Victorian Bar News

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BAR COUNCIL REPORT

At its meeting held on 29th March, the Bar Council resolved to recommend to Barristers Chambers Ltd. that existing rent subsidies to young barristers be terminated.

The effect of such a decision by the Company is that future applicants to sign the roll of Counsel will not receive any subsidy. Members presently entitled to subsidy will have it withdrawn at the end of twelve months.

Rex Wild, who has been the Honorary Secretary of the Bar Council since Easter 1977 has retired from that position as from 16 March, 1979. P. C. Dane (the former Assistant Honorary Secretary) has been appointed to replace him. The new Assistant Honorary Secretary is J. M. Murphy.

The Bar Dinner for this year will be held on 12 May, 1979 at the Leonda Restaurant Hawthorn. "Price lists" will be available shortly but it is likely that Cummins Q. C. will not be required to pay for his meal since he has been briefed to appear as Mr. Junior Silk at the dinner.

AUSTRALIAN BAR ASSOCIATION REPORT

At its last meeting, the Australian Bar Association appointed a standing committee to consider ways in which professional indemnity insurance and superannuation for barristers could be organised on a national basis. The committee consists of John Hanlon Q. C. of the Victorian Bar and Rodney Purvis Q. C. of the New South Wales Bar. It is expected that the committee will report on this question to the Association at its next meeting.

The Association also resolved at its last meeting to make a gift to the High Court of Australia to mark the opening of its building in Canberra (which is expected to take place early in 1980). The gift is to consist of a bas relief depicting the first sitting of the High Court. It will be prominently displayed in public areas of the building.

CONGRATULATIONS: SOUTHWELL J.

In 1969 Alec James Southwell left active practice at the Bar to take his seat on the County Court Bench. Like his friend Gray J., he served there for ten years until his appointment to the Supreme Court on 3rd April this year.

His Honour's education was at Melbourne Grammar and Melbourne University, then with Naval Reserve until he signed the Bar Roll in 1951. He read in the chambers of Ben Dunn, another County Court Judge successfully translated to the Supreme Court. During his time at the Bar His Honour acquired a reputation of a formidable adversary in all aspects of the personal injury field. He had four readers, Hanlon Q. C. , Bennett Q. C., Stott and Croke.

He is a man of considerable energy. In addition to a reluctance to spare himself (and others) in discharging his judicial work-load, the Judge finds time to engage in sailing (joing Commodore Sorrento Sailing Club), golf (single figure handicap at Commonwealth), woodwork (he has built boats and assisted in the construction of his Sorrento house) and tennis. A regular visitor for lunch at the Victoria Club, he exhibits there a considerable skill at snooker and billiards. He has had an interest in Metropolitan winner "Losari".

His Honour has distinguished himself during his decade on the County Court. The State of Victoria has had the benefit of his report as Education Board of Enquiry in 1971. He sat as a Marine Court of Enquiry into the loss of the tug "Melbourne" and very recently into the loss of the "Shark" at Lakes Entrance.

The Bar congratulates the Judge in his new office and wishes him a long and satisfying term in its discharge.

FOR THE NOTER UP

Supreme Court of Victoria
Judges

Add: Southwell J. (1969) 52 1.11.26 1979
1998

County Court

Delete: Judge Southwell (translated to Supreme Court 3.4.79).

RULINGS ON PROFESSIONAL CONDUCT

Anticipating great demand pursuant to s.14M of the Legal Profession Practice (Discipline) Act 1978 (see Summer Edition p. 7), the Bar Council has deprived itself of the prescribed fees by publishing a series of Rulings on professional conduct as follows:—

1. A barrister shall observe the rules of conduct which are observed by the Bar of England so far as the same are applicable to conditions in Victoria and so far as they are not inconsistent with any established practice of the Victorian Bar or inconsistent with any ruling of the Victorian Bar Council.
2. The Bar Council or the Ethics Committee on application by a barrister in respect of any particular matter may authorise on the part of the barrister conduct which without such authority would be an infringement of a ruling made by the Bar Council or a matter of professional conduct or practice. If the authority is given subject to any conditions the barrister shall duly observe and perform each such condition.
3. In a contentious matter a barrister shall act as such only on the instructions of a solicitor provided that in contentious business before the Commissioner of Patents, Registrar of Trade Marks, Registrar of Designs or the law officers a barrister may be instructed by a patent attorney aithout the intervention of a solicitor.
4. A barrister shall not accept instructions to advise or settle documents from any person acting on behalf of a client except:—
   (a) A solicitor; or
   (b) In non-contentious business and in appropriate cases, a patent attorney.
5. A barrister shall not bind himself to act for any client save by the delivery and acceptance of a retainer.
6. A barrister shall not accept a brief marked with a contingent, conditional or alternative fee.
7. A barrister shall not accept more than one brief in the one court for the one day unless he can do justice to each brief without interfering with the court's disposal of its business.
8. A barrister shall not act in any proceedings in which it is likely that he will be required to give evidence.
9. A barrister shall not act in any proceedings in which it is likely that he will have a direct or indirect interest (other than counsel) in the outcome of the proceedings.
10. A barrister appearing in court in Victoria shall not appear with or hold a brief with any other person unless that other person:—
    (a) Is of counsel on the Roll; or
    (b) Is not a Victorian practitioner and is a member of a separate Bar in another State recognised as a separate Bar by the Victorian Bar Council.
11. A barrister participating in a legal aid scheme other than under any Legal Aid Act shall comply with the following rules:—
    (a) He shall provide his services without fee.
    (b) He shall not act in such a way as to as to give rise to any suspicion that

he is giving his services in order to obtain an introduction to solicitors or financial gain.

(c) He may act as a barrister for a lay client of the Legal Aid Scheme who he himself has advised but only if he is intructed by a solicitor and he himself acts without a fee.

(d) He may act with or without fee as a barrister for a lay client of the Legal Aid Scheme if he is intructed by a solicitor and he has not previously advised the client under the Legal Aid Scheme.

12. Two Counsel Rule

(a) Subject to part (b) of this Rule a Queen's Counsel shall not appear in any court or tribunal unless a junior counsel is briefed with him.

(b) Part (a) of this rule does not affect the existing practice relating to a Queen's Counsel appearing alone in a court of disputed returns or in a matter in which he was retained when he was of junior counsel.

13. Two-Thirds Rule

(a) Save where a brief has been declined under Part (c) of this Rule it is not improper for counsel to indicate the name of a counsel or the names of a number of the counsel (whether junior or senior to him) whom he considers that it would be desirable to be briefed with him or in his place in a matter.

(b) Where two counsel are briefed in a matter, the junior of them should charge a proper fee in all the circumstances of the case. A proper fee may be more or less than two-thirds of the fee of the senior of them.

(c) It is proper for Queen's Counsel to decline a brief in any matter on the ground that in his opinion he will not be afforded such assistance by other counsel also briefed in the matter as he considers desirable in all the circumstances.

14. A barrister who has accepted a brief to appear on his own which brief has not been returned shall be present in court ready to represent his client on each occasion that the case is called on for hearing.

15. A barrister who has to return a brief shall do so a reasonable time before the hearing so that the solicitor may have an opportunity of properly instructing some other barrister.

16. A barrister who accepts a brief to conduct a case shall do so to the exclusion of the solicitor.

17. Save in circumstances of necessity, a barrister shall not have direct dealings with the opposing party or anyone on his behalf other than through his own solicitor or counsel for the opposing party.

18. A barrister shall not use, refer to or divulge in the examination or cross-examination of any witness or otherwise in the course of any court proceedings any matter which has occurred or arisen in the course of an interview, conference or consultation had by him with the barrister or solicitor for any other party to the proceedings except by consent or unless what occurred resulted in the creation of some contractual or other legal relationship or it was expressly stated before the commencement of such interview, conference or consultation that matters occurring thereat should not be regarded as without prejudice or priveleged from use or disclosure.

19. A barrister shall not give an undertaking to the court on behalf of his solicitor or his lay client without the express authority of the person concerned.

20. Save where a barrister advised a lay client directly, all fees shall be collected

from the solicitor or patent attorney by whom the barrister is briefed and in any event all fees shall be paid to the barrister's clerk.

21. A barrister shall not receive any monetary gift from client and if any such gift is sent it shall be returned to the client.

22. A barrister shall not attend the office of a solicitor for any purpose except:—

    (a) Where the relationship of solicitor and client exists between the solicitorand the barrister and requires the barrister to attend at the solicitor's office.

    (b) Where a barrister on circuit attends at the office of the solicitor for the purpose of conferring with a client and witnesses or for other purposes of the cases in which he is briefed.

