Victorian Bar News

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BAR COUNCIL REPORT

1. Current membership of Ethics Committee

The newly appointed Ethics Committee consists of:—

Charles Q.C. (Chairman);
Waldron Q.C. (Vice-Chairman);
Hedigan Q.C.;
Hampel Q.C.;
Chernov (Secretary);
Mandie; and
Webster (Assistant Secretary).

2. Accommodation — Capital Towers

After the General Meeting of the Bar held in connection with the possible leasing of space in Capital Towers, the Bar Council appointed the firm of Messrs. Phillips, Fox & Masel to act as its Solicitors for the purposes of any negotiations with the National Bank. It also retained an independent real estate consultant to advise it on this matter. Further, a Committee headed by Davies Q.C. (and which includes Berkeley Q.C., Liddell Q.C., Sher Q.C. and Webster, with power to co-opt), has been established to investigate and report to the Bar Council on the Capital Towers project and alternative means of satisfying the accommodation needs of the Bar. To date, no report has been received from that Committee.

3. Law Institute proposals

The following proposals were recently submitted to the State Government by the Law Institute of Victoria.

(a) The establishment of a single costs fixing Authority which would be empowered to fix the amount of fees that could be charged lawfully by members of the Law Institute and the Victorian Bar respectively. When this proposal came to the notice of the Bar Council discussions between representatives of the Bar Council and the Law Institute followed. Discussions were also held with the Attorney-General. In view of the fact that the general question of costs was being discussed in joint meetings between the Bar and the Law Institute of Victoria; the Attorney-General has been requested by the Law Institute to take no further action.

(b) An amendment to the Legal Profession Practice Act aimed at constituting a Solicitors' Disciplinary Tribunal which would bring all practitioners, including barristers, under its control. The Chairman and Vice-Chairman and two other senior members of the Bar Council called on the Attorney-General in relation to this suggestion. Discussions were also held with representatives of the Law Institute. Subsequently, the Chairman received an assurance from the President of the Law Institute that it was never intended by it to subject barristers to the jurisdiction of that Tribunal and the failure to make that clear in the proposed amendment was due to an oversight. An appropriate change will be made to the proposed amendment in consultation with the Law Institute

4. The Bar Dinner for 1978

In view of the various comments that have been made in relation to the venue and quality of the 1977 Bar Dinner, the Bar Council has resolved to hold that function on 13th May, 1978 at the Leonda Function Centre, Hawthorn.

5. Annual Subscriptions

The annual subscriptions for the year 1977/78 have been fixed at the following rates.

Queen's Counsel	—	$210
Over 10 years' standing	—	140
Over three years but under 10 years' standing	—	85
Over one year but under three years' standing	—	45
Under one year's standing	—	20
Interestate Queen's Counsel	—	35
Interstate juniors	—	25
Solicitor-General and Attorney-General	—	35

Crown prosecutors and Parliamentary Counsel	–	35
Non-practising list	–	35

YOUNG BARRISTERS' COMMITTEE

The Committee recently elected comprises:—

Danos; Hillman; Watkins; Riordan; Beder; Jacobsen; Wodak; Turner; D.B. Smith; McCabe.

Matters to be considered by the incoming committee include the proposed move to Capital Towers, the collection of overdue fees and the Scale of Magistrates' Court Fees.

Counsel wishing the Committee to investigate any matter of significance to Young Barristers are welcome to approach members of the Committee on the subject.

WELCOME: MR. JUSTICE TREYVAUD

William Brian Treyvaud was on the 27th day of October, 1977, appointed a Justice of the Family Court. His appointment culminates an industrious, intensive and skilful career at law.

He was educated at Glen Iris State School, Geelong College, and Melbourne University. Whilst at University he was the law students' representative on the Students' Representative Council, and participated in sporting and other Club activities.

Shortly after serving his Articles of Clerkship in Melbourne with the firm of Messrs Rylah & Rylah, he and his family moved to Geelong. Within a year he had joined the firm of Crighton, Coulter & Co., and been admitted into partnership. He then practiced as one of the principal partners in the firm, the name of which became Coulter, Treyvaud & Gazio. During his eleven years in practice at Geelong, there developed an acknowledged respect for his industry and his capacities as a Solicitor, a respected advocate, and an able negotiator.

Whilst resident in Geelong he developed permanent ties with, and a continuing keen interest in, the Geelong Football Club. He also developed a certain flare for the gentle sport of golf, as well as a connoisseur's interest in the delights of good food, wine and conversation. He continues to pursue these interests with zest.

In 1963 he returned to Melbourne with his young family. Upon his admission to the Bar in that year he promptly developed a practice which was cast far and wide. Gradually he concentrated his advocacy skills in the common law jurisdiction, running down work and matrimonial law.

His father practiced for many years as a Solicitor under the firm name of W.E.C. Treyvaud & Co., in Melbourne.

The continuity of the family name in the law is assured. His second eldest daughter has recently graduated in law from Monash University and is presently serving her Articles with the firm of Kenneth D. Opat & Associates. His young son Phillip has just completed first year law at Monash University.

Of readers there were four, namely, Moore, J., Ross, B., Lewis, G., and Kozicki, P. Each acknowledged the privilege of the opportunity given them: to learn under the mantle of his interest, his patience, and his quiet capacity gently to coach them in the rigours of practice at the Bar.

His industry, broad experience, incisiveness of thought and widely cast skills will serve him well in the work to which he now moves. The Bar congratulates him and wishes him an extensive and satisfying career in his new office.

UNREPORTED JUDGMENTS OF THE COURT OF CRIMINAL APPEAL

As set out in the Annual Report of the Victorian Bar Council 1976-77 a scheme has now been implemented to facilitate the perusal of all unreported Judgments of the Court of Criminal Appeal. As from the 1st of December 1977 a comprehensive Index will be placed in the Bar Library on the 13th floor covering every un-

reported Judgment of the Court of Criminal Appeal since the 1st of February 1977 which would be of interest to practitioners. The majority of these unreported Judgments of the Court of Criminal Appeal have been placed on a file in the office of the Supreme Court Librarian and the balance of these unreported Judgments are available on application to Mr. E.W. Lawn. It is believed that these unreported Judgments will be of vital interest to those who practice in any part of the criminal jurisdiction. Some of the more interesting points referred to in these unreported Judgments which can be discovered by searching the Index in the Library are:—

(a) The role of the prosecutor in the sentencing of an accused. On an appeal by the Attorney General the Full Court considered the effect of the failure of the Crown to object to a non-custodial sentence.

