for pain and suffering for victims of crime. The new scheme reflects the Government's commitment to restoring access to justice in Victoria. $60 million over four years has been allocated to fund the scheme, which is part of a comprehensive package of assistance for victims of crime. Compensation for pain and suffering will be available to victims affected by acts of violence committed on or after 1 July 2000. Access to compensation for pain and suffering will also be available to certain victims of childhood sexual assaults committed before 1 July 2000. The special assistance provided to these victims recognises their particular vulnerability, and the inherent delays in reporting these crimes.

I was very pleased to announce, in recent weeks, a series of new appointments. Jennifer Coate has been appointed as a County Court Judge. Judge Coate will sit as President of the Children's Court. Also recently appointed were four new Magistrates, Angela Bolger, Caitlin English, Susan Wakeling and Ross Betts. Each of the appointees brings a wealth of experience to the courts and I am pleased to be able to expand the diversity of the judiciary.

Rob Hulls
Attorney-General

Review of the *Legal Practice Act* 1996

ON 13 March 2000, the Attorney-General, the Honourable Rob Hulls MP, advised the Victorian Bar Council of his intention to conduct an assessment ("the Review") of the effectiveness of the reforms introduced in the *Legal Practice Act* 1996 ("the Act"). The Attorney indicated that he is "considering establishing a review of the regulatory system and the various legal institutions that are dependent on it financially". The Review will consider the effectiveness of the current arrangements and present options for improvement. The Attorney-General then sought the preliminary views of the Bar on the relative strengths and weaknesses of the current Act.

The Attorney-General subsequently appointed Crown Counsel, Professor Peter Sallmann and Richard Wright to conduct the Review.

On 9 June 2000, the Attorney-General announced that having regard to the need to strengthen consumer and community confidence in the legal system, to provide the legal profession itself with an effective and efficient regulatory regime, and to ensure that the best possible use is made of available funds, the Review will investigate and report on the following matters:

- the effectiveness and efficiency of the regulatory system and the operational relationships between the Legal Practice Board, the Legal Ombudsman, the Legal Profession Tribunal and the Recognised Professional Associations under the Act;
- the division of responsibility for complaint handling between the Office of the Legal Ombudsman, Victorian Lawyers RPA and the Victorian Bar;
- the consistency of the statutory requirements of the Act with accepted good business practice in the wider community;
- whether breach of ethical conduct reviews should be conducted by the Law Institute and the Bar Council alone;
- any occurrences of waste, duplication or inefficiency in the operation of the legal profession caused by the regulatory requirements of the Act; and
- any related matter.

In conducting its inquiry, the Review will also have regard to:

- world's best practice in regulation of the legal profession and professions more generally;
- the need to ensure that the Victorian legal profession is well placed in the evolving national and international market for legal services; and
- the general requirement that the Victorian legal system be as accessible to the community as possible.

In its report, the Review will present to the Attorney-General:

- options for the implementation of its proposals;
- strategies for the adoption of any changes that might be proposed; and
- estimates of any savings that might be achieved in the adoption of different approaches to regulation of the legal profession.

A report will be provided to the Attorney-General by 20 December 2000.

The Victorian Bar will be making a submission to the Review.

Bar News Supplement June 2000

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

On 23 June 2000, *Victorian Bar News* Supplement 06/00 was issued in order to notify regulated practitioners of the Bar of the issuing of a Practitioner Remuneration Order made on 17 May 2000 and effective 1 July 2000. Further copies of the Order can be obtained from the Bar Council Administration office.

Monash Places Property Law Students

The Editors

Dear Sirs

PROPERTY LAW PLACEMENTS IN PRACTICE PROGRAM

THANK you very much for your support of the Monash University Faculty of Law Property Law Placements in Practice Program.

Places for 236 Property Law students have been secured for this year, exceeding the initial target. Hosts include barristers, solicitors, corporations, banks and government departments.

The Program started very successfully at the beginning of April when the first pairs of students attended their placements with much anticipation; they were not disappointed. The Project Leader, Mrs Joycey Tooher, and the Project Manager, Mrs Adiva Sifris, are delighted with the positive feedback from hosts and students alike.

The project team would like to acknowledge and thank those members of the Bar who are participating in the Program. Their support and generosity are an important part of the success of the Program and provide the students with an invaluable experience.

I would be pleased to provide further information for other members of the Bar who may be interested in participating in the program next year: elspeth.mcneil@law.monash.edu.au.

Yours faithfully

Elspeth McNeil
Professional Affiliation Co-ordinator
Assistant Lecturer, Faculty of Law
Monash University

Snails and the Law

The Editor

Dear Sir,

I was greatly concerned to read the article in *The Age* 29 April, 2000 (attached).

All practitioners know the law moves at snail's pace. It disturbed me then to learn that a committee in the Apple Isle was prepared to peremptorily de-list the *Anoglypta Launcestonensis* snail ("the Snail") from Tasmania's threatened species schedule without hearing evidence from snail experts.

While the article is unclear, it can be assumed that the Conservation Trust, representing the Snail, brought to the Committee's attention the fact that relevant experts could give evidence supporting the Snail.

If this did occur, then arguably the Snail has been denied procedural fairness. Natural justice demands that parties be given the right to present evidence. If the Committee was aware that (1) there was evidence assisting the Snail, and (2) financial or other constraints prevented the Snail from adducing that evidence, the Committee, acting as an investigative tribunal, should have informed itself of such evidence by whatever means.

In the circumstances, the Snail may have good grounds of appeal. The case has significant ramifications for snails worldwide. I call on my colleagues to join the committee I am now establishing: "The Snail Legal Advisory Committee" ("SLAC")

Yours faithfully,

Rod Saunders SC*
*Snails' Counsel

Snail loses protection test case in Tasmania

The north-east forest snail (Anoglypta launcestonensis) has lost a test case, under Tasmanian state law, to protect endangered species.

A decision by the Resource Management and Planning Appeal Tribunal means Forestry Tasmania is free to log and replant in much of the snail's only habitat, the north-eastern forests. It was the first time the tribunal had heard an appeal against a decision to de-list an animal from the state's threatened species schedule.

"The snail happens to live in the middle of intensive forestry activity," Tasmanian Conservation Trust director Michael Lynch said.

A Forestry Tasmania consultant, Kevin Bonham, applied to the scientific advisory committee to have the snail de-listed. The committee, headed by Forestry Tasmania's senior scientist Mick Brown, sent its recommendation to Environment Minister David Llewellyn, who struck the snail off.

The Conservation Trust appealed, but the tribunal broadly accepted Mr Bonham's findings — that areas to be reserved from logging were sufficient to ensure the species' survival.

Mr Lynch and Greens MP Peg Putt criticised the outcome.

Mr Lynch said it was amazing that the tribunal could accept that 37 per cent of the snail's habitat would be destroyed by logging over the next 20 years, yet decide against listing it as vulnerable.

The appeal was lost because the trust could not afford to bring in snail experts to give evidence in the "struggle conservationists face against the financial might of loggers and government," Ms Putt said.

"The score is: forestry, one; threatened species, nil. That's a cause for grave concern," Ms Putt said.

AAP

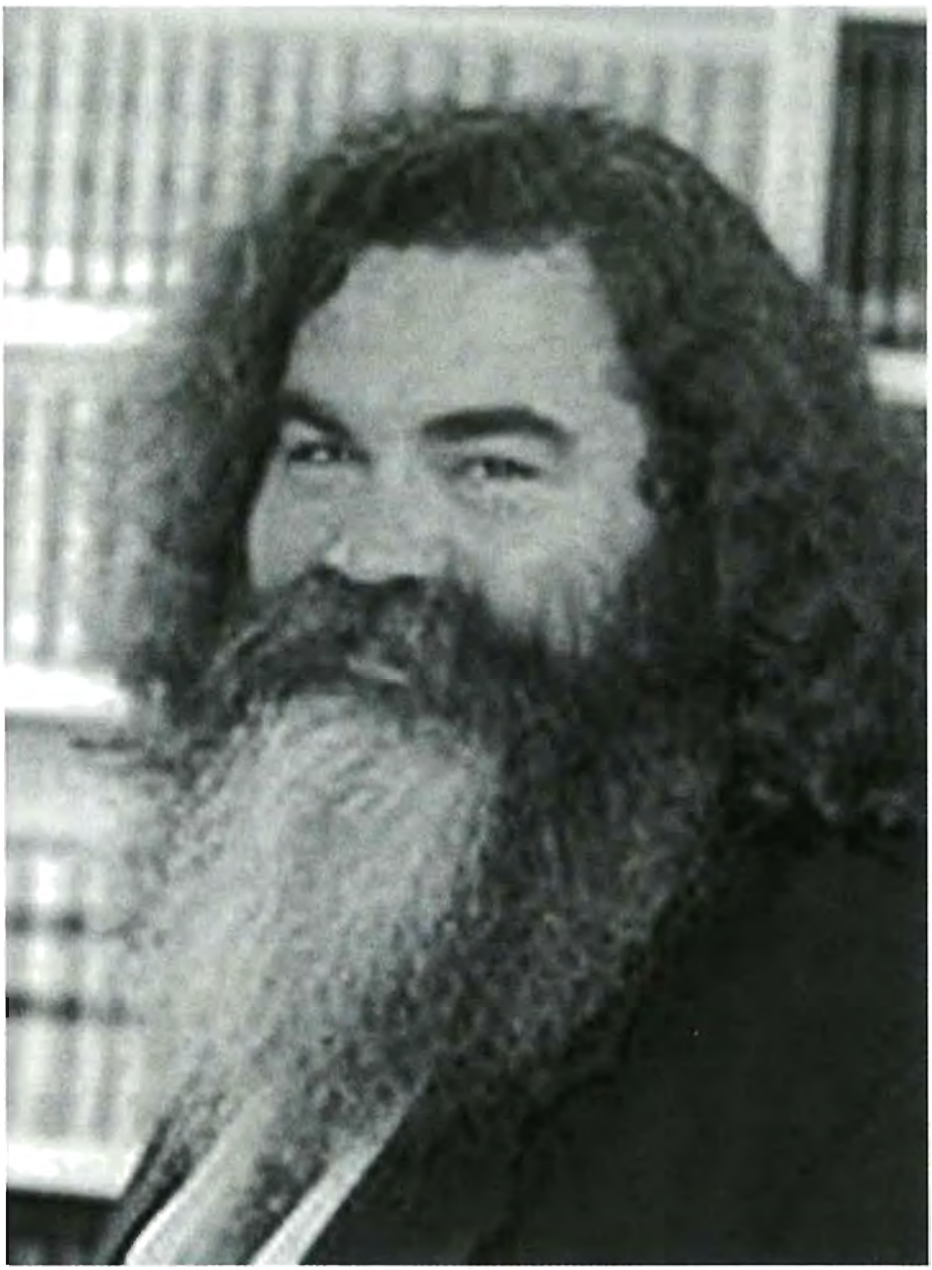
John Hardy, M

JOHN William Hardy was born in Mildura in country Victoria in 1954. As a young child he grew up in the foothills of the Dandenongs where his father was a local medical practitioner. He completed his secondary education at Lilydale High School in 1971 and commenced the RMIT articled clerk's course in 1972. Hardy excelled during the first year of this course and was then invited to continue his studies in law at the University of Melbourne in the following year.

He completed his LLB and commenced Articles with the firm of W B & O McCutcheon in 1976. He was admitted to practice in March of 1977 and continued to work as a solicitor until signing the Roll of Counsel in September 1979. He read with Jeff Loewenstein where he is reputed to have learned the value of the six (or seven) Ps which were to stand him in good stead for many years.

In the early 1980s His Worship took chambers in the now infamous Four Courts complex where his reputation for thoroughness and toughness became widely known. It is fair to say that his no-compromise approach when dealing with contested matters in the Magistrates' Court had the short-term effect of saving Hardy from many long lunches but provided the longer-term benefit of establishing a reputation that made him feared by police prosecutors and other opponents for the remainder of his career at the Bar.

The skills of always being prepared, which were learned early in his career, were genuinely combined by Hardy with a deep respect for the processes of the law and a genuine compassion for the clients he represented. As one who knew him socially, as well as professionally, these aspects of his career as a barrister were perhaps not as well known or understood as they may have been. Over the years he developed a certain expertise in serious traffic matters, most particularly those associated with drink-driving. He would regularly spend many hours in preparation and in conferences with his clients and other witnesses to achieve a favourable result for his client in circumstances where many others would have been simply overwhelmed by the complexities and difficulties of the particular case.



John Hardy, M

Apart from his very successful practice at the Bar, Hardy had many and varied interests outside it. In keeping with his particular appearance there has been a lifelong association with the Essendon Football Club where he used to enjoy happily mingling with many similar supporters on the school wing of Windy Hill. Regrettably the gentrification of football in recent years has not lessened Hardy's fervour for his beloved Bombers but has resulted in him making less frequent personal appearances. Additionally perhaps, the devotion of his wife to a competing

football team has also interfered with Hardy's winter passion.

His interest in fine cars has been known for many years with the current fleet including a classic 1967 Alpine Renault, as well as a more recent example of the breed which is the "daily driver". He has been involved as a competitor in motor sport events for many years and in his little car has distinguished himself with various class and outright wins including winning the Class Award in the 1998 Australian Hill Climb Championship and thus displaying a legal outlet for the activities often informally practised by many of His Worship's former clients. I had the pleasure of having Hardy navigate for me in a number of car rallies and he distinguished himself by achieving outright placings on a number of occasions despite his relative inexperience with that branch of the sport. He also enjoyed sailing and competed in a number of ocean races during the 1970s and 1980s including a couple of Sydney–Hobarts. In recent years the strictures of a practice at the Bar and married life have tended to restrict him to the more genteel activities of wining and dining, although one suspects that he would welcome the opportunity to tackle some of the more challenging activities of his former years.

Although I was overseas for the first six weeks of His Worship's time on the Bench, I understand that he received regular attention from the media and it may well have been that his appointment date of 21 December 1999 was three days too soon as Father Christmas ordinarily arrives on 24 December. Seriously, the appointment of John Hardy as a Magistrate in Victoria is warmly received by his former colleagues at the Bar and will no doubt be appreciated in coming years by those who appear before His Worship both as advocates and litigants. His reputation for thoroughness, fairness and his adherence to the motto that "proper preparation and planning prevents poor performance" will ensure his reputation achieved as a barrister continues as a Magistrate. We wish him well.

Robert Dyer

Sir George Hermann Lush

FEW highly intelligent people have the ability and character so to harness their intelligence that it directs their other attributes towards a contribution of outstanding richness. George Hermann Lush was such a person.

His education at Carey Grammar School and Ormond College in the University of Melbourne, coupled promise with achievement, including two university exhibitions, much sporting success, and the degree of Master of Laws. In 1935 he joined the Bar. Despite the difficult economic times, the steady growth of his practice was interrupted only by war.

Among a number of alternatives which might have been chosen, Private Lush volunteered for the front line. He fought in Palestine with the 2/3 Machine Gun Battalion where he was severely wounded. Commissioned as an officer on Anzac Day 1942, he was transferred to the 2/43 Infantry Battalion, which, in August 1943, arrived in Papua New Guinea. Four months of almost continuous action followed, at close quarters and in appalling conditions. Death was often inches away. On 3 December Lieutenant Lush took over command of "C" Company. He was to become the only rifle company officer continuously on duty with the battalion from then until the last operation against the Japanese at Finschafen.

In the meantime, on leave in Melbourne on 9 March 1943, Lieutenant George Lush married Betty Wragge. She held a Master of Science degree from the University of Melbourne. It was, and remained, a partnership of equals in which both love and friendship flourished. Lady Lush and their three daughters, Margaret, Jennifer and Mary (respectively a medical practitioner, a lawyer and a Doctor of Philosophy in botany) survive him. He derived great and constant pleasure from their success and companionship.

Captain Lush was discharged from the army in December 1945. He returned to the Bar, adding a university lectureship in mercantile law to an already busy life. His appointment as Queen's Council in 1957 was followed by nine years of extraordinary leadership as an advocate, as a member of the Bar Council (chairman 1964–66) and as a representative of the Bar on professional and academic bodies. He also served as commissioner of the Overseas Telecommunications Commission (1961–66) and as president of the Medico-Legal Society of Victoria (1962–63).

Sir George Hermann Lush

He was an obvious candidate for appointment to the Bench. This came on 1 February 1966. In the succeeding years, his early promise was fulfilled. Well before his retirement on 4 October 1983, he had cemented his reputation as one of the great judges of the Supreme Court, adept in all areas of its jurisdiction. He was decisive, firm and courteous, with wit and learning to match. Above all, he was impeccably and obviously fair. In 1979 he was knighted for services to the law.

At the time of his retirement from the Bench, Sir George was chairman of Ormond College Council (1981–90) and chancellor of Monash University (1983–92), He brought to both institutions his intelligence, his incisive wit, his sense of balance and his ability to unearth nonsense no matter in what high academic or legal garb it might be dressed. Monash recognised his merit, conferring on him the degree of Doctor of Laws *honoris causa*.

Other important work occupied him. In May 1986 he was appointed at the instigation of the Hawke Government to chair the parliamentary commission of three former judges established to investigate the conduct of a Justice of the High Court, Lionel Murphy. In December 1988, Sir George and two other retired judges were appointed by the Queensland Parliament to inquire into the behaviour of Angelo Vasta, then a member of the Supreme Court of Queensland.

He was a man of many parts. He loved walking with his family and friends, especially in the Otways. His friendships extended over decades and across a wide variety of social and intellectual boundaries. Never one to bandy words, he detested pomposity. Much of his pleasure was in good conversation to which he invariably made a distinctive and measured contribution, each word deftly sent to its proper destination, each anecdote perfectly constructed and consistently informed by the dry humour he made his own.

His intelligence gave him wisdom, and his wisdom gave him a deep understanding of the human condition. He was a great Australian.

Justice David Harper

Julian Joseph Zahara

JULIAN Zahara optimised and upheld the finest qualities of the Victorian Bar. He took any brief that was offered to him. He was equally courteous with clients and fellow practitioners. He never had a bad word to say, often despite provocation, about his instructing solicitors, opponents or the Court.

Educated first at the kindergarten at Mandeville Convent, he met Arthur Adams, the first of his life-long friends. Then to Xavier and Newman College at Melbourne University where he obtained a law degree. He was an accomplished rower, and although he did not reach the Olympian heights of some of his contemporaries, he still managed to represent Melbourne University at Intervarsity. More importantly, it was the measure of his strength of character and devotion to the sport that, for ten years, he coached the Xavier College Tenth Crew, not a prestigious coaching job, because he believed it was important that young boys be taught how to row properly. In his time, he managed to coach and enthuse Peter Antonie, who is preparing for his fourth Olympics, and Nick Green, of the Awesome Foursome. He still managed to row in the winning Veterans Head of the Yarra Crew in 1991. For his service to the sport, he was made a life member of Melbourne University Rowing Club.

He worked in many jobs whilst studying for his law degree and completed the degree part time whilst working at the Victorian Department of Agriculture as a clerk. Later for six months he was a private secretary to the Minister for Agriculture Sir William Chandler. He first commenced work as a legal officer in the Crown Solicitors Office of the State of

Julian Zahara

Victoria and moved to the State Insurance Office, the Public Solicitors Office and then worked with Mr Rob Elder at Madden Butler & Graham. He signed the Bar Roll in 1971 and read with Mr Frank Costigan. He had only one reader himself, Stephan Sherrifs.

Julian had a surprisingly broad practice. He appeared in 17 murder trials in Papua New Guinea briefed for the defendant by the Public Service Office, appeared in a number of long-running petrol pricing inquiries and before the Prices Justification Tribunal on a number of occasions. In the last 10 years his work was mainly personal injuries, workers' compensation work, WorkCover and Accident Compensation Tribunal work.