    (c) Where permission is granted by the Ethics Committee.

23. A barrister shall reply to correspondence from the Ethics Committee when asked to do so.

24. An applicant to sign the Bar Roll shall not make any misrepresentation in his application to sign the Bar Roll.

25. A barrister after signing the Bar Roll shall forthwith give to the Secretary notice in writing of any misrepresentation in his application to sign the Bar Roll.

26. A barrister shall observe and perform each undertaking given by him in or in connection with his application to sign the Bar Roll or in connection with the granting by the Bar Council of consent to his signing the Bar Roll.

27. A barrister shall pay in the manner and within the time required the amount of any fine imposed on him under Part IIA of the Act.

28. A barrister shall not without permission of the librarian remove or cause to be removed any library book from the Bar library.

29. A barrister shall not remove or cause to be removed any book from the library of any other barrister unless a notice is left at the shelf from which the book is taken which states the name of the book, the date of the borrowing and the name and room number of the borrower.

30. If a book is borrowed from a library of another barrister, then unless the owner expressly agrees otherwise:—

    (a) The book shall be taken only to the chambers of the borrower.

    (b) The book shall be returned on the day on which it is borrowed or the next day.

    (c) The book shall not be left in the chambers of the borrower behind a locked door.

    (d) If the book is borrowed and returned damaged or not returned to the owner, the borrower shall forthwith pay to the owner the the cost of repairing the book or replacing the set of which the book is a part as the case may be.

31. A barrister shall not publish either orally or in writing or otherwise his opinion of the professional characteristics of his fellow barristers or any of them in such a way or in such circumstances as to impugn the dignity and high standing of his profession.

32. A barrister shall not do anything in the nature of advertising or touting.

33. A barrister shall not perform the work of a solicitor.

34. A barrister shall not without the permission of the Bar Council practice from chambers other than those provided by Barristers' Chambers Ltd.

35. A barrister whose name is on the Practising List shall have acting for

him as his clerk one of the barristers' clerks.

36. A barrister shall not entertain his clerk or be entertained by his clerk save with the consent of the committee of his clerking group.

37. No gift or anything in the nature of a gift shall be made by a barrister individually to his clerk or to any member of the staff of his clerk.

ETHICS COMMITTEE REPORT

The committee met on six occasions since the last issue of the Bar News. During those meetings, it considered five complaints by solicitors against individual members of the Bar, three complaints made by barristers against other members of counsel and it dealt with six requests from counsel for rulings.

In respect of the complaints made by the solicitors, the Committee dealt with three of them by way of summary hearings.

(a) One counsel was charged with having failed to return briefs to three solicitors, each of whom requested that he return the respective briefs. Counsel attended upon the Committee. He admitted that he was asked to return the briefs in question, but in the circumstances which he outlined to the Committee, he had failed to do so. The Committee determined that in failing to return the briefs in question, counsel had committed a disciplinary offence and was directed to pay fines totalling $300. Advice was also tendered to him to the effect that it was an obligation of counsel to return briefs to his instructing solicitors as soon as was practicable after the return of them has been sought by the solicitors.

(b) Another member of counsel was charged with having breached an undertaking given to a solicitor during settlement of a case in which that counsel was a litigant. It was alleged by the solicitor in question that he accepted the undertaking only because he knew that it was given by a member of the Bar. The Committee met on three occasions, heard witnesses who were called by the counsel concerned and received arguments and submissions from him. The Committee determined that it was satisfied that counsel had breached the undertaking in question and that in all the circumstances, he was guilty of a disciplinary offence. He was fined $250.

(c) A third member of the Bar was charged with failing to pay his annual subscriptions in accordance with the Rules. The Committee determined that he was guilty of a disciplinary offence and directed that he pay a fine of $50.

Chernov

INQUIRY INTO ABORIGINAL ACCESS TO LEGAL AID

The Minister for Aboriginal Affairs, Senator the Hon. F. M. Chaney, has requested that the the Committee inquire into and report on the access of Aboriginals to legal aid with particular reference to:

1. The special needs and demands of Aboriginals for legal aid;

2. The extent to which the legal needs and demands of Aboriginals are being met by Aboriginal Legal Aid Services and other legal and counselling agencies;

3. The costs and benefits (economic and social) of Aboriginal Legal Aid Services; and

4. The means of meeting the special needs and demands of Aboriginals for legal aid in the future.

As part of its inquiry the Committee will be seeking submissions from Aboriginal groups and organisations concerned with the access of Aboriginals to legal aid including the Aboriginal Legal Aid Services. It will also be inviting written submissions from representatives of Commonwealth and State Government departments, Legal Aid Commissions, Law Reform Commissions, the courts, Law Societies, University Law Faculties and others interested in the inquiry.

Some of those making submissions to the inquiry may be asked to appear before the Committee at public hearings to be held later in the year to give supporting evidence to their submissions.

The Committee would be pleased to receive submissions from any other individuals or organisations interested in the access of Aboriginals to legal aid.

It would be helpful if those proposing to lodge submissions with the Committee would notify the Secretary to the Committee of their intention as soon as possible.

This is the second matter which has been referred to the Committee during the 31st Parliament. The first reference, received from the Minister for Aboriginal Affairs on 16 March, 1978, requested that the Committee inquire into and report on Aboriginal health.

The Committee recently completed its inquiry into Aboriginal health and proposes to table the report during the forthcoming period of parliamentary sittings.

The Committee is aiming to complete the inquiry into the access of Aboriginals to legal aid and report to the parliament before the end of 1979.

The membership of the Committee is as follows:

Mr P. M. Ruddock M. P. (Chairman)
Mr A. C. Holding M. P. (Deputy Chairman)
Mr S. E. Calder DFC, M. P.
Mr J. S. Dawkins M. P.
The Hon. D. N. Everingham M. P.
Mr P. D. Falconer M. P.
Mr J. R. Johnson M. P.
The Hon. R. C. Katter M. P.

Inquiries and written submissions should be addressed to The Secretary, House of Representatives Standing Committee on Aboriginal Affairs, Parliament House, Canberra, A. C. T. 2600 (Tel : 062 72 6770).

LAWYERS SUPPORT NO FAULT DIVORCE

The Law Council of Australia has asked that there be no change to the "no fault" Divorce Law.

The request is part of a lengthy submission prepared by the Council's National Family Law Committee for the Joint Parliamentary Committee on the Family Law Act. The Committee comprises delegates from all States and the A. C. T.

Reference to "fault" increased bitterness between parties and leads to an inaccurate assessment of the true responsibility for the breakdown of the marriage. Frequently neither party was to blame.

The submission says that the present provision of the Family Law Act for a 12 months' waiting period allowed the parties a breathing space and the opportunity to seek guidance from counsellors.

However, under the previous Act, it was possible to obtain a divorce more quickly and easily using the "fault" grounds.

The Family Law Act has strengthened family ties and the institution of marriage because it had made provision for counselling to assist both parties.

The submission criticised the lack of staff at all levels of the Family Court of Australia as this causes delays which have adverse effects on the family. The Committee strongly recommended that more judges, registrars, deputy registrars and counsellors be appointed.

The submission urges that the Institute of Family Studies be brought into operation in order that the full effects of the Act can be assessed.

COMMERCIAL CAUSES LIST

On 1st February 1979 Victoria acquired a Commercial Causes List. Order 14 of Chapter II of the Supreme Court Rules defines a Commercial Cause in the following terms:

> "Commercial Cause means any action commenced after the 1st day of Febrary, 1979 arising out of the ordinary transactions of merchants and traders or relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking, mercantile agency or mercantile usages."

This definition has as its origin the description contained in the Judges' Ruling in England in 1895 and incorporated in the Commercial Causes Act 1903 – 1957 (N. S. W.). A useful analysis of the definition is to be found in Malleys v Horton Investments (1961) 78 W. N. (N. S. W.) 1128.

A significant feature of the new procedure is that a cause is not entered into the list as of right. It is necessary to apply to the Judge in charge of the list (Menhennitt J.) for an order to that effect.

On 9th March 1979 the first applications were made to include cases in the new list. On that occasion, His Honour observed that the occasion was an historic one. He took the opportunity to make the following observations upon the expected function of the new list:—

> Basically the object of this list, these rules. is to give, in effect, preferential treatment to Commercial Causes. The rules recognise that Commercial Causes involve matters in which people in the business community often need to know where they stand relatively promptly. That is true, of course, of all litigation, but there are considerations in which promptness sometimes is more significant in Commercial Causes than in other causes, and that is why these rules, the Supreme Court (Commercial Causes) Rules, have been made, and that is why the list has come into existance, and basically the whole object behind the creation of this list is that the real issues of Commercial Causes shall be identified as early as possible, and that they shall be dealt with in the most expeditious and suitable way possible. That is not spelled out in the rules expressly, but that is what the objective is, and having said that, I reiterate that the success of the rules will depend very significantly on the extent to which the members of the Bar and the solicitors appreciate those objectives, and take steps to endeavour to see that they are implemented."