(b) The question of intent and the effect of alcohol and drugs. The application of the decision of the House of Lords in Majewski has been considered.

(c) The present scope of the felony murder rule has been discussed.

(d) The defence of provocation and the cumulative effect of successive events which are relied on as provocative has been considered.

(e) The Court of Criminal Appeal has held that the Applicant's demeanour during trial and the way in which he has conducted his defence are relevant matters to questions of sentence.

(f) Observations have been made about the duties of the authors of pre-sentence reports as to what material should not be included in such reports.

(g) The discretion of a Judge to prevent cross-examination of an accused as to the truth of a confession on the voir dire has been considered.

These points demonstrate the usefulness that these unreported Judgments will have to practitioners generally.

THE NEW SILKS

The Bar congratulates the following members whose appointment as Queens Counsel was announced on 23rd November, 1977.

William Bernard Frizzell

Francis Walsh

Leonard William Flanagan

William Michael Raymond Kelly

Garth Samuel Harold Buckner

John David Phillips

Allan William McDonald

Brian William Nettlefold

John Michael Batt

John Rupert Hanlon

David Myles Bennett

Edward Francis Dunphy

Neil Harry Mark Forsyth

Gerald Edward Fitzgerald, Q.C. (Qld.)

Brian John Herron, Q.C. (N.S.W.)

500TH ANNIVERSARY OF THE BIRTH OF THOMAS MOORE

**"SUDDEN ARREST
IMPRISONMENT WITHOUT TRIAL
FREEDOM IF THE PRISONER RECANTS
EXECUTION IF HE REFUSES"**

"The old familiar pattern of the individual against the State. As familiar today as in Tudor England when Sir Thomas Moore followed his conscience and defied King Henry VIII.

Throughout the Modern World it is repeated with many variations."
(From "Conscience Decides" — Thomas Moore's Letters and Prayers from Prison" — Geoffrey Chapman London.)

Sir Thomas Moore was Chancellor of England under Henry VIII. He refused to take the Oath of Supremacy though all his peers and Churchmen of great eminence were doing so. Imprisoned in the Tower of London he waited many months in uncertainty, and was finally condemned to death and executed.

A Committee, with Sir Gregory Gowans, formerly a Justice of the Supreme Court of Victoria as Chairman, is organising a celebration of the 500th anniversary of the birth of Thomas Moore which occurs on 6th February, 1978.

By courtesy of the Chief Justice and the Church Committees responsible for the religious observances for the opening of the Legal Year in 1978, there will be special references to Thomas Moore at the usual Church Services which mark this occasion.

Sir Gregory's Committee is also arranging for the celebrations to include a Commemorative Dinner to be held on Friday the 3rd February, 1978, in the Great Hall at the National Gallery of Victoria. At this dinner an Australian, well known for his Scholarship and Public Eminence, will deliver an Address on Thomas Moore. It is anticipated that the cost of the Dinner will be about $20.00 per person. To enable the Committee to assess the degree of interest and to facilitate arrangements generally those who desire to attend the dinner are requested to apply for an application form which is available from Michael O'Sullivan, Q.C., Room 624, or Secretary, Room 621.

ACCOMMODATION

The proposed move to National Bank House (Capital Towers). Two views.

FOR: VIEW ONE (by a junior member of the Bar Council)

In 1972 a dozen or so junior barristers arranged chambers for themselves in a building called "Henderson House" situated opposite Tait Chambers in Lonsdale Street. The rent was low and the quality of the accommodation was commensurate with that rent — the building was in short, a hovel.

These barristers were forced into that situation by the inability of Barristers' Chambers Ltd. to provide accommodation in either Owen Dixon Chambers or Tait Chambers. Fortunately, the situation did not persist for long as Barristers' Chambers Ltd. assumed the responsibility for providing accommodation for those who could not be accommodated in either Owen Dixon Chambers or Tait Chambers. As a consequence, areas were leased in a number of other buildings and sub-let to the barristers requiring accommodation.

Today, the situation is that of 538 practising barristers for whom Barristers' Chambers Ltd. provide accommodation, 220 are housed in buildings outside Owen Dixon Chambers leased by the company. Those 220 barristers are scattered amongst some 5 other buildings. They are predominantly junior barristers (less than 5 years' call); in all but one building (Tait) they have no intercom facilities; and they are (obviously) not in the same building as their clerks, the Bar administration or the Common Room facilities.

Those barristers are now isolated from the main stream of the Bar and are as a group, fragmented. Their circumstance is something that was not foreseen when the Bar Council initially decided to ask Barristers' Chambers Ltd. to lease space in outside buildings — it is only the unprecedented growth of the Bar in the last 2 years which had highlighted the situation.

As a result, barristers in those buildings do not have the day-to-day contact with senior barristers as their counterparts did in the days of abundant space in Owen Dixon Chambers and are consequently denied the development of acquaintance and sense of community with one's seniors, and the easy access to advice and reassurance that was the lot of their predecessors.

This situation has a number of effects: firstly, many of those barristers personally feel out of the main stream of the Bar or at least disadvantaged in becoming part of it; secondly, and related, they sense that those chambers are seen by the profession generally as junior barristers' chambers with consequent disadvantage to the type of work that they as occupants of those chambers can attract; and thirdly, apart from what is felt or sensed by the tenants, it is in fact creating a situation where junior barristers, embarking upon their practising careers, are having the development of their skills and competence positively hampered by their lack of access to and contact with the guiding hand of experience.

That these are all undesirable effects from the point of view of the Bar's continued existence as an independent entity should be self-evident — if the middle and senior juniors of tomorrow cannot mix with the middle senior juniors and silks of today, they will gain nothing from being members of the Bar.

Furthermore, it is fatuous to suggest that the solution lies in the juniors simply walking across the road, making a telephone call or knocking on any door in Owen Dixon Chambers. The problem is a real one, it is felt by those outside Owen Dixon Chambers and has been felt by those who have practised for some years in those outside chambers and then had the opportunity to obtain chambers in Owen Dixon.

The answer lies, broadly, in accommodating those outside Owen Dixon Chambers in chambers which have a mix of seniority. Apart from the limited movement of seniors out of Owen Dixon Chambers to Hume House, there has been no enthusiasm amongst senior barristers to move to outlying chambers.

