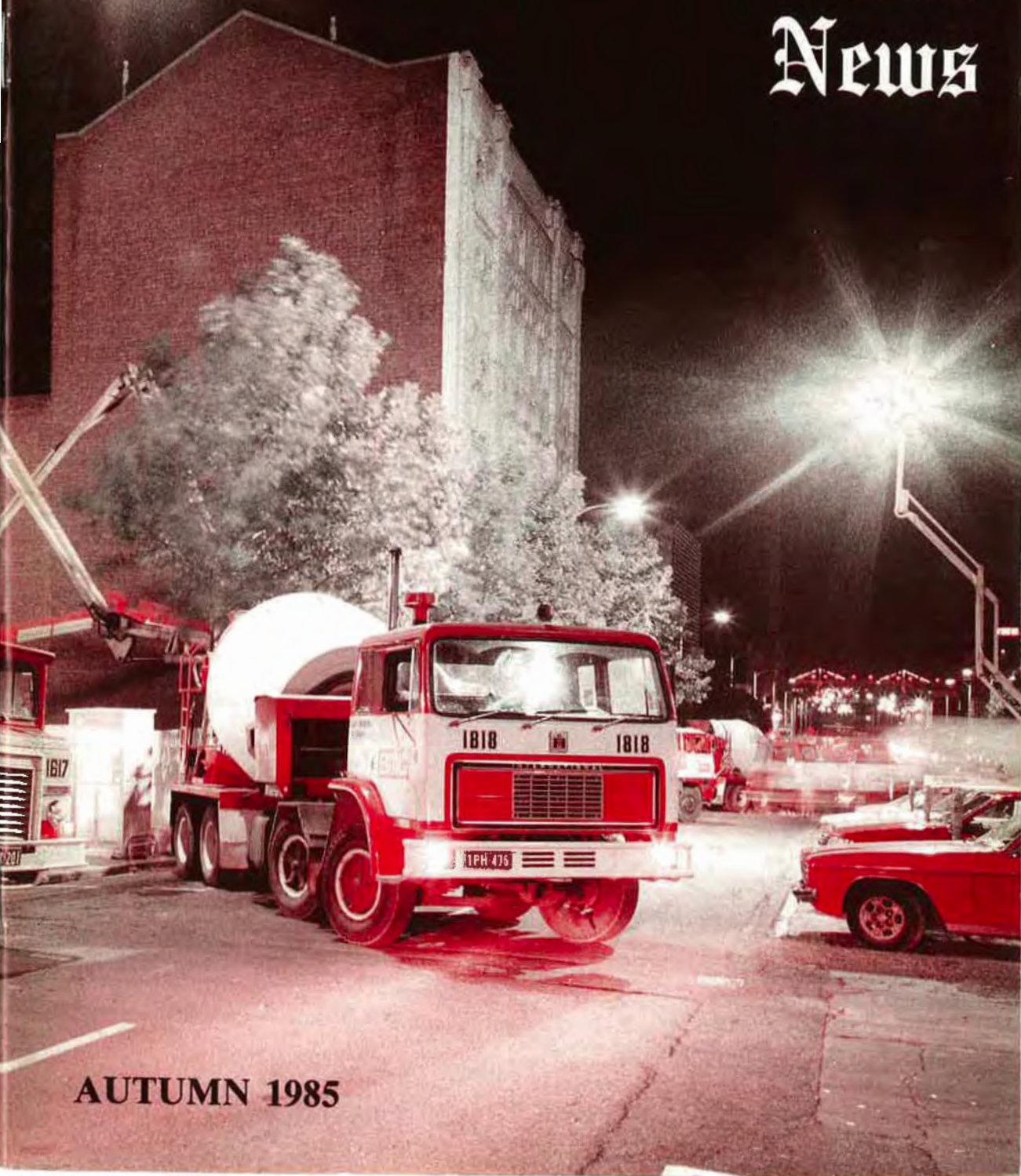


# Victorian Bar News



# VICTORIAN BAR NEWS

## AUTUMN 1985

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# BAR COUNCIL REPORT



## **By-election**

Following relinquishment by Coldrey QC, the new Director of Public Prosecutions, of his newly acquired seat on the Bar Council, a by-election was held in December. The successful candidate was Hedigan QC.

## **Law Council of Australia**

In the Summer Edition of **Bar News** there was an article dealing with the efforts of certain constituent members of the Law Council to amend the constitution of that body. The amendment would permit individual practitioners to become Members, with the likely result that those constituent bodies with large membership would be able to outvote smaller bodies. The amendment was passed last year. At its annual meeting in February 1985 the constituent bodies of the Australian Bar Association, decided not to withdraw from the Law Council of Australia notwithstanding the evident disadvantage to them of the amendment.

## **Extra-mural Chambers**

Following the establishment of a Division of the Family Court at Dandenong, permission has been given to F.M. Daly and B. Paul to set up Chambers at Dandenong as sub-tenants of Barristers Chambers Ltd.

J.C. Hall has been permitted to set up Chambers in Macalister Court, Macalister Street Sale.

In February the Bar Council refused permission sought by D.H. Gude to occupy Chambers in Geelong in a building where solicitors have offices or from his home.

## **Pre-Trial Conference — Dealing with an Opposing Solicitor**

The Bar Council resolved that the following procedure would be in accordance with established practice in dealing with solicitors:

"Counsel may deal directly with an opposing solicitor at a pre-trial conference when the opposing solicitor has not briefed Counsel. Counsel should not deal directly with an opposing solicitor in negotiations prior to the pre-trial conference except in circumstances of necessity."

## **Visit of Chinese Minister for Justice**

On Friday 9th November 1984, the Bar Council entertained at lunch in the Essoign Club a delegation from the Chinese Ministry for Justice.

## **Accommodation**

The shortage of accommodation for very junior members of the Bar has continued to be a matter of concern to the Bar Council. At this end of Melbourne there is very little tenable space available, which does not require expenditure of substantial sums on partitioning. This inevitably means more expensive accommodation and, since the capital cost of fitting out must be amortised, a commitment to such premises for ten years. The Bar considers it undesirable to commit Bar funds to further long term tenancies, having regard to the anticipated completion of Barristers Chambers next year. It has, however, arranged to take a relatively short term lease (with options) of premises on the first floor of the building on the north-east corner of Queen and Little Collins Streets. These premises will be made available only to Counsel under two years' call at the time of application for tenancy on an individual and share basis for short terms.

## Courts closures

A letter dated 16th November, 1984 from the Victorian Attorney-General advising of his decision to close the Courthouses at Coburg, Footscray, Elsternwick, Carlton, Collingwood, Fitzroy, Brighton, Chelsea and Eltham as from February 1985 was received by the Bar Council. It was noted that such closure is initially for a trial period of six months. The letter was referred to the Young Barristers' Committee for consideration and report. No report has yet been received from the Committee.

## Civil Justice Committee Report

Individual members of the Bar Council have considered the proposals of the Civil Justice Committee Report. The Bar Council has called meetings of various groups of the Bar for the purposes of discussing the Civil Justice Committee Report. The Attorney-General has asked the Bar Council to indicate which of the recommendations are supported and thus appropriate for immediate implementation and those which require further discussion.

## Workers' Compensation Reform

The Bar Council has held discussions with the Attorney-General and the Treasurer concerning the Government's proposal to amend the law relating to workers' compensation. It expects to have further discussions with the Government in the near future, having received assurances from the Treasurer that the Government will not implement certain parts of its proposals without first hearing submissions from the Bar.

The attitude of the Bar Council to these reforms, as endorsed by several recent meetings of members of the Bar, is that it is opposed to those parts of the recommendations as are concerned with the taking away of the right of the injured worker to claim lump sum compensation for loss of earnings. The Bar will be informed of developments in this area. The Bar Council supports some aspects of the report e.g. accident prevention and rehabilitation. Certainly it agrees that serious reforms are necessary to overcome the backlog of cases and unnecessary delays.

## Fees Collection

Following its receipt and consideration of an extensive report on this topic the Bar Council adopted the following recommendations of that Committee.