Dealing with an early application His Honour emphasised the discretion invested in the Judge considering an application for entry. There are now in Victoria no divisions of the court as exist in other places, but certain Judges have been given responsibility for certain classes of cases. Thus the Chief Justice has appointed the following supervising Judges:

Crime:	Anderson J.
Commonwealth Tax Appeals:	Jenkinson J.
Building Cases:	Brooking J.
Land Valuation:	Gobbo J.
Industrial Property:	Fullagar J.

In refusing an application for entry of a breach of confidence case into the Commercial Causes List, His Honour observed that, even if it was a commercial cause within the above definition (which was by no means certain), then he would still reject it for inclusion in the list since it was a case more appropriate for supervision by the Judge in charge of the Industrial Property Cases.

It is still too early to assess whether the new rules will achieve the purposes described by

Menhennitt J. We might all hope that with the co-operation of the profession the new list will ensure that the legal processes are more able to serve the commercial community than has been possible in the past.

A NEW TAX

"But in this world nothing can be said to be certain except death and taxes" —
— Benjamin Franklin, 1789.

An amendment to the Income Tax Amendment Act has been made which may have the result that payments in many business leases will no longer be allowable deductions. The amendment was introduced in a Bill for the Income Tax Assessment Amendment Act (No. 5) 1978. It has been passed, and has recently received the Royal Assent.

Purpose of the Amendment

The general purpose of the Act, is to catch those schemes which use prepayment of interest and rentals for high deductions. But as we shall see, the Act will catch many bona fide business leases, and the taxpayer will not know in advance whether his payments will remain deductions or not.

The Essence of the Bill

The Act will affect any lease which has the following characteristics —

(a) one of its results would be a reduction in taxation;
(b) there is a prepayment element or the rental is higher than it would be if property might not ultimately pass to the lessee or an associate;
(c) property ultimately passes to the lessee or an associate by reason of the agreement;
(d) the price of acquiring the property is les
(d) the price of acquiring the property is less than an arm's length value, by reason of prepayments.

The Text

"82KJ. Where —

(a) a loss or outgoing in respect of which a deduction would, but for this section, be allowable, was incurred by a taxpayer after 19 April 1978 by reason of, as a result of or as part of a tax avoidance agreement;
(b) having regard to the benefit in respect of which the loss or outgoing was incurred (but without regard to any benefit relating to the acquisition or possible acquisition of the property referred to in paragraph (c)), the amount of the loss or outgoing was greater than the amount (if any) that might reasonably be expected to have been incurred, at the time when the loss or outgoing was incurred, in respect of that benefit if the loss or outgoing had not been incurred by reason of, as a result of or as part of a tax avoidance agreement;
(c) property has been, will be, or may reasonably by expected to be, acquired by the taxpayer or by an associate of the taxpayer as a result of, by reason of, or as part of the tax avoidance agreement;
(d) the consideration (if any) that was payable in respect of the acquisition of that property was less, or the consideration that may reasonably be expected to be payable in respect of the acquisition of that property is less, than the consideration that might reasonably be expected to have been payable, or to be payable, as the case may be, in respect of the acquisition of that property if the loss or outgoing had not been incurred.

notwithstanding any other provision of this Act, a deduction is not allowable to the taxpayer in respect of the loss or outgoing".

There are also some definitions in a new section 82KH:

"associate" has a definition running to

three pages and includes spouse, child, relative, partner and so on.

"property" includes a chose in action and also includes any estate, interest, right or power, whether at law or in equity, in or over property;

"tax avoidance agreement" means an agreement that was entered into or carried out for the purpose, or for purposes that included the purpose, of securing that a person who, if the agreement had not been entered into or carried out, would have been liable to pay income tax in respect of a year of income would not be liable to pay income tax in respect of that year of income or would be liable to pay less income tax in respect of that year of income than that person would have been liable to pay if the agreement had not been entered into or carried out."

Comments

From the text of the section, it is clear that a business lease will be regarded as a tax avoidance agreement, where the payments are sought to be deducted from assessable income. If no deduction of payment is sought, then an agreement does not become a tax avoidance agreement and the section will not operate.

The section will apply in respect of deductions which are sought from April 19, 1978. By a proposed amendment to section 170 of the Principal Act which is contained in Clause 20 of the Amendment, the Commissioner will be given an enabling power. He will be allowed to make retrospective amendments to assessments made in previous years.

The section seems to operate in the following way. The taxpayer enters a leasing agreement for a car, say, in the middle of 1978. The new cost of the car then was $10,000. His lease is from one of the large leasing organizations. It is to run for three years. At the end of the three years he will have the power to purchase the car for 50% of its price, that is, for $5,000. He takes the car and commences to make his payments. Because he uses the car for business, he deducts his payments from his assessable income. The Commissioner allows his deduction. The system continues unchanged for the three year term with payments being made, and deductions for those payments claimed and allowed. At the end of the term of the lease, in the middle of 1981, he buys the car for $5,000. At that time the market value of his car is more than $5,000. The Commissioner applies section 82KJ. All his payments which have previously been claimed and allowed now cease to be deductions, not just partially, but wholly. His tax returns for the last three years are re-adjusted. Upwards.

These principals will apply to any leasing or other agreement described in the section.

The nature of the property is not relevant. As well as cars and plant of any sort, the section can apply to books, secretarial equipment, farm machinery and so on.

Ways Around the Section

(1) Having your wife buy the car. Not on, because of the broad definition of "associate".

(2) Selling your interest in the unexpired portion of the lease to a stranger. This is a possible solution. Depending on the actions of the Commissioner, we may see the rise of companies specialising in such purchases. However the operation of S. 82AJ is not entirely clear in these regards, and some dangers may exist in this case.

(3) Bringing the leasing agreement to an end before the entitlement to acquire the property arises or simply not acquiring the property. This would seem one satisfactory solution in relation to cars and some plant. The Commissioner will have difficulty working out the figures, especially if your friendly car trader will put a high value on the old car. In these circumstances the Commissioner is unlikely to act.

This system would not work for those Counsel who have libraries on lease for an extended term with a residual value of $1 as some do.

(4) Ascertaining that the leasing company in question has had its leasing figures approved by the Commissioner as not being unreasonable or such as to attract the operation of S. 82KJ.

Complaints About the Section

1. It is very difficult to understand. For instance, look at S. 82KJ (b) again. Let a quote from the editorial of the Australian Tax Review suffice: "When the Income Tax Assessment Act, which is relevant to every commercail transaction and is often regarded as of decisive importance, becomes so complex that it is unable to be understood, not only by the general class of taxpayers, but even by those who are regarded as experts in the area of taxation law, grounds for very great concern arise" (Vol. 8 No. 1 (March 1979) P.1).
2. The taxpayer cannot order his affairs with confidence. If market fluctuations beyond the taxpayers control push the price of his property up in spite of his expectations, he is in trouble. All his payments will cease to be deductions.
3. It pays no regard to inflation. The consensus in the business community now is that inflation will not reduce below 7% p.a. in the foreseeable future. This affects the value of the property and of itself may bring the section into operation.
4. The section is self operating. The Commissioner is not given any discretion. This underlines the unfortunate and unpredictable consequences of the section. First it will be unjust in terms of the section if it is applied in only some cases of breach. Secondly the section affords no defence to its breach. The only argument could be on the calculation of "consideration".
5. The penalty is too great. Where the market value exceeds the residual value only marginally, it is a grave penalty to disallow all previous deductions (rather than, for example, previous deductions to the extent that they represent excessive payments).