If the problem is acknowledged by the Bar as a whole and the responsibility to overcome it is accepted, there are only 2 ways in which it can be solved with any lasting effect:

1. For the whole Bar to move to a new building sufficient to house the whole of the existing Bar and to allow for say the next 10 years expansion at the very least.
2. For the Bar to acquire accommodation in one other building sufficient to house a number of barristers equal to the number who presently have chambers outside Owen Dixon Chambers and to allow for (in that building and/or Owen Dixon Chambers) expansion for a similar period to that suggested in 1.

In implementing either of these alternatives the construction of new buildings by the Bar would not be possible in the present climate either economically or organisationally due to the probable desire of the Bar to limit its outlay in any such project. The purchase of an existing building to implement the first alternative would not be possible for similar reasons.

The purchase of a second existing building to implement the second, may be more feasible financially. However, the obvious examples, Four Courts Building and Hume House, would not meet the problem — neither could house the present number of barristers outside Owen Dixon Chambers let alone allow for any future expansions. Figures on the maximum number of barristers who could be housed in Goldsborough Mort building (purchase and refurbishment of which is another alternative) are not as yet precise — the indications are that it may house a number equal to all those presently outside Owen Dixon Chambers but would not allow for any future expansion.

This leaves, so far as present possibilities go, National Bank House. It would appear that this building would meet either means of solving the problem.

It is not intended to canvass specific proposals with regard to that building, save to say that with prudent and hard negotiation, accommodation of a high quality, proximate to the Courts, at rates of rental competitive with those presently being paid could be obtained for up to about 750 barristers in that building.

There is a feeling at the Bar, that in any overall plan for accommodation Owen Dixon Chambers should be retained for chambers. On the other hand, a move of the whole Bar to National Bank House should be seriously considered as a solution for the following reasons:

1. The question of which senior barristers will move from Owen Dixon Chambers to help achieve the seniority mix will not arise — all barristers will move.
2. No question as to which are the principal chambers or headquarters of the Bar will arise.
3. The whole Bar will be housed in premises which are modern and are not faced with any imminent obsolescence problem.
4. Proper terms in the lease can achieve adequate security of tenure for the foreseeable future and protection from prohibitive rent increases.
5. Rental accommodation does not compare unfavourably with owning one's own accommodation, when one takes into account the depreciation of the asset and the sort of maintenance an owner must face up to. Indeed it is surprising so many barristers lack confidence in their profession's ability to compete on market terms (assuming they will have to) for accommodation with other businesses and professions. Our solicitor colleagues certainly don't appear to share our pessimism in arranging their own acommodation, though it must be conceded that our requirements of proximity to the Courts are greater.
6. The renting of all accommodation may permit a reduction in the capital commitment required to be made by barristers for their accommodation to Barristers' Chambers Ltd. and the substitution of this with a current outgoing type commitment with advantages of greater tax deductability.
7. Owen Dixon Chambers could be sold or refurbished so as to provide income and continued capital gain potential for the Bar.

AGAINST: VIEW TWO

The Editor,
Victorian Bar News

At your request I have reduced to writing my reasons for opposing the move to Capital Towers on the terms proposed by Berkeley Q.C. at the recent General Meeting of the Bar.

I leave to one side, although I do not underestimate, fears in relation to the suitability of the building and the question of whether or not the best possible terms have been negotiated; my objections are more fundamental and relate to the basis upon which chambers ought to be made available to Counsel by Barristers Chambers Ltd.

In the first instance I think I should make it clear that I am sympathetic to and support views expressed at that General Meeting, that the corporate entity of the Bar ought to be preserved, that economic barriers to going to the Bar should be reduced to a minimum and that it is desirable that barristers should be 'mixed' in their acommodation so that the more junior members of the Bar can obtain benefit from having chambers situated in close proximity to senior and more experienced barristers.

At the same time I reject as illogical, objections to barristers owning chambers on the basis that that is, of itself, undesirable and that it is 'unprofessional' to suggest that barristers ought

to organise their affairs on a commercial basis with a view to minimising the crushing burden of income tax. The bar must be unique in its 'head in the sand' attitude towards arrangements common outside the Bar by the use of service companies, trusts, and the like to substantially decrease the taxation burden and to enable capital assets to be acquired.

My essential objection to the proposed scheme is that it perpetuates the present system whereby barristers have no option but to lease chambers and prevents taking advantage of legitimate commercial arrangements prevalent in other professions. I acknowledge that the ability of barristers to purchase their own chambers and their need or wish to do so varies according to one's own financial circumstances and one's position at the Bar. No doubt very junior barristers would wish to lease accommodation and I see no reason why they should not be assisted to do so, but I see no reason why more established barristers who wish to protect their future and lessen their taxation burdens by the use of family trusts etc., to acquire their own chambers should not be able to do so. I see no reason at present why the two viewpoints cannot be reconciled and why a flexible system designed to cope with both cannot be achieved.

I propose that the Bar Council should thoroughly investigate the prospect of a scheme whereby in the first instance all chambers should be owned by Barristers Chambers Limited, but that Counsel should have the option (exercisable at any time) to either purchase or lease those chambers. The legal viability and the economics of such a proposal obviously required detailed consideration.

The projected move to Capital Towers does not take into account the above suggestions and commits the Bar for many years to lease chambers.

I am opposed to the sale of Owen Dixon Chambers. It does not appeal to me as a good reason that the Bar's sole valuable asset should be sold because it can no longer accommodate the whole Bar. When it was first built, it was more than adequate but was quickly filled, and following its extension it was quickly filled again. The fact that it no longer can hold the whole Bar is because of the exfluxion of time and the growth of the Bar. This is a problem which will face the Bar for ever and can never be solved. Even if one were to buy the whole of Capital Towers, the day would come when the Bar would outgrow it. To lease or purchase a substantial part of Capital Towers for the whole Bar only puts off to a further date the recurring problem with which we are presently faced. It is no more than a temporary solution and surely the Bar cannot move as a body every fifteen or twenty years. Further, the arguments advanced when Owen Dixon Chambers was only an ideas about the advantages which would flow to the Bar from owning its own chambers have been overlooked. They need not be elaborated but are surely just as true today as they were then. If an attempt is made to sell Owen Dixon Chambers, it is unlikely that a substantial price will be obtained and very little benefit will have been derived from owning it. Whilst rents in Owen Dixon may have been less than commercial in the first instance, that is no longer the case because of the expensive nature of leased accommodation outside Owen Dixon. If it were not for that accommodation, rents in Owen Dixon would be substantially less. The criticism of the building and the projected costs for refurbishing it are, I believe, unfounded and exaggerated.