- "(1) The Committee recommends to the Bar Council that, in general terms, the present system of collection of fees be retained and that each List itself ensure that the system of collecting fees by its Clerks is the most efficient possible. It should do so by discussing fee collection and fee collection problems and methods directly with its Clerk.
- "(2) The following matters may be dealt with on behalf of the Bar by a committee such as the present one:—
- (a) the regular monitoring of the position in respect of legal aid fees and Govern-

ment department fees and, if necessary, speaking to the appropriate persons concerned in those bodies about any desirable change in practices;

- (b) discussions to be held with representatives of the Law Institute with a view to bringing about a situation where moneys collected by solicitors wholly or partly on account of, or for payment of any disbursements, be paid into their trust accounts, and not into their office accounts;
- (c) through the Clerks and through information from barristers, seek to identify those solicitors who dishonestly make a practice of not paying accounts, and make recommendations as to how they can be dealt with, by formal or informal means;
- (d) request various Lists to consider instituting a monthly system of accounts rendered by their Clerks and act as a liaison or information exchange between Lists as to what they are doing, or could be doing, with regard to fee collection. Those counsel whose Clerk does not have computerised accounts will find that he will not be able to render monthly accounts, or even to render frequent accounts rendered. If they are not prepared to require him to computerise, then the Committee can only assume that they are happy with the current situation in that regard.

- "(3) Neither the Bar nor the Committee can, or should try, to do anything about the Plaintiff's solicitors who as part of their practice "punt" on a result, and not pay until the end of the case, or not at all if there is a loss. In practical terms, if a solicitor regularly briefs counsel on that basis, instead of sending his client to the Legal Aid Committee (where he would only receive 80% of his fees) then the occasional hazards of such a course probably have to be borne by those concerned."

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## MILESTONES — 1984

### Addendum

In the **Bar News** Summer 1984 we published significant milestones attained by our members in 1984. The following regrettable omissions have been noted.

#### 55 Years:

Sir R.A. Smithers J. signed the Bar Roll 6.5.29

#### 35 Years:

Frank Gaffy QC. admitted to practice 3.10.1949

## FAREWELL:

### JUDGE VICKERY

On February 1985 representatives of the Bar and the Solicitors gathered in the Workers' Compensation Board to pay tribute to Judge Vickery upon his retirement from the County Court on account of ill-health.

His Honour has served on that Bench since 1962. Few members of the Bar have clear recollections of that time and it seems appropriate to recall the man who in that year was elevated to the Bench after only 11 years at the Bar.

Before World War II he obtained an Economics degree at Sydney. He served throughout the War, obtaining a Military Cross in the Western Desert Campaign. On his return to civilian life he studied law part time at Melbourne. He signed the Bar Roll in 1951 and read with Reginald Smithers. His work on Motor and Traffic Law is well known, widely respected and inevitably used by practitioners in that field. After the war, he maintained his interest in things military in the CMF where he attained the rank of Major-General, the Senior Officer in the CMF for the whole of Australia.

As a judge he succeeded Judge Dunn as Chairman of the Police Service Board. This became a full-time appointment in 1979. In 1983 he was transferred to the Workers' Compensation Board where he served until his retirement.

The Bar wishes His Honour a satisfying retirement.

### JUDGE FORREST

Some twenty years ago Jim Forrest first took his seat on the County Court Bench. At the age of 46 the new judge had previously served in the Air Force, signed the Bar Roll in 1948 and read with Oliver Gillard. His eighteen years at the Bar had been spent mainly in Crime and Common Law.

His twenty years have seen the County Court grow in size and jurisdiction. As judge in all jurisdictions and as Chairman of the Youth Parole Board, Judge Forrest acquired a reputation for fairness, humanity and humour. These characteristics made him an excellent judge, loyal to his friends and a ready source of advice and support for his colleagues on the Bench. One of them wrote of him in these terms:

"If you take qualities like down-to-earth judgement of people of all sorts and affairs and things of all sorts; an innate and unfailing sense of fairness and justice; a very lenient and merciful approach to his fellow men; great dignity combined with an earthy common touch — you can find any of those in numbers of people. It is not often you find them all in one person as you do with JHF, and in such ample measure."

Such an accolade would provide solace aplenty for any retiring judge.

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### SHORT VACATION

Members will note the dates of the Short Vacation this year:

— 27th July – 11th August (inclusive) —

This is to coincide with the 23rd Australian Legal Convention which is to be held in Melbourne from 5th to 9th August.

## WELCOME:

### JUDGE DUGGAN



Photo - Burnside

On the 18th December 1984, the legal profession welcomed Jim Duggan to the County Court Bench. After leaving school His Honour's career was remarkable for its diversity. He started with Surveying and then turned to Architecture before taking up a position as a Clerk of Courts for some 12 months. The later move was hardly surprising given that his father, also Jim, was a Stipendiary Magistrate and later Chief Stipendiary Magistrate until his retirement in 1973. Those with a faith in bloodlines are confident that the son will achieve a reputation for fairness and compassion as his father before him.

His Honour did his law course at Melbourne University in 1963. He took articles with Mr. Colin McNab of the firm McNab & McNab. He signed the Bar Roll in 1968, the same year that he was admitted to practice. He read with Northrop and quickly established a practice at the Criminal Bar. After some four years' practice in crime His Honour's practice tended to civil cases with a bias towards the Personal Injuries jurisdiction. He soon developed an

outstanding practice in this area and for many years was a very prominent member of the Geelong Circuit. He appeared for both plaintiffs and defendants and was involved in some of the pioneering litigation on asbestos related injury, toxic fume injuries and repetitive strain injuries.

As well as being a capable and persuasive advocate, His Honour maintained an enormous paperwork practice. He was a resourceful barrister who could surprise his adversaries with his knowledge of some esoteric piece of interstate industrial legislation. His Honour had five readers; Neale, Sheen, Perry, Zarbo and Oley. Despite his enormous workload His Honour maintained a conscientious interest in his readers' work and was known to readers and opponents alike for his friendliness and courtesy.

Outside the law, His Honour's penchant for active participation in sport is well known. He played more than 100 games for the CBC St. Kilda old-boys in the Amateur Football Association. When he finally put away his football boots His Honour turned to the less vigorous pursuit of marathon running. He has competed in no less than eleven marathons and has been a prominent participant in the annual "Berkeley Boot" Race on behalf of the Bar. Given his undoubted fitness and relative youth, His Honour ought to be a fancied candidate in the Judicial Section of that Race.

Whilst sport provided some relief from the great demands of his practice, Judge Duggan also managed to be active for some ten years as President of the Milparinko Training School for Intellectually Handicapped Adults and Children.

His Honour was a respected and admired member of the Bar and doubtless his knowledge of the law coupled with his humanity and courtesy will make him a great asset on the County Court Bench.

The Bar wishes him a long and happy career.

### GONGS AND PIPS

The following appointments and honours have been bestowed upon members of the Bar this year:—

#### **Australia Day Honours**

Officer of the Order of Australia — J.C. Finnemore  
Q.C.

Member of the Order of Australia — A. Bonnici

#### **Member of the Administrative Appeals Tribunal**

Elizabeth Curtain

#### **Member of the Residential Tenancies Tribunal Small Claims Tribunal Referee**

Margaret Rizkalla

Mary Slade

# WELCOME:

## JUDGE HART



Photo - Burnside

On Thursday the 21st March 1985, Leo Richard Hart was welcomed as a Judge of the County Court in a ceremony before such numbers of the profession as reflected his popularity as both man and Counsel.

He was born on the 12th October 1936 and educated at Xavier College. In 1954, His Honour's leadership qualities and sporting prowess saw him as School Captain, Captain of Football, Captain of Athletics and stroke of the first eight rowing crew. At Melbourne University between 1955 and 1959, he obtained Exhibitions in Property, Torts, Equity, Executors and Trustees and Contract (which he shared). During his University years, His Honour also played football with the University Blacks.

Upon the completion of his course, His Honour took his BA and LLB, and also a wife, when on the 3rd December 1959 he married Carole Bowen. An active family man he has seven children ranging in age from 24 to 6. Apart from his family, His Honour's recreations still include walking, camping, tennis and horse racing (as a spectator).

He served Articles with the late Bernie Gaynor of Renwick & Gaynor and was admitted to practice on the 1st day of March 1981.

On the 21st September 1981, he signed the Bar Roll and read in the chambers of Xavier Connor. His Honour quickly developed a wide ranging practice, but as the years progressed his skill as a common law advocate saw his role become that of one of the most successful jury advocates at this Bar. He was not only notorious for the size of verdicts in his clients' favour, but also for his continued attempts to preserve the vestiges of his sporting fame. Edition after edition of this publication reported on his latest annual attempt to cross the Little Desert in a competitive foot race. In every year His Honour would come last, but he always finished. In 1979, he took on his greatest sporting challenge when he decided to canoe the Franklin River in Tasmania (in his own version of "Deliverance") and the photographs that subsequently adorned His Honour's Chambers on the 9th Floor of Owen Dixon Chambers were a tribute to the magnitude of the excursion.