DAVID ROSS

VICTORIAN LAWYERS SURVEYED

Last year Charles Q.C. ran into a little pother when he ventured to express doubts as to the competence of some of the younger members of the Bar. Some of those who resented these observations doubtless studied at the feet of Professor Nash, Dean of Monash Law School and author of the bulky tome which they cart about the suburban courts. At a seminar given by the Victorian Law Foundation in conjunction with the Law Institute on 17th March the Professor delivered a paper on the recently published "Victoria's Lawyers" in which he had the following to say about the future of the Bar:—

> "The Bar is at present in a strange position. Its numbers are greater than they have ever been in the past, but it is bottom heavy. There are a great number of silks and a huge number of junior juniors but the percentage of the bar with more than five years experience is very small. More importantly many of the very junior barristers are at the bar because they have been unable to obtain employment as solicitors. They are not barristers because they are experts or because they have special qualifications, but because they could not persuade a solicitor to employ them. This is a most strange condition for the branch of the profession which takes pride in its expertise, its specialisation and its innate intellectual superiority over the soliciting branch.
>
> The bar needs to impose some curb or control on its numbers and the quality of its intake. Analogies from English experience can be misleading. The nature of chambers and the difficulties of entering particular set of chambers in the United Kingdom system are quite different. In Victoria at the present time, any person admitted to practice who can persuade a junior barrister of the requisite standing to share a room with him for six months can sign the Roll of Counsel. Not unreasonably, members of the Bar are reluctant to refuse a fellow practitioner this opportunity,

particularly when they only have to live with him for six months. Unless some quality control is exercised at this level, the bar will lose credibility as a specialist institution and the role of the bar as we traditionally see it, must disappear.

I have adverted to the tendency of country and suburban solicitors to "brief" specialists from the larger firms rather than members of the bar. This is a growing tendency and it is one which may well be accelerated if the bar cannot regain its image as a specialist institution. I do not propose here to canvass the merits or demerits of de facto fusion of the profession. Although we have de jure fusion in this State the question of de facto fusion is clearly a major issue. I do not know that I believe in fusion; but that non-belief is premised on the desirability of a small elite bar of lawyers who are either experts or (if very junior) have the intellectual capacity to become experts. In the absence of such a bar, the arguments against fusion are difficult to advance. I believe that if we continue with a huge bottom-heavy intellectually-sluggish bar we will inevitably have a fused profession in Victoria."

"Victoria's Lawyers" is the result of a questionnaire survey carried out in Victoria in late 1976. Inevitably the survey, the book and, incidentally, Professor Nash's paper were largely concerned with the profession as a whole, and principally with the problems of Solicitors. Nevertheless the fortunes of the Bar are in a great many ways intimately tied to those of Solicitors.

Many of the findings are worthy of the serious attention of barristers —

(a) Likely changes in demands for legal services

The questionnaire asked for those areas of work which were expected to increase and decrease in the next five years. The responses therefore indicated the expectations of the profession without any means of assessing the basis or validity of these expectations. The personal nature of the responses is indicated by the divergence between Solicitors and Barristers in their ranking of these areas.

Principal Areas of Expected Increase

Barristers	Melbourne Solicitors
Commercial and Company Law	Taxation and Estate Planning
Family Law	Commercial and Company Law
Trade Practices	Family Law
Criminal Law	Real Property
Local Government and Town Planning	Trade Practices
Taxation and Estate Planning	Local Government and Town Planning
	Probate

Principal Areas of Expected Decrease

Barristers	Melbourne Solicitors
Motor Accident Personal Injury	Real Property
Family Law	Motor Accident and Personal Injury
Criminal Law	Workers Compensation and Industrial Accidents
"Court Work"	Family Law

The inclusion of Family Law prominently in both lists may indicate an accurate prediction that the new legislation at that area has increased t the volume of work in this field. But a greater share of court work is being done by solicitors and, of the balance, the great bulk is handled by a small band of specialist barristers.

The areas most likely to expand are, as Professor Nash observed, those areas requiring intensive training and (*pace* Rumpole) greater intellectual skill. He argues from this the need for higher standards for admission into the profession.

(b) Specialisation

A surprising result from the survey was the relatively small amount of specialisation by practitioners in any given area of law. The survey defined a specialist as one who spends an abnormal amount

of time in the given area relative to other practitioners in the same field. The definition produced therefore a statistical concept of specialisation rather than a subjective one. The conclusion reached was that there is no area of law in which it can be said that significant numbers of solicitors are specialists. Among barristers, the results showed that specialisation may be said to exist only in the fields of criminal law (where 55% of work is done by specialists) workers compensation/ insustrial accident (50%) and Family Law (35%).

This result was considered surprising, because surveys overseas, particularly in Canada indicate a specialist pattern and, further, because of the general expectation that specialisation did exist. This latter impression is borne out by the quite different results obtained in the answer to the survey question "would you say you have developed a reputation among colleagues as a specialist in a particular area of law?" Of solicitors 70.5% answered in the affirmative compared with 50.8% of barristers. A similar survey was undertaken in New South Wales in 1977 by the Law Foundation of New South Wales and reported in "Lawyers and their Work in New South Wales". In this survey, the respondents were simply asked whether they regarded themselves as specialists and if so in what fields. This question produced the result that 64% of city solicitors and 54.8% of barristers considered themselves as specialists. The principal areas of specialty were given as follows:

City Solicitors
General Conveyancing.
General Commercial.
Civil Litigation (Supreme and High Courts)
Commercial Matters under Companies Act.

Barristers

Criminal Law.
Civil Litigation (Supreme and High Courts).
Family Law.
Commercial Matters under Companies Act.

The break-up of self-designatied specialties in the Victorian survey was very similar to that set out above.

(c) Over-Supply

Law graduates over the last decade have been keenly aware of the problem of oversupply. The increasing number of graduates, together with economic pressures on solicitors, has led to the very acute problem of obtaining articles. The establishment of the Leo Cussen Course has been largely successful in overcoming this problem. But it has postponed the bottleneck by twelve months.

The question of over-supply is intimately tied to the question of demand. Thus, graduates whose numbers swell the profession, create a great pressure on a static volume of work available. Perhaps lawyers in the next decade will have to abandon their tenacious grip upon decreasing areas of professional activity and come to terms with the expanding areas such as trade practices, administrative law and planning.

Professor Nash and Charles Q. C. are apparently not alone in the concern they have expressed as to the standards of practice at the Bar. Last year the Bar Council established a sub-committee to investigate the establishment of a more intensive formal course of study for readers than exists at present. There were some, even, who would require an applicant to sign the Bar Roll to prove his competence by successfully sitting for an entrance examination.

The concept of an entrance exam faces formidable opposition from those who see it as incompatible with the equal status in law of barristers and solicitors. Furthermore, there are practical obstacles. The establishment of a course of study, the preparation and conducting of examinations would impose real strains on the Bar's Administration.

Nevertheless, there are signs that the benevolent treatment offered to would-be barristers is a thing of the past (see p. 2). It may be that the imposition of a joining fee in the Sydney manner is unacceptable. But the Bar is unlikely in the future to subsidise the first years of its younger members.

Perhaps the suggestion which most fairly resolves the present objections to an open Bar is that applicants to sign the Bar Roll should, as a prerequisite, have two years' experience as an employee Solicitor. The experience gained in those two years would be of great value in a career as a Barrister. Professor Nash's supposition that many young barristers are in truth rejected solicitors, would be resolved, since the persons he has in mind would not qualify. Finally, the period of two years as a solicitor would, it is hoped, give would-be applicants an opportunity to see the Bar and its life in a more realistic light than that which shines in the bright eyes of a new admittee.

D.B.

THE CONDOM CASE

"The abolition of the guilt concept has taken all the colour out of Divorce, castrated it I'd say, no wonder they had to introduce that pussy-foot euphemism 'Family Law' "; my old Victorian colleague mused gloomily over a glass of Melbourne bitter.

"Pity in a way. I don't know about your fellows in the West but it developed a breed all on its own over here. A bit pompous. I suppose and heavy handed — my client is always right — but they were characters all right, no suppressing them."

"I shall never forget the 'Condom Case' as it came to be known. We briefed old Sillet on that. Wasn't the brightest of Counsel but he had a reputation for tenacity and a boots and all approach. It seemed to please the clients even though it humped up costs. There's a lot of masochism in your average matrimonial client.

"Our lady was alleging adultery among other things. She had found a carton of condoms in her husband's dressing table. This had precipitated the action. Old Sillet pounced on them. He always had an obsession for what he called 'hard evidence'. So that the Judge would clearly see what they were he made me unwrap and unfold every one of the wretched things and put them in a big glass jar with a screw top.

"I expected complications because the Judge, although purporting to have strict religious scruples about contraception, was a notorious womaniser in private life. In exacerbation we had a pretty pugnacious fellow on the other side who was a lot brighter than Sillet. Grey haired hawk-nosed fellow named Clarke.

"It comes to the stage when Sillet produces the jar of condoms. An objection is made. The Judge agrees with the other side.

"I can't see the relevance of this evidence, Mr. Sillet' says the Judge.