In my opinion, Owen Dixon Chambers is not nearly as bad as it is painted and I doubt very much the accuracy of the figures put forward. In any event any building taken as an alternative will require the expenditure of sums for maintenance from time to time as it grows older. Owen Dixon Chambers is centrally located, accommodates a large number of Counsel, has in it a number of very excellent chambers, and substantial facilities for the Bar as a whole including a library, common room, eating facilities and accommodation for the Bar Council and its secretariat. Why this should all be disposed of because of some hope that it can be replaced by some better quality accommodation (not owned

by the Bar) which will be subject to triennial increases in rent is beyond my comprehension. I suggest that the Bar should look to supplement Owen Dixon Chambers with a building which might well accommodate something like the same numbers. If a satisfactory agreement can be reached, I would not object to space in Capital Towers being either purchased or leased with an option to purchase.

I believe there are two essential issues to be considered. The first is the economics of any move and the second is the philosophical or policy justification for it. As to the former, I do not believe they have been properly investigated, nor have adequate alternatives been considered. As to the latter, I think it is foolish to regard it as undesirable that Counsel should own chambers or that the whole Bar has to be accommodated in one building. The Bar has historic, emotional, and I believe, practical ties to Owen Dixon Chambers.

Finally, I should say that I believe that unless the views of Counsel who wish to own their chambers are taken into account, those who insist on their own inflexible arrangements will bring about the very opposite of that which they wish to achieve. The Bar is more likely to split if arrangements accommodating all needs are not taken into account

JEFFREY L. SHER

RECENT ETHICS COMMITTEE RULINGS

1. The Ethics Committee recently resolved that prima facie once a brief is delivered to counsel, he is entitled to mark a proper brief fee notwithstanding that the matter is subsequently settled either by him or between the Solicitors.
2. The Ethics Committee has found a member of counsel guilty of a breach of Council Rules in that, contrary to a recent ruling of the Bar Council, he had failed to respond to communication from the Ethics Committee. The same counsel was also found guilty of infringing a rule of professional conduct in that he had failed to return a brief to his former instructing Solicitors despite their request that he do so.

   In view of the circumstances in which these offences were committed, counsel was cautioned by the Committee pursuant to Rule 32A (f) (3) of the Bar Rules.

THE MYSTERIES OF SILK

The silken season is upon us again. Thirteen tiros are now to be heard rustling through the Courts, accompanied by juniors only two thirds as grand (or even less grand by negotiation).

Not until 1863 were Queen's Counsel appointed in the colony of Victoria, some ten years after the first appointments in New South Wales. Today they number 73, including interstate practitioners. But what is it really all about?

1. **Application for Silk** (Those who have made it or think they never will, can skip this bit.)

The grant of Letters Patent to a barrister in Victoria is within the prerogative of the Governor in Council. He makes the appointment upon the recommendation of the Attorney-General made upon the nomination of the Chief Justice (Vic. Govt. Gazette No. 97 Oct. 21/1970 p 3419).

In 1964 Sir Henry Winneke directed that applications would be received only in September (rather than at any time as formerly). The present Chief Justice in 1975 directed that applications would be received only in August. This gives the tailor something of a seasonal bulge even before Christmas. Applicants must write to the Chief Justice setting out their full name, date of birth, date of admission to practice in each jurisdiction and the date of signing the Bar roll. Interviews take place in September and applicants are advised by the Chief Justice in October whether

he will recommend their appointment.

Successful applicants are required to send letters to all counsel on the roll senior to themselves, including Queen's Counsel, advising that they have made an application. Historically these letters warned juniors of greater seniority of the application, enabling them to make an application themselves if they wished. Thus in England the tradition was that letters were not sent to Queen's Counsel. There the custom was discontinued entirely in 1961. In Victoria it remains only as a courtesy to those senior on the Bar roll.

Prior to the end of October the applicant informs the Chief Justice that he has sent his letters. The list of nominations is submitted in November, in which month the Letters Patent are granted and the fact of such grant Gazetted. The new silks appear before the Full Court on the first sitting day in December.

2. Criteria for Appointment

The basic criterion for appointment of silks is eminence in the profession. The present Chief Justice is understood to apply the principles laid down during the time of Sir Edmund Herring. These principles were set forth in a memorandum of that Chief Justice as follows:

"I think I should point out first of all that the granting of silk is never a matter of course. It is primarily the exercise of a judicial function, and one that is always exercised with considerable anxiety. For, as was pointed out by the Privy Council in (1898) A.C. at p.252, the office of Queen's Counsel is 'a mark and recognition by the Sovereign of the professional eminence of the Counsel upon whom it is conferred'.

"Consequently personal considerations cannot enter into the matter. The matters the Chief Justice has to consider are all those from which it may be determined whether the applicant has really attained eminence in the profession that is worthy of being recognised by the Sovereign. Such matters include duration of the applicant's practice, the income derived therefrom, the nature of the practice, the Courts in which it is carried on, the importance of the cases handled, whether the applicant commonly appears with a junior, the capacity to conduct cases in Court and so on."

It need hardly be said, therefore, that extraneous matters such as the applicant's political affiliations have no place in the decision. See 44 ALJ: 302 and 318.

3. The Privileges and Practice of the Silk

Precedence among Queen's Counsel is determined by Order in Council made on the 11th October 1955. The Solicitor-General ranks first, and after him the silks in order specified in the Order in council authorising their appointment. For practical purposes, this precedence is governed by the date of the grant of the Letters Patent and, among those whose letters were granted on the same day, in the order specified in the Letters themselves.

The work which English silks may undertake is summarised in Boulton, **Conduct and Etiquette at the Bar** (4th edition 1965) p.64-66. By the Bar Council ruling of March 1957 these propositions are equally applicable to silks in Victoria.

"A Q.C. should refuse all drafting work and written opinions on evidence, as being appropriate to juniors only; but he is at liberty in consultation with a junior, to settle any such drafting and to advise on evidence."

"Where papers have been delivered simultaneously to both a Q.C. and junior counsel, the Q.C. should not advise except in consultation with the junior, but where no papers have been delivered to junior counsel, a Q.C. may advise in conference or give a written opinion without the assistance of a junior."

"By a general dispensation granted in 1920, a Queen's Counsel can now appear in a case against the Crown without a licence from the Crown."

This last provision abrogates the old rule that a silk may not appear against the Crown since he is, in theory at least, one of Her Majesty's Counsel.

Since the appointment is made by the Governor of Victoria, the rights and privileges are domestic only. If a Victorian silk appears interstate, he enjoys the rank and privileges of a stuff gownsman only, unless he has been granted silk in that jurisdiction.