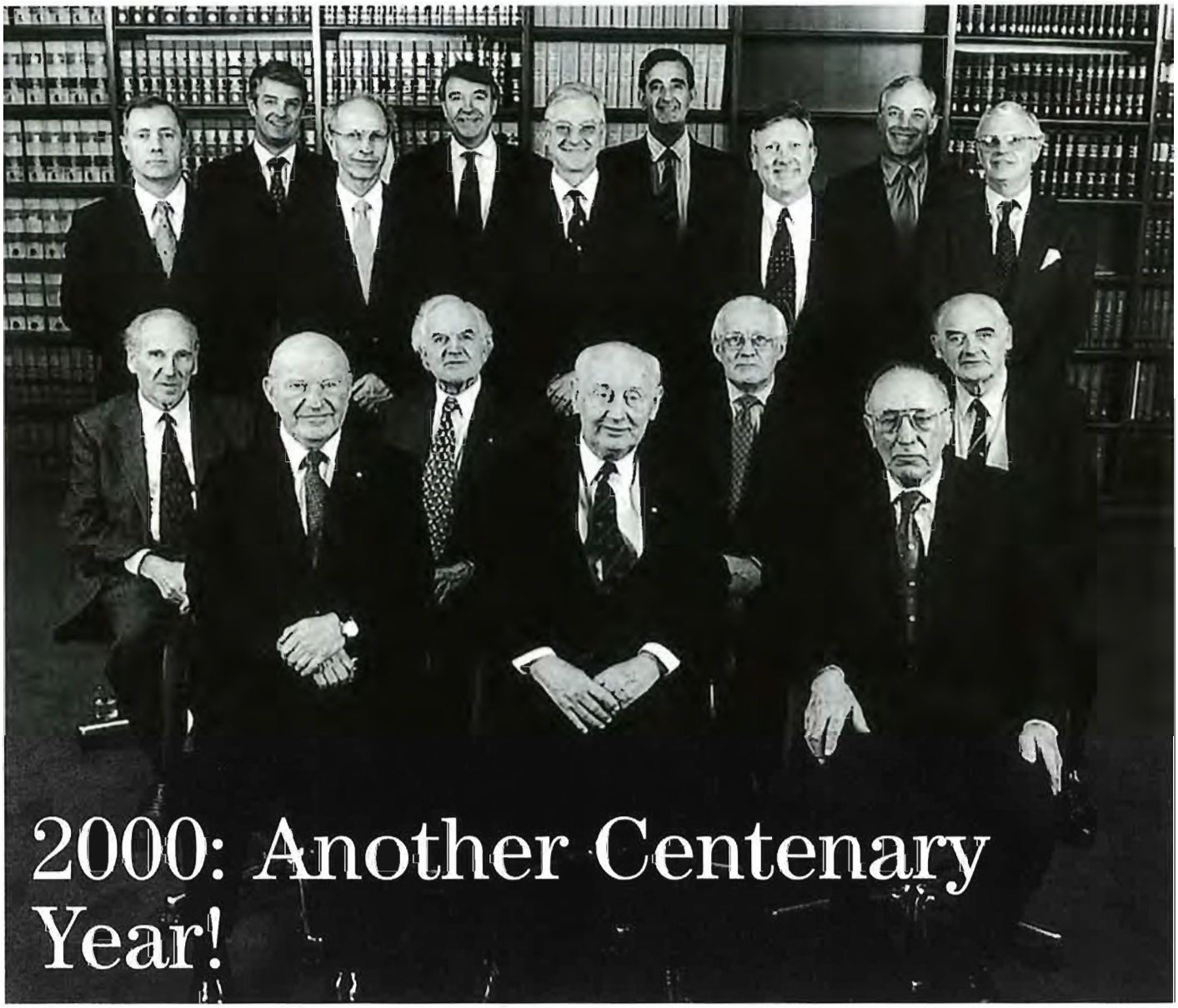
He took cases that nobody else would take and often had tremendous victories: *Myer Stores Ltd* v *Soo* (1991) 2 VR 597, a leading judgement of the Full Court about false imprisonment. (Julian was proud of his decision, he claims that it was the only decision against Coles Myer that Counsel had held in the Full Court.) Occasionally he had heart breaking losses: *Lilly* v *Alpine Resorts Commission* (1998) Aust. Torts R 81–475, a decision of the Court of Appeal.

He enjoyed life at the Bar to the full and had a witty if not thoroughly subversive sense of humour.

He gave great service to the many institutions with which he was involved. He was a pilot officer in the Airforce Reserve, he was a schoolboy rowing coach, he voluntarily worked with St Vincent De Paul's with the disadvantaged, he owned and ran a small beef farm, he was president of his local branch of the Liberal Party, liaison officer for the Neighbourhood Watch and president of his local residents association, the East Melbourne Group. He gave freely his time and energies.

He had a wonderful send off at the Sacred Heart Church, Kew. Requiem Mass was celebrated by four priests, all friends of Julian from school days, together with Bishop Dennis Hart, another friend. The church was crowded to overflowing with cabinet ministers, the president of the Court of Appeal, judges from all courts, politicians, Lord Mayors, people from all walks of life and more legal practitioners than attended the Bar dinner that night. Everybody at the service had been touched by Julian's commitment to the fundamentals of the Bar and his loyalty and service to so many people and organisations.

He is survived by his wife Merilyn.



2000: Another Centenary Year!

The Basis of the Bar Established

As is reported in the Chairman's Cupboard, on Tuesday, 20 June 2000, a ceremonial meeting of the Victorian Bar Council was held to mark the centenary of the first meeting of its predecessor — the Committee of Counsel.

MANY members of the Bar will recall that in 1984, the Bar chose to celebrate the centenary of its formation in the Colony of the Victoria. Those celebrations were marked with a wide range of religious and secular events including centenary religious observances, a formal centenary dinner, a centenary oration delivered by the then Governor-General, Sir Ninian Stephen, and a special Bar Revue. In this age of good corporate governance and moderation, the centenary of the formation of the Bar Council appropriately was marked with a taking of a photograph of past chairmen of the Bar Council with the current members of the Bar Council[1] and a modest reception.

When, in August 1978, the then Chairman of the Bar Council, Costigan QC, sought the wise counsel of Hulme QC and Merralls as to the appropriate year in which to commemorate the centenary of the Victorian Bar, those learned gentlemen reviewed the available historical materials and concluded that:

In our view two Centenaries emerge:

(a) The Centenary of the Victorian Bar

We fix this on 10 July 1984, in deference to the meeting of 10 July 1884 at which there were adopted Bar Regulations governing the conduct of "members of the Bar of Victoria".

Key to the Past Chairmen of the Victorian Bar Council

Former chairmen of the Victorian Bar not present for group photograph

1: 1967–1969
The Hon. Mr X. Connor AO, QC

2: 1971–1972
The Hon. Mr W. Kaye AO, QC

3: 1973–1975
The Hon. R.E. McGarvie AC, QC

4: 1975–1976
Mr L.S. Lazarus QC

5: 1976–1977
The Hon. Mr K.H. Marks QC

6: 1977–1979
Mr F.X. Costigan QC

7: 1979–1981
Mr H. Berkeley QC

8: 1981–1983
Mr B.J. Shaw QC

9: 1983–1985
The Hon. Mr Justice Charles

10: 1985–1986
The Hon. Mr Justice Chernov

11: 1986–1987
The Hon. Mr Justice Cummins

12: 1987–1988
Mr C.H. Francis QC

13: 1988–1990
The Hon. Mr Justice Gillard

14: 1990–1991
The Hon. Mr Justice Harper

15: 1991–1992
Mr A.J. Kirkham QC

16: 1992–1993
Dr C.N. Jessup QC

17: 1993–1994
Mrs S.M. Crennan QC

18: 1994–1995
Mr D.J. Habersberger QC

19: 1995–1997
Mr J.E. Middleton QC

20: 1997–1998
Mr N.J. Young QC

21: 1998–2000
Mr D.E. Curtain QC

22: 2000–
Mr D.M.B. Derham QC

(b) The Centenary of the Victorian Bar Council

This fixes itself, at 20 June 2000.

Of the two dates, we regard 1884 as the more significant. As all times since then there has existed in Victoria a definable body known as the Bar, and carrying on, pursuant to a known code of governance, functions similar to those carried on by the members of the Bar of England.[2]

Nonetheless, the "second" centenary is a timely occasion to recall something of the history of the Bar at that time, the circumstances leading to the first meeting of the Committee of Counsel and the counsel who were first appointed to serve on it.

The first meeting of the Committee of Counsel was preceded by a general meeting of the Bar itself. The records of the Bar show that, on 20 June 1900 (a mere two weeks or so before the United Kingdom Parliament passed the Commonwealth of Australia Constitution Act[3]), some 25 lawyers who were practising solely as barristers in the colony of Victoria met "to consider the advisability of appointing a Committee to represent those gentlemen who practised exclusively as Counsel at the Bar ... in matters affecting them in the practice of their profession". Dean comments that this meeting was the "first *recorded* meeting of the Bar since 1892, when the Bar Association was abolished".[4]

The general meeting was held in Selborne Chambers at 4.00 pm in the Chambers of Mr J B Box. Among those present with Box were several lawyers, who were instrumental in shaping the legal profession, government and society both in Victoria and in the soon to be created Federation. They included Gavan Duffy, Higgins, Starke, Leo Cussen, Purves, Moule, Coldham, and Dethbridge. Box was elected the chairman of that general meeting.

The minutes of the general meeting do not record any resolution formally establishing "the Victorian Bar" or adopting any constitution or rules for such an association.[5] In this respect, it does not appear that those present were quite ready to retrace the rocky and unsatisfactory path that had been taken in 1891.

Rather, the principal business of the meeting focused on establishing a "Committee of Counsel" to undertake certain tasks that the general meeting set and to appoint counsel to that Committee.

The first Committee comprised the following seven barristers:

(a) James Liddell Purves, QC;
(b) John Burnett Box;
(c) Frank Gavan Duffy;
(d) Samuel St John Topp;
(e) Henry Bourne Higgins;
(g) Edward Fancourt Mitchell; and
(h) Herbert Bryant.

With the passage of the resolution establishing the Committee, Dean observed that the "result is that from 1900 there is for the first time a properly elected Committee which has ever since regulated the practice of the Bar and enforced the standards of etiquette considered by the Committee to be proper".[6]

The tasks that the general meeting of the Bar assigned to the Committee were the compilation of "a Roll of Names of Counsel practising exclusively as such at the Bar of Victoria" and the preparation of draft rules relating to the relations of Counsel. When prepared, the draft was to be submitted to a meeting of the members of Counsel on the Bar Roll. The Committee was also requested to obtain from the Attorney-General copies of the "draft of the proposed new rules of practice in the Supreme Court" and to consider and report on them to the Attorney-General.

The first meeting of the Committee of Counsel followed the close of the general meeting. It was also held in Mr Box's Chambers. All seven committee members attended. Purves, QC was elected to chair this first meeting. While Purves was chairman of this first meeting, it is generally accepted that Box is more properly regarded as the first Chairman of the Committee of Counsel. Notwithstanding that Purves was in the chair on that Wednesday evening, Box confirmed the minutes of the meeting at the

On the 20th June 1900 a meeting of Counsel practising at the Bar in Victoria was held at 4 p.m. in Mr. I. B Box's chambers Selborne Chambers Melbourne.

The following gentlemen were present:-

Mr. I. L. Purves Q.C.	Cole R. H.
" I. B Box	Meagher
" L. Goldsmith	Lewis
" Duffy. H. G.	Schutt
" Topp.	Delbridge
" Higgins	Wanliss
" Moule	Starke
" Mitchell.	Eagleson
" Anderson	
" Cohen	
" Rigg	
" Kilpatrick	
" Pigott	
" Bryant	
" Mackinnon	
" Cussen	
" Theobald	

Mr. Box was elected to the chair

Mr. Box addressed the meeting & explained the reason why the meeting had been called was to consider the advisability of appointing a Committee to represent those gentlemen who practice exclusively as Counsel at the Bar in Victoria in matter affecting them in the practice of their profession

It was resolved that the following gentlemen be appointed the Committee of Counsel practising at the bar of Victoria viz.

Mr. I. L Purves QC
" Box
" Duffy
" Topp
" Higgins
" Mitchell
" Bryant

It was resolved that the committee be instructed to compile a Roll of the names Counsel practising exclusively as such at the Bar of Victoria ~~and such Roll to be the names of those present at the meeting~~

It was resolved that the committee should

Minutes of a Meeting of the Committee appointed at a Meeting of Counsel practising at the Bar of Victoria held in Mr. I. B Box's Chambers immediately after the close of the Meeting of Counsel on 20th June 1900.

Present. Mr. I. L Purves Q.C. Mr. Box, Mr. Duffy Mr. Higgins, Mr. Topp & Mr. Mitchell. & Mr. Bryant

Mr. I. L Purves was elected to the Chair.

It was resolved that Mr. Grant be appointed Secretary to the Committee.

It was resolved that the Sec.y write on behalf of the Committee for copies & Typewritten Copies of the draft of the proposed new Rules of Practice for consideration by the Committee;

The Sec.y was instructed to prepare a draft Roll of the names of Counsel practising exclusively as such in Victoria & to submit same at the next meeting of the Committee

The Committee then adjourned till Saturday next June 23rd at 10. a m.

23/June/1900. Confirmed I. B Box Chairman

The first Bar Council chairman, J B Box, 1900, 1903–5.

J L Purves, the Chairman of the first Committee of Council on 20 June 1900.

foot of the Minutes of of the Committee Counsel on 23 June 1900 as "Chairman".[7] A brief review of the minutes of subsequent meetings of the Committee reveals that Box was in the chair for most of them and that Purves rarely attended subsequent meetings. In these circumstances, it might be speculated that, at the first meeting, Box and the others deferred to Purves as the leader of the Bar and a silk and asked him to chair the first meeting, leaving Box to assume that role in future meetings.

Mr Guest was appointed the first Secretary to the Committee. The first resolutions of the Committee delegated the preliminary work that the Committee was required to complete to him!

First, he was directed to write to the Attorney-General requesting copies of the proposed new rules of practice for consideration by the Committee. He was also asked to prepare a draft roll of the names of counsel practising exclusively as barristers in Victoria for submission to the next meeting of the Committee which was fixed for 10 am on the following Saturday morning, 23 June. It appears that the Secretary was expected to complete these tasks in the three days before that second meeting.

The second meeting of the Committee was occupied with its first law reform issue. The meeting was devoted solely to the discussion and consideration of the draft of the proposed new rules of practice that had been received from the Attorney-General. That process continued over three days of the following week, culminating in the preparation and settling of a report from the Committee on the proposed new "Rules of Court" which was forwarded to the Attorney-General. That report concluded the third task assigned to the Committee of Counsel by the general meeting.

The subsequent history of the Committee's work on the Bar's constitution and rules is conveniently summarised by Dean:[8]

On 21 September 1900 a further general meeting was held. Box, the Chairman, is reported as saying: "Rules providing machinery for the annual election of a Committee giving certain powers and jurisdiction to the Committee have been prepared by the present Committee and the meeting has been called to consider, and, if thought fit, adopt the rules." The rules were then read and adopted.

No contemporary copy of the 1900 Rules can now be found. In 1949 *Counsel Rules* were printed, of which copies are still in existence, headed, "Adopted at a Meeting of Counsel held 2lst September 1900". It seems probable that any amendments made between 1900 and 1949 were of minor significance. The rules provided for the annual election by counsel on the Roll of a Committee, and named the members of the first Committee, namely, the Attorney-General for the Commonwealth and for Victoria if of counsel on the Roll, Purves, Box, Duffy, Topp, Higgins, Mitchell and Bryant. The rules provided for a Roll to be kept by the Committee of persons admitted by the Committee to sign it.

It also is appropriate to provide some brief observations on each of the members of that first Committee of Counsel and something of the professional life for members of the Bar at the turn of the century. Gunst, in his contribution commemorating the Bar's centenary,[9] records the following passage from Bradshaw's Selbourne Chambers Memories:

A barrister whose recollection goes back to the beginning of the century has stated that around 1900 the great mass of legal work was still in the hands of a small group of barristers — in fact it may have been an even smaller

group than that referred to in 1896. The result was that there was very little work for the remainder of the Bar, most of whom were nearly always idle. The deterioration of conditions at the Bar reflected itself in the tenancy situation in Selbourne Chambers, and by the end of the century there were quite a few vacancies.

A perusal of the volumes of the Victorian Law Reports of that time suggests that none of the seven Committee members fell in the "nearly always idle" category; most were appearing regularly in Supreme Court cases.

JOHN BURNETT BOX[10]

Notwithstanding his junior status, it would seem appropriate first to say something about John Burnett Box. Our impression is that, it was he who provided the primary motivation for the convening of the general meeting in 1900. Certainly, after the first meeting of the Committee of Counsel, it was Box who remained its effective chairman until he was elevated to the County Court bench in 1905.

Box was born in 1843 in England, arriving in Australia in 1849. He returned to England to complete his tertiary studies at Trinity College Cambridge. Thereafter, he was called to the Bar at the Inner Temple, only returning to Melbourne in 1871. His early involvement in the law in Victoria appears to have been as Associate to Mr Thomas Howard Fellows, the fifth judge appointed to the Supreme Court. On completion of his associateship, he commenced practise at the Victorian Bar. He developed a considerable practice in the common law jurisdiction and often was junior to Purves, QC. It appears from the little known of his practice that he was a vigorous and able advocate. One could well expect that this would be the case given that he would have learnt much of that style from his learned leader, Purves. Although very much the advocate, he must surely have had a love of the law and its recording for he served as the editor of the *Victorian Law Reports* from 1888 until his appointment to the Bench.

Another interesting aspect of Box's life was his passion for, and devotion to, the game of Royal tennis. He was the inaugural winner of the Champion Gold Racquet in 1882[11] and a subsequent winner on a further 13 occasions over the period from 1883 to 1894 and 1899. As with his interest in the organisation of the Bar, he was instrumental in the establishment of the game in Melbourne. He was heavily involved in the setting up of what became the "Royal Melbourne Tennis Club" and the first committee meeting of that Club was held in his chambers[12] in 1881.

Little appears to be written about Box's time as a judge, which occupied him for about eight years, beyond the observation of Jacobs recounted by Dean, that he was "rather too jocular and talkative on the Bench".[13] On his retirement, he repaired to Metung to live out his life on the Gippsland Lakes.

JAMES LIDDELL PURVES[14]

The prodigious skills of Purves as an advocate are the subject of frequent remarks in the biographical writings about him. For example, he is described by Dean, perhaps too extravagantly, as "undoubtedly the greatest advocate the Victorian Bar has produced".[15]

As with any such accolade, it carried with it the observation that he was a skillful cross-examiner.[16] Indeed, Dean said that this skill rested on "his powerful personality, his sense of atmosphere and his gifts as an actor . . .".[17] A more colourful description comes from Sir Ninian Stephen, in the course of recounting a Purves anecdote, in his Bar centenary oration. He there painted the following picture of his subject:

> They spoke their minds in the 1880s, and none more so than Purves of the great moustache and the ferocious manner, who however, one day met his Waterloo at the hands of Mr Justice a'Beckett. Writhing under his cross-examination, the witness muttered that Purves was a rude bully. Purves appealed to the judge who extracted from the witness an admission that he had indeed mumbled those words. "Well," said Mr Justice a'Beckett in mild reproof "you mustn't mumble, witness, you really must not mumble."[18]

Purves was born in Swanston Street, Melbourne, in August 1843, the eldest son of James Purves who was an importer, race-horse breeder and owner of a significant station property in the Western Port region of Victoria. His secondary education began in Melbourne but he was beset with poor health and in 1885 at the tender age of 12 years, he was sent to Europe to recover his health and to complete his education. This was completed in London after spending some time in Europe. Following his matriculation, he commenced to study medicine at Trinity College, Cambridge. A doctor's life was not to be for Purves for he soon changed to the study of law at Lincoln's Inn.

Apparently, during his time overseas, Purves discovered his capacity for journalism and literary critique. He is said to have used these skills at times to support himself, while he was away.[19]

Having been called to the English Bar, he returned to practise in Melbourne, taking silk in 1886. It is reported that he was a much sought after lawyer, holding retainers for a large number of both private and public institutions, including in particular the Victorian railways.[20]

He also maintained his journalistic and literary skills in Melbourne by, for example, being a columnist of the "Talk of the Town" (or perhaps "the Talk of the Train") which appeared in the Melbourne *Herald*.[21] He also used these skills for the benefit of the law as a co-editor of the *Australian Jurist*.

As the above story recounted by Sir Ninian Stephen suggests, the anecdotes involving Purves are legion. Indeed many have been recounted elsewhere.[22] However, we could not resist one addition to the collection. The following story is taken from Forde's story of the Victorian Bar:

> One day, during the lunch hour at the Supreme Court, three barristers, who had just returned from "Mrs McDonald's" or John Anderson's Hotel, lounged into the deserted court. Mr Purves went on to the bench and sat in the judge's chair. His first judicial act was to order Mr Casey to take his hands out of his trousers' pockets and sit down. Mr Molesworth, Jnr., prophesied: "Coming events," he said, "cast their shadows before". In this case, the prophecy, like a dream, was realized contrariwise; it was Mr Molesworth himself who became a judge. So did Mr Casey. Mr Purves became a KC.[23]

On the political level, Purves was a federationist and an active member of the Australian Natives' Association.[24] Like Box, he also was a keen sportsman and a talented exponent of several diverse sports. He inherited his father's fondness for horses and horse racing. He is reputed to have owned many "fine race horses".[25] Equally, he shared with Box, a love of tennis, although he pursued the other game — lawn tennis![26]

FRANK GAVAN DUFFY AND HENRY BOURNE HIGGINS

The professional, public and personal lives of these two great Victorian jurists have been well documented and space would not allow us to do justice to them by attempting potted summaries of their achievements.

The minutes of the Committee of Counsel do, however, confirm that they each played an active role in the work of the Committee in those early days. Moreover, it appears that, sharing a common Irish heritage,[27] they became great friends at the Victorian Bar and that that friendship persisted while they were Justices of the High Court, notwithstanding that Higgins was perceived as a radical and Gavan Duffy a conservative.[28] They also co-authored at least one legal tome on insolvency[29] and they were members together on the Victorian Council of Law Reporting.

Before the meeting in Box's chambers at 4.00 pm on that day in June, Higgins spent his time before Mr Justice Hodges in battle against Mitchell opposing an application for joinder. Higgins appeared for one defendant and Cussen for the other four defendants. Higgins was in the pleasant position of following Cussen in his argument and being able simply to "adopt" the arguments presented by Cussen.[30] We suspect this was a comparatively easy day for Higgins, leaving him ample time to reflect upon the weighty issues to be discussed and determined that afternoon in Box's chambers.

SAMUEL ST JOHN TOPP

Topp was born in Birmingham in England. He came to Melbourne before he completed his secondary education. He left school early and worked as a law clerk, studying for his matriculation at night school. His academic capacities came to the fore when he was studying law and arts at Melbourne University, where he has been described as having had a "brilliant career".[31]

He began practice at the Bar in 1877, where he quickly developed a solid and substantial equity, company law, insolvency and mining law practice. He is reported not to have fitted the usual stereotype for an equity lawyer, being "witty, with a 'slightly audacious' manner in court".[32]

Outside the law, he enjoyed a rather unusual hobby (and perhaps a unique one among members of our Bar) — he collected snakes, which it is said "he hunted on his annual holiday at Lorne and [which he] kept pickled in spirits in his cellar".[33]

EDWARD FANCOURT MITCHELL

Mitchell was another English immigrant, who having received his secondary education in Geelong and Melbourne, returned to Cambridge for his tertiary studies. In 1881 he was called to the Inner Temple of the English Bar, but later in the same year, he returned to Australia and came to the Victorian Bar.