"But surely, Your Honour, as a man of the world must appreciate its importance' says

Sillet. I don't know if this reference was intentional but the Judge certainly took it to be.

" 'That's coming pretty close to contempt of Court, Mr. Sillet'.

"By this time the Associate has got around to marking the jar for identification and rather tactlessly shoving it under the Judge's nose. The judicial proboscis wrinkles in great disdain, 'What would I want with these things, Mr. Sillet?' bellows the Judge.

" 'Your Honour may have no use for them at all, but I assure Your Honour I intend to use them in a minute' says Sillet.

" 'My learned friend has to get them in before he can use them'. Counsel for the respondent observes with masterly control of his facial muscles.

" 'At this stage, his instructing solicitor, who, like me has been almost bursting with suppressed laughter, goes into an enormous spluttering coughing fit and flees from the Court, leaving us all teetering on the verge of committal for contempt as the Judge goes more purple every second.

" 'My learned instructing solicitor suffers from asthma, Your Honour' Clarke interjects and saves the day. 'The Judge's hue slowly returns to pink and benignly he says, 'He must be allergic to rubber, Mr. Clarke!' Never was judicial wit greeted with such gales of relieved laughter.

"It says much for judicial impartiality that we actually won the case on a reserved judgement.

"As I was packing up my papers to leave the Court the Associate said to me,

" 'I say, would you mind taking this exhibit away with you, I find it a bit embarrassing sitting on my mantelpiece in Chambers.' He handed me the jar of condoms. I hastily hid them in my brief case and forgot about them until I got out of the train on the way home.

" 'My God,' I thought, 'what will Elsie say if I come home with these, she'll never believe they're an exhibit.'

"Fortunately, my way home from the station wended through the local park. I opened the jar and scattered them in paper chase fashion beside the path. I retained the screw top jar, my wife being an enthusiastic amateur pickler for local church fetes.

"To my horror, a week later the Associate rang me,

"The respondent's lodged Notice of Appeal, you'd better bring back those exhibits.'

"I had to rescue the jar from the pantry, incur personal matrimonial ire for decanting a batch of immature pickles and rush off to the park.

"There I had to forage through the grass for the original contents. My task was made more difficult by virtue of the fact that the park was a favourite fornicating ground for the promiscuous local young.

"I found it difficult to distinguish the exhibits proper from other people's improper discards. In the end I stopped trying, I simply collected a sufficient quantity to accord with the number originally counted and screwed the lid down tight.

"In the event, the appeal was never proceeded with. I have no doubt the jar remains in some Supreme Court vault as a potential artifact for some future legal historian. I hope he does not open it up and contract some dreadful disease like the poor chap who violated the tomb of Tutankhamen."

Lloyd Davies

(This article is reproduced from "Brief", the journal of the Law Society of Western Australia, by kind permission of the Editor. No assurances have been given as to its accuracy: Eds.)

VERBATIM

McGarvie J:

"The law has always been thought of as a chancy business. Even in the newspaper, the law list appears flanked by the weather and the shipping."

At Lunch: 15th February 1979.

●●●

Judge Read:

11 year old boy giving evidence about 12.30 p.m. starts to talk faster and faster. The shorthand writer can't keep up —

His Honour: "Now don't hurry...there's plenty of time".

Boy witness: "Yeah well...I'm getting pretty hungry".

November 1978.

●●●

Judge McNab:

After conflicting evidence as to ownership His Honour made certain findings as to the ownership of chattels in an interpleader. As one of the parties was leaving the court — she said to the Judge "You are a very fair man". When the parties had left the hearing of the court His Honour replied, "I must have been wrong".

In Chambers: 28th February 1979.

●●●

Judge Forrest:

His Honour's charge to the jury included the following:

"Mr.....was the articled clerk, and like all articled clerks he seems to lose documents. That is the function of the articled clerk, members of the jury, to lose documents. If they do not lose them, they are blamed for not losing them.....".

R. v Nathan 26th February 1979.

Craddock S. M.:

(To a hapless Lebanese Defendant who attested to the presence of an unknown 'mystery' man who was present at the scene of the assault and perpetrating all the damage he was charged with)

"I've read the Arabian Nights and it's a good fairy story but that's all....".

●●●

Darvall:

(27.3.79 who left the bar in 1976 to live a life of self-sufficiency in Cairns.)

"Spent yesterday putting a steer in the fridge in bite sized chunks and tomorrow we are doing a pig.. Rain has caused bananas to go mad and we will have to eat a bunch for every meal shortly.

Milk is flowing, grass is growing, sun is shining. Next week I'm walking to Cooktown with a local hippie — along the beach. What will you be doing next week?"

●●●

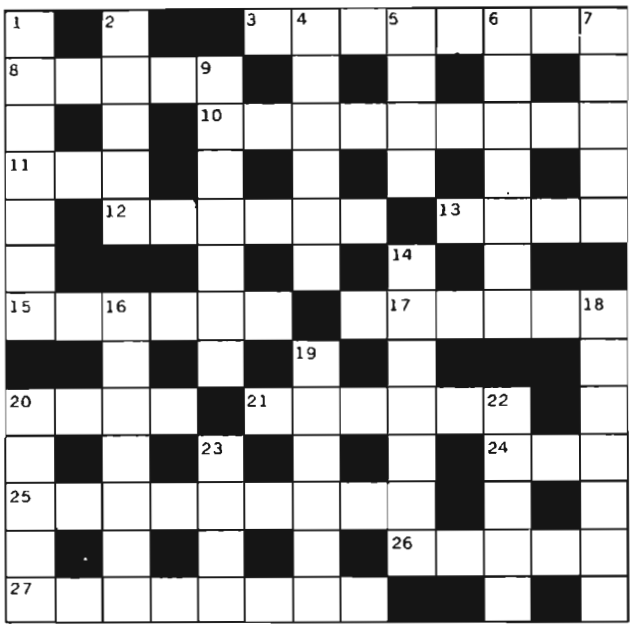
Dee:

Mr Dee: ...." and as to the count of fellatio I can only refer to what fell from Your Honour's lips yesterday".

R. v Christopher and others

Nov. 1976 before Judge Vickery

CAPTAIN'S CRYPTIC
No. 27



DOWN

1. On its own in a latin void (2,5)
2. Animal desires for sexual indulgence (5)
4. Inborn (6)
5. Terminate the services of the bag (4)
6. Loan on account (7)
7. Sir Edward Hamilton Barber Q. C. (5)
9. Shadowy (7)
14. All bias lips (7)
16. Tumult & disturbance (7)
18. Neophytes to advocacy (7)
19. Snake in the grass is a power man (6)
20. Coat breast folded back (5)
22. Contravened Crimes Act Section 44 (5)
23. Floating film (4)

ACROSS

3. Dispossess (8)
8. Guano excresence (5)
10. Under local self government (9)
11. Venerate.....as.....(William Hazlitt) (3)
12. Fairy (6)
13. First element of assault (4)
15. You son of a judge (6)
17. Exchange in trade (6)
20. In place of crazy (4)
21. Virgin sturgeon produce (6)
24. Also ampersand (3)
25. Main actor (9)
26. Aver (5)
27. Embrocation (8)

MOUTHPIECE

"You know" said Bigwig "I'm more than a little bothered by the new Tax laws affecting leasing. Have you read them?" "Yes I have" said the other. "The only way to be sure of a tax deduction for payments is never to acquire property in the goods you are leasing "That way you'll have the deduction admittedly" said Bigwig. "But just imagine what would happen. New forms of leases would spring up extending terms to an inordinate degree. The lease for your car would be over twenty years instead of three."

"And the leasing of your library would be made to run for hundreds of years" said the other. "I bet there'd be plenty of takers too. No one feels at all bad about putting debts off for eight generations or so. There would be even less qualms about tax."

"Firms of barristers' outfitters would be brought into existence" said Bigwig. "One-stop Barristers Equipment! They would lease you everything. Car, chambers, fully furnished with shelves crammed with books. Authorised reports $50 per month extra. Lease of secretarial equipment including secretary. And the Mark II package would include discretionary trust deed (all executed and stamped) together with management company and service agreement. For the single there would be available a house with study complete with fully deductable spouse and two blonde children" Bigwig snorted. "Life as we know it will disappear. Our lives should not be governed by economic considerations. I told them that at the general meeting last week. This new Act will be the cause of a complete and utter social disaster."

"It wouldn't be all bad Bigwig", mused the other. "After a while you could refuse to pay the rental for your wife."