4. Relations with the Junior Bar

The new Silk takes precedence over all junior barristers whatever may have been his previous standing.

A surprising exception in England to the general rule that no counsel may recommend another to a solicitor-client is found in Boulton at page 63:—

"There is no objection to a barrister recommending another barrister as his leader or junior, but only if he is asked for his opinion."

Finally, in Victoria the old custom is followed of a Queen's Counsel recognising the services of a junior who has appeared with him by the gift of a red bag. It may be a reflection of the standard of the junior bar, or possibly of its modesty, that these red bags are now rarely seen in chambers.
(What about the parsimony of silks? . . . Ed.)

5. The Two Counsel Rule

At the meetings of the Bar held in 1884, the Regulations then adopted included the following:—

"The Attorney-General, Solicitor-General, or Queen's Counsel may not appear without a junior on the tril of any action or hearing of any suit, or in judge's chambers, and may not draw or settle, otherwise than in consultation with a junior, any pleadings, affidavits, conveyances, or legal documents of any kind, but may appear on any rule, motions or petitions, opposed or unopposed, or on any arbitration, without or with a junior."

In all other respects the Victorian Bar followed the rulings of the General Council of the Bar in England.

In its recent report in 1976, the English Monopolies and Mergers Commission observed that whereas the Office of Queen's Counsel dates from the time of James I, the two counsel rule existed as such, only in the last years of the nineteenth century. This observation has been challenged by Raymond Cock (1976) 92 LQR 512. But it appears clear that not until 1890 did the recently formed Bar Committee formulate the rule that a Queen's Counsel should not appear for the plaintiff in a civil cause without a junior. As late as 1889 it was considered proper for a silk to appear alone for a plaintiff in a non-jury trial: (1977) 92 LQR 190. The extension of the rule to appearances in any court was not formally adopted in England until 1935. Before that date it was described as "the usual practice" for silk to insist on a junior when appearing for a defendant.

It would seem, therefore, that the rule in England for most of the nineteenth century was merely a practice adopted by the various circuit messes. Thus "the immemorail custom" in 1828 in the Norfolk Circuit mess required two counsel where a King's Counsel appeared for the plaintiff or prosecutor.

In March 1957 the Victorian Bar Council restated the rule in the following terms —

"(1) It is the practice of the Bar of Victoria to follow those rules of conduct in regard to King's Counsel (sic) which are observed by the Bar in England so far as the same are applicable to conditions in Victoria and so far as they are not contrary to any established practice of the Victorian Bar.

(2) In any Court, including the Coroner's Court, Queen's Counsel other than Crown Prosecutors must appear with a junior. The same rule applies to the Commonwealth Industrial Commission, the Workers Compensation Board and Boards of Review. Before other tribunals which are not courts, Queen's Counsel has a discretion to appear without a junior. In the exercise of this discretion Counsel should take into account whether oral evidence is to be heard or any other circumstances which may make the briefing of a junior desirable."

So much for the past.

In July 1977 under pressure from the Monopolies and Mergers Commission the Bar Council in England resolved as follows —

"2. Abrogation of Rules
All existing rules of professional conduct and etiquette restricting the right of Queen's Counsel to accept instructions to appear as an advocate or to do any other work without a junior are abrogated and are replaced by the following rules.

3. Appearance as an Advocate

(1) Queen's Counsel may accept instructions to appear as an advocate without a junior.

(2) Unless the contrary is stated when instructions in any matter are first delivered to Queen's Counsel, he is entitled to assume that a junior is also to be instructed at the hearing.

(3) Queen's Counsel should decline to appear as an advocate without a junior if he would be unable properly to conduct that case, or other cases, or to fulfil his professional or semi-professional commitments unless a junior were also instructed in the case in question.

(4) Paragraph (3) of this rule shall have effect notwithstanding any obligation which requires counsel to accept a brief in a forum in which he professes to practise.

4. Contentious Written Work
Queen's Counsel should not without a junior settle pleadings or draft such other documents necessary for the conduct of contentious proceedings as are normally drafted by junior counsel provided that Queen's Counsel may without a junior settle pleadings or draft documents for use in proceedings in which the Queen's Counsel has agreed to appear as an advocate without a junior."

In Victoria on 31st July 1975 the Bar Council ruled that it was not improper for junior counsel by special arrangement prior to accepting a brief and after consultation with his leader to accept a fee other than two thirds of the leader's fee, provided that such fee was not less than the normal or recommended junior fee. The requirement of a "special arrangement" means that in most cases the traditional fee ratio will survive. It remains to be seen whether this ruling, even in such an attenuated form would offend the Trade Practices Act.

The two thirds rule has gone, in theory at least, both in Victoria and in England. In New South Wales it is presently under scrutiny by the Enquiry into the legal profession.

There is probably no valid reason for the abolition of the office of Queen's Counsel. It provides a sanctuary for the busy junior seeking to avoid the burden of paperwork. It is a dignity appropriate to senior barristers in the eyes of the profession and the community at large. It enables those who wish it, to restrict their practice to heavy and difficult cases without weakening the cab-rank principle.

But the established pattern of the practice of a silk is one which the Bar must stand ready to justify.

6. Excursus

An interesting note on the dress of silks and in particular the "powder rosette" or "wig bag" appears in 28 A.L.J. 237. It has been suggested in this State that the rosette is worn because of our early links with the Irish Bar. There is no indication in the A.L.J. note that the wearing of the rosette is an Irish tradition. The note states, inter alia, of the English practice: "It was, apparently, originally worn to keep the powder from the wig getting on to the collar of the coat . . . (it) is not worn when a gown is worn, but only when no gown is worn, as, for example at a Royal Court". Further it appears that English silks "for reasons of economy" wear their stuff gowns except in the House of Lords when they also wear a full bottomed wig. A perusal of recent price lists for robes leads one to ponder how many of our men, for similar reasons of economy, may be no more than artificial silks.

Those who have had time to read to this point may desire to wander further down the by-ways of legal history and dress. The once great order of serjeants-at-law requires an article to itself. But serjeants, like silks, were known by their costume being described as "of the degree of the coif". The coif was a patch on the wig

(Jowitts Dictionary of English Law 1959 p.402) possibly derived from a skull cap worn in earlier times. The degree of serjeant was never abolished. It died out when, after 1st November, 1857, it was no longer necessary to be a serjeant to become a judge of the superior courts of common law. A legacy of the order is the custom of Judges calling each other "Brother". An attempt was made in 1834, by warrant under the hand of the King, to deprive the serjeants of their exclusive right of practice in the court of Common Pleas. This was challenged, after a hesitation of some years, and the report of the decision upholding the privileges of the serjeants, which appears in 6 Bing (N.C.) pp.235. ff, bears reading. The following appears at p.238.