He served the Bar diligently in his years of practise. His numerous Committees included the County Court Practice Committee from 1965 to 1971; the Committee on New Courts 1964-1965; the County Court Fees Committee 1970-71; the Joint Committee and Bar Committee on National Compensation 1977-78; the Workers' Compensation Consultative Advisory Council from 1980 to the date of his appointment and the Joint Standing Committee of the Bar and Law Institute on Accident Compensation from 1983 to his appointment.

His Honour had a stable of eight Readers: Lopez; Connor; P.F. O'Dwyer; Hayes (left the Bar); D.B.X. Smith; S.K. Wilson; N.T. Robinson and McEachern. These readers are among those few who are aware of the contradictions in His Honour's psychological make-up. The man who can run across deserts and canoe raging torrents has a morbid fear of travelling as a passenger in motor cars. When being driven up to Beaurepaire track at Melbourne University for his evening's jogging in one of his Reader's battered MG convertible, His Honour, knuckles white as he gripped the top of the front window, was heard to mumble, "I'm not Volenti, I'm not Volenti". The man who appeared so relaxed as he disarmingly faced the jury was a compulsive smoker. He was famous for the speed with which he would return paperwork, very rarely more than 48 hours after receipt notwithstanding its immense volume. This no doubt impressed his instructing solicitors and perhaps caused them to make unkind comparisons with his colleagues.

His Honour took Silk on the 25th November 1980, and continued his practice as a leader of the Common Law Bar. In 1982 and 1983, he was Counsel assisting the Board of Enquiry into Casinos in Victoria which Board was constituted by his old Master Xavier Connor.

As a man of all round legal ability and human understanding, it is to be hoped that His Honour's personal charm and wit will grace the Bench for many years to come.

## WELCOME: JUDGE CROSSLEY

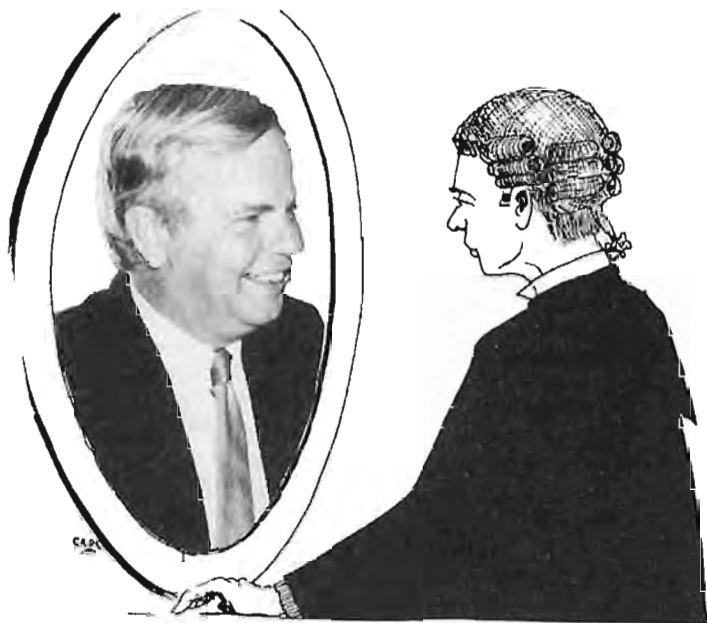


Photo - Burnside

His Honour Judge Crossley was a short silk — in fact only four months. When he first donned the rosette in November 1984 he fulfilled an ambition cherished since the night of his first Bar Dinner when he sat next to Gifford QC. His neighbour regaled the young barrister with the delights of the inner bar and disclosed to him in passing, the annual cost of his helicopter hire that exceeded all the fees that Crossley had ever earned.

He was the guest at another dinner held late last year by his many readers. Present also was his former master Judge Tolhurst. Further ambition must have been kindled in the bosom of Crossley QC at the sight of His Honour being called for by a shiny Government car equipped with suitably deferential chauffeur.

Indeed it seems that Dinners have always brought out the best in Judge Crossley. As a law student and member of the Law Students Society Committee, he was attending a formal dinner at Union House. Guest of Honour on this occasion was Mr. Justice Little. "Croc" Crossley took his Honour to one side and confided in him his expectation of a judicial destiny. He could not fail, he said putting his arm around his older companion, because they both had so much in common — "We are both little and smoke Chesterfields".

Graham Rueben Glover Crossley was born on the 21st day of October, 1940. He was educated at Melbourne Grammar School and Melbourne University. At school he developed particular talents as an Artist and a Sailor. He obtained the Matriculation Exhibition in Art and has kept drawing since. His pen for many years enriched the pages of this Journal on a regular basis, until the demands of his enormous paperwork practice came to dominate his every

week-end. Michael Adams hopes that with the increased opportunities for leisure which the Bench will offer, his artistic output will increase. A showing is said to be planned for the Essoign Club later in the year.

His Honour has also maintained his interest in sailing. Last season he took out the Merricks Yacht Club Championship with his daughter Rowena and his son Marcus. During winter vacations in the preceding years he had refined his talents with some serious sailing in northern waters in the company of Nicholson, Meldrum, Dickson, Fricke, Balfe, and W.R. White.

Judge Crossley signed the Bar Roll in 1965. He has persistently resisted the temptation to specialize. In recent years he held substantial briefs in such various fields as industrial, shipping, constitutional, commercial, personal injury and criminal law. He also assisted in a Royal Commission concerning the Builders Labourers Federation. The signs erected on nearby construction sites facing the County Court building will no doubt be seen by His Honour as a touching memento of those happy days looking into the affairs of that merry band.

He had eight readers, Osborn, Middleton, Preston, Dugdale, Maxted, Casely, Drake and Findlay. Upon these and upon his colleagues generally, Graeme Crossley bestowed his warm friendship and good humour.

A well-rounded and gregarious personality, he goes to the County Court, one of the Bar's characters. He has a long judicial career ahead of him; his diverse interests and generous disposition will serve him well in his new office.

We wish him well.

## WELCOME:

### JUDGE SCHIFTAN



Photo - Burnside

Lynnette Rochelle Opas Q.C. has been appointed as the First Lady of the County Court.

Only the second woman silk in Victoria's legal history, Her Honour has become the first woman to be appointed a judge of a Victorian Court.

Born on 6th March 1942, Her Honour attended the Methodist Ladies College in Melbourne. Following in her family's footsteps, she then attended Melbourne University between 1961 and 1965, and studied law. After being admitted on the 1st of June 1967, Her Honour signed the Bar Roll on the 12th October of that year, reading with Austin Asche (as he then was). During the course of her career as junior counsel she had six readers, Julia Langslow, Elizabeth Curtain, Sue Blashki, Carolyn Douglas, Clare Gray and Mary Slade. Her Honour took silk in November 1984.

Her Honour says that at the commencement of her career, she experienced a great deal of prejudice against her as a female barrister, from the community generally, from solicitors and from the Bench. She says, however, that she suffered no such prejudice from other members of the Bar, who formed a protective barrier around her which she remembers with great affection.

In 1968, shortly after her admission, Her Honour went to Papua New Guinea to practice. She was engaged by Bectil as a Contracts Engineer. This work required Her Honour to oversee and vet contracts entered into by her employer, including the contracts which were later let in respect of the Bougainville Copper Mine.

Her Honour is married with two children. While she and her family were in New Guinea, her husband Peter ran a supermarket. In addition to her work for Bectil, Her Honour defended a number of persons who had been apprehended and charged with theft from this supermarket. This defence she carried through with great success, although not without a fair degree of marital displeasure.

In her early years at the Bar, Her Honour engaged in a broad general practice, although in later years she developed a significant Family Law Practice. In 1972, for example, she defended (unsuccessfully) the first sex shop in Melbourne prosecuted for obscenity. She was widely known at the Bar as a tireless worker and a vigorous advocate in the cause of her clients. Her services in the Family Court area were widely sought after.

Her Honour's expertise in Family Law led to her appointment to the Family Law Council in 1984. She intends to remain as a member of this Council, where she will no doubt make a significant continuing contribution. In 1982, furthermore, she was appointed to the distinguished Committee (headed by Professor Louis Waller) appointed by the Victorian Government to consider and report upon in vitro fertilization in Victoria.