Byrne & Ross DD

APPEAL COSTS FUND ACT 1964

The Act is administered by the Appeal Costs Board constituted under section 4. The present members are Mr. R. Freadman (Chairman), Mr. K. C. Brookes (Law Institute nominee) and Mr. A. Hooper (Victorian Bar nominee). The Secretary is Mr. C. Gatt, Law Department, 221 Queen Street, Melbourne.

The regulations under the Act now in force are Appeal Costs Fund Regulations 1965 (S. R. 35 of 1965) as amended by (inter alia) S. R. 483 of 1975, S. R. 111 of 1975 and S. R. 205 of 1975 (hereinafter called "the Rules").

By proclamation published in The Victorian Government Gazette No. 54 of June 1971 –

(a) The maximum amount payable to any respondent under Section 14(3)(b) under any one indemnity certificate is fixed at $4000.

(b) The maximum amount payable to any one appellant under an indemnity certificate being the amount referred to in Section 14B(2) was fixed at $200.

(c) The maximum amount payable to any one respondent under Section 19 is fixed at $4000.

(d) The maximum amount payable to any infant plaintiff or next friend is fixed at $4000.

The relevant forms are set out in the regulations. Attention is also directed to the new form of indemnity certificate prescribed by S. R. 111 of 1975 for use in relation to applications under Section 18(i)(d).

There is a wide variety of proceedings and circumstances under which an entitlement under the Act may arise and it is not possible in this article to give precise details as to the material required by the Board in every possible case. It is intended that this article will provide some guidance for practitioners – the article is prompted by the recent experiences of the Board, which has received a number of applications which have been of such a poor standard as to reflect a lack of

knowledge of the Act and the relevant documents and procedures on the part of the solicitors who prepared them.

Applications are required to be submitted within six months of the time when the entitlement arose (Rule 5). If out of time, the applicant should by letter request an appropriate extension and explain the reasons for delay. Extensions of time are not granted as a matter of course, but will be granted in appropriate cases.

The application must be signed by the applicant personally unless the applicant is unavailable in which event it may be signed by the Solicitor and should be accompanied by a letter requesting payment to the Solicitor pursuant to Section 21. That letter should contain the Solicitor's undertaking to account to the client as to the appropriation of moneys received from the Fund.

The requirements as to the documents to be submitted with the application are set out in Rule 4. Forms of affidavits are not prescribed and care should therefore be taken to ensure that the affidavit deals with all relevant matters.

Practitioners are required to submit four copies of all applications and supporting documents (S. R. 205 of 1975).

As a general guide to the form of affidavits, it is suggested that the affidavits should include a concise statement of the cause of action or charges and the history of the proceedings and should also clearly cover each element which the relevant section requires to be established as the basis upon which a payment out of the Fund may be made. In case of an application under Section 18 the affidavit must show that there was a new trial and that the applicant incurred costs of the first hearing. The application should set out clearly the amounts claimed and in the case of Solicitors fees, particulars are required as to how the amount is made up.

It should be noted that an indemnity certificate is the foundation in all except the following types of applications:—

Section 18(i)(a) Civil or criminal proceedings aborted by reason of illness of judge, magistrate or justice or a member of the court or by disagreement of jury.

Section 18(i)(b) Appeal on a question of law against conviction by person convicted on indictment and new trial ordered.

Section 19 New Trial of action ordered on the ground that the verdict of the jury was against the evidence or the weight of evidence or that damages awarded were excessive.

Section 19A Refusal to sanction compromise of infant's claim and thereafter infant receives no more than the amount offered in proposed compromise and is ordered to pay the whole or part of the defendant's costs.

The grant of an indemnity certificate is in the discretion of the "Court" (see definition of "Court" Section 2).

The amount payable from the Fund in the following types of cases is as follows:—

Section 13. Applicant's costs as ordered to be paid and actually paid — and the respondents costs as taxed or agreed by the Board, being the costs of the appeal and of any new trial and if the respondents costs are taxed, costs of taxation are also payable.

It is to be noted that the total amount payable in respect of the respondents costs and cost of taxation shall not exceed the amount of the appellant's costs and that the total of all amounts payable shall not exceed $4000.

Section 14A. The total of appellant's costs of appeal plus costs of taxation to a maximum of $200.

Section 18. Such amount as the Board considers has been reasonably incurred by the applicant in the proceedings before they were rendered abortive or were adjourned or discontinued or the conviction was quashed. The Board has complete discretion in determining what amount has been reasonably incurred and allows only such costs as have been thrown away.

Section 19. Appellant's costs in the motion for and upon the new trial ordered to be paid and actually paid — and respondent's costs in the motion for and upon a new trial as taxed or agreed and if taxed also costs of taxation.

Section 19A. Costs ordered to be paid by the infant plaintiff to the defendant plus plainteff's costs and costs of taxing thereof (if any). The limitations as to the amount referred to in relation to Section 13 entitlement apply also to Section 19 — 19A entitlements'

The Board invites attention to the following provisions:—

Section 14(2). Which enables the Board to pay direct to the appellant costs due to the appellant by the respondent in respect of which the respondent is entitled to indemnity, in a case when the respondent unreasonably refuses or neglects or is unable through lack of means to pay the costs due to the appellant or when payment to the appellant would cause the respondent undue hardship. Apply by letter giving reasons.

Section 18(3) and (4). Circumstances in which a new trial shall be deemed to be ordered, and in which a criminal proceeding is deemed to be adjourned.

Section 19(1)(a). Proviso enables payment direct from the Fund to appellant compare Section 14(2). Apply by letter giving reasons.

Section 19(1A). In cases where a new trial has been ordered and upon the new trial the appellant is ordered to pay the respondent costs of the new trial, appellant entitled to be paid from the Fund the amount specified.

Section 21. Power to pay direct to the Solicitor in appropriate case. Apply by letter giving reasons.

The provision which gives rise to the greatest number of applications and which gives the Board more difficulty than any other (and indeed which since its inclusion in the Act has proved to be a heavy drain on the Fund's resources) is Section 18(1)(d). The following quotation from the second reading speech of the Minister sets out the reasons for the introduction of this sub-section: "Clause 3 contains a series of amendments to deal with the situation which sometimes arises, where on the day fixed for the hearing of a criminal trial, but before the proceedings have commenced, the trial is adjourned on the application of the Crown which by reason of an unforeseen emergency is unable to proceed immediately. The Act makes no provision for payment to the accused in these circumstances, and both the Victorian Bar Council and the Appeal Costs Board consider that such provision should be made."

The underlying factor for the amendment was that it was almost invariable practice in all jurisdictions to refuse any order for costs in favour of the accused person in such circumstances. In civil proceedings, conversely, the party seeking the adjournment would normally have to pay the opposite parties their costs thrown away by reason of the adjournment.

Section 18(1)(d) has provided an effective remedy for the situation described in the above quotation from the second reading speech, and has created a desirable equivalence between the position of an accused person in a criminal case and the position of an opposite party in civil proceedings in this respect.

However, the sub-section is now being increasingly used by the Courts and in particular by certain magistrates in cases in which an adjournment of a criminal proceeding takes place merely because the other commitments of the Court prevent the commencement of the hearing of that criminal proceeding that day with the consequences that it must by adjourned.

The Board has reason to believe that such a use of Section 18(1)(d) has resulted in claims being made on the Fund which otherwise would have not been made and which in fact should not have been made and it has

suggested to the Minister that the sub-section should be amended to prevent the Courts from giving certificates in this sort of case.

Whilst the sub-section remains in its present form however, the Board considers that it is obliged to give effect to it when a Court grants an accused person a certificate in terms which are in strict compliance with the Act and the Rules, that is to say when the Court certifies that the adjournment has been sought and obtained by the prosecution and uses the form of certificates set out in the Statutory Rule 111 of 1975. Nevertheless, in these instances the Board (which usually adopts the view that it should not insist upon a meticulous observance of technicalities) does demand that all the documents constituting the application to the Board (and in particular the certificate granted by the Court) comply with the statutory requirements. In any case which does not so comply the Board regards itself as bound to send the application back to the practitioner concerned with a request that he provide the Board with the material required under the Act and the Rules.

However, quite apart from the type of application referred to above it is disturbing that a majority of the applications to the Board under Section 18(1)(d) (which in themselves form some 80% of the total applications to the Board) are so defective in substance as well as in form that they must be referred back to the practitioner who submitted them for further information.