> "We, therefore, think ourselves justified in saying that from time immemorial the serjeants have enjoyed the exclusive privilege of practising, pleading, and audience in the Court of Common Pleas. Immemorial enjoyment is the most solid of all titles; and we think the warrant of the Crown can no more deprive the serjeant who holds an immemorial office of the benefits and privileges which belong to it, than it could alter the administration of the law within the Court itself. The rights and privileges of the serjeant, and rights and privileges of the peer of the realm, stand upon the same foundation, immemorial usage."

A footnote to the report reads:

> "During the delivery of the above, a furious tempest of wind prevailed, which seemed to shake the fabric of Westminster Hall, and nearly burst open the windows and doors of the Court of Common Pleas."

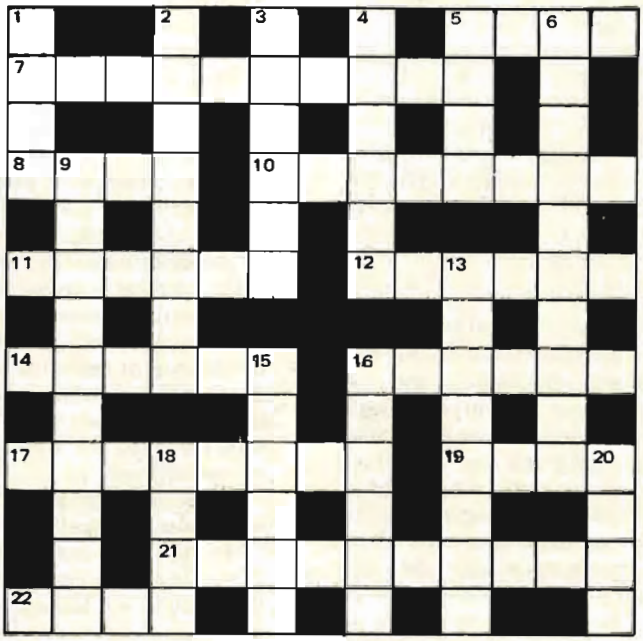
A sign of Divine displeasure which might be variously interpreted.

MOUTHPIECE

"Bristers", observed Pooh, "are very strange animals."
"Are they dangerous?" asked Piglet, "Not", he added quickly that I care. It's only that you want to know in case of meeting one."
"They are only dangerous when well paid", said Pooh, "or if someones tries to disturb their lair. Then they get all stirry and pass motions all over the place."
"Is **that** dangerous?" said Piglet.
"Well it doesn't get anything done," said Pooh. "But it is a bit untidy especially if you happen to be standing under their tree."
"Oh, they live in trees?" said Piglet.
"Sort of trees" said Pooh. "But then again sort of layer cake beehives. They live in cells piled one on top of the other in tall buildings and no one is allowed to live with another in his cell unless very young. They like to be all piled up together; they say it makes them feel more of a Brotherhood."
"That sounds like ganging up to be dangerous" said Piglet who had been reading about Scicily. "Why do they want to be a Brotherhood?"
"They **say**" said Pooh, that they want to train their young and to be friendly to each other. But it seems to me they all want to keep an eye on what the others are doing."
"What **are** the others all doing? asked Piglet.
"They talk a lot about what they think they think, and they think a lot about what they think they think. But they don't often think a lot about what the others who are talking about what they think they think are thinking they are thinking" said Pooh.
"Oh" said Piglet.
"That's because they all think that their own thinks are right and everyone elses' thinks are wrong; which is a waste of time" said Pooh.
"Yes" said Piglet.

CAPTAIN'S CRYPTIC

NO. 22



ACROSS

5. Halt from masculinity (4)
7. Notice of arrival of goods by train (6, 4)
8. His Majesty the judge (4)
10. On and On like the babbling judging (8)
11. The first rower comes last (6)
12. Holding land from a soup dish (6)
14. The ruling hand rocks it (6)
16. Unusually large and rising ball (6)
17. Colour slightly (8)
19. Open Indian prince (4)
21. Brought into evidence (10)
22. Moiety (4)

DOWN

1. Slope for holding money (4)
2. Circumviation (4, 4)
3. Maybe it appears (6)
4. To assess the legal price (2, 4)
5. Let out the secrets (4)
6. Judge born 11/1/1911 (9, 1)
9. Praetor's possession orders (10)
13. Very many (8)
15. . . . doesn't assist the volunteer (6)
16. Native of French coastal province (6)
18. Serjeant at law's white hat (4)
20. Assistant from a thought (4)

"Sometimes some of them think they think it would be a good idea to move trees", said Pooh "or beehives. Then all the others jump up and down on the spot, pass motions, and shout 'Silly idea, silly idea' in loud voices."
"Is it a silly idea?" asked Piglet.
"That" said Pooh wisely "all depends on what you think."

D.G.H.
(with the usual apologies to A.A.M. who probably doesn't care anyhow)

NOTANDA

Well known reformed nicotine addict and blue water buff Barton Stott recently entered into a competition sponsored by the manufacturers of "Salem".

Rumour has it that, as part of the drying out process, he used to collect empty packets and was therefore well in front of all competitors before he started.

His jingle, of course, won the prize. Listeners will doubtless be seduced by its charm on the media next year.

The reward for this skill exercised in the interests of orderly marketing, was a trip for two to the U.S. of A. There to watch the procession in honour of that other triumph of U.S. technology - the twelve metre yacht.

Five per cent is believed to have earned Kevin Foley a free ride on the bus to Tullamarine to see him off.

Stott maintains that he refused the sponsor's offer of an unlimited quantity of its products.

Notwithstanding the result of the races he was seen laughing on his return to the Ballarat circuit.

LAWYERS IN THE COMMUNITY

The First Report of the Victoria Law Foundation's recent survey of lawyers in the Victorian community is nearing completion and should be published before the end of the year.

It is proposed that this First Report should cover the following principal areas:

- lawyer's social characteristics (age and sex distributions; social background; ethnic background; current income; educational background)
- roles of lawyers (current range of occupations; work satisfaction; additional work roles; occupational mobility; "dropping out")
- problems of legal practice (areas of law; clients; work loads)
- opinions on legal education and practical training
- opinions on areas of special concern to the profession (specialization; advertising; fusion; efficiency; socio-legal needs)
- lawyers and their professional associations.