Her Honour is not, however, without a great sense of feeling and humanity. Like most other Australians, she was overjoyed when the America's Cup was won by Australia II in October 1983. In Beijing at the time, on a tour as part of the Commonwealth Law Conference 1983, she (together with a number of other members of the Victorian legal profession) insisted upon an early morning "raid" during which the American Embassy was subjected to a rather raucous rendition of "Waltzing Matilda".

Her Honour brings to the County Court Bench not only all of the inherited characteristics of her distinguished legal family, but the virtues of compassion, intelligence and industry. We feel sure that she will be an adornment to the Bench of the County Court in Victoria, and wish her well.

## THREE BARRISTERS FOR THE MAGISTRATES' COURT

Following what is believed to be an unprecedented number of applications from practising members of the Bar, the Government has appointed four new Magistrates — three of them Barristers.

**W.J.G. (Bill) O'Day** was admitted to practice in 1970. He signed the Bar Roll in the same year and read with Spence. His former Clerk, Perce Dever says that he had a general practice in the Magistrates' Court and in the County Court Juries and was very competent in everything he undertook.

**H.R. (Hal) Hallenstein** was admitted to practice in 1971 after graduating in Law from Monash University. He was one of Goldberg's numerous readers after he signed the Bar Roll in 1973. He has had one reader, Bruce Heathershaw. After practising for some years in all courts he came of recent years to specialise in the Magistrates Courts. He will therefore fit very comfortably in his new role as Stipendiary Magistrate.

**Rodney Crisp** is the most recent of the three new Magistrates to be admitted. It was in 1973 that he commenced practice and immediately signed the Bar Roll. He read with John Nixon. In 1976 he successfully completed an LL.M. He conducted a general practice until 1984 when he was appointed as a Referee in the Small Claims Tribunal and a member of the Residential Tenancies Tribunal.

### CRI DE COEUR



The Bar Council has received a request from the President of the International Bar Association for the views of members of the Bar as to the perceived strengths and weaknesses of the international body.

Over the years, many Counsel attended the various conferences held by the IBA and no doubt recognise

what valuable work it does in bringing together lawyers from the various legal systems around the world to exchange views, experiences and practices and to discuss the working of the rule of law around the world.

If any Counsel has any thoughts as to how the IBA can more usefully perform its functions or wishes to make constructive criticism of it, please make your views known in writing to the honorary secretary, R.A. Finkelstein. Such views will be passed on to the Executive Director of the Association.

## VICTORIA LAW FOUNDATION



The Victoria Law Foundation seeks an input from the Bar into its current review of policies and programmes. Its statutory objects are:

- (a) to promote or undertake legal research, whether being conducted within or without Victoria, which, in the opinion of the Foundation, may be of value in the reform of the law in Victoria;
- (b) to promote legal education in Victoria, including the education and training of legal practitioners and persons employed by legal practitioners in any subject or field that, in the opinion of the Foundation, is likely to promote the efficient practice of law in Victoria;
- (c) to establish, maintain or improve law libraries in Victoria;
- (d) to investigate or enquire into proposals for the improvement of the administration of law in Victoria, including the work of the legal profession, and to promote or undertake projects directed towards such improvements;
- (e) to promote or undertake within Victoria community education in law and the legal system, including programmes in schools;
- (f) to communicate to legal practitioners and other persons information on the law and matters related to the law;
- (g) to publish or subsidize the publication of material relating to, resulting from or connected with the carrying out of the objects of the Foundation;
- (h) do anything incidental or conducive to the carrying out of the foregoing objects.

Its activities have fallen into three main areas:

### Foundation Research Projects

As a result of suggestions made to the Foundation it has, from time to time, identified projects of major significance which, because of either their scale or nature, appeared to be appropriate for the Foundation to pursue as "in-house" projects. In recent years, such projects have concentrated on the administration of law in Victoria. Thus, in addition to the recently-completed Civil Justice Project, for which the Foundation provided the support staff, it has provided research support to the Shorter Trials Committee and the Supreme Court Rules Committee for the purpose of a revision of the Rules.

### Grants Programme

The Foundation has responded to a wide variety of requests to support research, publications, conferences and other significant activities. Grants have varied from \$50 to \$123,000, but are usually in the range of \$2,000 - \$15,000, depending on the type of activity. As a general rule, it looks for innovative proposals, based on a sound strategy, which are to be executed by individuals with the skills and commitment to accomplish the work proposed.

In 1984, projects supported by the Foundation included the Australian Institute of Judicial Administration's enquiry into Delay and Efficiency in Civil Litigation and its seminar on the use of computer technology in court administration. It also contributed to the Dispute Resolution Project conducted by the Legal Aid Commission, a feasibility study of Youth Legal Advocacy Systems, and the "Families in Conflict" study undertaken by the Victorian Court Information and Welfare Network for the provision of support services in the Family Court.

In addition, it supported a number of publications, including the Lawyers Practice Manual, a booklet on wills and estate planning for intellectually disabled people and the projected re-publication of the Convention Debates on the Australian Constitution, with detailed indices and commentaries.

### Law Reform Activities

The Foundation also has a continuing commitment to law reform activities. It is the primary source of funds and library support for the Law Reform Commission of Victoria and meets the cost of secretarial services for the Chief Justice's Law Reform Committee.

Professor S.D. Clark of the University of Melbourne has recently been appointed Executive Director of the Foundation. He would be delighted to hear from any member of the Bar who may have ideas for the future activities of the Foundation or for particular research proposals. A pamphlet setting out guidelines for applicant's and an informative annual report may be obtained from the Foundation. Its telephone number is 602 2877.

# LAW REFORM COMMITTEE REPORT

The following matters of interest in the area of Law Reform have risen over the last three months.

**A Report by the N.S.W. Law Reform Commission on "A Transport Accident Scheme for N.S.W. which proposes the abolition of lump sum compensation for loss of earning capacity"** has been discussed by the Law Reform Committee and referred to members of the Bar and organisations within the Bar such as Personal Injuries Bar Association for comment and report.

## **Family Law — Reference of Powers**

A letter from the State Attorney-General and proposed Draft Bill have been discussed by the Law Reform Committee. The draft Bill proposes to refer to the Commonwealth for a period of time and subject to certain provisions the following matters:

- (a) The maintenance of children and the payment of expenses in relation to children or child bearing;
- (b) The custody and guardianship of children.

It is also proposed to refer to the Commonwealth subject to certain provisos the following:

- (a) the declaration or alteration of interests in property, being property of the parties to a marriage (including a marriage that has been dissolved) or of either of them, in proceedings between the parties to the marriage arising out of the marital relationship.
- (b) the property of the parties to a marriage (including a marriage that has been dissolved) or of either of them, whether acquired before, during or after the subsistence of the marriage or by virtue of the solemnization of the marriage, and the creation, declaration or alteration or rights and liabilities in relation to such property as between —
  - (i) the parties to the marriage;
  - (ii) either party or both parties to the marriage and a child of the marriage;
  - (iii) either party or both parties to the marriage and any other person; or
  - (iv) a child of the marriage and any other person;
- (c) in relation to the matters referred to in paragraphs (a) and (b), the preservation, protection or realisation of property and the enforcement of rights.

## **Australian Law Reform Commission — General Insolvency Inquiry — Issues Paper**

The terms of reference of this enquiry require the Commission to examine the Law and Practice relating to the insolvency of both individuals and companies.

Because corporate or company insolvency is presently the subject of State and Territorial legislation, the Commission is consulting with the State and the Northern Territory, the National Companies Securities Commission and the Companies & Securities Law Review Committee.

The paper contains Options for Reform including:

- (i) To retain the two systems in their present Commonwealth-State structure;
- (ii) To have enacted National Insolvency Legislation which would embrace individual and corporate insolvency under the one law;
- (iii) To have corporate insolvency dealt with by a National Companies Legislation.

The Commission is inclined towards the view of a National Insolvency Legislation and has addressed itself in this paper to that prospect.

The Paper deals with such matters as:

Proceedings in Bankruptcy; Company Insolvency Proceedings; Insolvency Administrators; Aids to Administration; Property; Creditors; Debtors; Receivers; Charges & Revenue, Insolvent Companies & the Consequence for Individuals; Trading Trust.