By 1900, he was said to have developed a prodigious practice in many areas of the law, particularly constitutional law. Indeed he appeared in the first reported Victorian case that was argued before the High Court in November 1903. That case involved issues concerning the rights of State public servants upon the transfer of Departments of State to the new Commonwealth.[34] Subsequently he made regular appearances before the High Court and the Privy Council.[35]

Dean describes him as being the leader of our Bar for many years and as remaining a member of the Committee of Counsel until 1936. Surely that must be the record for continuous membership of the Bar Council!

Mitchell also had extensive connections with the business, religious and sporting communities in Victoria. He was appointed chairman of directors of Goldsborough Mort & Co Ltd in the middle to late 1890s. In 1910, he was appointed chancellor of the diocese of Melbourne of the Church of England, a position he held until his death in 1941. His sporting interests were eclectic. He was a founding member of what became the Royal Melbourne Golf Club and an active and skilled lawn tennis player and cricketer. He was a vice-president of the Lawn Tennis Association of Victoria and is reported to have been responsible for that Association purchasing the land on which the club at Kooyong now resides.[36] His involvement in cricket administration was equally influential. He was for many years the President of the Melbourne Cricket Club and also the Victorian representative on the Australian Board of Control for cricket in 1907 and 1908.[37]

Surprisingly for a man of such influence and professional standing, he is described by one commentator as possessing "dreariness as a public speaker" and "ponderousness and lack of 'verbal felicity'".[38] Whether or not this is correct, the Bar clearly benefited from his considerable contribution to work of the Committee of Counsel.

HERBERT BRYANT

According to Dean, Bryant, who was admitted to the Bar in 1882, was "a capable common lawyer . . . but as a lawyer not in the front rank".[39] Again, with faint praise, Dean added that Bryant was "adept at taking objections . . . and arguing in support of them at length and a case in which he appeared was likely to be protracted."[40]

Notwithstanding these personal limitations, Bryant managed to develop an extensive practice. The Victorian Law Reports around the turn of the century record that frequently he was briefed to appear in Supreme Court cases.[41] Often, he was opposed to Cussen. For a man who prized neatness of dress and appearance,[42] the facts of one such case, argued late in May 1900, must have tested this aspect of this character and tried his professionalism. In *Lyon* v *Thomas*,[43] Bryant appeared for an informant, whose information had been dismissed by the magistrates in the Court of Petty Sessions. His opponent was Cussen, whose client had been charged with having spread nightsoil within the shire of Preston, not having thoroughly deordorized and disinfected it to the satisfaction of the council health officer and not having obtained the appropriate consents, contrary to the relevant provisions of the *Health Act* 1900. On this important matter of the public health, Cussen's arguments prevailed. Counsel and the Court were relieved from the need to delve into the facts giving rise to the offences since the case was able to be decided solely on a question of construction of the legislation.

In the result, the Bar has been well served both by the foresight and perseverance of the 25 who attended Box's chambers on the afternoon of 20 June and the dedication of the seven men that they entrusted to represent the Victorian Bar as its first Bar Council.

D M B Derham QC
G J Moloney

NOTES:

1. See photographs accompanying this article.
2. *Bar News*, Centenary Edn (1984) at p.5. The need to secure a definitive opinion as to the appropriate year to mark this centenary was clear from even a cursory reading of Sir Arthur Dean's review of the various and sporadic meetings of barristers held during the period from October 1871 to 20 June 1900. The impetus for most of these meetings to formalise the Bar in the Colony of Victoria was the protracted public debate about and the enactment of the first *Legal Profession Practice Act* in 1891, the so-called "Amalgamation Act": see Dean, *A Multitude of Counsellors — A History of the Victorian Bar* (Cheshire, 1968), esp. chp. 6. 1891, the year in which a Bar Association was formed (only to be dissolved in February of the following year),

was rejected by Hulme and Merralls as the proper commencement of the centenary period, on the ground that that "[o]n no view do it and the Victorian Bar Council have continuity": *ibid.* They were, however, prepared to give some recognition to 1891, in the form of choosing libations for the 1984 celebrations from 1981 vintages!

3. 63 & 64 Vict, ch.12.
4. Dean, *op. cit.*, at p.156.
5. The minutes of the general meeting suggest that an additional resolution may have been put forward at the meeting requiring the Committee of Counsel to "draft rules as to the election and tenure of members of the Committee, the jurisdiction of the Committee and such other rules affecting Counsel on the Roll as they consider expedient . . .". However, a resolution to that effect was struck out in the minutes of the meeting, perhaps because it was thought superfluous given the other resolutions that were passed.
6. Op cit., at p.155.
7. Given that there is no similar confirmation at the foot of the general meeting minutes, Box may have been signing to confirm those minutes as chairman of that meeting.
8. Dean, *op. cit.*, at pp.157–8.
9. Gunst, C.,"1900–1920 — New Bar, New Century" (1984) *Bar News — Centenary Edn*, at p.15.
10. We are indebted to Mr Justice Kellam, from whose writings on Box, the following account largely relies.
11. This was a nine-inch long replica of a royal tennis racquet in gold awarded to the champion of the Melbourne Club. The annual royal tennis competition between the Bench and Bar and solicitors is held for the J.B. Box Trophy.
12. His chambers were then in Temple Court.
13. Dean, *op. cit.*, at p.181.
14. See generally the entry in the *Australian Dictionary of Biography*, vol. 5 at pp.459–461.
15. Dean, *op. cit.*, at p.145. In a similar vein is the comment of Monti, T, in "1884–1900 — Boom and Bust" (1984) *Bar News*, Centenary Edn, at p.12.
16. Dean, *op.cit.* at p.145.
17. *Ibid.* See also *Australian Dictionary of Biography*, *op. cit.*, at p.460.
18. Address by His Excellency, Sir Ninian Stephen on the Occasion of the Centenary of the Victorian Bar at Wilson Hall, University of Melbourne on 18 July 1984 (High Court Library, Canberra), at p.8. The same story is recounted in Dean, *op. cit.*, at p.139.
19. In Forde's book, *The Story of the Bar of Victoria*, this aspect of Purves' skills is also referred to. Forde says that he was "a literary man – of great power as a writer" and as having been described as "a brilliant writer": Forde, J L, *The Story of the Bar of Victoria*, Whitcombe & Tombs, Melb., at p.276.
20. *Australian Dictionary of Biography*, *op. cit.*, at p.460.
21. *Ibid.* Forde, *op. cit.*, at p.276 describes the column as the "Talk of the Train" which he says was published under the pen-name "Asmodeus".
22. See for example, Dean, *op. cit.* at pp.146–9; Gunst, *op. cit.*, at p.16 and Monti, *op. cit.*, at p.13.
23. Forde, *op. cit.*, at p.270.
24. *Australian Dictionary of Biography*, *op. cit.* at p.460.
25. *Ibid.*
26. *Ibid.*.
27. Gavan Duffy was born in Dublin in 1852 and Higgins in County Downs in 1851.
28. See Fricke, G. *Judges of the High Court* (Hutchinson, 1986) at pp.63–64.
29. *Ibid.*, at p.64.
30. See *Montgomerie's Brewery Company* v *Blyth* (1900) 26 VLR 24.
31. *Australian Dictionary of Biography*, vol. 6, at p.289.
32. *Ibid.*, at p.289.
33. *Ibid.*
34. See *Boyd* v *Commonwealth* (1903) 1 CLR 13.
35. See *Australian Dictionary of Biography* (1891–1939), vol.10 at p.527.
36. *Ibid.* at p.527.
37. *Ibid.* and see Dean, *op. cit.*, at p.182.
38. *Ibid.*, at p.527.
39. Dean, *op. cit.*, at p.184.
40. *Ibid.*
41. He also appeared before the High Court. In 1903, for example, he was opposed to Sir John Quick in an election petition case (*Chanter* v. *Blackwood* (No. 2)) and in 1904, he appeared as junior to Isaacs, KC and Cussen in *Deakin* v *Webb*.
42. *Ibid.*
43. (1900) 26 VLR 44.

All The World's a Stage: The Trial of Ned Kelly

In late 1999, I had heard whispers of the Victorian Bar having a desire to exercise its theatrical muscle in the guise of a staging of the Ned Kelly trial of 1880. When, suddenly, my trusty and erstwhile producer, Richard Bourke, explained to me that the job of directing the theatrical recreation was mine if I wanted it, I paused for a moment. How could this be, or rather, how would it work — a strange fusion of my extra-mural passions and my rent, paying all-consuming nascent career as an advocate? It had been four years since the last foray and that was a dark journey into a Banana Alley vault to unearth the petit-giant of German folklore, Kaspar Hauser.

Nicholas Harrington

A CERTAIN SCENT

ANY egotist who wishes to direct theatre must have a certain, shall we say metaphorically, olfactorial sixth sense in order to sniff out the right job at the right time. The chalice, to move the metaphor from the nose to the cup, was there to be grasped. Twisting and mixing that metaphor further I was unable to tell, at that time, if a certain Scottish dagger was appearing before me. But, back to the nose. If the nose is truly drawn to the scent, well . . .

I am no Ned Kelly aficionado. I am, in fact, rather suspicious of those I have come to label as the Nedophiles. Strange fenian-type creatures who are within metres of any upturned bucket with a slit in it, Guinness oozing from the veins, decrying the injustice. Around them, there is always a strain of Danny Boy wafting through the air and an ideology you could cut with a butter knife. Not for me. Yet, the images evoked from the Nolan paintings suggested there is so much more to the story.

I decided Kelly was not a historical footnote adrift in a sea of sentiment. I commenced the project sceptically and I finished informed and intrigued. As with any subject of merit which is filled with intellectual, emotional and historical intrigue, one is faced with further questions at the end of the inquiry, whatever its form. It is the enigmatic nature of the subject matter that instills the debate with an organic character — it lives, dies and re-grows.

The following are some extracts from my mental diary.

THE MEETING

We are in Santamaria's chambers and there is a great energy about the possibility. It is like some bright aura gone mad and it hovers above the table, searching out some fool who will embrace it and destroy the next 12–13 weeks of his or her life. Those Santamaria eyes are flashing at me, encouraging me to dive in and to hell with the life jacket. I am coming Paul, it sounds so good . . .

My producer is, as ever, bluntly explaining that yes, we are the people to do

In 1992, Nick, Richard Bourke and Pia Di Mattina established Theatre Tarquin Inc. Its first production, *Exit* (1992), was awarded the Fringe–ABC Radio National Award for "Best Group Production". Theatre Tarquin has also produced *Escurial* (1993), *Orpheus* (1993), *The Trial* (1994) (Fringe–ABC Radio National Award for "Best Adaptation"), *Kaspar* (1996). In 1993, Nick worked as an assistant to Barrie Kosky on *Faust* at the MTC.

it; yes, we have done this before (particularly in non-theatrical spaces); no, it will not be a disaster if the Bar provides appropriate resources (read subtext: we all own it if it is good, if it's a howler, it belongs to the director and producer — read directorial postmodern subtext: it belongs to the producer— read subsubtext: "resources" is money, cold hard cash, moolah and we want it do the thing properly) and finally yes, Duncan Allen, the Irish issue will be addressed. I feel a tad queasy but I felt strapped. Yes, strapped to the rump of the Bar Council and someone is whipping me . . . but the dream always ends there.

Two issues jump from the shadow of my hubris and confront me. No script, no actors and 12 weeks to get the thing up. Mmmm, bad vibrations. The second, more fundamental. There is a subtle reference to theatrical licence and the staging of an important historical piece. Here come the Ides of March. The door crashes in. The historical/theatrical political correctness police are here. "I am sorry, Mr Director, the show cannot be performed tonight by order of the PC police, we have run out of 1880s boot polish

Mark Robins as Edwin Living, a witness.

for the ushers and there cannot possibly be a performance this evening. It would be soooo inaccurate historically!" I am back in the meeting. I blurt out that a line of chorus girls, high leg-kicking with upturned steel waste bins on their heads was the direction I was moving in. Nervous titters all round. They are thinking, "He is sooo theatrical he just can't be serious!"

I know there and then that there can be no "editorial committee". I ask for a scriptwriter and two professional actors and I will agree to take the job at whatever the cost. Done. But you must use barrister actors for the rest they say. Shouldn't be too hard I think. There are bound to be some warm barrister props out there somewhere. I leave the meeting as a sense of high-fiving and backslapping proliferates. I draw a quick breath and think. Possible, but difficult . . . like all things worthy of endeavour.

THE SCRIPT

Beers over myths and stories. I am told the story of Kelly and why it all ended in such a profound disaster. Rushie is there. Intense with a steel trap grasp of the minutiae. He has the angles and wants in. I have met McIntyre. He has never acted before. I think Fellini used non-actors in his films. I am then struck by the thought that Fellini was never a barrister nor did he ever drink Cascades at the end of February in Little Bourke

Director's Note

I was drawn to the idea of this project for a number of reasons.

THE RE-ENACTMENT

The courtroom as theatre. For myself, this was the first time I was able to explore the Australian historical landscape through the lens of the legal system. In utilising such a lens, the production was drawn towards a particular theatrical genre. For the most part, the courtroom genre is limited in its scope in the theatre. For that reason, Tom and I made a conscious decision to create two theatrical worlds — the world of the remembered courtroom and the meta-theatrical world of Old Bindon, where dream and memory collide.

The remembered courtroom is moderated entirely through the narrative character of Old Bindon. It is not necessarily the courtroom of the 1880s where the trial took place. It is a strange and fragmented place where characters disappear as quickly as they appear, some more colourful, some more menacing. It possesses a dark, poetic quality where memory moderates the "sense" of the environment. In creating such a theatrical world, we have worked within the obvious limits of the Banco Court. As a result, the lighting has taken the place of any overt design element. The lights create and then vanish worlds. Kelly is alive and speaking to us and then, he is no more than an abstracted image, half lit, half darkened.

And the subject matter. The Kelly story is a contested historical site. Ever since that armoured half hour, Kelly has been, and continues to be, many things to many people:

Kelly as outlaw
Kelly as vagabond
Kelly as poet
Kelly as accused
And then there is the bush
Kelly persecuted
Kelly as murderer
Kelly encased in steel and memory
Kelly as shadow
And then the myth.

It has many constituent parts which have seemed to coalesce over time to create in Kelly an archetypal character — part hero, part rebel, part criminal. He is now abstracted and fragmented and awash in comment and opinion — he is now myth. Kelly remains elusive and never more iconic. What he stood for and stands for is not for this production to answer. Nolan seemed to capture the beauty of the ambiguity better than most.

The Kelly story. It is a story of Irish migration and police oppression. It is a story of the last of the great bushrangers who was party to the greatest slaughter of police in Victoria's history. It is the story of a fledgling political state, bejewelled in its endless gold deposits and Victoriana, ready to bare its wares to the "civilised world" in the Great Exhibition — a world of which it did not yet really feel a part. And there were those who had to be dealt with. Inadequate representation and a quick trial.

The Kelly words. We made a conscious decision to allow Kelly to speak his own words. In fact, every single word uttered by Kelly in this production is

Street. Duncan is about to break into "When Irish eyes . . ." he is so happy. He is worthy of an anti-Irish taunt now and then to remind him which country he is in but he is singularly warm and generous so I desist. Bourkie is moulding and shaping the meeting but he is hardly Patrick Swayze in that saccharine scene in "Ghosts". He is the producer, "Gladiator", and we are the roughage in the hands of Maximus.

It is March and time to get married and go to Thailand. So I do. Books on Kelly make it to the beach in Thailand. Ned would never have bothered to rebel in this enchanting place. I sit on the ferry from the Phi Phi Islands to Phuket and make notes on the Jerilderie letter. I am fat knecked, wombat headed and splay footed at the prospect of having to find eight or so barrister actors. Perhaps Tom and I could get up on stage on opening night and liturgical dance our way through a conceptual Marcel Marceau version of the trial of Kelly. I think not and gnaw on my pineapple.

Tom Wright and I get to work on the script. He does the lion's share of the work and is full of ideas. In every meeting he reveals to me strange historical oddities from his deep and expansive knowledge of the history of Victoria. He is all over the historical and conceptual framework like a cheap suit, as my Manhatten acquaintance would say.

Douglas Salek QC as James Gloucester, witness for the prosecution.

taken from either the Jerilderie or Cameron letters (as we were wary of putting words into his mouth). They are strangely poetic words — from heroic tales, from the bush, from a distant but unknown Ireland, from a troubled heart.

The location. To transform the Banco Court in all its ceremonial glory into a theatrical venue has been an extraordinary experience for which I am very grateful to the Chief Justice and his fellow judges. This place has in its every crevice and corner, on its walls and ceilings, stories from our own collective histories. Tonight, possibly for the first time in 120 years, it is transformed into a space for the telling of a unique story in a different way. Its integrity and stature is not diminished.

My special thanks to Tom Wright for unsurpassed professionalism, loyalty and commitment. And to Richard and to Pia . . . once again.

THE RE-TRIAL

On any view, the attempt to re-try Kelly as part of an educational and theatrical project is challenging. How much theatre? How much direction? How much script? These questions, I suppose, can be answered by escaping behind a label. The re-trial is best described as a "quasi-theatrical improvisation based on historical fact and performed according to a real trial model".

The structure is that of a normal trial. Both sets of counsel have been provided with briefs containing as much relevant historical material as seemed necessary. Most importantly, the theatrical script from the re-enactment was also provided. Counsel were directed that the evidence in chief of the prosecution witnesses was to be relied upon as evidence in chief for the purposes of the re-trial. On other matters, counsel have been consulted and decisions made. In one instance, Mr Justice Coldrey handed down a "ruling on the law" (over the telephone) for the purposes of the production. We thank him for the spirit in which he has embraced his role as presiding judge.

We start our theatrical re-trial at the point of defence counsel cross-examining the key prosecution witnesses. The defence has also been given the opportunity to call a limited number of other witnesses. The prosecution has been informed as to the identity of these historically relevant characters. The prosecution will be allowed to cross-examine these witnesses.

Finally, there will be a charge to the audience by the presiding judge and thereafter, a closing address by each counsel.

There has been no rehearsal of this material. In that sense, the performance (if it can be so-called) is like a real, live trial — spontaneous, improvised at times and a great test of the intellect and "metal" of those involved.

There will be no jury verdict. This is a matter for each individual.

If there has been a director of the second half, it has been the "moderator" (and otherwise producer) Richard Bourke. A sterling job.

Nicholas Harrington

THE CAST

"Like a slug slowly sliding down the razor blade."

Yes, Marlon Brando from the shades of "Apocalypse Now". He was on to something.

People say that barristers are like actors. With egos mewling and puking all over the place, waiting to give birth to that killer moment, it seems a natural fit. Let me be blunt. That is crap. There is at least one major difference between most barristers and most actors. Actors understand the power of silence. Barristers do not. No, barristers are more like directors in search of a cast. Standing back, surveying the landscape and waiting for the opening, slightly frustrated that they are not under the lights with the make-up on but deeply comfortable with the power they hold. Push them under the lights with the make-up on and it all gets a little skewed. Some deal with it well and it is a seamless transition. Others, well, there is a constant sense that the slice of cake is just not nourishing enough, just not big enough and if I were to be allowed to . . .

I won't bore you with the details. It took a number of days to recover from the minor operation to have the phone surgically removed from my ear but, hey, what wouldn't I do for my art?

I remind myself now that there were no auditions and I took everyone on faith. Sheer lunacy!

I found a good solid cast with real potential. Jim Shaw looks the goods as a young and earnest Bindon.

THE SIMON WILSON FACTOR

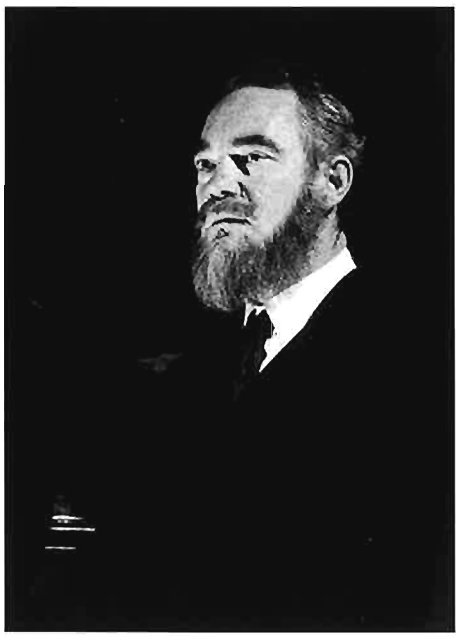
You know those stories that commence with, "I would not be the man/woman I was today but for . . ." Wilson is a runaway train in need of a crew of drivers. Nevertheless, he was committed (in a very Wilson way) from the start. Wilson rounds up Salek and gets Elliott involved. I am regaled with stories of the 1984 revue. This is the first of the 120,853,707,547 times I will hear about that damn spectacle. I was in Year 9 in 1984. I was a chorus member in "Grease" and worked backstage on "Pirates of Penzance". The Pirate King has returned to haunt me.