The detail of the Report will be settled in consultation with the Advisory Committee, which includes representatives of the Bar Council and the Law Institute.

The response to the questionnaire was most encouraging. The over-all response rate came close to 70%, which is regarded as excellent for a project of this kind. Moreover, studies have shown that the respondents can be regarded as representative of the group as a whole. Hence the findings of the survey can be accepted as reasonably reliable for the total lawyer population.

Analysis of the vast amount of data collected is of necessity slow work, even with the assistance of Melbourne University's computer. This First Report will not be the last, although it is likely to be the most basic. Pending its publication, preliminary drafts of analyses in particular areas are being made available to

institutions or researchers with urgent need of them, including the professional associations.

The Foundation is most grateful for the co-operation it has received from the profession in this undertaking.

AN ARCHIVIST FOR THE BAR

As far as I am aware, no specific effort is made on behalf of the Bar to record and preserve the rich store of oral and written material from days past which lies in the memories and desk drawers of its members. If something is not done soon much of this precious stuff will be lost. It is time, I believe, for the appointment of a Bar Archivist to collect and collate what is available. To illustrate my point: below is a valediction by Judge Stretton delivered over twenty-three years ago, and I wonder how many members of the Junior Bar know we once had a colleague with this supreme mastery of the English language.

J.H. Phillips

Valediction by Judge Stretton in tribute to late Judge Book 11th Court, June 9th, 1954

Members of our profession — we meet upon this day of sorrow to speak the name of Clifford Henry Book who was well-loved in the brotherhood of the Law. For more than thirty years he lived and worked among us. So much had he become one of us that it is hard to imagine he is no longer with us.

Early in life he chose the path of service to the State. As Crown Prosecutor, and later in the seat of judgment, he left no blemish on the name of the great institution of the Law which so long he served with quiet distinction. His personal life was virtuous. His manner of living bore upon the lives of those about him as beneficent influence. He worshipped his God. He did his duty. He had the gift of friendliness. He did not reject the good things of this world, nor did he despise the common consolations of mankind. He saw the complexity of life clearly and he saw it whole. Clifford Book was a sound man, a good man.

In his work as Prosecutor he recognised that he held an unusual responsibility; and so it was that he combined in himself the qualities of astuteness, resourcefulness and fairness which are expected of those who are appointed to that office in a British community.

All that one heard of his judicial life was good. He knew the ways of men and was not to be deceived; but his tolerance ensured that his judgment should not be impaired by unworthy suspicion or by prejudice. When he sat in judgment upon those who had offended against the criminal law he faced his duty squarely. He was just and merciful.

His life beyond the law was a full life. In his church and in the brotherhood of Freemasonry he has left a name which will be held in loving memory.

One feels that his religion was a potent reality and that, because it was so, the dark threshold of death would be, for him, the portal to the poet's "white radiance of eternity".

May our good friend and brother rest well.

THE BAR DRAIN

The thought of Castan and Segal digging potatoes next year in a Kibbutz in Israel, makes you wonder whether there may yet be an escape from practice at the Bar other than the grave or judicial appointment.

Retentive readers will recall that in June 1966 an article in this journal discussed the problems caused by the tremendous influx of younger

barristers. A brief glance at the annual reports show that the numbers of those signing the roll has in no way abated since then, as the following table illustrates:

Year Ending	August 1968	1969	1970	1971	1972	1973	1974	1975	1976	1977
Number Signing	36	30	37	51	52	39	44	73	103	59
Total in practice	302	327	343	*	396	429	444	497	558	565

* Figure not available.

The figure given for those in active private practice includes all those keeping chambers in Victoria but does not include Crown Prosecutors or Parliamentary Counsel.

From year to year some balance has been preserved by the numbers of those who leave active practice for various reasons. By far the most common fate is appointment to the Bench. This is followed by the transfer of barristers to the solicitor's branch of the profession and the third, in order of numbers, is death. In all, over the last decade, 163 barristers have ceased active practice. Of these 56 became judges, 25 became solicitors and 19 died.

It is of interest to note that the years of greatest influx have also been the years when the greatest number left. The following table has been compiled from information gathered from varying sources showing, in the case of those leaving active practice, where each went immediately following his departure.

	Died	Judge	Pros.	Sol.	Business	Retired	Govt.	Uni.	Unknown	Other	Total
1967-68		3		1					1	1	6
1968-69	1	3			1	1				1	7
1969-70		4			1		2			1	8
1970-71	5	3			1	2	2	1	2	2	18
1971-72		6		1	2			1			10
1972-73	2	3	1	4	1		1			2	14
1973-74	3	4	2	8	2					1	20
1974-75	3	5	1	1			1		2	3	16
1975-76	1	14	3	8	1	1	2		1	1	32
1976-77	4	13		2	1	1	2	1	3	5	32
Total:	19	58	7	25	10	5	10	3	9	17	163

The very great number of judicial appointments in the last two years is far from characteristic. Unless there is drastic change in the structure of the Courts, it is likely that in the foreseeable future the numbers becoming judges will fall back to the traditional 3 or 4 per annum. The consequence of this will doubtless be a great strengthening of the senior bar in the next decade.

A surprising feature of the information in the table is the relatively small number of barristers leaving to become solicitors. It had been supposed that large numbers of counsel, especially at the junior level, would find life at the Bar unprofitable and would return to the greater security of salaried employment in Solicitor's offices. As to the profitability of their practices, one cannot be certain. But the predicted exodus has not occurred.

The figure for death may speak volumes for the healthy atmosphere of private practice at the Bar. Or possibly, at current rates of taxation and provisional tax,death is a luxury we cannot afford.

The other figures speak for themselves. It is to be deplored that there is relatively little movement between the Bar and the Universities. A busy practice gives little time for research and examination of the broader implications of the law, the study of which would doubtless be of advantage upon judicial appointment.

In the classification "Government" there has been included a number of miscellaneous appointments such as Shore's appointment to the Patents Office, Todd's departure to the Taxation Board of Review, and the two Small Claims Tribunal Referees, Strathmore and G. Johnstone.

In the year ended 1977, 5 members have joined the ranks of the "Miscellaneous". These include Neil Roberts who has become a Magistrate in Hong Kong, Cahill who has become Crown Counsel in that Colony, Toohey who has gone to the Legal Aid Committee and Brear who went tothe Fitzroy Aboriginal Legal Aid Office.