This reference which has wide ramifications for many members of the Victorian Bar has been referred to Robson, Myers and Hayes for comment and report back to the Law Reform Committee.

## **Law Reform Commission of Queensland — Working Paper on Legislation to Review the role of Juries in Criminal Trials.**

This has been referred to the Criminal Bar Association for comment and report.

## **An Options Paper from the Inquiry into Prostitution in Victoria**

This has been referred to the Criminal Bar Association for comment on the proposals to decriminalize prostitution.

## **Reports from the Australian Law Reform Commission on Admiralty Jurisdiction and on Service and Execution of Process**

Problems and uncertainties that exist in the area of Admiralty Law include:

- (i) how special admiralty rules relate to ordinary rules on such matters as limitation of actions, pre-judgment interest, and insolvency;
- (ii) how admiralty arrest relates to Mareva injunctions against ships, and
- (iii) the relationship between common law liens and statutory rights of arrest or detention of ships.

The paper states that many of the above problems are difficult to resolve as long as admiralty remains a separate jurisdiction. The presence of a specific admiralty power in the Constitution suggests that what is required is not abolition but reform within the existing framework of admiralty. The paper proposes Commonwealth legislation consisting of four parts:

- (i) The types of claim which lie within admiralty jurisdiction;
- (ii) The way in which that jurisdiction may be exercised (what ships or cargo may be arrested where, when etc.);
- (iii) The courts which are to exercise the jurisdiction, and finally,
- (iv) A part dealing with the relationship between admiralty and other jurisdiction.

Any member of the Bar who has an interest in Admiralty Jurisdiction who wishes to comment on this paper should contact the Secretary of the Bar Law Reform Committee.

#### **The Civil Justice Committee Report**

This Report has been referred to the Bar Council and various meetings with members of the Bar likely to be affected by proposed changes have been held.

#### **Report from Business Law section of the Law Council of Australia on Forms of Legal Organisation — "Limited Partnership" or "Incorporated Business"**

This has been received by the Law Reform Committee together with a submission prepared by the Companies Committee of the Law Council of Australia on Companies and Securities and Legislation (Miscellaneous Amendments) Bill (No. 2) 1984.

The Law Reform Committee is now chaired by D. Graham QC. New members of the Committee welcomed at the last meeting were T.H. Smith and P.B. Murdoch. Smith has considerable experience in the area of Law Reform. As a Commissioner with the Australia Law Reform Commission, he played a prominent role in its enquiry into the Law of Evidence. The voice of the Victorian Bar in the areas of Law Reform is strengthened by having a person of Smith's calibre on the Law Reform Committee.

**J.J. HOCKLEY**

Hon. Secretary to the Law  
Reform Committee of the  
Victorian Bar

## **CRIMINAL BAR ASSOCIATION**

1985 promises to be a busy year for the Criminal Bar Association. As at the end of 1984, the Association had 256 financial members and the numbers will grow during 1985.

A number of issues have already arisen this year for consideration including matters such as committals, the problems of listing of trials for counsel and the regular discussions and negotiations concerning fees.

The Association is involved in each of these areas. It is proposed to conduct a seminar in the near future on the listing problems and invite to it the Director of Criminal Listings.

The question of fees is now a very difficult one and requires negotiations which take account of the Victorian Bar Fees Committee, the Legal Aid Commission and the Victorian Government itself. Since the majority of work done by members of the Association comes from public funds, there is constant pressure on fees. A review of fees generally is occurring and the Criminal Bar Association is taking an active role in that.

On the 6th October 1985, the first International Criminal Law Congress will be held in Adelaide. The Congress, to be opened by the Chief Justice of the High Court, is expected to attract a large number of practitioners in the criminal law and is specifically designed to be reasonably practical rather than esoteric. Frank Vincent QC, Lex Lasry and Frank Galbally are the Victorian representatives on the national organising committee.

#### **JUDGMENTS OF THE COURT OF CRIMINAL APPEAL OF VICTORIA**

The Law Department, Victoria, is offering for subscription a service which will include a cumulative index and summary of all judgments of the Court of Criminal Appeal in Victoria on a periodic basis together with complete copies of the more significant judgments when these are handed down. This service will include judgments commencing from February 1985. The annual subscription payable to the Law Department, Victoria is \$250.

Your order, together with mailing address and remittance, should be forwarded to the Director, Finance and Accounting Services, Law Department, 471 Little Bourke Street, Melbourne.

# THE CONTRIBUTION OF THE BAR TO THE TASK OF PROSECUTION

## Prosecutors for the Queen

Section 353 of the Crimes Act 1958 provides that the Director of Public Prosecutions or any Prosecutor for the Queen in the name of the Director of Public Prosecutions may make presentment at the Supreme or County Courts of any person for an indictable offence. The section also provides that such presentment must be in the form contained in the Third Schedule or to that effect, and it shall be as good and of the same force, strength and effect in law as if the same had been presented and found by the oaths of twelve men. Thus, the Director of Public Prosecutions and Prosecutors for the Queen in Victoria perform the same function as the Grand Jury once performed in England. In the early days of the colony of New South Wales, Grand Juries could not be called as the inhabitants were mainly convicts and unqualified for service upon such juries. In 1828, the English Parliament provided that offences triable in New South Wales in the Supreme Court were to be "prosecuted by information in the name of His Majesty's Attorney-General or other officer appointed for such purpose by the Governor." (9 Geo. IV Ch. 83 S.5). This legislation created the office of Crown Prosecutor in Australia and laid the foundation of the system of independent prosecutors in this country. Section 353 is set against this background. The Director of Public Prosecutions and the Prosecutors for the Queen act as independent and impartial officers of the Crown in administering justice, taking their office under the sovereign, and not as delegates of the Attorney-General or Solicitor-General. The Director of Public Prosecutions himself, or any Prosecutor for the Queen, carries out his duty to make presentment of his own motion and discretion in each particular case: see **R. v Parker** 1977 V.R. 22.

Other common law countries, as well as other States in Australia, have adopted a system of independent, salaried prosecutors, recognising that a prosecuting authority in a democratic society should be as independent as possible from the government of the day. The abuse of the *ex officio* information in England, particularly during the 17th century, for the purpose of instituting politically motivated prosecutions by governments, has caused the requirement of independence of prosecuting authorities from government control and influence to become a

deeply imbedded convention of our criminal justice system. Indeed, it seems that England and Wales are among the very few common law countries which do not have counsel holding office equivalent to that of Prosecutor for the Queen. As in many other instances where the common law has been transplanted from England to other countries, there are local variations in substantive law, procedural law and practice, designed to meet the needs of the various local societies. In England itself, there was debate throughout the 19th century on the adoption of a system of public prosecutors such as prevailed elsewhere, including Scotland.

Prosecutors for the Queen are appointed by the Governor-in-Council pursuant to the provisions of section 352 of the Crimes Act 1958. That section provides that the qualification of a barrister to be appointed as a Prosecutor for the Queen is that such barrister "... shall have practised as an advocate, barrister or special pleader in England, Ireland, Scotland or Australia for a period of five years or, if he has practised in more than one of those places, for an aggregate period of five years." In practice, this is a minimum requirement and those members of counsel who are appointed Prosecutors for the Queen have usually had considerably more than five years experience as a barrister. Many have had a wide experience of practice in other fields besides criminal law and have prosecuted or defended in many criminal trials before their appointment.

Prosecutors for the Queen have two main functions. Firstly, they are the principal indicting authorities for the State of Victoria — see section 353 of the Crimes Act 1958. Secondly, they act as advocates in the conduct of prosecutions, subject to those special duties imposed upon Prosecutors by the rules of law and practice of the State of Victoria laid down for the conduct of all prosecutors. As well, Prosecutors for the Queen appear on behalf of the Crown in appeals before the Full Court of Victoria and the High Court of Australia. In some cases, particularly murder trials, the one Prosecutor for the Queen will discharge both the function of indicting authority and the function of advocate. More usually, the function of the advocate is performed by a private practitioner briefed to prosecute a case where the presentment has been signed by a Prosecutor for the Queen.

## The Prosecutor for the Queen as an Indicting Authority

A Prosecutor for the Queen to whom a brief is delivered must consider:—

- (a) Whether a person who has been committed for trial should be presented on any charge at all;
- (b) what counts are appropriate for inclusion on the presentment;
- (c) whether it is appropriate to tender advice to the Director of Public Prosecutions in relation to the entry of a *nolle prosequi*;
- (d) the possible acceptance of offers to plead to lesser charges than those which might properly be laid;
- (e) tendering advice to counsel briefed to prosecute particular trials.