The most common omissions appear to be:

(i) failure to demonstrate anywhere in the documents that there has been a further hearing and that costs have been incurred thereby;

(ii) failure to comply with the Board's practice of requiring backsheets for both hearings in cases in which Counsel has been employed;

(iii) failure to provide adequate details of solicitors' costs actually thrown away as a result of the adjournment (and the Board incidentally is not prepared to accept, save in the most unusual cases where some special circumstances can be made out, the view apparently held by numerous practitioners that solicitors' costs of instructions for brief, interviews with witnesses, drawing and engrossing brief to Counsel etc., are thrown away simply because the case has been adjourned for a few days or weeks); and

(iv) failure to obtain the client's signature on the application form or alternatively to give some reason why the Board should apply Section 21 in favour of the solicitor.

The Board does try to deal with applications as speedily as possible, but the increase in work caused by defective documentation not only increases the costs of administering the Fund, but also causes delays in payments being made to those justly entitled to them.

It is recommended that the practitioners familiarise themselves with the Act and Rules as this article does not attempt to do more than present a brief summary of the more important provisions.

MISLEADING CASE NOTE NO. 5

Pucker v Lostagain and Others

Bung C. J. said:

This case has achieved some notoriety in the Press, and it is unfortunate and demeaning (which word I use in its modern and usual sense, of undignified) that it should have done so. It is bad enough for this court-room to be packed with reporters, and hectored by banner headlines such as "Pucker versus the Establishment Again" and "Establishment Lawyers Clean-Bowled by Latest Delivery"; but to have a crowd of people who, in between fixtures outside the Arbitration Commission, stand outside this Court chanting "C'mon Plaintiff C'mon", and who support every objection and submission by

the Plaintiff's representatives with loud cries of "Howzat" and much leaping into the air, it is quite beyond the pale (which expression I use in its ancient and proper sense, of an area of barbarians of mainly Irish extraction).

The facts of this case are fortunately fairly simple, and can be stated shortly. The Defendants in this action, Mr. Lostagain and others, have control of the Victorian Bar. The Plaintiff, Mr. Pucker, has started an enterprise which he calls the "Superbar". Its idea is, apparently, to buy a group of top barristers with lucrative contracts, and to employ them in a sort of travelling circus, doing a highly paid series of well publicised cases. The ultimate aim of his enterprise, he states freely, is to establish a parallel court system to provide the public with entertainment which, he says, has been sadly lacking in the "Establishment" courts for many years. The Defendants, as the custodians of the moral certainties of society and the defenders of truth and monopoly, have reacted to the Plaintiff's spirit of competition with the resolution of which the Plaintiff complains — they have resolved that any barrister who takes part in any of the Plaintiff's exhibitions will be banned from practising at the Victorian Bar. Such an attitude may seem churlish, but the Defendants have clung to their attitude that they alone can represent clients in court with all the tenacity of a leech on a good vein. The Plaintiff comes to this court seeking declarations that the resolution of the Defendants is unlawful, on a variety of grounds, which it is not necessary to consider here. Mr. Teadium appeared for the Plaintiff, and the Defendants appeared in person.

This court has previously held, in Brown v The Prahran Magistrates (unreported), that advertising by the courts of their services is not unlawful, and I can see no reason why that reasoning should not be extended to legal practitioners. I realize that there might be some undesirable practices which could arise from this ruling, but I have received assurances from Mr. Teadium that the pink gowns and canary-yellow wigs tendered in evidence will, at least for the present, not be used. Courts have always, to some extent, advertised their services, even in the Middle Ages, going as far as the public execution of those who lost their cases. Even the inquisitions by television of those Mr. Willesee considers to have wronged "The Public" serve to underline the "Establishment" courts' continuing commitment to convincing the public that some ultimate form is necessary for resolving disputes.

Much of the argument before me revolved around particular barristers, and particular advertising "jingles", the Plaintiff seeking to show that these would help barristers financially and still be dignified, and the Defendants the reverse. In granting the declarations sought I have tried to indicate which slogans and jingles I believe can be used, and which should not.

As I have already said, I do not believe that it would be dignified for Counsel to appear in pink robes, or matching canary-yellow wigs and gowns. Neither do I think it fit that objections in court should be termed "Appeals", and prefaced by a loud call of "Howzat". I can however see nothing wrong with a refined slogan such as "Come and see the exciting pitch and deliveries in the classic struggle between Batt and Ball", or in a simpler vein, that which has already been successful: "The Bush Fire Enquiry starring that biological pair Woods Lloyd and Byrne" or even "Come and see the Barber lopping Sparks Marks."

As to the particular barristers, evidence was given that Jest and Buckleys have agreed to do the promotions of the "Superbar" line of deodorants and insecticides. Having two barristers with such extensive experience of such matters, I am satisfied that those advertisements will be presented in a dignified and proper (which word I use in its ancient and proper sense, of proper) manner. It appears that Willard will have to continue at the Victorian Bar a while longer, this being the second of Mr. Pucker's circuses in which he expected to perform, and which he missed out on.

Having decided to grant the declarations, I have only one other matter I wish to mention. I accept that working for Mr. Pucker will bring financial rewards to members of Counsel, but I cannot understand why anyone would want to do it. Surely young Counsel realize that to prostitute their amateur status for the mere sake of huge material gain will bring them no happiness? Will they not have to bow their heads when their grandchildren ask them "What did you do in the Seventies?" and say with remorse "I was wealthy"?. The declarations will be granted. I wash my hands of the matter.

Muckinerly J:

Far be it from me to contadict or detract from anything the learned Chief Justice has said, but I cannot use two words where ten would suffice. I concur.

O'Briar J:

I agree.

SPORTING NEWS

That hackneyed axiom "they never come back" will be put to the test once again. A high jump run and pit has been installed in the backyard of Morrish as he attempts to rival those halcyon days when he cleared 6 feet 10¼ inches. He remarked that his best comeback jump has been 6 feet 1 inch which is "not a significant difference" from his best, or from the current world record of 7 feet 8½ inches. The chap who installed the run up and pit said to Morrish that "he had only ever done one of these jobs for a private individual before and that was for a young bloke called Morrish about 20 years back". The comeback is aimed at the Veterans and Masters events.

●●●

Only some of them ran, and no one seemed to find it fun. Despite the misnomer, quite a number of Counsel entered the Fun Run. Fricke and Duggan disregarded the well-publicised advice that only those who were thoroughly prepared should enter. There were however, some very well prepared counsel. S. B. Spittle recaptured his championship form of years ago in completing the 13 km. in just over 45 minutes. He was a good distance ahead of Vincent. A legweary Bleechmore, not fully recovered from his last marathon, was third home in respectable time. We have on some authority that Danos, Crossley, Faris, Fajgenbaum, Les Ross (limping due to recent marriage) and Judge Bland also finished. We now know that Crossley has been unable to draw the cartoon for this edition. It is said he has an interstate practice. More probable is that he draws with his feet and is not up to it at the moment.

●●●

Some time ago a tall, athletic member of the bar, specialising in the Family Law jurisdiction, was seen on the banks of the Yarra by a talent scout from Cosmopolitan Magazine. Impressed by this splendid specimen of manhood, albeit greying a little, he was approached with a view to be displayed in the centrefold of the magazine which has a large following amongst the fairer sex. He was to have appeared under the caption of "Bachelor Playmate of the month". For a fee (some would describe it as a stud fee) of about $400.00 the gentleman gave consideration to accepting the offer. In previous editions the various subjects had been shown with a hallmark of their trade or profession strategically placed to cover their genitalia. For example, a tennis racquet was used for a tennis player and a football for a footballer and so forth. There had been some trouble when the leading apprentice glass maker was displayed. Our friend decided to pose with a wig placed akin to the original fig leaf. It was with shock and dismay that he learnt that his application to Costigan of the Ethics Committee had been refused.

LETTERS TO THE EDITOR

Dear Sir,

I was pleased to note in your last edition (Summer Edition p. 3) that at last there has been an attempt to obtain for the Bar, concession rates for the purchase of air tickets. We are a group of over 800 strong. Surely we should be able to extend the group purchase principle. I have in mind stationery at wholesale prices.

Yours sincerely,

Stingy.

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Dear Sirs,

At the meeting of the Bar on Tuesday 13th March, 1979 I put forward the following motion:—

> "That the Victorian Bar advise the Victorian Bar Council that it desires the Bar Council to re-introduce its practice of resolving to recommend minimum fees in Supreme Court matters."

I have now been asked to write a note on the above motion and will include the reasons why I put such resolution before the meeting.

On the 14th August 1978, the Bar Council resolved —

(a) to withdraw its existing recommendations concerning barrister' fees;

(b) to not substitute further recommendations;

(c) to leave barristers to arrange their own fees.

Prior to that date, the Bar Council had, from time to time, recommended minimum fees and on my information the most recent recommendation was made to apply as from 1st August 1976.