THE ELLIOTT REHEARSAL

It is a Saturday in early May. I meet Elliott for a rehearsal. We chat about life and jury cases. We then immerse ourselves in Smythe's closing address. He is good and has an inherent understanding of the internal dynamics of this closing address. There is a hint of poison and razor blades about his performance. Just enough subtlety to keep you guessing. You can almost see the years of jury advocacy pouring into and then out of the performer. We need only refine the ideas. Venom with a smile.

Paul Elliott QC as Charles Smyth, prosecuting counsel.

Simon Wilson QC as Sir Redmond Barry.



Michael Rush as Constable McIntyre, chief prosecution witness.

MONDAY NIGHT AND THE BIG WIGS

I have barely thought about the second half — the re-trial. My producer drags me into a meeting with Justice Coldrey, Julian Burnside and Suresh, Michael Rozenes and Ed and my trusty scriptwriter. We are here to work out some ground rules for the re-trial. It is a sometimes pleasant, sometimes amusing and sometimes feisty affair. It is more akin to a pre-trial conference than a touchy, feely "theatre luvvie" meeting where we all embrace at the end. No, these boys are serious. No quarter asked for, no quarter given. The Judge exercises some level of authority and stops the bickering. Well, I think, at least they are taking it seriously.

The defence, as always, does not wish to reveal its game plan nor its witnesses.

This will not work. I have heard of improvisation, but this will last for days. His Honour is right on to this. There is a little speech, in which the essential message is, "get real, we have 70 minutes". At the end, it is made clear that the silks are off limit to the media who are baying at the door. No paparazzi. Interesting!

I leave the meeting exhausted and furious. It's all yours, Mr Producer. You "mediate" it, whatever the second half may be.

THE MUSIC

It is a Sunday night in May and the cello arrives at my door with Liz Ingham in tow. We have only chatted about what the music could be and the sense in which it could ignite the theatrical narrative. She plays me her thoughts. Within minutes I know the cello is the only instrument for this piece. It is haunting and riveting and so evocative. And yes, some of the music is inspired by an Irish ballad.

The first time the cello is played in the Supreme Court, it is indescribably beautiful. Fragile, yet powerful.

THE PRODUCTION WEEK — SUNDAY ARVO

It is Sunday and the "50 words or less" biographies are due. There are threats of injunctions and *voir-dires*. Are we putting on a show or sideshow? My trusty assistant watches from the sidelines, astounded and galled all at once.

TUESDAY NIGHT REHEARSAL

Wilson arrives with the Santa suit. It is an actual antique Supreme Court judges outfit from whenever. It is the full box and dice and he just "must" try it on. He can barely keep his gear on. No, please Simon, don't put the silk knickerbockers on as well, I just can't control myself!

I lecture the cast that it is now time to get serious and although we are in the Neil Forsythe Room, they must treat this as the real thing. They listen solemnly and at last, there seems to be a real sense that this is not playschool any more. We commence a run of the show. Three minutes in, Wilson's mobile phone rings. I watch him like an eagle descending from high-above on its prey. My God, I think, he is going to answer it and speak. "Wilson," he intones softly. The volcano within starts to spew its lava-like bile. "Turn it off" I scream, and the call is finished.

THE TECHNICAL REHEARSAL

This is the nightmare. Getting the lights focussed and positioned. Working out the lighting plot. It is an endurance test. A focus on the task at hand is essential.

Jim Shaw as Bindon, Counsel for Ned Kelly.

I start at around 5.00pm. It is 8.30pm and Salek is at my arm being less than diplomatic about his need to leave this place. I feel the cork slowly dislodging from my bottle of patience. I am 3.5 hours into a lighting plot and I have at least three hours to go. We finish at 11.45pm. It has been a long day.

WELCOME TO THE PIT OF DESPAIR, BUCKLE YOURSELF IN! THURSDAY NIGHT DRESS

The first dress rehearsal is a disgrace. Flaccid with no rhythm and lines "dropped" all over the place! It is all flounce and no grace.

Disconsolate and riven with despair, there is a strange inner acceptance of the process. This is inevitably the way it is. I am approached by the film people. They want to film the address to the actors. I desperately want to say no and tell them to vanish but then I think it is more interesting if they can catch some of the process. I also fear their presence will cause me to be more mannered or, alternatively, intensify the sense of circus that already surrounds this great, limping, unwashed spectacle. I know it can work but so many people, so many egos, so much misspent energy.

I walk into the dressing room. I want to meet every face with a stinging glare but not all are deserving of my petty vaudevillian tactics.

I start to speak. I feel a building fury. There is still chatter and from some, so little recognition of how high the stakes are. Do you really want to look like a moron in front of your peers and the general public?

I am digging into a great, unhealed wound named rejection. I am furious and impassioned. I see before me the image of the coach on the football field. Strutting, mewling and puking his words. Hunting the pack of players and expressing an unbridled, invective drenched spleen. It is Barassi in flares tearing strips from Baker. It is the moment before physical violence. A moment that will pass. It is a tip toe along that fine line between the beast and the humanist.

FRIDAY NIGHT

I am called from the vaults of the Industrial Relations Commission where I am trying to fulfil my obligations to a rather large case. I am then inside the Banco Court and there are "techy" type guys crawling over everything, laying cables etc. You are not going to place those monster cameras there, I think to myself. And of course, they do.

At 5.00pm I retire to my dishevelled and quiet chambers to take a long breath before we go into battle. I listen to Preisner. It is his CD "Requiem for my Friend" and is dedicated to a dead friend. I drink peppermint tea and hover over the steam, looking into the void. I am tired and I have no real conception of how this spectacle will take shape. I look back now and think, there could be no finer image of a dilettante.

I venture across to Banco and one of the first things I see is one of those "techy" type guys about to stanley knife the fishing line which holds the chandelier in place. What the hell are you doing — do you think this is a production of "Phantom of the Opera"! "Stoooooop!" yells my producer. He is like Albert

Finney in "The Dresser". Come to think of it, I feel like Albert Finney in the last scenes of that film. The fishing line is saved.

In the rehearsal room, the heat is on and there is a sombre and slightly tense atmosphere. And so there should be. The time of reckoning is near. Some will shine and others will stumble. It is brutal but it is the way. All who participate implicitly accept that premise. My job is drawing to a close and there is now nowhere to hide.

I have three minutes to speak beforehand. We are in the performance space. It is no longer Banco Court. There is a weird warm glow and an emptiness, a silence before the onset. The crowd is milling outside and there is a dull hum, of anticipation, of a creeping energy. The air in Banco hangs heavy with an intense silence. It may not matter to them but it matters to me. Intensely.

This is the last moment with this thing that I, and others, have brought into the world. Like wishing your flesh and blood off to war, I am filled with pride and deep fear. It is the moment where language can both fail and shine, reaching a new level. It is my contribution to the performance and it is like a kiss to the wind. A gesture that is past before it is caught presently. An elusive moment. I speak of courage and endeavour. I ask them to look around at this magnificent room and consider its history. Tonight, for but a moment in time, it is all ours. This creation now belongs to all of them. Behold it and do it justice.

It is two minutes to lights down. As usual, I sit by myself on these occasions. For one brief moment, my forehead falls into my hands and I rock forward. I sweep my hair back and suck in a deep breath as if to douse the building tension. Lights down . . . and the cello, that beautiful, elegiac cello. We are there, inside the performance. It lives.

THE POSTSCRIPT

Monday 22 May and I am in the desert. I have the consultant's hat on and I hop off the plane at Alice Springs, weary and confused. My fellow consultants and I traipse through Standley's Pass and Simpson's Pass. And all around me is the mythic bush. Still, empty, quiet. "The bush in all its quiet and death." On Tuesday we fly to Darwin and we are in the tropics. I check the messages and there is this and that about Ned Kelly. We will meet again, I know that.

R *v* Edward (Ned) Kelly: The Re-trial

The recent re-trial of Ned Kelly revived my interest in that troubled case.

Many fascinating books have been written about Kelly and his trial; Sidney Nolan's famous series of paintings created the visual iconography which is now attached to the Kelly legend.

ABOUT the trial itself, a few things are clear: Kelly was inadequately represented; the only eye-witness was not adequately challenged; a viable case of self-defence was not properly developed. Kelly did not get a fair trial.

About the underlying facts there is more room for dispute. On one view, a fair trial would still have resulted in a conviction. On another view, the defence of self-defence might have been available (although it was not without its difficulties) if it could be shown that the police who went to arrest Kelly were in truth intent on killing him.

The following facts are clear: Kelly was an enthusiastic and prolific cattle stealer. His family had been victimized by a local policeman, Brook Smith, and probably by others. Kelly himself had had several experiences of rough justice with other policemen, including Lonigan and Strahan. A warrant for Kelly's arrest had been issued and gazetted. For six months, Kelly had been evading the law. He had built a fortified hut deep in the Wombat Ranges in north-eastern Victoria. With Dan Kelly, Joe Byrne and Steve Hart he was panning for gold, growing corn for an illicit still and improving his marksmanship by constant target practice. He was a skilled bushman who had no real difficulty keeping out of the way of the police if he chose to.

In October 1878, a police party left Mansfield in search of Kelly. The party was led by Sergeant Kennedy. The other members were Constables Lonigan, Scanlon and McIntyre. On their first night, they set up camp at Stringybark Creek. They had no idea how close they were to Kelly's hide-out. McIntyre had tried to shoot a parrot during the afternoon: a very careless thing to do if they were trying to take Kelly unawares. The party carried more weapons and more

Julian Burnside QC prosecuting in the re-trial.

Michael Rozenes QC defending Kelly.

ammunition than prescribed by regulation. Their weapons included a Spencer repeating rifle: a very powerful and lethal weapon by the standards of the day. They were not in uniform. Their equipment included several long straps capable of slinging bodies on a packhorse.

Kelly came across their tracks, and recognised them as police tracks because of the distinctive markings on government-issue horseshoes. Together with Dan Kelly, Joe Byrne and Steve Hart he approached the camp and saw two men only: McIntyre and Lonigan.

They came out of the speargrass and called on Lonigan and McIntyre to "Bail up. Put up your hands". McIntyre put his hands up. What Lonigan did is uncertain, but Kelly shot him dead.

The Kellys, Byrne and Hart ransacked the camp for weapons and waited for Kennedy and Scanlon to return. When they did, Kelly called on them to "Bail up". Scanlon reached for his gun and was shot dead. Kennedy ran for cover and after an exchange of fire he also was shot dead. Amid the heat and confusion of the gunfight, McIntyre escaped. Over the next 48 hours he made five statements about what had happened. They differed in significant details. In the first of them (a short note scratched out as he hid in a wombat hole) he said that Scanlon had reached for his gun, and had been shot. In later accounts, he had Lonigan reaching for his gun and being shot. (His evidence at trial was silent about Lonigan reaching for his gun; in fact, it placed Lonigan behind McIntyre, so he would have been unable to see what Lonigan had done when called on to bail up).

The trial should have explored two issues: was Sergeant Kennedy's party on a mission to kill Kelly, or simply to bring him to justice? And did Lonigan take aim at Kelly before Kelly shot him?

For the next two years, Kelly evaded capture. He wrote (or rather dictated) several long letters in which he said he had shot the three policemen at Stringybark Creek, but asserted that the police were on a mission to kill him. He told several people that he had killed Lonigan, but that he did so only when Lonigan had drawn his revolver and tried to shoot Kelly.

When Kelly was captured at Glenrowan, he was charged with the murder of Constable Lonigan. The trial should have explored two issues: was Sergeant Kennedy's party on a mission to kill Kelly, or simply to bring him to justice? And did Lonigan take aim at Kelly before Kelly shot him?

There is useful forensic evidence which provides a convincing answer to the second question. Dr Reynolds gave evidence that Lonigan had a graze to the temple, consistent with a bullet wound, but not necessarily one; a bullet wound through the left forearm; a bullet wound to the right eye; and a revolver bullet wound in the left thigh.

Kelly had a breech-loading single-shot

The Re-trial — a Curtain Call.

rifle. He only had the chance to fire one shot. That shot, in my view, passed through the left forearm and into the right eye: Lonigan had his arm in a defensive position when he was shot.

The Kellys had no revolver. The thigh wound must have been caused by Lonigan's own revolver. The revolver wound to the left thigh was odd: it "travelled under the skin and around to the inner side of the thigh". It was odd in another way: the bullet had travelled less far than would be expected. The angle, and reduced penetration, are consistent with Lonigan having accidentally discharged his own revolver *whilst it was still in its holster.*

Accordingly, it seems very unlikely that Lonigan had taken aim at Kelly, as Kelly had later asserted.

And what was the party's purpose? The evidence is certainly suggestive: more ammunition than prescribed; more guns than prescribed; and the body straps. All these things might plausibly favour the Kelly theory that it was a killing party. However, even the "body straps", which add such a sinister cast to the other evidence, might have another explanation.

It seems to me that the answer may lie in the character of Sergeant Kennedy himself. He was in charge of the party. By all accounts he was a decent man in a police force not noted for the quality of its men. Kennedy was filled with foreboding when he set out and was not the sort of man who would take part in organised murder under colour of office. I strongly suspect that he armed the party as he did because he knew there would be trouble if ever they found Kelly; and he carried the body straps because he believed not all of his men would survive an encounter with Kelly.

However, there is another aspect of the matter which runs in Kelly's favour. Why was he charged only with the murder of Lonigan? In a document dictated by Kelly, but written by Steve Hart (the Jerilderie Letter), Kelly stated that he had shot all three policemen. But the Jerilderie Letter also contained many statements favourable to Kelly's case that he was the target of a police vendetta. Although the Crown sought to tender the Jerilderie Letter at the trial, they pressed it faintly: the clear impression is that they were relieved when it was excluded.

The evidence of McIntyre was enough to prove that Kelly shot Lonigan, but only Kelly's statements in the Jerilderie Letter would have proved that he had shot Scanlon and Kennedy. I suspect that Kelly was charged with the killing of Lonigan alone in order to avoid the need to rely on the Jerilderie Letter. If that theory is correct, it suggests that the minds who shaped the Crown case were very sensitive to the defence which Kelly might have run if given the opportunity.

The truth of the matter is beyond knowing. But whichever theory is right, Kelly's counsel failed him, and as a direct result Kelly did not get a fair trial.

Julian Burnside QC

Plaintiffs' Barristers: What a Bunch of Mugs We Are

Terence Casey QC

OVER the last 15 years, at least, a tradition has developed whereby counsel for the plaintiff is expected to wait an inordinate time for payment of fees without any payment of interest. On average the plaintiff's barrister will have to wait 12 to 18 months from the date of completion of the trial until payment of the appearance fee.

Since the introduction of the "no-win/no-fee" concept, which was imposed upon the Bar by plaintiff's solicitors, the usual situation is that the plaintiff's barrister will only be charging a fee if the plaintiff has succeeded at trial and an order for costs has been made against the defendant. The Legal Practice Act of 1996 introduced the concept of the written agreement between barrister and the client and/or the solicitor whereby fees might be agreed to be paid in a structured way. In practice, plaintiffs' solicitors almost uniformly have refused to enter into such agreements which might expose the solicitors or their clients to a contractual obligation to pay the barrister's fee. Barristers did not have the market clout to insist that the agreements be made in conformity with the Act. So, in reality, the plaintiff's barrister lost the security that the plaintiff's solicitor would ultimately be responsible for payment of the fee.

In personal injury cases the defendant is almost always insured. So, an order for costs against a defendant means that an insurance company or a statutory authority such as the Transport Accident Commission or the Victorian WorkCover Authority assumes the liability to pay the plaintiff's costs.

Rule 63A.03(2) of the County Court Civil Procedure Rules provide that "costs which a party is required to pay under any of these Rules or an Order of the Court shall, unless the Court otherwise orders, be paid forthwith." A nice sentiment indeed, but, in practice, a toothless tiger which the insurance industry and the Government authorities religiously ignore.

Let me take a typical example where the plaintiff has succeeded in a personal injury case at trial in the County Court. The traditional Order made by the County Court is that the defendant pay the plaintiff's costs to be fixed on the appropriate scale. The scale is set out in Appendix A and includes the fees to counsel. In theory the defendant should pay the scale fees to counsel forthwith. The defendant never does. Instead the defendant's solicitors require the plaintiff's solicitors to tax the costs in accordance with the Judge's Order. In practice this means that the insurer will not pay the party/party costs, (at this point read the barrister's fee as a disbursement), until the formal taxation of costs procedure has been concluded. The ordinary response of the plaintiff's solicitors to the barrister's polite inquiry is that "the file is out for costing". Costing a file, it seems takes 12 months or more to achieve payment from a party who has been ordered to pay the costs.

Traditionally barristers have looked at the firm of solicitors who briefed them for payment of the fees. However, experience has shown that the plaintiffs' firms do not or cannot remedy the delay. Rarely will a plaintiff's firm agree to payment of counsel's fee out of the damages award — many solicitors nowadays require of the client that the solicitor/client costs come out of the award and so the solicitors who paid those costs (which in the substantial cases constitute the majority of their total costs) within one to two months; having secured those costs they are prepared to wait the further 12 or more months to recover their party/party costs. Those party/party costs include the disbursements which, of course, include the barrister's fees. This comment does not apply to all firms, for to obtain the average delay, there are some who perform better than others and some who patiently await the costing process to obtain their own costs. The point is that when it comes to payment of the barrister's fee it should not be assumed that the interests of the barrister and the briefing solicitor coincide.

In the commercial world a delay in payment of 12 months is unacceptable. It is futile to lay the blame on anyone in particular. The system has evolved over time, and the insurance industry and the statutory authorities which represent the defendants in the compensation cases have been beneficiaries. No rationale appears to exist for such delays — the insurance companies and statutary authorities are able to pay the fees to counsel who appear for the defendant within 30 days or so.

I advocate that counsel's fees certified by the Court, should be paid by the defendant within 30 days of the date of the Order costs. The time for service of Notice of Appeal from a judgment of the County Court is 14 days; accordingly, the appropriate Order might be: *"Subject to the service of a Notice of Appeal, Order that the defendant pay to counsel for the plaintiff the fees certified by this Order within 30 days."* So, the certified fees should be paid directly by the insurer to the plaintiff's counsel and counsel may execute upon the Order without involving the plaintiff's solicitors.

Item 29(h) of Appendix A deals with certification by the Judge of counsel's fees and includes the power to certify for two counsel, quantify the brief fees where Queen's Counsel appears (and the fees of the junior) and allow fees for junior counsel above scale. The Court has a wide discretion in allowing for fees above the scale set out in Appendix A: Rule 63A.82. The procedure on party/party taxation provides for a discretion in the Registrar to allow fees and all allowances referred to in Appendix A except where the Rules or any Order of the Court otherwise provides: Rule 63A.48. Where the Court has certified counsel's fees the Registrar has no discretion to change the fees. Where the Court has not certified fees above scale then it appears that the Registrar may do so.

In the Supreme Court the system of certification does not apply. The fees payable to counsel for hearing or trial in the Supreme Court are at the discretion

of the Taxation Master: Rule 63.82.

I believe that the County Court already has the power to make the order suggested. The definition of "costs" includes disbursements. The definition of "party" is wide enough to include counsel in whose favour an Order for payment is made. The Order suggested would be an Order which met the description of "unless the Court otherwise orders" in Rule 63A.05.

If I am wrong in my conclusion then the Rules should be changed to permit such an Order.

The effect of such an Order would be that counsel would be paid the scale fees or, if above scale, the fees certified by the Court within 30 days.

No doubt the proposed Order which I have advocated will appeal to some and not others. It may need some polishing. However, I am convinced that such a procedure is in the best interests of the Bar and solicitors. I would encourage all members of the profession to consider the pros and cons of the proposed Order — by all means, criticise it and improve it if you can.

In Brief: Security of County Court Building

THE Chief Judge of the County Court has advised that from Thursday, 4 May 2000, surveillance equipment similar to that which is used in the Melbourne Magistrates' Court will be put into operation at the front entrance of the County Court building, 223 William Street, Melbourne (Courts 1–25).

Members of the Bar are therefore cautioned that at "peak" times the presence and operation of the surveillance equipment is very likely to cause significant, but unavoidable, congestion both leading to the front entrance and also within the vestibule of the building.

Solicitors and clients should be warned of likely delays in access to the Courts as a result.

The surveillance equipment will not be installed at 565 Lonsdale Street (Courts 26–37) or at 4/436 Lonsdale Street (Courts 38–40).

Owen Dixon Chambers East: Work Starts

Maurice Phipps QC

WORK started on the renovation of the ground floor Owen Dixon Chambers East in the middle of June. The builder is Bovis Lend Lease Pty Limited.

The work is being done in two stages, stage 1 being the clerks' areas and bank premises and stage 2 the new entrance on the North side. Target date for stage 1 completion is 29 August 2000 and stage 2, 15 December 2000.

During stage 1 the Commonwealth Bank has moved to temporary accommodation on the opposite side of the foyer; Foleys are using the Mediation Centre; Dever, the Bar Council Chamber and Chairman's room; and Hyland, rooms on the fourth floor of Owen Dixon Chambers East. The Forsyth Room is being used for Bar Council and other meetings which would normally take place in the Bar Council Chamber and Chairman's Room. The Mediation Centre is using the Readers' area.

On the completion of the first stage in late August, the Clerks and the Commonwealth Bank will move back to their premises. The bank intends refitting, and Dever intends carrying out some fitout works which will include moving the entry to that office around the corner to the East-West corridor. Otherwise there is to be a new ceiling, lights, fire sprinklers and airconditioning.

The works have been timed so that the Readers' area can be used for temporary accommodation in the three-month period between courses.