Each of the tasks set out above requires not only a mastery of substantive and procedural law, but also experience as an advocate regularly briefed to prosecute criminal trials. While certain criminal charges may theoretically be open on the evidentiary material available, procedural and practical considerations apparent to an experienced advocate may render it inappropriate for such counts to be included on a presentment.

Besides their individual expertise in the field of criminal law, Prosecutors for the Queen, as members of a group specialising in the prosecution of criminal trials, both contribute to and benefit from the collective expertise of that group. It is not only in trials in the Supreme Court that difficult questions of law and procedure arise. A suggestion that the Prosecutors for the Queen appear only in the most difficult and interesting cases, leaving easy, uninteresting and unchallenging work for those private practitioners who prosecute, is not borne out by experience. On the contrary, private practitioners briefed to prosecute frequently encounter difficulties and seek the advice of Prosecutors for the Queen, knowing that such advice will be given freely.

Both as an indicting authority and as an advocate, the role of the Prosecutor is not to "press for conviction" of an accused. Rather, Prosecutors should regard themselves as "ministers of justice" assisting in the administration of justice, not merely as advocates: **Reg. v Puddick** (1865) 4 F. & F. 497, 499, per Justice Compton; **R. v Banks** (1916) 2 K.B. 621, 623; also Kenny's *Outlines of Criminal Law*, 17th Edition, at p.569; Kidston, "The Office of Crown Prosecutor" (1958) 32 A.L.J. 148. In the last mentioned article, the learned author states (p.153): "Having found charges, or reported against them, a Crown Prosecutor has performed a function which calls for a detachment approaching that of a Judge."

It is submitted that, in the same way that Judges are not paid according to the number of cases they try but are appointees of the Crown, financially independent and not holding office according to the whim of the government in power, so Prosecutors for the Queen should be placed in the same position, free of financial and political influence. While the security of tenure of office which Prosecutors for the Queen enjoy leads to independence of thought and action, it cannot lead to complacency, since each Prosecutor for the Queen knows that his work will be judged, not only by his fellow practitioners, but also by the courts in which the presentments which he has signed are filed.

## The Prosecutor for the Queen as an Advocate

Whether discharging his function as an indicting authority or discharging his function as an advocate, a Prosecutor for the Queen is required to act as a "minister of justice" — see **R. v Puddick**, *supra*. As an advocate, a Prosecutor for the Queen is bound, as is any other prosecutor, to discharge the obligations placed upon him by law and enunciated in such cases as **R. v Lucas** (1973) V.R. 693; **R. v Richardson** (1974) 131 C.L.R. 116; **R. v Apostilidis** (1984) 58 A.L.J.R. 371. A Prosecutor for the Queen is bound, as is any other barrister, by the rules of the Victorian Bar. As an advocate, each Prosecutor for the Queen knows that his performance will be assessed by other members of the Bar engaged in the case which he is prosecuting and by the tribunal before which he is appearing. Indeed, each Prosecutor for the Queen knows that the standing of his office, as well as his own personal standing, depends upon the competent discharge of his duties.

Prosecutors for the Queen are well aware that their clients are not the police, the government of the day or any special interest group but the community at large. While it is in the interests of the community that wrong-doers should be punished, the paramount interest of the community is that each and every person presented before the courts of this State should have a fair trial. It is the duty of each Prosecutor for the Queen, so far as he is capable, to further that paramount interest by ensuring that he prosecutes both diligently and fairly so that the freedoms of members of the community are not curtailed.

## The Importance of the Bar as a Collegiate Body

In the past, there has been criticism of the situation where Prosecutors occupy chambers in a different building from the rest of the Bar. It has even been suggested that this tends to make Prosecutors for the Queen a sub-group within the Bar itself. The establishment, in recent years, of sets of chambers scattered around the law courts does not appear to have affected the collegiate life of the Bar adversely. It

would appear that the contribution of any barrister, whether Prosecutor for the Queen or private practitioner, depends not upon the geographical location of the chambers occupied by that member of the Bar but upon the attitude of the individual barrister to the collegiate life of the Bar. Many Prosecutors for the Queen, have, over the years, made substantial contributions to the life of the Bar.

The Prosecutors for the Queen maintain a significant control over the conduct of prosecutions in the State of Victoria. Where an offer to plead to a lesser offence is made to a private practitioner briefed to prosecute, the private practitioner has a discretion as to whether or not to convey that offer to a Prosecutor for the Queen in Chambers. Only if the private practitioner is of the view that the offer is appropriate, does he then discuss it with one of the Prosecutors for the Queen. If the Prosecutor for the Queen is of the opinion that the offer is one which should be accepted he will, save in significant cases which must be referred to the Director of Public Prosecutions, approve acceptance of the offer. Prosecutors for the Queen understand the criteria applicable to the assessment of such offers as those criteria have been stated by successive Solicitors-General and, more recently, the Director of Public Prosecutions. This process, it is submitted, serves to ensure that there is some consistency in the process by which pleas to lesser offences are considered.

As well as advising upon the acceptance of pleas to lesser charges than those contained in the presentment, Prosecutors for the Queen are frequently asked to advise private practitioners on various aspects of the conduct of prosecutions. The traditions of the Bar oblige Prosecutors for the Queen to give such advice to the best of their ability and they are most willing to contribute to the collegiate life of the Bar by doing so.

The importance of the Bar as a collegiate body is referred to by an American writer, Sarah J. Cox. In her article "Prosecutorial Discretion: An Overview" (1976) 13 American Criminal Law Review 383 the author makes the following comments at page 417:—

"In addition to other forces affecting his decision-making, the prosecutor is, and presumably thinks of himself as, a member of a professional group with professional training and a code of professional ethics. The prosecutor is more likely to perform competently and withstand other forces which might unduly alter or modify his decisions if he strongly identifies with this profession and its standards. However, the effectiveness of professional standards as a control over prosecutorial discretion decreases when Attorneys serve as assistants in the prosecutor's office for three to four years and then move to higher paying legal positions in other areas. This constant turnover could affect relationships with other members of the system because the prosecutor might have expectations of a future association. It may also affect the relationships among prosecutors who have only a fleeting association with one another."

Prosecutors for the Queen are well aware that they are members of the Bar who have accepted an appointment which lays upon them an obligation to act fearlessly and independently in the discharge of their duties, to uphold civil liberties and to do their utmost to enhance the standing of the Bar in general and the criminal Bar in particular. Prosecutors for the Queen have made, and will continue to make, contributions to the law in various fields, including law reform, conscious of their duty to the legal profession and the community at large.

**R.L. LANGTON**



*"Now you're in big trouble. Here comes my solicitor."*

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Punch London

# ADMINISTRATIVE APPEALS TRIBUNAL

The Administrative Appeals Tribunal of Victoria was created by the Administrative Appeals Tribunal Act 1984. It is modelled on the Commonwealth Tribunal in structure and purpose.

The President must be a County Court Judge. Deputy Presidents may be County Court Judges, or persons qualified to be County Court Judges, the former being senior to the latter. Members of the Tribunal may be lawyers of 5 years standing or other persons with "special knowledge or skill" in relation to matters coming before the Tribunal. The President is to determine the composition of the Tribunal for the particular case. However only a legally qualified member may preside.

At hearings lawyers have right of audience without leave. In most cases a tribunal member will conduct a preliminary conference for the purpose of seeking to resolve the dispute by negotiation and conciliation. The function of the Tribunal is to review, on the merits, decisions of Ministers, Officers, Boards and the like within the State administration. The traditional role of the courts has not encompassed this function. They have been concerned merely to ensure that the decision making process was undertaken in a lawful manner. The procedures of Parliament made it an unsuitable institution for the review of individual cases.

Community pressure developed for the establishment of a truly independent body to look again at bureaucratic decisions. The Administrative Appeals Tribunal has been given this task. Its counterpart seems to be working well in the federal sphere.

The Tribunal has commenced with power to hear appeals from:—

- The Motor Accidents Board;
- The Crimes Compensation Tribunal;
- The Estate Agents Board.

and appeals concerning:—  
Freedom of Information;  
Adoptions.

and State Employees Retirement Benefits.