In the November 1978 part of the Law Institute Journal at page 617 there appeared a letter headed "Barristers' Fees — Letter from the President" and purported to have been signed by Bernard Teague. Under subheading "Long Term Aims" the letter indicates that the Council of the Law Institute "has approved proposals calling for the introduction of a single legal costs fixing authority, and for the granting to that authority of power to determine a scale of barristers' fees in the Supreme Court".

Also contained in President Teague's letter is a table of fees "allowed by the Taxing Master in recent taxations." It is stated to be a guide and not a scale of minimum, maximum or recommended fees and furthermore "necessarily somewhat out of date."

If one leaves aside the fees payable to Queen's Counsel (which were not the subject of a recommendation by the Bar Council for the period commencing 1st August 1976), the fees for use as a guide are precisely those which were recommended by the Bar Council to apply as from the 1st August 1976. Perhaps the Taxing Master "usually allows" fees recommended by the Bar Council, but to my mind it is too much of a coincidence that the figures which purported to be based on the experience of solicitors who have attended taxations in the Supreme Court should precisely coincide with the recommendations made as minimum fees by the Bar Council.

The main reason I put the motion forward to the meeting was that, in my view, the Bar Council should recommend minimum fees, or if this raises difficulties under the Trade Practices Act or for some other reason, then why should not the Bar Council at least issue a guide from time to time. This would mean that the Bar Council would at least be retaining some of the control of the mechanism whereby the fees payable to counsel are to be ascertained.

I did not suggest to the meeting that there is necessarily a fee increase due at present, although the matter was discussed at the meeting. But unless the Bar, through its Bar Council, at least maintains the process whereby the Bar is able to control its own

fees, then it seems clear that some other organisation or person is quite prepared to fulfil that role.

LLOYD BRYANT

TIDBITS

Companies Auditors' Board

Paterson Q. C. has retired as Chairman of this Board. D. Graham Q. C. has been appointed Deputy Chairman.

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Prosecutors

Hassett, Hugh Jones and R. Read have been recently appointed Prosecutors for the Queen.

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Crown Counsel, Hong Kong

Moorfoot has recently accepted the position of Crown Counsel in Hong Kong. He will join Cahill who accepted a similar position some time ago.

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More Conventions and Courses

The Business Law Education Centre is conducting courses in the following subjects in the near future.

Criminal Advocacy (10 weeks commencing 18th April).
Industrial and Intellectual Property Part 1 (10 weeks commencing 18th April).
Tenancy Law – the new Residential Tenancies Bill (May/June).
Enquiries to the Centre, 25th Floor, 140 William Street.

Taxation Institute of Australia is presenting five lectures at the Leo Cussen Institute on five successive Wednesdays. Topics are Tax Accounting for Trusts, Tax Plans for Retirement, Current Year Losses. Alienation of Income and Challenging the Commissioner. Enquiries to the Institute 113 Swanston Street.

The Australian Law Council Foundation in conjunction with the Law Faculties of Melbourne and Monash is offering the Third Annual Seminars on Law at Melbourne University from Monday 14 May to Friday 19 May. Interested persons may select from the following Courses and Lectures to be given jointly by an academic and a practitioner: Trade Practices, Company Law, Current Trends in the Law of Contract, Administrative Law and Taxation.
Enquiries to Law Council of Australia 155 Queen Street.

International Bar Association, "No Fault" Insurance Committee is conducting a medico-legal seminar on Rehabilitation of Accident Victims in Venice from 2nd to 5th September 1979.
Enquiries to Mr. D. J. Weston, I. B. A. 123 Queen Street.

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Building Dispute Practitioners Society

At a meeting held on 5th March 1971 at the Master Builders Association Headquarters about 100 lawyers, architects, engineers, building consultants and arbitrators adopted a constitution for the Building Dispute Practitioners Society. The objects of the Society are as follows –

> "to provide a forum for the discussion and consideration of problems affecting the resolution of disputes arising out of building and engineering works, to advance the knowledge and expertise of persons concerned with such disputes, to advance reform in the law relating to such disputes and to promote justice in the administration of such law."

Patkin, Furness and D. Byrne were elected to the Committee of the Society.

Members are encouraged to join the new Society by forwarding a subscription of $25 to the Secretary –

> Mr. Michael Ryan
> c/o Messrs. Wainwright Ryan & Co.
> 534 Whitehorse Road
> Mitcham 3132

A LAWYER'S BOOKSHELF

Reforming Victoria's Tenancy Laws:

Report of the Community Committee on Tenancy Law Reform 1978 – Victorian Council of Social Services, 290 Wellington St., Collingwood.
$4.00 – 88 pages.

In December 1976, a public meeting at the Collingwood Town Hall convened by the V. C. S. S. resolved to form the Committee which has now produced this report. Visually the result is quite pleasing. The type is large and the text is clearly set out in short numbered paragraphs with concise titles and headings. The Committee has also provided in 97 numbered paragraphs a summary of its major recommendations. Thus those who are not inclined to read or follow the Committee's reasonings or explanations can nevertheless ascertain and quote its conclusions.

On the other hand, there is no comprehensive index supplied which, even in a work of this relatively small size, must be regarded as a failing. More open to criticism is the profusion of full-page uncaptioned photographs (19 pages, or more than 20% of the book), which mostly seem to have only a tenuous connection with the text. The Committee has set out to address itself to the Government on a serious issue affecting a large part of the community. Photographs such as the one of an apparent family just evicted, or of an apparent residential corridor in a filthy and delapidated condition, touching and of interest though they may be in themselves, can only raise the suspicion that the report is simply a polemic.

The suspicion, unfortunately, tends to be confirmed upon reading the actual text. It is hard to imagine that the Committee could satisfactorily perform its aims without some landlord representation among its members. The report itself acknowledges that "Trying to reform the Landlord & Tenant Act without seeking the opinion of landlords – would be absurd". However, the claim that landlords were represented among the 16 member Committee is certainly not borne out by any cursory reading of their names and organisations. One looks in vain for any representative of a large commercial property company. Perhaps the closest apparent representative of landlords was that of the member of the R. E. S. I. It is, however, fallacious to assume that estate agents are in some way the natural representative of landlords. Their interests are far from identical. Thus it might be that measures inimical to landlords as such would cause them to dispose of their property to owner-occupiers, could, nonetheless, be favourable to agents by way of commissions from increased sales.

The tone of the report is set out virtually from the opening line: "By most standards, the case for complete reform of Victoria's tenancy laws is hard to deny". The report certainly makes no such attempt. Rather, the very questions which one might feel should be discussed and analysed are instead largely assumed to be proved or incapable of contrary argument.

The report enunciates, as a basis for a new Act, the principle that "decent and secure housing, on fair terms and at a reasonable cost, is a right". One could expect some discussion on the political, philosophical and economic rationale of such an assertion,and its consequences. After all. attendant upon any right is an obligation. Upon whom is the burden of providing the same to fall? Presumably landlords. Yet the Committee simply relies on the bald claim,which may or may not be true, that it is generally accepted within the Australian community, as it is in many others, that people have such a right.

Again the bald assertion is made "Tenancy law for example can create sub-standard housing or can it prevent it." Can it? Is there evidence to support this? If there is, it certainly has not been considered worthy of inclusion in the report, not even as a footnote. Needless to say, the report contains many such glib and facile assumptions, arrived at without benefit of any apparent analysis, or supported by evidence.

After having established to its own satisfaction that there is a need for fundamental changes in the law, the report lists a number of specific proposals. The role of the economist is often described as being to consider the unintended and otherwise unforeseen consequences of human actions. The Committee commendably saw fit, therefore, to prepare that part of the report dealing with the possible consequences of their recommendations in consultation with Professor Henderson of Melbourne University. Given such professional help, it is amazing to find, for example, the argument presented that the proposals would not affect the profits of landlords as a group, but only those of fringe landlords who cannot or will not operate under fair laws or on reasonable returns. This sort of analysis is simply not good enough. As Professor Parish of Monash University has pointed out elsewhere, insofar as the proposals strengthen the position of bad tenants, it increases the risks of landlords in general overall, and thereby their costs.

All in all then, the report is scarcely to be recommended as a work of any serious nature. It is therefore disturbing to find, that, to some extent at least, it has apparently been used in the preparation of the new Victorian Residential Tenancies Bill.

Sharp

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The total number of Barristers in active practice keeping chambers in Melbourne and in the country (not including prosecutors) is now 647.

SOLUTION TO CAPTAIN'S CRYPTIC No. 27


THE SUPREME COURT
OF VICTORIA
ROSS