The second stage is the construction of a new entrance on the North or County Court side and the rebuilding of the link between East and West. There will be new steps and a properly graded disabled access ramp at William Street, a proper foyer and reception area and a new ramp leading up to Owen Dixon Chambers West complying with current standards. A disabled toilet will be built near the rear of the building. The current entrance will be blocked off from William Street so that it will then be a conventional lift lobby with access from the new entrance. The toilets will be upgraded and a new mail room constructed.

As part of the renovations, all asbestos is to be removed from the ground floor. Asbestos has been used as fire protection on the steel structure. The following is a brief description of the precautions taken during removal.

The work is being done in two stages, stage 1 being the clerks' areas and bank premises and stage 2 the new entrance on the North side. Target date for stage 1 completion is 29 August 2000 and stage 2, 15 December 2000.

All removal work is done inside a plastic bubble enclosure; that is, the working area is completely sealed off with plastic sheet and tape. It is smoke tested to ensure that it is air tight and as an additional precaution put under a negative air pressure during work.

Workers wear protective clothing and exit and decontaminate through a double shower and air lock system to ensure that they have removed all asbestos before leaving the protected area. All material leaving the protected area is taken out in sealed containers.

Removal is done in accordance with a detailed plan prepared by Occupational Health and Safety Consultants, Noel Arnold & Associates Pty Ltd, and approved by WorkCover. The asbestos removal work is done by specialist contractors.

There is constant monitoring of the surrounding area. Tenants will see small air sampling monitors in various positions around the building.

The asbestos removal plan includes procedures to be adopted if asbestos is detected outside the protected work area. The action limit for these procedures is ten times below the permitted exposure level.

As work progresses a timber tunnel will be erected to protect the corridor. Work areas are all in the possession of the builder and entry is only permitted with the permission of the builder's representative. This is an obvious and essential safety precaution and must be observed.

All testing and monitoring is done (independently of the contractor) by Noel Arnold & Associates Pty Ltd who are retained and paid by Barristers' Chambers Limited.

In the basement there will be a substantial amount of work on the William Street side to construct the new stairs and entry ramp and other works. The existing airconditioning equipment on the roof of the first floor will be removed and replaced with new equipment. The first floor roof is to be renewed. Anybody whose room looks down over the first floor will have seen the necessity for this.

The builder has constructed a site office and accommodation in the basement. Generally access to work areas for the builder will be through the back stairs entrance on Guests Lane.

The builder has produced a tenancy management plan to deal with any issues that may arise affecting tenants. Hopefully little will arise. Noisy work is not permitted between the hours of 8.00 am and 6.00 pm, Monday to Friday. Outside those hours there will inevitably at times be some noisy work.

BCL is grateful to the Clerks, the Commonwealth bank, the Bar Administration and those who have temporarily lost their car parks for their co-operation and assistance. For other users of the building hopefully inconvenience will be minimal. The fact that the ground floor is now a construction site is obvious, and on one view this is already an improvement on what was there before.

Mr Junior Silk's Bar Dinner Speech

Presented by Jonathan Beach QC on Saturday, 3 June 2000

Jonathan Beach QC, Mr Junior Silk.

MR Chairman, Honoured Guests, ladies and gentlemen:

The Year 2000, in addition to being an appropriate year for a carnival by the sound of it, is the centenary of several significant events for the Bar.

On 20 June 1900, Victorian Counsel set up a Bar Committee,[1] the predecessor to the Bar Council. Then on 21 September of that year, the Bar Roll was established, with Mr J B Box as the first signatory[2] — this was only a few days after Ludwig Roselius had created something special for the Bar's café set, decaffeinated coffee.[3] Further, the Bar Rules originate from the Regulations which Gowans sourced to those made in 1900.[4]

So our modern Association!

There had been two earlier Associations. The first was created in 1884.[5] And the centenary of its creation was appropriately celebrated as the Bar's centenary, on the advice of SEK Hulme QC and J Merralls QC.[6] 1984 was the best year for drinking their then favorite vintages. The 1884 Association was superseded by the 1891 Association — described as the newest form of communism by Mr W.T. Carter in the Legislative Assembly in that year.[7] This organized collective was dissolved in 1892, according to Sir Arthur Dean,[8] coincidentally at the same time as the collapse of the first major Victorian Bank,[9] but due more to the unhealthy climate associated with the profession's amalgamation.

Fortunately, the third Association has had a more charmed existence. Indeed, it has now been enshrined in perpetuity with its conversion of status to "Victorian Bar Inc". And from what the Chairman has said, we now also have a theatre company to float at a premium. And this has all been due to the talents of generations of Honoured Guests. So the tradition of recognizing their individual honours.

But the tradition is one thing. Being an Honoured Guest is no guarantee of life-long devotion from the Bar.

In 1913, one unfortunate found himself the subject of a resolution of the Bar Committee — that it "deplored and deemed it to be its duty to protest against the violent discourtesy of Mr Justice Hodges in his conduct on the Supreme Court Bench."

However, for the new Millenium, an Australian Judicial College is being created to correct such problems. Further, the modern Bar would not disown its offspring. In fact, our Honoured Guests are to be treasured.

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The first Chief of the new Federal Magistrates Court is Diana Bryant QC. And the style guidelines in Schedule 1 to the Federal Magistrates Act 1999 require her to call herself Diana Bryant, CFM. But apparently she would like others to refer

to her as "Her Honour", because she considers herself to be a "justice" under the Constitution. Her argument is that she heads a Chapter III Court, and Section 72 of the Constitution uses the word "justice" for any holder of judicial office in any such Court. So she is therefore entitled to be known as "Her Honour".

This flexibility of thought is one of Her Honour's great talents as another example demonstrates.

As a National Executive Member of the Law Council's Family Law Section, Her Honour to be, with others, published on 16 August 1999, a policy position on the Court:[10]

- recommending that it should come under the caring and sharing embrace of Justice Nicholson;
- and suggesting that Daryl Williams QC had been a little vague in his justification for a separate Court.

So when the Attorney innocently said that such a Court will improve access through its "user-friendly procedures and less formal culture", she said upfront [par. 1.2], "whilst terms such as 'user friendly', 'streamlined' and 'less formal judicial culture' are widely used in the context of litigation reform, they are meaningless."

Contrastingly, on her appointment, both her separation and user friendly procedures were very enthusiastically embraced.

Indeed Her Honour has gone so far as to say "We have late night shopping, I don't see why we shouldn't have late night Courts"[11] — and who could argue with that reasoning?

But Her Honour may have forgotten the historical reason for judges' shortish sitting hours, which for Judges of Henry the VI were only between 8 o'clock and 11 o'clock in the morning.[12] The idea was that they could spend the rest of the day in the reading of the Holy Scriptures, the study of the laws, and what Fortescue described as other innocent amusements. Which of these little pleasures will have to go?

She certainly won't be giving up her roller-skating down at the trendy Beacon Cove resort in sunny Port Melbourne — although the bike-riding Justice Heerey in the immediate vicinity creates its own hazard — a different form of professional cycling to that which our President has had to regulate, which will be explained later.

Further, Her Honour will also be reluctant to give away another of her innocent amusements — sitting under the West Gate Bridge at night, checking out the nesting habits of the Willie Wagtail and other less innocent nocturnal activities.

Her Honour has shown administrative skills of the highest calibre, not only as a director of Australian Airlines, but more recently as the head of Chancery Chambers, looking after other high-fliers. She also deftly handled that Chambers' dealings with their friendly neighbour, Justice Hayne, before he sold up and moved into his new penthouse.

Diana Bryant CFM

More globally, Her Honour has displayed considerable talent managing her time-share investments in the South of France, near the Chateau de Griffith, and her major farming enterprise, which has monopolized all the good views along the Margaret River.

In short, Her Honour is ideally suited to a position that will involve a lot of travel and a big budget to spend.

One can have no greater confidence in the new Court than the confidence the government has shown in it — by making such a first class appointment — and also by providing in Section 8(2) of her Act, that the Court is allowed to describe itself as a "service" — thereby giving it a unique entitlement for a Court — the statutory right to warrant that it is providing something useful.

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Bernard Bongiorno's expertise in air cleansing technology is being used to probe CityLink emissions. But as he said in 1991, and which now applies with even greater force, he has a history of doing "odd" things.[13]

It is ironic that he is cleaning up after the government that cleaned him up. But Bonge has achieved the remarkable. Lazarus, upon his revival, disappeared into obscurity with good grace and humility, after sharing a notable meal with his sisters. Bonge, on the other hand, has not only had many more important lunches, but has starred again — by winning an order of the Italian Republic — for assisting in the expression of Italian culture. Something to warm the heart of the Santamaria family at least.

There is a debate about what his assistance precisely involved, apart from the liberal use of his surname at various suburban parties. Indeed, he is still spreading his surname by handing out his old DPP business cards, which have been personalized by hand-written notation to read "Bernard Bongiorno — former Director of Public Prosecutions". A valuable collector's item! But nevertheless, Government property, which will have to be returned to another Honoured Guest, Mr Hulls, at the end of the evening.

It is a curiosity that although Bongiorno is a good Italian name and is apparently being used to advantageous effect, the Bongiorno family has in fact been in Australia for a very long time. It was as long ago as 1895 that Bonge's ancestor, Antonino Bongiorno, aged 16, first set sail from the tiny Island of Salina, in the Aeolian group, off the coast of Sicily, and headed for Australia, never to return.

Fortunately Bongiorno has not lost his cultural ties. And he has a deep appreciation of one important part of Italian culture that Mussollini took great advantage of — train watching and reporting on their movements to officials. Some important correspondence between Bonge and the Federal Court, which was mistakenly left on a Flagstaff platform, demonstrates that Bonge has been behaving like a very good Italian.

It reads like this:

My Dear Chief Justice,

At 9.50 o'clock this morning, 27 April 2000, two steam locomotives pulling a rake of New South Wales Government Railway passenger coaches, left No.1 platform, Spencer Street, on the standard gauge track. The front

Bernard Bongiorno QC and Sarah Hinchey.

engine was definitely a Pacific class (probably 38 series). No prior notice of this outstanding event was given to the public at large. This is unfortunate. With my binoculars, I was able to watch the progress of the train until it disappeared somewhere under the City Link viaduct.

Regards,

Bonge.

The response was in the following terms:

My dear Bonge,

What a pleasure it was to receive your train movement report. All the better, because it was written with the authority of the only silk, who is known to have cooked an egg on a coal shovel in the firebox of an A2 in the Geelong Goods Yard.

It was particularly good to hear from you. You will of course have noticed that the new Commonwealth Law Courts have been built with large balconies from which train movements can be observed.

Your dearest Chief Justice.

As part of the Code for the Italian order, Bongiorno has to show gratitude for the award — perhaps extending some charity to his free-loading mates up at the Essoign Club.

But the Bar owes a debt of gratitude to Bonge — his demonstration of independence and integrity has added lustre to it. Bongiorno holds a unique place in Victoria's legislative history. Hopefully he will remain unique.

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When Rob Hulls was appointed Attorney-General, he proclaimed:

I am the fount of all knowledge when it comes to legal matters.

Our Court of Appeal can have been none too pleased! But what did please them was their President's public success a few months earlier — when His Honour won his Order of Australia — the medal Jocelynne Scutt rejected!

Our President enjoys a symbiotic relationship with the other members of the Court. So when the award was announced, he had the press publish a statement that it was "a reflection of the work the Court of Appeal had done over a period of four years".[14] Now this was also a particularly astute observation to make, in any event, for a number of reasons:

- first, the free advertisement kept his members happy. And more importantly, it distracted others from scrutinizing his own lifestyle achievements;
- second, its generality was very handy — if anybody asked him what precise work of the Court he had in mind which justified the Award, he could focus on the bigger picture, and not the very rare cases such as *Naxakis*[15] or *Palmer* v *The Queen*,[16] where the Court's unanimous opinion had been unanimously misunderstood. Though, in fairness, two of our other Honoured Guests were in fact responsible for this. Bernard Bongiorno was responsible for *Naxakis* by not properly defending the Court of Appeal's honour in the High Court. Judge Kent was responsible for *Palmer* by winning his High Court appeal, but only because he resorted to a clever tactic — concentrating only on contrary NSW decisions.

Old habits obviously die hard with our President when it comes to attracting publicity. In his first year at the Bar, young Jack was busted for advertising, by inviting the press up to his Chambers on the 7th floor of East, to take his photo with a lovely view of the Supreme Court dome in the background. He had been associated with the Hawthorn grand final win that had occurred shortly prior. He was convicted, but then appealed to a full meeting of the Bar, as was then his right.

According to Hartog Berkeley QC, the appeal, held before 200 barristers late one afternoon, was a "bloody shambles", with our potential President taking advantage of this and being let off on some technicality — the only stain on his character being that he had wasted an hour of everyone's good drinking time.

But returning for the moment to our President's more recent good press, what did the other Members think?

Some would have read on the same day that Len Evans, the wine writer, was welcomed to the Order, but considered that their work could not be equated with wine reviews, even if both required critical judgment on objects of varying colour and taste.

Others may have wondered which one of their judgments had satisfied the Award's ambitious criteria of distinguished service to humanity. After all, each of their valuable thoughts had been reduced to digital code, and then enhanced, "with the aid of artificial intelligence", to use the words of Mr Justice Brooking in *Fry* v *Oddy*,[17] for access by humanity through search engines such as "Excite Australia".

But why had it taken four years to produce this effect?

A bit of their own instinctive synthesis would have caused them to realize that their President had raised a distraction, and that the real reason for the award was His Honour's effort in successfully refereeing the Kathy Watt and Lucy

Tyler-Sharman fight in July 1996 about who was going to ride the bike for the Atlanta Olympics. A gold medal contribution – and a delayed gratification only because his friends may not have quickly appreciated the full significance of this humanitarian effort and lodged his application in a timely fashion. Our President seems to have eschewed further Olympic feats for the moment. Instead of going to Sydney recently, the right place to be for further gold medals, another member[18] was sent instead to carry the torch.

But whatever the reason for the award, no award was necessary to mark the obvious — that the President and other members of the Court have made a major contribution to jurisprudence, and more importantly, justice as the leading State appellate court in the country.

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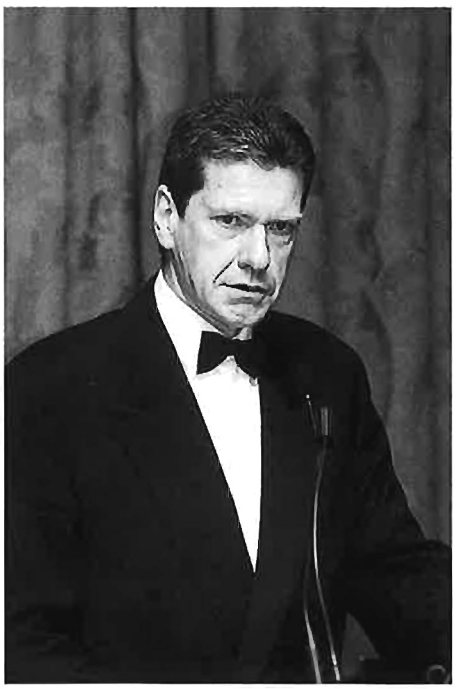
Judge Betty King likes secrets:

- Her first secret was her opinion that the equity practice of her Master, John Kaufman lacked excitement.
- Her latest secret, following advice from the Court of Appeal to County Court judges, has been to keep to herself her lack of knowledge of defamation law.
- Her Honour was also very good at keeping secrets as defence counsel, and even better at appearing to have none, when she became a prosecutor for the Queen.

Mr Justice Winneke AO, President of the Court of Appeal.

Her fondness of secrets was always going to draw her to the National Crime Authority, as was another attraction — dealing with the related political process.

Mark Derham QC, Chairman of the Bar Council.



David Porter QC, President of the Australian Bar Association.

One essential skill Her Honour developed as a member of the NCA was how to deal with the Joint Parliamentary Committee overseeing its operation. This talent, and her great quality of independence, was displayed to great effect when she dominated a public hearing of that Committee in 1996. The Committee were kind enough not only to provide her with a forum for her views, but to publish them under Section 2 of the *Parliamentary Papers Act* 1908 (Cwlth).[19]

The proceedings went something like this.

The Parliamentary Chairman of the Committee began by naively asking her what she thought about his Committee. She replied by saying that she had had three previous meetings with it, and that she found that the hardest part was getting a quorum.

The Chairman then asked for more punishment:

"Did you take that as being a lack of interest on behalf of the Committee?" he enquired

"Yes I did," she said, giving him another serve.

The Chairman then applied a bit of self-justification to his bruises.

"Obviously, members of parliament are very busy," he said.

She gave him another belting:

"I do not believe people should be on committees unless they are prepared to actually participate," she said.

Later, when asked about the qualities needed of a person to chair the NCA, she said that you had to be entirely suitable.

By this time, the intellectual pressure of the conversation was taking its toll on the Committee.

"What does it mean to be entirely suitable?" a puzzled Mr Truss asked.

She responded:

"In a case like this, you need to be a most amazing person."

One of the Senators ungenerously questioned:

"A lawyer?"

Not to be put off, she replied:

"Yes."

The Senator then said, rather worryingly:

"Aren't there enough of them in the Authority and the DPP?"

She sweetly responded:

"It would be a bonus to have someone who understands the Act."

Her Honour should be proud of her achievements with the NCA and associated matters. They were not simply confined to re-educating others. More

importantly, her work involved such things as cleaning up the upper management of the Griffith drug industry as part of the Cerberus investigation. This success arose out of what is known as the IOC reference — Italian Organized Crime.

But when asked at the time what her greatest achievement was during her term of office, it wasn't that. Nor was it the fact that in a line of authority, *AB* v NCA,[20] the Federal Court had given Miss King, as she was described, a judicial gold star for getting her paperwork correct. Rather, with great pride and a twinkle in her eye, of her greatest achievement she boasted:

"I didn't let out a secret."

We are very proud of her.

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Australia and Austria have a very close connection. Australians travelling in Europe are often confused with Austrians. This is what must have happened to Gavan Griffith QC — when he was in Vienna, as Vice-Chairman and delegate to the United Nations International Trade Law Organization, camped out in his usual modest accommodation within day-dreaming distance of the Schönbrunn Palace. What may also have confused the Austrians was the fact that Griffith uses the title "Doctor", which is what Austrian lawyers call themselves as a matter of course.

Anyway, the Austrians conferred on him the honour, as published,[21] of Groszes Goldenes Ehrenzeichen mit dem Stern fur Verdienste um die Republik Osterreich — The Grand Decoration of Honour in Gold with Star for service to the Republic of Austria. However, what appears on tonight's menu, settled by Griffith, is his German description for a knighthood, because that's how he says it is to be ranked — also appropriately alongside the menu's sacher-torte.

According to numerous Griffith voicemails that apparently the very patient and kind Anna Whitney received on this point, the decoration has the rank of a Knight Commander's Cross (1st Class), and outranks not only Bongiorno, but also the Austrian ambassador. This may explain why the cultural attache in their embassy in Canberra was less than enthusiastic about explaining to me why Griffith's contribution to Austria was worth more than years of international diplomacy — again, the rank was suggestive of some monumental cock-up.

At any rate, when the Austrians realized what they had done, they quickly got on the phone to the Australian Government. But our Government was in fact very pleased.

You see, when Griffith retired after 15 years distinguished service as Solicitor-General, our Government had nothing to give him. He had already been given an Order of Australia, in 1990, for all of his hard work as the author of the cross-vesting legislation — prematurely as it turned out. Look in fairness, it seemed like a good idea at the time, and its validity was initially upheld in *Gould* v *Brown*.[22] Anyway the Austrians had solved Australia's problem.

Your Honour has transcended each of those perceived vices. And the Victorian judiciary has been greatly enhanced by your appointment. Further, you have fulfilled a dream of one of our other Honoured Guests, Mr Hulls — which was to make his first appointment to the County Court.

There seems to be a trend, since knighthoods were abolished in Australia, of Australians purchasing by their noble deeds international titles. Bob Hawke had the right idea to put a stop to this elitist practice. When Australians used to go up to Papua New Guinea to acquire their knighthoods, Hawkey threatened to withdraw international aid unless the PNG government stamped out the practice — which they then did! Judge Kent just missed out.

It was said of Sir Maurice Byers' 10 years as Solicitor-General for the Commonwealth between 1973 and 1983 that this was a period of unparalleled controversy in Australian constitutional law.[23] It can be said of Griffith's period of 15 years, that this was a period of unparalleled development in Australian constitutional law.

It is difficult to envisage anyone performing any more distinguished service in the role than Sir Maurice or Griffith, although it is fair to say that neither of them ever came close to Bennett's techno-wizardry or his capacity to manipulate airline timetables for flights out of Melbourne. Mind you, Griffith also had plenty of flair. We are still waiting for him to fulfil one important promise. At the time of *Gould* v *Brown*, Griffith promised that if the cross-vesting legislation was ever thrown out, he would walk naked over Parliament House — apparently this is technically feasible in the right weather conditions. Well, the High Court were obviously undeterred by this threat, and went ahead and decided Re Wakim[24] anyway. And we are still waiting for this illuminating spectacle!

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The modern High Court Building is an egalitarian place — the tourists in the cafeteria share the same view of the lake as the Chief Justice. And it is this cafeteria that caused one tourist, Judge Kent, to miss a plane flight.

After the argument had been completed in Palmer, his opponent, Morgan-Payler, offered to shout him lunch on the practitioners' level. His Honour assumed that the DPP budget only extended to some cheap and nasty sandwiches. So instead, he decided to try out the High Court dining facilities downstairs. Unfortunately His Honour took a long time to be served. And when he did, he got so carried away with his lukewarm fish and chips and gazing out over the Lake, thinking about what might be, that he lost track of the time and missed his plane flight.