Later this year the Tribunal is to deal with appeals under Victoria's Taxing statutes and will sit in a Taxation Division for this purpose. It will also hear appeals from the Minister of Health under the Infertility Medical Procedures Act.

There is a steady stream of appeals from the Motor Accidents Board. During February some twenty Freedom of Information applications were transferred from the County Court to the Tribunal together with two appeals from the Estate Agents Board. With a greatly extended right of appeal from the Crimes Compensation Tribunal, including quantum, the work in this field should also build up.

The founding members of the Tribunal are:

President: Judge Rowlands;

Members:

- Mr. Brian McCarthy of Rennick & Gaynor;
- Mr. Michael Higgins of Slater & Gordon;
- Miss Elizabeth Curtain of the Victoria Bar.

The Registrar is Tim McDonald and he is assisted by Miss Heather McMurray. Mr. McDonald is legally qualified and is established at the Tribunal's headquarters on the Ninth Floor of the Henry Bournes Higgins Building 471 Little Bourke Street, Melbourne (Telephone: 606 9111).

The Registrar has been a Clerk of Courts for many years. He has served as secretary of the Crimes Compensation Tribunal and after graduation went to the Costigan Royal Commission for a period of time.

A typical case commences by the lodging of an Application (form 1 under the Tribunal Regulations) seeking a review. A Notice (form 2) is then sent to the decision maker, from whom the appeal lies, by the Registrar. That person or body must respond within 28 days by forwarding details of the decision and other relevant material to the Registrar.

While in general, Appeals to the Tribunal should be lodged within 28 days of the decision and this time may be extended upon application to the Tribunal, the time for appeals under specific Acts, such as the Motor Accidents Act 1973 and the Freedom of Information Act 1982, may be greater.

Thereafter the Registrar gives notice of a Preliminary Conference if the President directs that this is appropriate in the particular case. In most cases he is likely to do so but clearly some cases, such as disciplinary appeals under the Estate Agents Act, may not lend themselves to the conciliation process. At the Preliminary Conference a vigorous attempt is

made by a Tribunal Member to resolve the issue by agreement between the parties.

To date this has been successful in some 80% of cases. This is in line with experience in the Commonwealth Administrative Appeals Tribunal. If there is no agreement then directions may be given and a hearing scheduled.

Hearings are to be informal. Interest is widely defined. Unrepresented persons may obtain assistance from the Registrar and lay representation will be welcome. Persons interested in the proceedings other than the application or the decision-maker may appear.

An interesting feature of the Tribunal is that the members hearing the case may be added to or subtracted from as the true importance of the case is revealed.

An appeal on question of law lies to the Supreme Court. It is to the Full Court if a Presidential Member is presiding, otherwise it is to a single judge.

The Tribunal is bound by published ministerial statements of policy known to the applicant and relied on by the original decision-maker.

The Attorney-General has a right to intervene in matters other than those under taxing Acts, and the Ombudsman may do so in Freedom of Information cases.

If the Commonwealth precedent is followed the Administrative Appeals Tribunal will enjoy an expanding jurisdiction of great interest to the Bar.

• • •

## NEW BUILDINGS CONTROLLER



Following the retirement last year of Mr Bill Oliver, a controller of Owen Dixon Chambers, Barristers' Chambers Limited has appointed his successor.

Mr Frank Collings has a background of 18 years military service. He has extensive experience in building control and maintenance. He commenced duty as Building Controller on 19th February 1985.



## Destinations In Law

23rd Australian Legal Convention  
Melbourne, 5-9 August, 1985

The 23rd Australian Law Convention is to take place in Melbourne from Sunday the 4th August to Friday the 9th August this year. The short vacation has been changed to coincide with the Convention.

**This is our Convention.** Representatives of the Bar have taken part in the organization and planning of the Convention. The lawyers of this State will play hosts to many interstate and overseas visitors.

We have arranged an interesting and varied programme involving eminent overseas and Australian participants. Amongst those taking part are Sir Harry Gibbs, Justice Sandra Day O'Connor of the U.S. Supreme Court, Sir John Donaldson M.R., Justice Willard Estey of the Supreme Court of Canada and Judge Jack B. Weinstein, Chief Judge, United States District Court of New York.

The theme of the Conference is, Destinations in Law. We are confident that every registrant will find something of interest in the papers to be delivered.

The registration fee is \$275.00 for registrants and \$90.00 for accompanying persons. The fees cover the printing of the papers. The fees have been kept to a minimum due to the sponsorship of various organizations.

We are hosts to this Convention and we expect the Bar to fully support the Convention, not only by participation, but by assisting with the social activities.

If any Barrister wishes to obtain further information, he or she is requested to contact the Bar's representatives on the Committee, Jack Rush or myself.

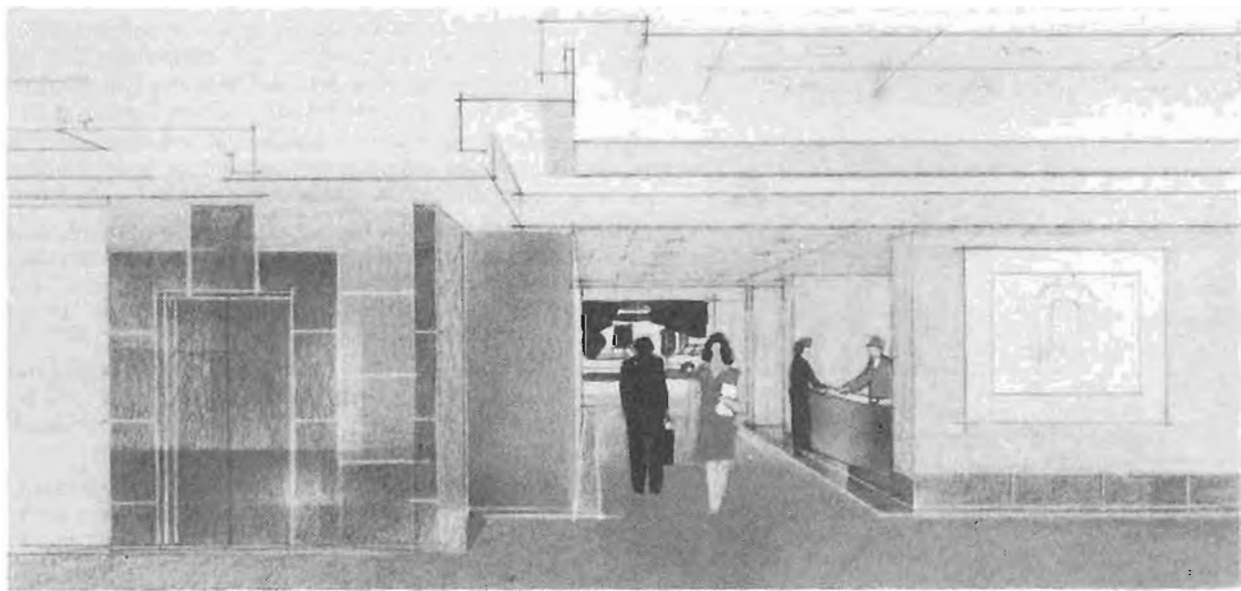
**E.W. GILLARD, Q.C.**

## THE NEW BUILDING



Photo — Squire Photographics

Concrete Raft Pour 18th December 1984  
10.00p.m. Plan view of the 4 concrete pumps  
operating whilst trowel hands have a break.