The following table shows the seniority of those leaving the Bar in the last ten years.

	Under 1 year	Under 2 years	Under 3 years	Under 4 year	Under 5 years	6-10 years	11-15 years	Silks & over 15 yrs.	Total
1967-68			1	1				1	3
1968-69		1						2	3
1969-70			1	1			1	1	4
1970-71		1	1	2		2		4	10
1971-72		1		1		2			4
1972-73		2	1	1	1	2		1	8
1973-74	2	1	1	1		4		2	11
1974-75	1		3			2	1		7
1975-76	1	4	1	2	1	3	2		14
1976-77	1	2	3	1	1	6	1		15
Total	5	12	12	10	3	21	5	11	79

There is no question here of an exodus of juniors.

Once at the Bar it seems it takes a rare plum to entice someone away. Or maybe we feel we are on a tram and can't get off. Or is it somewhere in between? And in any event, is such speculation useful?

Heigh-ho, back to the paper work.

SPORTING NEWS

The annual golf match between the Bar and Bench versus The Services was held at Metropolitan Golf Club on the 29th September, 1977.

The Bruche Cup was successfully defended by the Bar and Bench and the MacFarlan Cup once again was taken home by the Services.

A short history of the annual contest has been prepared by a member of the Services and is available from Cashmore. In essence, the matches started in 1925 largely due to the efforts of Judge Ellis. The Bruche Cup is played in honour of Major-General Sir Julius Burche who had earlier become fully qualified as a Barrister and Solicitor. The MacFarlan Cup is, of course, named after Sir James MacFarlan who was a Supreme Court Judge and played off a low mark at Royal Melbourne.

The attendance by the members of the Bar and Bench has been somewhat disappointing lately and the following proposal is to be discussed: "In future years, we assemble at a nominated course, play our respective matches and decide the outcome of the two trophies. On conclusion of the event, we retire to a Service Mess in the Melbourne area where a formal dinner and trophy presentation will be held."

Your reaction to this proposal should be given to Cashmore.

David Martin's mare "Gold Melody" has run her last race and is (hopefully) in foal to the English stallion Estaminet who stands at Colin Hayes' stud at Lindsay Park in South Australia. I understand the owner got a little hot under the collar when she was balloted out of the Marlboro Cup won by Raffindale.*

Four Eyes

(* Gold Melody on the other hand was happy to settle for Estaminet. — Ed.)

FORMER DOG REVISITED

The author of "Former Dog Refuses To Eat Dog" (Bar News, Spring 1977) would be well advised to continue his professional indemnity insurance, to cover himself against claims by any English Counsel who may have relied upon his advice and let their standards, and premiums, slip. His assertion that English Counsel are immune from all actions for negligence is somewhat wide of the mark, and is certainly not justified on the basis of **Saif Ali v. Sydney Mitchell & Co.** (1977) Sol. Journal 336.

The House of Lords decision in **Rondel v. Worsley** (1969) 1 AC 191 established the principle that a barrister is not liable in negligence for the conduct and management of a cause in court. That immunity was also said to extend to necessary preliminary work, such as the drafting of pleadings, but not to matters unconnected with cases in court.

The New Zealand Court of Appeal considered the matter in **Rees v. Sinclair** (1974) 1 N.Z.L.R. 180, and in his judgment McCarthy, P. said that "the protection exists only where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing".

The principle is clear from the cases cited, and appears to have been based upon the public's need for an independent Bar, the likelihood of such actions requiring retrial of the original action, and the facts that barristers cannot pick their clients, nor sue for their fees.

The decision of the Court of Appeal in **Saif Ali v. Sydney Mitchell & Co.** (supra) does not depart from the principle of the two cases previously cited. In his judgment, Lord denning, MR, with whom both Lawton and Bridge LJJ concurred, said that it was "plain that a barrister was not liable for negligence in the conduct of litigation or in advising in connection with it". His Lordship relied upon both **Rondel v. Worsely** and **Rees v. Sinclair** in his judgment, and nowhere extended their principle. Once again the considerations of public policy seem to have been

the main reason for maintaining the immunity. As Lawton LJ said, "public policy required that barristers should perform the function of a legal sieve and that in performing that function they should not be liable for negligence."

The position of members of the Victorian Bar is complicated by the fusion of the profession in this State, and by Section 10 of the Legal Profession Practice Act 1958; and has been canvassed by Heerey in the Australian Law Journal Volume 42 at page 3.

Counsel should note that, notwithstanding the concern of the English Bar, **Saif Ali v. Sydney Mitchell & Co.** is a decision of Lord Denning MR in the Court of Appeal. It arose because Saif Ali's action, commenced on counsel's advice against the owner of a vehicle, was discontinued following the House of Lords decision in **Launchbury v. Morgans** (1973) A.C. 127. That case stands for the proposition that the owner of a vehicle is only liable for the negligence of one who uses it, if a relationship of agency exists. The House of Lords expressley overruled the earlier decision of **Launchbury v. Morgans** (1971) 2 Q.B. 245, which stood for the proposition that the owner of a vehicle is liable for the negligence of one who uses it if he has merely given his permission for the journey. **Launchbury v. Morgans** (1971) 2 Q.B. 245 was the decision of Lord Denning in the Court of Appeal.

C. Gunst

MOVEMENT AT THE BAR

Members who have signed the Roll (since September 1977)

R. MURUGASON
J.R. CHAMPION
T. SEPHTON
D.M. SALEK
P.J. GREY
L. WENGROW
R.C. BENKEL
J.S. BESSELL
D.S. LEVIN
R.C. KENZIE (N.S.W.)

Members who have transferred to the Non-Practising List

A.I. GIANNE
H. SEGAL

Member whose name has been removed at her own request

M. ROSENBAUM

SOLUTION TO CAPTAIN'S CRYPTIC NO. 22

1 B			2 R		3 S		4 T		5 L	A	6 M	E
7 A	D	V	I	C	E	N	O	T	E		C	
N			N		M		C		A		I	
8 K	9 I	N	G		10 B	R	O	O	K	I	N	G
	N		R		L		S				E	
11 S	T	R	O	K	E		12 T	E	13 N	U	R	E
	E		A						U		N	
14 C	R	A	D	L	15 E		16 B	U	M	P	E	R
	D				Q		R		E		Y	
17 T	I	N	18 C	T	U	R	E		19 R	A	J	20 A
	C		O		I		T		O			I
	T		21 I	N	T	R	O	D	U	C	E	D
22 H	A	L	F		Y		N		S			E

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