In addition to the great result in that case, His Honour's advocacy performance seems to be responsible for something else — Justice Kirby's praise of Victorian silks for their studied politeness.[25] Judge Kent may have been polite, but he may not have thought of himself as being scholarly in quite that way, at least.

The County Court will require some adjustment for His Honour. There is little opportunity for one of his favourite and published[26] pastimes, snorkelling. Although that is a good thing, since it is counter-intuitive to another skill he needs, which is to keep his head above water. Further, he will struggle in vain to hear, as he did in Vanuatu, someone call him or treat him as "My Lord". Obsequiousness is not the reward, at least at his level.

And neither are interesting matters lof the type he had to deal with in *Noel* v *Toto*[27] in the Supreme Court of

Vanuatu. His lengthy judgment in that case starts off by disclosing a dispute over who was entitled to income from cruise ships which off-loaded tourists at the highly desirable location, Champagne Beach.

The judgment then blossoms into an expansive Constitutional treatise about women's rights under the Vanuatu Constitution. The County Court is unlikely to offer him such exotic opportunities.

Finally, people now talk about him very differently. One morning before Court, in a lift in Owen Dixon, two barristers were discussing what they were doing, but oblivious to the fact that they were being overheard by another County Court judge.

One asked the other:

"What have you got on?"

The other responded:

"I'm starting something in the County Court."

The first asked:

"Who before?"

The other responded with a colorful phrase identifying Judge Kent by reference to both his intellectual and physical gifts.

The eavesdropping Judge then went away and dobbed the culprit in to His Honour.

The trial started with His Honour keeping mum. During the morning, something described as a *voir dire* occurred, in which the hapless author of the colourful description submitted to His Honour:

"I haven't seen you do that before!"

His Honour said, "What you mean is that you haven't seen that so and so called Kent do that before."

The unfortunate junior took a little time to recover, during which His Honour took the appropriate course of simply advising him to be a little more careful of what he said in the lift, and that the junior was lucky to meet someone as generous as he was.

Because His Honour has been so generous with his advice to readers and others, let me return the favour and pass on a bit of gratuitous advice.

Many centuries ago, Bacon advised his judges[28] before a particular Summer circuit, that: "Judges should be more learned than witty, more reverend than plausible and more advised than confident."

What he was really saying, of course, was that it is only the Bar that has the natural monopoly for the witty, the plausible and the confident. Your Honour has transcended each of those perceived vices. And the Victorian judiciary has been greatly enhanced by your appointment. Further, you have fulfilled a dream of one of our other Honoured Guests, Mr Hulls — which was to make his first appointment to the County Court.

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Decades ago, a prospective Supreme Court judge[29] had the time to soliloquise about an Attorney-General. Unlike our precious contemporary poets, he wrote a

Justice Kirby AC, Diana Bryant CFM and Rob Hulls AG.

nice poem for the Bar which can be recycled:

It's R.H.
The A.G.
The Pride of the Law,
Who, now he's in high office
We humbly adore,
His largesse (or smallesse)
Will soothe our puny griefs,
When R.H.
The A.G.
Hands around a few Crown Briefs

Some of us are still waiting.

Our new Victorian Attorney-General is more prophetic, than he is poetic. Ten months before Labor's victory at the last State election, the press reported that he had called a young Jeff Kennett fan a loser. How right he turned out to be.

His other impressive talent for clarity has also surfaced elsewhere. Recently, his diary, the script for "Rob of a 100 days", was published, containing some curious entries, including a reference to an early morning muffin and cappuccino with Chief Justice Phillips — decaff. probably. He also said that he wants "to change the world". That's OK, just leave us out of it.

Our Attorney is more fashionable than the Federal Court's new designer gear. First, he posed with Charlie Brown at a Myer fashion parade and then with Carolyn Burnside at the Moet-Pearl Ball. He has also made some fashionable changes of his own:

(a) First, he quickly got rid of Jan Wade's antique furniture.

And, of less pressing urgency, he gave the tradition of appointing silks a make-over. But next year's Junior Silk can be left to try and explain what that all means. It is more up-beat to speak of being the first than the last.

(b) Second, he has now turned his attention to addressing the problem that Alex Richards QC identified in anxious terms:[30]

"They stick into you, they're itchy — and they're horrible."

She was talking about wigs.

(c) Finally, the talented Mr Hulls has to take personal responsibility for some of our honoured guests. But, his selections to date have been impeccable. And they are all running true to form, at the moment, although he has taken a punt.

But as he said:

"My father's father was a mad punter and my mother's father was an SP bookie, so it's in the breed. And racing is compatible with being Attorney-General because I don't think there's a lawyer in Victoria that doesn't like a punt from time to time."

The County Court Bench and the Attorney have a lot in common.

Indeed one of the Attorney's gifts to the County Court, Judge King, maintains her official "residence" in the Members' carpark at Flemington during the Spring Racing Carnival, and has generously promised to throw it open to all members of the County Court this year.

The Bar welcomes the new Attorney with his new approach and his strong commitment to justice, but with one cautionary note. The Bar heeds the warning that he gave to the electorate on election night, which was, that there would be "no more Mr Nice Guy".

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People who refer to theatrical criminal advocates, well-fed common lawyers or greedy commercial operators, in fact describe the very foundations of the adversarial system. And our Guests' backgrounds demonstrate the point. Further, although their backgrounds collectively present an irregular picture, fractal geometry can demonstrate that there is beauty to be formed even out of this chaos — as nature has shown with broccoli, a natural fractal. Quite what the

picture would be in this case though escapes me!

In honouring our new age Guests, everyone should take pride. Our Guests' success has been more conspicuous, but their success reflects well on all.

Please join me in congratulating our Honoured Guests on their fine achievements.

NOTES:

1. Twenty-five barristers met and appointed J. Box and six others as a Bar Committee. Sir Arthur Dean: *A Multitude of Counsellors* (1968) at pp.156–7.
2. Mr Box was the Chairman in 1900 and also 1903–5. He was appointed to the County Court in 1906.
3. 10 September 1900.
4. Sir Gregory Gowans: *The Victorian Bar* pp.1 & 13; Dean at pp.105 & 157 — though some reference was made post 1900 to "the old Bar Regulations" (1884) (see also the opinion of SEK Hulme QC and J Merralls QC dated 23 August 1978 which discusses the point).
5. Dean at pp.89–92.
6. Opinion dated 23 August 1978 (*Victorian Bar News* — Centenary Edition 1884–1984 p.5).
7. T. Monti: "Boom and Bust" (*Victorian Bar News* — Centenary Edition 1884–1984 p.11).
8. By resolution of the Association members on 4 February 1892 — Dean pp.102 & 104.
9. Mercantile.
10. Law Council of Australia: Position Paper dated 16 August 1999.
11. *The Australian* and *Canberra Times* dated 1 February 2000.
12. Sir John Fortescue — "De Laudibus Legum Angliae": 1874 translation by Francis Gregor p.204.
13. *Victorian Bar News* — Autumn 1991 (No.76 pp.24–9).
14. *Herald Sun*: 14 June 1999.
15. Unreported: Court of Appeal, 5 September 1997 and then (1999) 73 ALJR 782.
16. Unreported: Court of Appeal, 10 September 1996 and then (1998) 193 CLR 1.
17. [1999] 1 VR 557 at 567.
18. Mr Justice Ormiston: acting NSW judge, 15 May to 14 June 2000: (2000) 74 ALJ 277.
19. 21 October 1996 — www.aph.gov.au
20. (1998) 156 ALR 52.
21. (1999) 73 ALJ 870.
22. (1998) 193 CLR 346.
23. (1999) 73 ALJ 380.
24. (1999) 73 ALJR 839.
25. Justice Michael Kirby AC CMG — Speech at Koorie Heritage Inc. dinner on 15 November 1999 (*Victorian Bar News* — Summer 1999 p.18).
26. *Who's Who in Australia 2000* p.958.
27. *John Noel* v *Obed Toto*: Supreme Court of the Republic of Vanuatu, Luganville, Santo Civil Case No.18 of 1994 (unreported 19/4/95) at pp.2–3, 11, 15 & 19.
28. Lord Bacon: Essay on Judicature.
29. Arthur Dean.
30. *The Age*: 19 May 2000.

Bar Dinner Notes

The Bar dinner has become famous. It must be so, because on 11 June 2000 the Bar dinner featured in that august publication *The Sunday Age*. There was a photograph of new Chief Federal Magistrate Diana Bryant and an article concerning her speech in Lawrence Money's "Spy" column. It is quite flattering that a little bit of banter and repartee between speakers at the dinner should seem worthy of such an important column.

BUT the report of the proceedings raises another question. Who was the mole at the Bar dinner? The Bar News is offering a bottle of the best Essoign house claret for suggestions for the biggest mole at the Bar dinner. It may be that there was more than one mole at the Bar dinner; and it would be greatly appreciated by the Bar in general if the names of tattle tales, leakers and gossips could be revealed. It may be that the person who leaked the Bryant/Beach story to *The Sunday Age* was not a barrister at all. There were other people present. It is well known that many eminent members of the Bar have their own publicists. It may be that the story came from one of the publicists who was disguised as a wait person, cook or dishwasher on the evening. The names of these barristers and their publicists would make good reading in the *Bar News*.

Chronic leaking seems to be a problem for the Bar. In days gone by, when the Bar Council sometimes stood up to government, the so-called confidential comments of members of the Bar Council and confidential documents would strangely turn up in various organs of the press. Indeed Mr Money's Spy column often contains tales from the Bar and the profession in general. From where does he get these stories? We would love to reveal his sources.

Many agreed that this was a better dinner that in some previous years. It was not only the fact that the honoured guests numbered only six rather than the usual football team, but that Mr Junior Silks' speech was a good one. Jonathan Beach QC's speech can only be described as a piece of wicked waspish whispering wit. It was good to see a few bon mots thrown in to liven up the evening, rather than a long and lengthy list of turgid platitudes.

Chris Hanson, Carrie Rome-Sievers and Paul Lawrie.

Paul Pentony, Sebastian Reid, Sharon Cure and David Bennett.

Jonathan touched upon the proposed changes to the profession. First, the abolition of the outmoded concept and title of Queens Counsel. This caused great debate amongst many tables at the dinner. If Queen's Counsel are to be replaced by Senior Counsel, what will become of the tradition of Mr Junior Silk? What will we have next year? For if the title Queens Counsel is to be abolished, then it is logical that the concept of silk and Mr Junior Silk will also have to be changed. The concept of calling Queens Counsel "silk" is yet another outmoded tradition of the anglo-celtic subculture and needs to go. But what material will replace silk? Many wags proposed an alternative. Rayon, polyester, nylon, or hand-woven organic non-pesticide wool. The majority agreed that plain unadulterated good Australian wool would be the best material to replace the outmoded English concept of silk. Therefore next year's speaker will be known as Mr Junior Wool. But everyone agreed that this sounded just a little bit too dull, a bit too greeny and Clifton Hillish. So what type of material would epitomise the new generation law industry? What would be fashionable in the corporate box society of the future? The consensus was shantung. This was a material that epitomised the proposed changes to the profession. So next years speaker will be called "Mr Junior Shantung".

But this again led to further debate. What with the abolition of wigs, the next thing to be abolished will be gowns. Therefore there will be no need to refer to any material whatsoever as there will be no wearing of material of such nature. Finally the title of the speaker at next years Bar dinner was settled. It is official. With the replacement of the title of Queens Counsel with Senior Counsel the speaker at the next Bar dinner will be known as Mr Junior Senior. Or more correctly, Ms/Mr Junior Senior. Or more correctly even still, the Junior Senior Person. It's great to see the law industry going in the right direction.

Judge Lazaraus, Anne Duggan, Judge Duggan and Jeanette Morrish QC.

Jeff Moore QC, Judge Fagan and Helen Symon.

Paul Elliott QC, Douglas Salek QC and Simon Wilson QC.

Stuart Rowland, Judge Kent and Barbara Walsh.

With the replacement of the title of Queens Counsel with Senior Counsel the speaker at the next Bar dinner will be known as Mr Junior Senior. Or more correctly, Ms/Mr Junior Senior. Or more correctly even still, the Junior Senior Person.

Mark Derham QC and John Barnard QC.

Jonathan also touched upon nasty prickly things that stick into you. These things will also be abolished. Later in his speech he clarified his position by reminding everybody that he was, of course, referring to wigs.

Now the debate about wigs has caused a division in the ranks of the Bar.

Elizabeth Johnson, Elizabeth Brophy, Erin Gardner, Richard Thomson and Steve Tudor.

Despite the fact that over 60 per cent of the Bar voted for them recently, most clients like and expect them, television advertisers will be disappointed that they can no longer portray be-wigged barristers pushing their products, and the Japanese on the tourist buses will not be able to take photographs of wonderfully dressed beaks crossing the road to the Supreme Court, the Government said they must go as part of the bad Anglo tradition. An eminent silk ruminated that the two opposing parties should have names. Those supporting wigs were naturally called the "Whigs". That was easy, but with what name should the opposing party be tagged? A semi-retired male barrister snorted that they should be called the Socialists. He was quite quickly put down and reminded that *that* word, along with comrade, is now no longer in vogue. Instead it was agreed that a better name for those opposing wigs should be the Chardonnays. A profound equity whisperer at the table pointed out that this division at the Bar may well go much further than wigs and may well reawaken the thorny question of whether anybody needs the Bar at all.

Bill Pinner, Jim Bessell, Mick Bourke and Wayne Toohey.

So there we have it. Just as in Romeo and Juliet there, were the Montagues and the Capulets at the Bar there are the Whigs and the Chardonnays.

But wigs are essentially about fashion and what about the fashion on the night? Alarmingly it seems that no fashion statements are being made at the Bar dinner. Those with good taste have been taken aback by the trend over the years for members of the Bar to be seen in the same outfit year after year. Black tuxedoes have totally taken over. Former Chief Justice Sir John Young attempted to halt this trend many years ago by wearing a very stylish white tuxedo. Unfortunately despite brave attempts by some members of the Bar to emulate the white tux, it seems that the tradition is falling into *désuétude*. Simon Wilson QC, a former proponent of the white tux, has stated that he'd gone back to black because his old jacket had shrunk with much dry cleaning and had become pinkish through the ravages of red wine. Criminal barrister Peter Jones was seen at the dinner in a white jacket, but all that could be said was that it could hardly be described as a dinner suit. His fashion statement was to have a red serviette protruding from his pocket. Hardly

Neil Murdoch and Katherine Bourke.

Daniel Star and Mark Moshinsky.

Tony Cavanough QC, Charles Gunst QC, Jonathan Beach QC (Mr Junior Silk), Peter Booth and Phil Kennon QC.

Jennifer Laau and David Neal.

an appropriate fashion statement for the Victorian Bar.

As to the female Bar, the fashion high priestesses ordained that the acceptance of wearing the same dress year after year appears to be associated with the abolition of the deb balls in Melbourne. With the abolition of debutante balls, Government levies and similar charity galahs there does not seem to be the need to be seen in a different dress every year. Therefore the obligatory black, the odd sequin and a marginal splash of red seemed to be the only real fashion trends. No names and no pack drill, but many seemed to be quite pleased with themselves for freely admitting they were wearing the same dress as in 1999. Such is life in our society.

In the past two years the toast to the Queen somehow or other disappeared. It is not really understood how and why this decision was made as it has been the tradition, from the inception of the Bar, for the head of State to be toasted. This year, however, the toast to the Queen was reinstated.

Overall this could be dubbed the philosophical Bar dinner. Philosophical because of the great debate about the changes being mooted at the Bar. But philosophy also fuelled by the toast to the Queen. In the past two years the toast to the Queen somehow or other disappeared. It is not really understood how and why this decision was made as it has been the tradition, from the inception of the Bar, for the head of State to be toasted. This year, however, the toast to the Queen was reinstated. It may have had something to do with the fact that the Queen was elected by every State of Australia to be the country's head, but this is idle speculation. So it cheered up a lot of the folk to see compere chairman Marko Derham QC give the loyal toast to the Queen. But so as not to upset some of the barristers and guests of a different persuasion, Marko added some other words to the toast, about other things, which allowed these people to rise to their feet at the toast to the Queen clutching, of course, glasses of chardonnay.

New County Court

Maurice Phipps QC

MEMBERS of the Bar will have noticed that work has started on the new County Court, corner of William and Lonsdale streets. The building is to open in early 2002.

The building has been designed by Daryl Jackson as principal architect. It consists of three sections — a three storey building on the William Street frontage, which will house judges' chambers, a low rise section including an atrium in the middle and then behind that, running the full length of the block from Lonsdale to Little Lonsdale Street, a ten-storey building housing courts.

Twenty civil courts and 26 criminal courts are proposed. Public access from ground level to the first and second floors is by escalator, all three levels having courts on them. The fourth to ninth floors have four courts a floor and there are four lifts for public access, the tenth floor has plant rooms. There will be a separate entrance and lifts for empanelled jurors, separate lifts for judges and separate custody lifts.

Before the design was finalised the Bar Council was invited to send representatives to a design workshop and to put its views. Maurice Phipps QC and Peter Lithgow attended and as a result a substantial number of matters were dealt with in a letter from the then Chairman of the Bar Council, David Curtain QC, particularly in relation to the custody area. The submissions in relation to the custody area were largely prepared by Richard Bourke, Secretary of the Criminal Bar Association.

The original design proposed for the custody area was of considerable concern, and dealt with in the Chairman's letter. Subsequently the Bar's representatives, this time Maurice Phipps QC and Richard Bourke, were shown amended plans which met the concerns raised. The custody area will have exercise areas, provision for separating different classes of people in custody, areas for supervision of persons who are at risk and contact interview rooms.

The Chairman's letter also put views in relation to a practitioners' library, number of courts, design of Bar table, document storage in courts, and conference rooms, and no doubt these will be taken into account in the detail of the design.

Site of the new County Court.

Bar Readers' Course 20-Year Reunion

IN late 1979 the then Victorian Bar Council decided, in its wisdom, and being concerned with the maintenance of the standard of advocacy in this State, to hold a moratorium in respect of those seeking admission to practice at the Victorian Bar. Each applicant was advised that they would not be permitted to commence pupilage until 3 March 1980. On that date, a group of young and not so young hopefuls were advised by the Bar Council to attend at their Masters' chambers that morning and were then required to meet on the 13th Floor Owen Dixon Chambers at 11.00 am. At that time we arrived in the area which is now the dining room of the Essoign Club, with the expectation of completing mere formalities. We were then, however, advised that we were all required to participate in the first formal Readers' Course to be conducted by the Bar Council. We were the ushered into makeshift instruction areas made up of temporary partitions and the Course commenced.

The Course did, however, commence with some resistance. Some considered that they had been involved in the law for long enough not to warrant any further tuition. Others had come direct from the Leo Cussen course and felt that they were merely to repeat a course which they had already completed (and paid for). The course went ahead regardless. Upon completion at the end of two months, without exception, we all felt that we had benefited from the time and effort that those instructing us had provided. But the benefit went much further than the tuition we had received. We had begun to learn the real meaning of "collegiality" as it exists at the Victorian Bar. A camaraderie had been forged as well as friendships that would last well into the future.

Since signing the Roll of Counsel we have vigorously engaged in a variety of areas of practice. Most of us have married and had children, some have divorced, with some of those even remarrying and one member has died. Of those remaining at the Bar from the first Readers' Course are:
Gerard Joseph Maguire, Shane Patrick Newton, Michael Joseph Richards, Simon Gillespie-Jones, David Mark Brudenell Derham (QC), John Frederick Perry, Maureen Teresa Green (nee Smith), Murray Victor McInnis, Phillip Geoffrey Priest (QC), Steven Ralph Graeme, James Anthony Logan, Peter Klaus Kistler, Phillip Goldberg (His Worship!), Damien Francis Cosgriff, Thomas Victor Hurley, Nahum Mushin (the Honourable Justice), Kiki Politis, Stephen Graham Blewett, Phillip Richard Trigar and Graeme John Skene.

It was with all this in mind that it was decided by the group that a 20 year reunion take place by way of a reunion dinner on 3 March 2000 in the Neil Forsythe Room, 13th Floor, Owen Dixon Chambers East. Pre-dinner drinks were followed by an excellent meal and fine wines catered for by the Essoign Club. We did not have a guest speaker. But Derham QC, who had the previous day been elected as Chairman of the Bar Council, spoke briefly and then, adopting the role of Master of Ceremonies, cunningly and without warning invited all those present to talk, for not more than two minutes, about their time at the Bar over the last twenty years. This request was at first met with the usual resistance, until one member after the other succumbed to the temptation to get to her or his feet and regale the gathering with stories from times past. Obviously some went over their allotted time, but even Priest QC who vowed to Derham QC that he would not give a speech because "he does not get paid for public speaking" could not resist the opportunity to tell a war story. Had it been realised that a record of the reunion was to be published, notes would have been taken and many humorous stories could be passed on. Needless to say, because of the after-dinner speeches the night ended late. Thereafter, we mingled and all caught up with each other, many of us having not spoken at length for some years as a result of the varied and diverse practices which we have pursued.

It was pleasing to have the Honourable Justice Mushim present, who made it clear from the outset that he was one of the "blokes", and did not wish to be treated with any of the formality which would normally be expected, and which we were prepared to extend given his position. There are too many Members to refer to individually regarding their excellent career paths and their achievements, but special mention should be made of Maureen Green (nee Smith) who left the Bar following her marriage to Green QC. With her children now all at school, she has returned to the Bar, but to her credit, rather than immediately commence practice, as is her right, she has decided to participate in the most recent Readers' Course.

Without exception those who attended at this function had a thoroughly enjoyable evening and enormous thanks must go to Jane Menesdorfer and her staff (particularly Frances) at the Essoign Club for making this occasion such a memorable event. One must realise that twentieth anniversaries of the subsequent Readers' Courses will arise in perpetuity and we can only recommend that such anniversaries be celebrated.

Verbatim

In a Safe Place

Ballarat Magistrates' Court

27 January 2000
R v *Anguin*
J. Gullaci appearing for the man of truth and honesty Mr Anguin
Charge: Traffic heroin

Gullaci: What do you do for a living?
Anguin: I was a plasterer.
Gullaci: What are you now?
Anguin: Now, I'm well, just a heroin dealer, I suppose, I was.
Gullaci: Do you always have the deals packaged in that egg container as you refer to?
Anguin: Yes, yes, it's always . . .
Gullaci: And where do you normally put that on your person?
Anguin: I keep it in front of me.
Gullaci: Where do you keep it?
Anguin: It's tucked underneath me penis, in between me penis and me balls.
Gullaci: And I've been handling that?

Getting Turned On

17 February 2000
Marshall & Webb v *Nicholls*
Coram: Member Lothian
Appearances: Finkelstein, solicitor, for applicants
Aghion, for respondent

Aghion (*asking Court Clerk to activate computer screens on the Bar table*)**:** Justin, can you turn us on, please?
Ms Lothian: Perhaps you would like to rephrase that, Mr Aghion.
Aghion: What Justin and I do in our private time is our business, Ma'am.

Speculating Realistically

26 August 1999
G. Slim prosecuting (and cross-examining the accused)
N. Crafti for the accused

Mr Slim: Can you speculate or conceive of how these things came to be missing from these secure premises?
Accused: Of course I can speculate.
Mr Slim: Well, give us some examples, please. I am talking about realistic speculation. Can you suggest realistically . . .
Mr Crafti: That's an oxymoron if ever I heard one.
His Honour: We will leave the morons out of it.

True or False

Victorian Civil and Administrative Tribunal
3 February 1999
Ms West, member
O'Connor appearing for the applicant
Fowler for the respondent

Fowler: Was it 92, 93 or was it 94, 95?
Witness: Well, I said 93, didn't I?
Fowler: You said that . . .?
Witness: Well, I'm one year out. 94. I mean, I haven't got that good a memory now. I'm getting old. I'm sixty-odd.
Fowler: That's young?
Witness: That's not young. Not when you've had two heart attacks and pacemakers and everything else. I'm sorry.
Fowler: From my perspective it's young, Mr Wilson.

An Inclusive Insult

County Court, Victoria

9 May 2000

The following extract from a jury address was, it seems, circulated to County Court Judges by Judge Kelly.
Smallwood QC: Let me give you an example of drawing inferences. Let us say, for example, having a law degree is a criminal offence and this courtroom is a circumstantial case and I am charged with having a law degree and the Crown are relying totally upon the circumstances which exist in this courtroom. You start your task. You come in and you say, "Right, has this bloke got a law degree?" and you look around and you think, "Well, this must be a courtroom". You look at one end of the court and you see a cynical old chap, ravaged by degrees of debauchery, wearing purple robes and you say, "Well, we've got that one right: it's His Honour", a deduction you could draw in most courtrooms in the State.

You then look at the back of the court and you see a man in a cage and you know that's the accused and you look around and you see the man who about once every four days has 12 jurors here at half-past ten and you think, "Yes, he's got a green uniform; we can pretty well deduce that he's the tipstaff". You see His Honour's associate and you think, "That must be what they call a judge's associate", and you're pretty satisfied that it's a courtroom, no dramas about that, and you look at the Bar table and you see my friend and I here, dressed in robes, with wigs on, announce our appearance at the start of the trial.

Moving Admissions

At the April admission ceremony:
(candidate and counsel unnamed)

"I appear to move the admission of X and I so move on the Certificate of the Board of Directors."

At a previous admission ceremony:
(unnamed again)

"I appear to move the admission of X as a member of this Court." (Such a rapid rise to the bench!)

A Plea With Teeth

Melbourne Magistrates Court

19 November 1999
per Crisp M

Prosecution of shop-owner for selling a product banned by the Consumer Affairs Commission — "Geezer Gallery Miracle Teeth". Plea in mitigation of penalty:
Solicitor: His shop trades at the top end of the gift market.
Crisp M: I can tell that because he sells such items as Geezer Gallery Miracle Teeth!"

Bushrangers

IN the second edition of the *Oxford English Dictionary*, Rolf Boldrewood is quoted 184 times in illustration of about 160 words. Appropriately so. Boldrewood (Thomas Alexander Browne, 1826–1915) was the first Australian author to capture faithfully the emerging Australian variant of the English language. Although born in London, he came to Australia as a child and spent the rest of his life here. He ran a farm in Victoria and was later a police magistrate and a goldfields commissioner in the Victorian and NSW goldfields. He had a good ear for idiom and had the courage to write it down faithfully. His characters are the first in Australian literature to speak real Australian, with no sense of parody.

Boldrewood did for the Australian language what Tom Roberts did for the Australian landscape: he removed the European filter and saw Australia through Australian eyes. Boldrewood's *Robbery Under Arms* is a comprehensive glossary of the language of bushrangers, and Dick Marston is the first truly Australian character in our literature.

When Ned Kelly ambushed the police at Stringybark Creek he called "Bail up. Put up your hands".

Much later, after his arrest, Kelly was asked by Constable McIntyre why he had ambushed the police party. He responded, "If we had not done so, you would have found us and shot us. We had bad horses and no money and simply wanted to make a rise."

Bail up and *make a rise* are early Australian colloquialisms. *Make a rise* is not used at all currently. *Bail up* is rarely heard, although you might occasionally hear of a person being *bailed up* in some awkward spot.

Surprisingly, *bail up* comes originally from dairy farming and was adopted *ad hoc* by bushrangers. From the early days of white settlement in Australia, the frame designed for holding a cow's head steady during milking was called the *bail* (also spelled *bale).* The farmer wanting to get his cows co-operating would shout "Bail up" as he pushed them into the bails. According to the second edition of the *Oxford English Dictionary*, this usage is specific to Australia and New Zealand. However, Morris' *Dictionary of Austral English* (1898) notes that this usage was also found in Ireland, and in the dialect of five English counties. In any event, the idiom was recorded in Australia as early as 1846. No doubt it had been in spoken use well before that.

By the time Ned Kelly told Lonigan and McIntyre to *bail up,* the expression had been current for several generations. As Sidney J Baker has noted (*The Australian Language* (1945)), the cry of *bail up,* in the general sense of demanding submission to the speaker's will, would have come readily to the tongue of that group for whom bushranging was a realistic career option. And so it did. From 1840 to the end of the century, *bail up* was commonly used in the way Ned Kelly used it. One of the illustrative quotations in OED2 is from Kelly himself.

It is clear from the various recorded uses of *bail up* that its central meaning involves submission to the speaker's will. For example, the quotation from Nisbett *Bush Girl's Romance* (1894) reads: "Reginald . . . acted like a wise man and 'bailed up', that is, he dropped his knife and threw up his hands as a sign of submission".

The first edition of the OED doubted whether the bushranger's use of *bail up* owed anything at all to the dairy farmer's expression. The question seems to have been answered authoritatively by Rolf Boldrewood in *Robbery Under Arms*, published in 1881. In chapter 47 he writes:

> The same talk for cows and Christians! That's how things get stuck in the talk in a new country. Some old hand like father, as had spent all his mornings in the cowyard, had taken to the bush and tried his hand at sticking up people. When they came near enough . . . he'd pop out . . . with his musket (and say) "Bail up, d__ you" .

Given the etymological observation implicit in the passage above, it is surprising that the OED2 does not cite Boldrewood for the meaning of *bail up.* Homer also nods.

In the famous Jerilderie letter, dictated by Ned Kelly but written by Steve Hart in early 1879, Kelly criticises many aspects of the colonial police force (". . . a parcel of big ugly fat-necked wombat headed big bellied magpie legged narrow hipped splay-footed sons of Irish Bailiffs or English landlords which is better known as . . . the Victoria Police . . ."). He discusses the idea that police witnesses regularly perjure themselves and adds that ". . . it was by that means and by hiring cads they get promoted . . .". This use of *cad is* puzzling. According to OED2, *cad* means:

- an assistant or confederate of a lower grade, e.g. a brickie's labourer; or
- a low fellow who hangs about the college at Eton, or Oxford.

Neither of these meanings makes much sense in the context of the Jerilderie letter. The second seems an unlikely usage for Kelly.

Another obscure meaning of *cad* is (specifically from Ireland) a *cade lamb;* that is, a tame or pet lamb. This makes sense in context, but only just.

But there is another possibility. *Cad* was Australian slang for a cicada, now out of use. It seems likely that the reference was to police informers who, like a cicada, will make a lot of noise when prompted. (For some odd reason, we have developed (and since forgotten) a lot of slang terms for cicadas: *baker, floury baker, floury miller, cad, green Monday, yellow Monday, miller, mealyback, red eye,* and *double drummer.* I confess that, apart from the last, these make no sense to me at all. Clearly there is something about cicadas I have missed.)

Kelly's other interesting colloquialism, *make a rise,* sounds suitably revolutionary. It is clear enough that *rise* has, as one meaning, *uprising.* Whilst it is true that Kelly has had attributed to him revolutionary tendencies (tendencies now being recast as republican), it seems very unlikely that his comment to Constable McIntyre was meant as an admission of a revolutionary purpose. Apart from anything else, he was too astute to inflame a difficult situation by adding armed revolt to the catalogue of his crimes.

Make a rise means to *strike gold,* and is so used by Boldrewood in *A Miner's Right* (1890) and later by Ion Idriess in *Lightning Ridge* (1940). In the more general sense of striking sudden good luck, it was used by W.T. Porter in *Quarter Race in Kentucky* (1836), where the luck came in the form of a gambling game which rejoiced in the improbable name *chuck a luck.*

At his fortified compound in the Wombat Ranges, Ned Kelly had been working for gold, as well as growing corn for whisky, and stealing horses. Gold mining was still a boom industry in Victoria in 1878, and fortunes were still being made. It was the one activity which offered the prospect of riches for the unskilled and unemployed. It is overwhelmingly likely that Kelly's comment to McIntyre was an unself-conscious declaration that he was trying to make an honest living. One hundred and twenty years later, the idiom has lost its innocent meaning and appears, mistakenly, to carry a sinister threat.

Julian Burnside QC.

Official Opening of Joan Rosanove Chambers

His Excellency, the Honourable Sir James Gobbo AC, Governor of Victoria

IT is an honour to be asked to open the Joan Rosanove Chambers for it gives me the opportunity to pay tribute to the life and career of one of the icons of the Victorian Bar. It also enables me to acknowledge the presence of members of the Rosanove family and, in particular, her daughter Justice Lusink and her grandson, John Larkins, both distinguished members of our legal profession, who must be very proud and no doubt nostalgic on this important day.

The Governor unveiling the plaque.

Joan Rosanove began her career as Joan Lazarus at a time when there were few women in the law. After some four years in her father's firm, spent mainly in court appearances, Joan, now Joan Rosanove, signed the Bar Roll on 2 September 1923, the first woman in Victoria to do so. She was not made welcome and was more or less banished to a small dingy office in Saxon House, a most uninspiring location and had almost three briefless years. An opportunity came to secure chambers in Selbourne Chambers, the home of the Bar, when Philip Jacobs, a tenant, applied to have her occupy his chambers whilst he was overseas for a year. The directors did not agree and threatened to terminate Jacobs' lease. A frustrated Joan Rosanove left the Bar and practiced from her home in Northcote. She was not to rejoin the Bar until 1949 — nearly 25 years on when she finally secured a room in Selbourne Chambers.

In the light of this history, it is especially fitting that these new chambers should be named after Joan Rosanove who had once been denied accommodation at the Bar. She must now be quietly chuckling with satisfaction.

It is recorded that when she left her solicitor's office and returned to the Bar, she heard someone in her clerk's office say on the telephone that Mrs Rosanove was no longer soliciting in Bourke Street!

I came to the Bar in 1957 and Joan Rosanove was for me a memorable and significant figure who had by then developed a specialist divorce practice in the Supreme Court and I did not have the opportunity of being in a case against or alongside her. But I recall clearly seeing her in Court and noting what a strong presence she conveyed and how beautifully turned out she was on every occasion in robes and a lace collar especially designed by her.

Earlier in her career she had appeared in a number of criminal trials, including some murder trials. The case in her repertoire which most appealed to me was one well known to some of you — at least those interested in constitutional law — namely one Egon Kisch, a Jewish Czech socialist. In 1934 he came to Australia seeking to do a lecture tour about the evils of the Nazi Regime. He was alleged to be a communist and the

The assembled throng.

Federal Government did not allow him to disembark from his ship on its arrival here in Melbourne. Joan Rosanove was engaged to appear for him to seek a writ of habeas corpus directed to the ship's captain to release him from shipboard custody. She secured an order nisi but next day when the ship was about to sail, the judge in the Practice Court, on the return of the order, refused to order Kisch's release. As the ship was pulling out, Kisch jumped down to the wharf and broke his leg. Nonetheless the police put him back on the ship which then sailed on to Sydney. There he was arrested and given a dictation test in Gaelic which he failed. Ultimately after a High Court order by Mr Justice Evatt, he was released and was able to give his lectures for some four months.

I am especially attracted to this story because like Joan I had to do a similar case very early on in my career. It concerned a young man of 16 named Tropeano, an Italian migrant, one of a large family of fruiterers here in Melbourne. He had been convicted of assault arising out of a brawl at the Victoria Market. This technically exposed him to possible deportation under the Migration Act. Someone in some file had written, without any basis, that he was a member of the Mafia and the Minister for Immigration decided to deport him. He was arrested and the ship was set to sail next day. Frank Galbally briefed me to try to get a habeas corpus writ against the Governor of Pentridge. But on what grounds since the deportation was authorized by the Migration Act? I put an argument that Tropeano was outside the Migration Act because he had been integrated into the Australian community and so had ceased to be a migrant. My problem was not my argument, although this was not without its difficulties, but the shortage of time. Though habeas corpus applications have priority, it was a Thursday and the Practice Court gave priority to Probate matters on that day. The Court was packed with senior counsel waiting to put tendentious arguments about wills and probate and like subjects. Moreover I did not fancy the judge sitting in the Practice Court that day. So I went looking for another judge and encouraged by Jim Edwards, Associate to Mr Justice Barry, I went into the Divorce Court where Joan Rosanove was appearing before Mr Justice Barry. She graciously allowed me to interrupt and I got my order nisi. Tropeano was not deported and was returned to the bosom of his large family, and I was launched, thanks, inter alia, to a considerate Joan Rosanove who must have been listening to my application with special interest.

To return more directly to Joan Rosanove, she applied for silk in 1954. Her application was regularly turned down and was not granted until 1965, when there was a new Chief Justice. Had her application been granted in the 1950s, she would have been the first woman QC in Australian legal history. As it was, the honour went in 1962 to Roma Mitchell, that very great woman who recently passed away and was granted a State funeral, which I was privileged to attend.

I have, I hope, already said enough to show that Joan Rosanove was both an extraordinary pioneer for women's rights in the law and a model for women's achievement in the wider fields of business and the professions. She was, moreover, devoted to the Bar and was regarded with great affection by all who knew her. Her resolution and courage and her formidable qualities of mind and heart are an inspiration to all who know of her life and career. There can be no more fitting name with which to endow a handsome set of chambers. All the more is this so, at a time when the talents of women as barristers and judges are finally receiving a recognition too long denied them.

May I therefore congratulate Barristers Chambers Limited on its choice of name and also commend it for continuing, not without heavy cost and difficulty, to provide chambers at reasonable rentals without a capital impost. This will nurture the special collegiality of the Bar — for which the men and women of the Victorian Bar — now and in the future — will be deeply grateful.

I also congratulate the architects and builders and all those involved in bringing about such an excellent result.

I noted as I entered the building that a travel agency occupied a prominent position on the ground floor. This will no doubt serve as a blandishment and possible source of restless discontent as barristers walk past it every day. Perhaps I should pass on the practice which my good friend Peter Brusey and I adopted when we were estimating our brief fees. We always incorporated a Tuscan fee to cover the possibility of travel to that fair region.

It is with very great pleasure that I officially open these new Joan Rosanove Chambers.

PILCH Pro Bono Awards 2000

On 6 June 2000, awards were presented to solicitors, barristers and community legal centre volunteers in recognition of their outstanding contributions in providing pro bono assistance to the community. The awards, initiated by the Public Interest Law Clearing House (PILCH) in 1996, are held biennially to recognise the extra, unpaid work that many lawyers give in the community interest. "The 2000 Pro Bono Awards acknowledge some of the Victorian legal profession's unsung heroes, who invest their time in the community, without public recognition or financial gain," said PILCH Executive Directors, Caitlin English and Samantha Burchell.

THIS year, the awards were hosted by the Attorney-General of Victoria, the Honourable Rob Hulls MP, and were presented by the Attorney-General together with the Chief Justice of Victorian, the Honourable Chief Justice J H Phillips AC, and the Honourable Justice Branson of the Federal Court.

The winners of the 2000 Pro-Bono Awards were:

- *Small Metropolitan Practitioner Award* — Thomas Molomby

  Nominated by the Schizophrenia Fellowship of Victoria, Thomas Molomby has provided free legal advice to the organisation for nearly 20 years. The Schizophrenia Fellowship is a support organisation for the families and friends of people living with schizophrenia. Thomas has been involved in the management of legal issues relating to properties, and has been instrumental in establishing the structures and procedures which ensure the Fellowship remains a democratic organisation. Thomas's commitment to mental health issues is further demonstrated by his 10-year membership of the Royal Park Hospital Ethics Committee and his membership of the Mental Health Research Institute's Board of Directors since 1987.
- *Large Metropolitan Practitioner Award* — Freehill Hollingdale and Page

  Nominated by a number of bodies in the community and welfare sector, Freehill Hollingdale and Page has undertaken a variety of significant tasks that have proven of immense practical benefit to community organisations with limited financial resources.

  Freehill Hollingdale and Page has specifically assisted several welfare and charitable organisations, providing advice on a range of issues including the interpretation of tax and charity law, administrative law, trusts and wills, and general corporate advice. The firm has an outstanding record in the provision of pro bono advice and has earned the great respect of these organisations for its professionalism and the provision of timely, high quality advice.
- *Regional Practitioner Award* — Susan Ruffin

  Susan is a sole practitioner from Inverloch and received her award for her long-term work for and support of the clients of the Salvation Army GippsCare's Domestic Violence Outreach Service (DVOS), both in and outside of normal business hours. Susan has made her legal expertise readily available to the women and their children who are escaping or experiencing violent family situations, particularly where they do not have the capacity to make payment for her services. Susan also provides free legal advice to members of the DVOS team which helps them to better carry out their work with clients, many of whom are undergoing intense emotional stress and suffering severe disruption in their lives.
- *Legal Team Award* — Ormond Thomas of Ryan Carlisle Thomas, Stephen Howells, Barrister and Judith Bornstein, Barrister

  This team provided comprehensive legal representation during 1999 to the Solomon Islands National Union of Workers in their fight against a logging company which had sacked 400 workers striking for better wages and conditions. The award was presented in recognition of the commitment of the team to a case which was not only of personal significance to the workers involved but also represented a precedent in the terms and conditions for

PILCH member award winner Michelle Quigley with Chief Justice Phillips.

workers on the Solomon Islands and will hopefully lead to a decrease in the exploitation of workers on the Island generally.

- *Advocates Award* — Matthew Townsend

  Matthew was nominated for his work on seven matters, however, these represented only a portion of his recent pro bono work.

  Matthew specialises in environmental law, however, his pro bono work has ranged from advising the Organic Federation of Australia on the contamination of crops with genetically modified organisms to planning permit issues for groups as diverse as a dance organisation and residents opposing a wind farm. As the National Environmental Law Association's nomination highlighted: "He has shown a deep commitment to working for anyone who can't afford advice or representation. He is non-judgmental, doing work regardless of whether he is passionate about the politics, issues or principles involved — an extraordinary commitment from an extraordinary man."
- *Public Interest Law Clearing House Member Award* — Michelle Quigley

  Michelle is a barrister who, for more than two years, has provided the Abbotsford Convent Coalition Inc. with free legal and planning advice and advocacy in its fight to ensure the Convent, a significant heritage site, is developed as a community-based arts, entertainment and hospitality precinct instead of a major private residential development.

  Michelle appeared for the Abbotsford Convent Coalition at the Independent Panel and Advisory Committee hearing which lasted for approximately six weeks. She also gave countless hours of her time in preparing for the hearing, analysing the Panel Report once it was released and developing the Coalition's strategies. She also represented the Coalition at public meetings and meetings with the State Government and the City of Yarra.
- *Innovation Pro Bono Service Award* — Arthur Robinson & Hedderwicks

  Arthur Robinson & Hedderwicks was recognised for the innovative pro bono strategies which it has implemented in conjunction with the Fitzroy Legal Service during 1999 and 2000.

  Arthur Robinson & Hedderwicks provided funds to the Fitzroy Legal Service to employ an articled clerk and also provided four articled clerks to work with the Service as researchers on a Drug Sentencing Project. The funding provided an opportunity to train poverty lawyers in an environment where training opportunities are normally sadly lacking. The firm's contribution to the Drug Sentencing Project significantly expanded the capacity of the Legal Service to undertake this research and thus make a significant contribution to the drug law debate.

Advocates' award winner, Matthew Townsend with Justice Branson.

Legal team winners: Orm Thomas, Stephen Howell and Judith Burnstein with Justice Branson.

- *Community Legal Centre Award* — Renata Alexander

  Renata's award recognised her contribution to the St Kilda Legal Service with which she has been involved for 25 years. During this time, Renata has undertaken a variety of roles including management, peer support, community legal education and the provision of diverse and specialist legal assistance to clients. Renata has been an exceptional role model, peer supporter and mentor for other lawyers and law students volunteering at the Legal Service. Renata has consistently displayed a high level of commitment to the philosophy of community legal centres and to the principle of providing access to justice.
- *Law Student Award* — Michael Rush and Konstandinos Karapanagiotidis

  In making a joint award, the judging panel wished to recognise the outstanding contributions of both students.

  Michael Rush has a shown a consistent commitment to pro bono work throughout his student career including volunteering to assist practitioners providing pro bono services and participating in an education program at Port Phillip Prison. In 1999, as an extension of his personal commitment, Michael initiated and developed the Monash Student Pro Bono Program. This is an outstanding practical attempt to encourage and promote pro-bono culture among law students.

  During the past eight years, Konstandinos Karapanagiotidis has been a committed volunteer with a number of community-based legal services including the Mental Health Legal Service, the Welfare Rights Unit and the Visitors Program of the Office of Public Advocate. In 1998, Kon founded the Human Rights Centre for Mental Health and remains its Director. The Centre provides a range of free legal and other advocacy services for people already in or likely to be in the mental health system. The nomination notes that this is "the only centre of its kind in Australia in that it works from a human rights perspective dealing with the person not the label".

  The Victorian Bar congratulates each of the Pro Bono Award winners and also commends the contributions made by many members of the legal profession to the provision of free legal advice and representation for members of the community.

The 2000 Pro Bono Awards acknowledge some of the Victorian legal profession's unsung heroes.

Photos courtesy of the Law Institute Journal.

Life Art: Ettie (Yetta) Sharp

March 2000, an exhibition in the Essoign Club

SYDNEY born, Brisbane bred and a resident of Melbourne since the 1930s, Ettie Sharp was a scholarship and prize-winning student at the famed National Gallery School of Victoria, where she studied full-time from 1954 to 1959. Fellow students at the school included John Howley, Janet Dawson and Charles Billich. Head of the school was Alan Sumner. The faculty included Charles Bush, George Bell, William Frater and Arnold Shore. For a time at the school, she adopted the nom-de-plume of Yetta Sharp.

A promising artist from her youth, she deferred an artistic career for the role of housewife and mother, only commencing full-time art studies when her children had reached secondary school level. In her time at the School, she was noted for her drawing, her still lifes and her studies of the human figure. Many of the students at the School exhibited at the early Herald Art Shows. Her work was much appreciated by the leading Herald critic Alan McCulloch, who invariably selected her works for inclusion in the premier section.

After leaving the School, she continued to paint and draw at her own pace and declined the temptation to have her own exhibition. She exhibited from time-to-time individual works in various groups and local art shows. Following her husband's death in 1975 she took over the running of the family business which she continued until the late 1980s. During this time she produced a number of pastels. For a while she had an interest in lino-cuts.

Now in her eighties, she continues to paint and draw as the inclination takes her.

In March 1999, she had her first commercial exhibition. A number of the exhibited works have been completed by her in recent weeks for showing at this exhibition.

Life Art is intended as a retrospective and includes a number of works from her student days, some still in the School frames in which they were hung in the annual student exhibition in the old National Gallery. The drawings span a number of decades, as do the oils, while the pastels date from the 1970s onwards.

Artist Ettie Sharp, fourth from right, at her exhibition at The Essoign Club with, left to right, Peter Kozicki (a member of the Bar); Justice Hampel, Ettie Sharp's son David Sharp (a member of the Bar); Ettie, her daughter, Elizabeth Gild; son-in-law Michael Gild and granddaughter Lysette Shaw.

Artist Ettie Sharp discusses her work at the Essoign Club exhibition with Justice Hampel.

Pen City Winner

Lisa Wallace wins Pen City's Pelikan M800 pen competition in the Autumn issue

MARS BAR

NOT interested in touring the Dark Side of Mars, or walking knee deep in muddy craters as recommended in the Mars Tour Brochure, I headed for the nearest bar. The green light soothed me immediately I walked in. Sauntering to the row of gleaming green bottles and about to order my particular brand of poison, a stunning guy sidled up to me. The "bar pickup" had long lost its allure, but as I had nothing better to do, I inclined my head toward the brute to give him the "yes" baby look.

With his tail in "erectus mobilus" mode and about to murmur something regarding raising the e. coli level, his head suddenly rotated 180° right. A stunning creature was sunning herself at the side of the bar.

She was stark naked.

"GC!" he mumbled.

"What?" I questioned.

"Gorgeous Chick," he replied, tongue dripping.

"Nope! That's only an SC," I replied cordially. "She's part of our tour group from the Vic. Bar. She looks great, but it's only skin deep."

"Super C . . .," he remarked, eyes glinting.

"Senior Counsel actually." A note of formality had entered my voice. "Uninteresting and unloved. Not like the old days when the Queen was around. No SCs then, only the QCs Queen's Counsel. They were a great lot of laughs in their horsehair wigs and long black gowns. We used to have bets on who had real hair underneath, or what colour undies they were wearing. Then the Queen wouldn't abdicate and The New Order got rid of her and the Queens, and gave us SCs."

"But she's naked," he drooled.

"Only because of Decree Order number 4001. By Law, SCs must have nothing up their sleeve. Up front and out there is the requirement. What you see is what you get. Bloody boring, if you ask me."

"Who gives for your Queer Cocks," he blurted. "Super C . . . honey, I'm coming."

I watched in dismay as he slunk over to get a closer look.

"Stupid C . . .," I muttered.

Turning to the barman, and about to order the greenest, ugliest drink possible, I was suddenly aware of looming tragedy. The lights turned red, the patrons screamed, a large disgusting creature hovered above the bar

RADAR ALERT. INCOMING DOG.

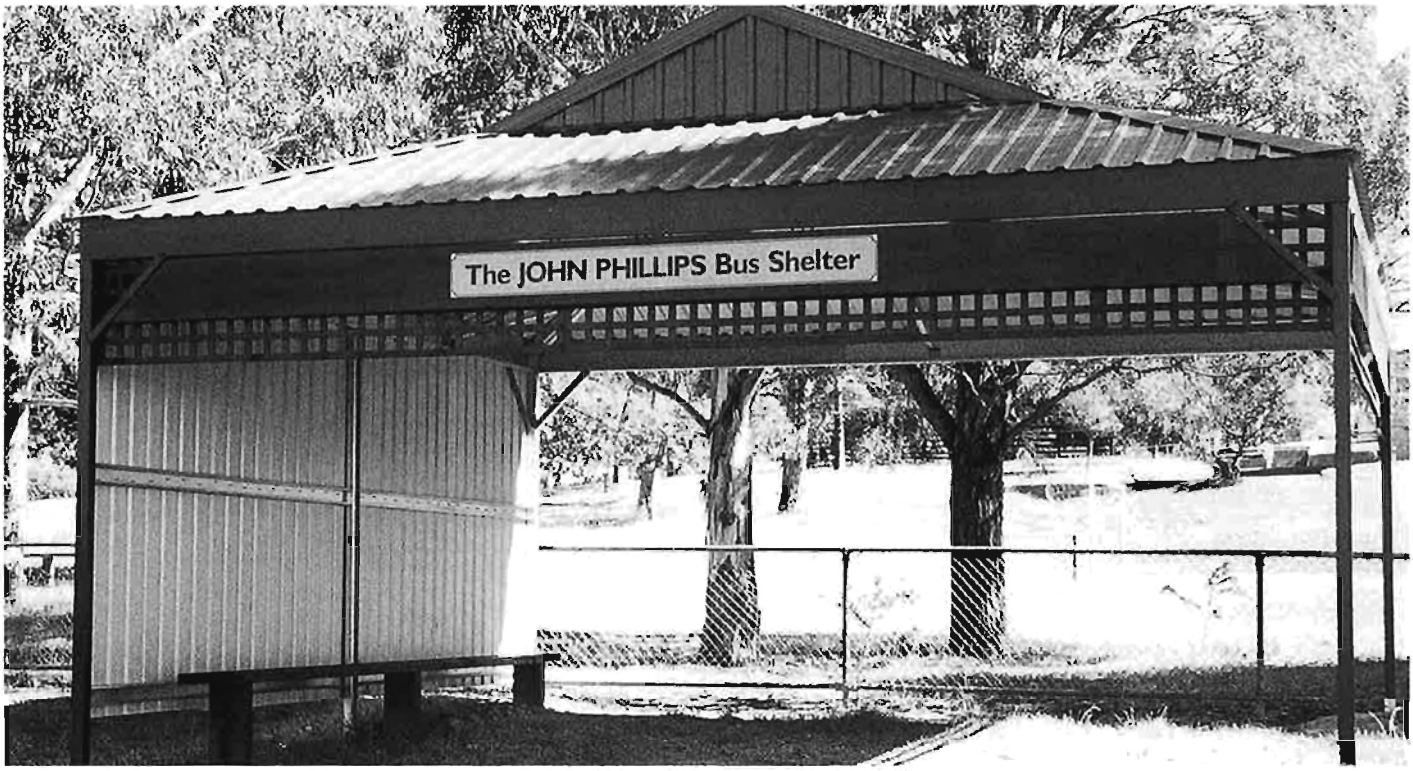
In one lick, the naked Stupid C . . ., erectus mobilus and half the Bar were obliterated. A split second later, one gulp and my world was gone. The Mars Bar had vanished.

Lisa Wallace, Autumn Pen City winner, with John DiBlasi.

Entries to Gerry Nash QC, c/- Clerk S, Owen Dixon Chambers East by ***15 September 2000.***

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.

New Winter Issue Competition — use your imagination, and you could win a Pelikan M800



Draft an appropriate caption for this photograph in 50 words or less.

Corporations and Associations Law, Principles & Issues (4th edn)

By John Gooley
Butterworths 1999
pp. v–viii, Table of Cases ix–xxiv, Table of Statutes xxv–li, 1-604, Index 605–631

CORPORATIONS and Associations Law, Principles & Issues provides concise analysis and explanation of aspects of the law relating to corporations and associations.

By virtue of the prevalence of the corporate structure as a vehicle for commercial activity, the bulk of the text is concerned with "corporations law".

This work has a clear analysis of a number of recent changes in relation to corporations law, both statutory and judicial. For instance the discussion of *Gambotto* v. *WCP Limited* (1995) 182 CLR 432 and *Gould* v. *Brown* (1998) 72 ALJR 375 is timely. Unfortunately the decision in *Re Wakim: ex parte McNally* (1999)73 ALJR 839 came down shortly after the book was published. No doubt, however, a fifth edition will address this decision and the legislative responses introduced as a result of that decision. In the meantime, however, the author has provided an explanatory note that can be accessed via the Butterworths website (www.butterworths.com.au) to *Re Wakim.*

In addition to dealing with corporations law, this work is concerned with other forms of business organisations including partnerships, incorporated and unincorporated associations, joint ventures and co-operatives. Each is the subject of discrete chapters.

It is curious that the chapter on co-operatives invites the reader to find the bulk of the chapter through the Butterworths website.

Given the prevalence of the trading trust as a form of business organisation, particularly for small businesses, it is somewhat surprising that this form of business structure receives a somewhat truncated treatment in the text. For instance, there is little explanation or analysis of trust structures such as unit trusts, discretionary trusts and other express trusts. The position of a trustee's rights and obligations and the rights of creditors of a trading trust are also matters of practical concern (see for instance *RWG Management Ltd* v. *CCA* [1985] VR 385 and *ASC* v. *AS Nominees Ltd* (1995) 62 FCR 504). It is hoped that in any further editions of this work, a more expansive treatment of this common form of business organisation will be provided.

Corporations and Associations Law provides a good general overview of all the common forms of business organisations and is particularly comprehensive as a guide to the complex and frequently changing regulation of corporate entities in Australia. The work provides assistance to those seeking an understanding of aspects of the law relevant to different business structures, particularly companies.

Peter Lithgow

Educating Lawyers for a Less Adversarial System

Edited by Charles Sampford, Sophie Blencowe and Suzanne Condlin
Federation Press 1999
i–xxvi including Contributors and Introduction, 1–246 including References and Index

Beyond the Adversarial System

Edited by Helen Stacey and Michael Lavarch
Federation Press 1999
i–xxiii including Contributors and Introduction, 1–168 including References and Index

BOTH these titles emanated from proceedings of a conference and workshop hosted jointly by the National Institute for Law Ethics and Public Affairs and the Australian Law Reform Commission in July 1997. A group of "engaged academics" and "reflective practitioners" from Australia and overseas came together to collaborate on and test out new theories and new approaches to the teaching of adversarial law, and the practice of law in an adversarial system.

The first volume looks broadly at what is taught and by whom, and then focuses on the relationship between legal education — both its content and style — and civil justice reform. This analysis highlights the potentially new roles and skills required of legal practitioners (to be instilled at law school, during articles, in further legal training and at the Bar) and asks: how should legal educators respond to the changes that emerge from the reform process, and how does it inform their teaching? What can Australians learn from examining other countries' experiences? Can legal education and training play an active role in law reform? Should it?

In the Introduction to the 11 papers in the collection, the editors give an overview of the changes being made to streamline legal proceedings in various quarters and to make them more accessible and affordable. These initiatives include alternative dispute resolution; simplification of court structures, procedures, documents and rules; improvements in case management and methods; and greater use of technology. Part 1 of the collection discusses in more detail aspects of reform of the civil justice system in terms of its impact on legal professionals. The reforms taking place are examined, and reasons advanced as to why some have met with only limited success. Further suggestions for additional measures to achieve a more simplified and efficient system are proffered. For example, Justice Olsson (of the South Australian Supreme Court) considers that "radical surgery" is needed on court procedures (possibly even amputation?) to encourage early settlement of actions. He proposes also a "one-stop shop" to deal both with civil and criminal matters, consisting of a disputes division and a multi-level adjudication division. As part of a general reflection on the skills and abilities legal professionals will need to learn to operate effectively in new roles, Professor Peter Sallman suggests that a co-ordinated program for educating all judges and magistrates into the mysteries of case management skills might be a useful initiative. This is not the only area of expertise where it is thought the judiciary might be lacking: judges and magistrates would also benefit from greater knowledge and skills in budgeting, personnel, technology use, media relations, and management generally. Reinhart and de Fina contend, in their paper, that litigation generally would be expedited and enhanced by practitioners' greater acceptance and use of witness statements and court appointed expert witnesses.

Part 2 examines different models of legal education, surveying practices in France and Germany as comparisons to the Australian scene. Professor Stewart

(Flinders University, SA) points to the significant State by State variances in the delivery of practical legal training programs, and raises the vexed question of national uniform admission requirements. Justice Brabazon and Frisby's paper notes that students themselves at law school are reluctant to accept too many divergences from the black letter law approach traditionally favoured, and that this is an impediment to the introduction and growth in acceptance of alternative dispute resolution processes at the undergraduate level. There is also discussion on the teaching of ethics in legal education courses. As a means of changing the culture of legal practice, its potential influence is enormous; but the emphasis is lost where, in teaching, ethics tends to be an add-on or optional extra subject, or a unit of a subject, rather than integrated into all legal subjects in the whole course.

If there are any unifying threads to this diverse and provocative collection of papers, they might be these:

- While education is accepted as a lifelong process, there has been lamentably little liaison between educators at different levels and stages of the process, seeking an understanding of their place in the overall framework.
- It is important that there be an integrated approach to the reform of the civil litigation system, because its relationship with the stages of legal education is one of interdependence.

The unsurprising conclusion is that, to be more effective, the contributions at all stages should be better co-ordinated, because legal education being continuous, of necessity reinforces and builds on the stage that has preceded it. Communication and liaison are the tools with which this might be achieved.

The second volume picks up where the first leaves off and confronts head on the "folklore" of the Australian civil justice system, and the very underpinning of civil litigation: adversarialism. These shortcomings are said to be, in summary:

- a reputation for being alienating and inaccessible, to all ordinary Australians, to juries, to families, and in particular to indigenous people
- an expensive, slow and complex forum where arcane and inefficient judicial practices are the norm, driven by money-hungry lawyers.

The lore thus laid out and confronted, the nine papers cut through it to examine the insights of various judges, lawyers and government users who work with adversarialism every day. Not surprisingly, there are defenders of the system and advocates for change. There is also a perspective from the US. As an agreed starting point, the "folklore" of the adversarial system is agreed to be shaped by a mix of reality and perceptions, of which there are three main perceptions:

1. Australia has a pure adversarial system.

This is clearly no longer the case, if it ever was. Whether by incremental change or by design, many court practices display a far more interventionist role for the judiciary than would be the case in a "pure" adversarial system. The Australian High Court itself has recognised in some of its decisions that a balance must be found between the needs of the system as a whole and the desires of particular litigants to pursue their rights and fight to the finish. Reduced funding for legal aid has made it clear that the holders of the fiscal purse strings are unable and unwilling to support indeterminate or indeed some kinds of adversarialism at all.

2. The system is reforming itself from within.

Well, yes and no. Some argue that reform is occurring, that reform is arising from within and at the instigation of the users of the adversarial system, and that this is the only effective way to achieve real and lasting improvement, on the principle that changes imposed externally are more likely to be resisted or avoided by judges and lawyers. Others, mostly policy makers and government officials, argue either that real change has not occurred at all, or that it is occurring at too slow a pace.

3. The pursuit of individual rights is a cultural foundation too important to jettison.

A number of arguments arise here: how the premise sits uncomfortably with the collective nature of decision-making within some communities, particularly Aboriginal ones; where does the cost-benefit-effectiveness equation come in to this scenario; whether the real issue is not really the economic flaws of the system but its moral flaws, on the principle that no justice can be delivered on the cheap, adversarial or inquisitorial, and deliver justice to all; and what of the morality of aspects of adversarial behaviour?

There is a striking differentiation of perspectives which the distinguished contributors bring to bear on their observations of the civil justice system in action, depending on whether they speak as judge, politician, advocate, or academic. However, there was some broad agreement on at least three areas:

- There is a significant lack of current empirical data on the operation of the civil justice system in its adversarial guise. There is, however, an abundance of anecdotal evidence.
- The civil litigation system in Australian performs a vital function in setting the standards wherein conflicts may be resolved. Alternative dispute resolution has a place in the system but is no complete answer.
- Continuing efforts need to be exerted to address concerns about access to the system, internal efficiencies, transparency of process, and the public interests in having individual cases of conflict decided on broader principles of fairness and equity.

All this is the stuff of reform agendas for decades to come. Thought provoking and diverse viewpoints to mull over with a glass of something else mulled in the coming winter months.

Judy Benson

Sackville & Neave Property Law: Cases and Materials (6th edn)

By Neave, Rossiter and Stone
Butterworths, 1999
pp. lxxxvi + 1038, paperback

THIS is the latest edition of a well-known student textbook, which many of us remember from law school. In my case at least, it is the source of what little is still recalled of the subject. Many of the classic property judgments we know (or at least vaguely half remember) and love are still there. They include *Jeffries* v. *The Great Western Railway Co.* (the railway trucks case), *Brand* v. *Chris Building Society Pty Ltd* (the one where they built the house on the wrong land), *Inwards* v. *Baker* (Lord Denning stopped an old man being evicted from his house), *Cowell* v. *Rosehill Racecourse Co. Ltd* (man chucked out of the races) and *Walsh* v. *Lonsdale* (the one about the machine shop lease, the point of which has something to do with equity).

There are, of course, also important and (in time) equally memorable new judgments. Examples are *Mabo* and *Wik* on native title, *Saade* v. *Registrar General* (on Torrens system indefeasibility of title) and *Commonwealth Bank* v. *Mehta* (misleading and deceptive conduct relating to the grant of a mortgage). In generations to come, they too will press themselves vaguely on the minds of law graduates as things they really should be able to remember more clearly.

There are some odd omissions. For example, in the sections dealing with Torrens title, I was surprised not to see more extensive reference to the 1990s series of Victorian Supreme Court decisions about indefeasibility and fraudulent instruments. I was also surprised not to find reference in the index to the High Court's recent decisions in *Forrestview Nominees* (on restrictive covenants), *Fejo* v. *NT* (on native title) or *Bridgewater* v. *Leaky* (on options to purchase and equity).

These are, of course, minor considerations, and my comments are not intended as criticisms. The choice of cases to put in a book such as this must be a personal one for the authors. It is not to be wondered at that they have chosen different cases to illustrate the points they cover. What is important is that there remains a comprehensive and generous spread of the relevant cases, statutes and other materials, and that it covers every area one needs to understand in order to grasp the subject.

The sections of the book deal with the general concept of property, fundamental issues such as possession and title, fragmentation, acquisition, transfer, enforcement and alienation of proprietary interests, statutory intervention and concurrent ownership. There are also chapters on leases, planning and mortgages. While as the introduction and "blurb" say, the emphasis is perhaps more on real than on personal property, the basics relating to each are dealt with satisfactorily, particularly from a student point of view.

Overall, this remains a commendable and useful student text on the subject. As well as bringing together most of the cases, legislation and other materials one would need to study or practise in the area, it has thought-provoking and interesting questions and comments, as well as useful summaries of the law in different areas of property law. One cannot but hope that whole new generations of law students will come in time to half-remember important things about property from it.

Michael Gronow