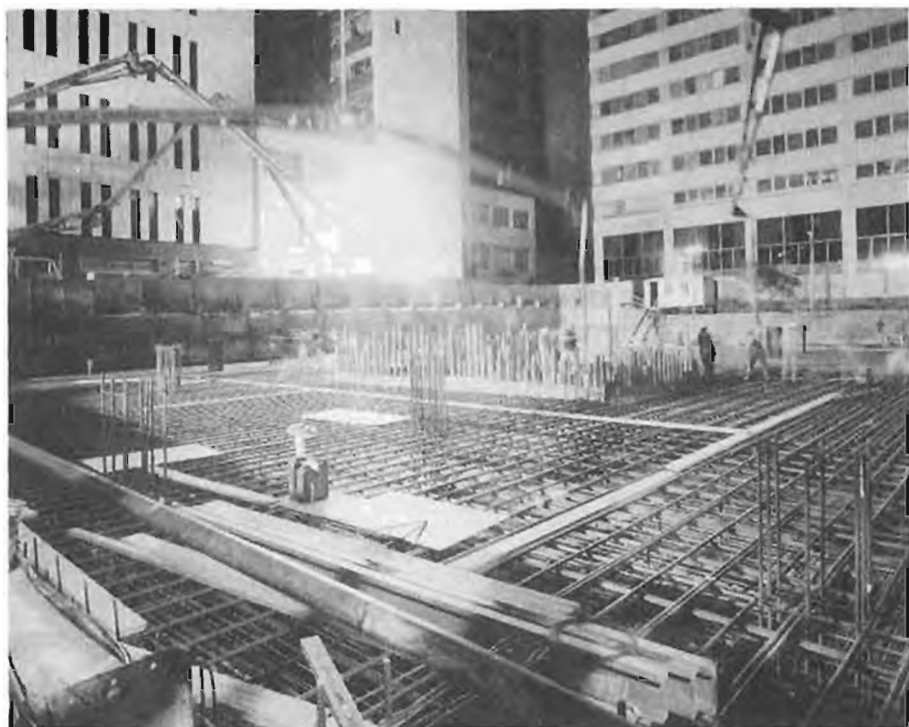


Photo — Squire Photographics

#### Concrete Raft Pour 18th December 1984

10.00p.m. Four concrete boom pumps stretch out like a huge praying-mantis. The overall pour rate averaged  $95\text{m}^3/\text{hr}$ . — which, in Barrister's terms, is 8,000 briefcases full /hr.



#### Ground Floor

Main foyer with view to the east through link towards Owen Dixon Chambers showing some Fit-Out items.

Perspective Sketch —  
Bales Smart and McCutcheon

# BUGS IN THE BAR



"THE CHEEKY BUGGER..!!"

Following concern expressed by certain members of the Bar that telephones may have been tapped, the Chairman on 19th December 1984 wrote a letter to -The Victorian Attorney-General  
The Victorian Police Commissioner  
The Commonwealth Attorney-General  
The Commonwealth Police Commissioner

in the following terms:

## **From the Chairman, Victorian Bar Council**

Dear

As you are no doubt aware there has recently been considerable publicity in relation to the alleged tapping of barristers' telephones in Sydney.

The Bar Council has received a letter from a member of the Victorian Bar inquiring whether it was the case that there had been tapping of barristers' telephones in Melbourne.

You will appreciate that it is a matter of great concern to legal practitioners and in particular to barristers that their telephone communications might be intercepted. Lawyers' communications with their clients are privileged, and it would be a most serious intrusion on the rights of litigants if they were unable to communicate freely with their barristers. Furthermore, the intercepting of such communications before or during litigation could well amount to contempt of court.

Accordingly, I am writing to you to seek an assurance that interception of barristers' telephones has not occurred in the past and that it will not occur in the future.

Since this is a matter of widespread concern at the Bar, I should say that I propose to publish to the Bar the terms of your reply.

Yours faithfully,  
S.P. Charles



Replies were received as follows:

**From The Secretary to the Attorney-General (Commonwealth)**

Dear Mr. Charles,

I acknowledge receipt of your letter of 19 December 1984 to the Attorney-General concerning the alleged tapping of barristers' telephones in Sydney.

The Attorney-General will write to you on this matter.

Yours sincerely,



**From the Commissioner of Police (Commonwealth)**

Dear Mr. Charles,

I have received your letter of 19 December 1984, and note the requests contained therein.

I am aware that the President of the New South Wales Law Society and the former New South Wales Attorney-General, the late Mr. Paul Landa, recently made similar representations to the Special Minister of State concerning the matters you raise. I have also responded to representations by Mr. N. R. Cowdery of Selbourne Chambers in Sydney.

The Special Minister of State replied to the first two mentioned above that it is, quite properly, not possible to exempt any profession from the legal process of investigations involving narcotic offences. The Australian Parliament has seen fit to make available to the Australian Federal Police, within the framework of stringent legislation, the facility of telephone interception for the purpose of narcotics investigations. It is clear that the Government does not intend to lay aside this most valuable tool in the fight to stem the ever increasing flow of illicit drugs into this country. I assure you that the Australian Federal Police will continue to utilise this means to gather sufficient evidence to prosecute offenders. I am sure that you and your colleagues would expect no less of the Australian Federal Police as the major law enforcement body within the Commonwealth jurisdiction.

The Minister, in the replies previously mentioned, further indicated that he was unable to give any undertaking that legal intercepts have not, or will not, be placed on the telephone lines of any barrister or solicitor in New South Wales by the Australian Federal Police after obtaining the warrant of a Federal Court Judge. I am similarly unable to give such an undertaking in respect to members of the Bar in Victoria.

I note your concern for the preservation of legal professional privilege in the relationship between barrister, solicitor and client. It remains a fact, however, that those persons suspected on reasonable grounds of being involved in organised narcotics crimes are also those who may, for a wide variety of reasons, have more frequent contact with the legal profession than the average citizen. Therefore, it is always a possibility that a suspect will use a telephone service on which the Australian Federal Police has legally placed an intercept, to contact his lawyer. I feel sure that your colleagues would recognise this possibility.

The Telecommunications (Interception) Act, 1979, places strict conditions on the release of intercept product. This Force complies with the legislation and will continue to do so.

(R.A. Grey)  
**Commissioner of Police**



## From the Victorian Attorney-General

Dear Mr. Charles,

### BARRISTERS TELEPHONES — ALLEGED TAPPING

I refer to your letter of 19 December 1984.

I fully appreciate and share the concern of legal practitioners that their telephone communications might be intercepted.

As you know, the interception of telephone communications within Australia is governed by the Telecommunications (Interception) Act 1979. Sub-sections 7(1) and 7(2) of the Act provide;

7(1)

7(1) A person shall not -

- (a) intercept;
- (b) authorize, suffer or permit another person to intercept; or
- (c) do any act or thing that will enable him or another person to intercept, a communication passing over a telecommunications system.

Penalty: \$5,000 or imprisonment for 2 years.

7(2) Sub-section (1) does not apply to or in relation to -

- (a) an act or thing done by an officer of the Commission in the course of his duties for or in connection with -
  - (i) the installation of any line, or the installation of any apparatus or equipment, used or intended for use in connection with a telecommunications service or the operation or maintenance of a telecommunications system; or
  - (ii) the identifying or tracing of any person who has contravened, or is suspected of having contravened or being likely to contravene, a provision of the Telecommunications Act 1975 or of any regulation or by-law in force under that Act; or
- (b) the interception of a communication in pursuance of a warrant.

The exception in sub-section 7(2) (b) is amplified in Parts III and IV of the Act. Part III deals with warrants authorising ASIO to intercept telecommunications and telegrams. Part IV deals with warrants authorising the Customs to do likewise. Without going into detail, each part provides for warrants to be issued, in restricted circumstances, by the Commonwealth Attorney-General (in the former case) or by defined members of the judiciary (in the latter case).

It is not entirely clear, however, that the above exceptions apply in respect of telephone communications which fall within the ambit of legal professional privilege. You will be aware of the decision of the High Court in *Baker v. Campbell* (1983) 57ALJR749. That decision was concerned with the search warrant provisions of the Commonwealth Crimes Act. Nonetheless, the approach adopted by the majority of the Court might dictate a similar conclusion in relation to the warrant provisions in the Commonwealth Telecommunications (Interception) Act.

I take it, however, that your main worry is with interceptions which are clearly illegal and that you may be concerned lest someone in Victoria may have illegally intercepted professionally privileged telephone communications, as has recently been alleged against policemen in another State.

Let me assure you that there is no information available to me which suggests that there is any basis for such a concern. Of course, if an illegal interception were to take place, it is likely that the offender would take steps to reduce the likelihood of information about that interception coming to my attention. Nonetheless, you have my assurance that, should any such information become available to me in the future, I will immediately take appropriate action.

Yours sincerely,

**Jim Kennon**  
Attorney-General



"THERE'S A  
MICROPHONE  
IN MY  
BRIEF!!"



**From the Acting Chief Commissioner of  
Police (Victoria)**

Dear Mr. Charles,

On behalf of the Chief Commissioner, who is on leave, I acknowledge receipt of your letter of 19th December, 1984.

I advise that there is no legal authority that permits members of the Victoria Police Force to tap telephones.

Members of the Victoria Police Force have not indulged in illegal telephone tapping in the past, nor will they in the future.

We are unaware of any tapping of barristers' telephones in Melbourne.

Yours Sincerely,  
**E.T. Miller**



**Following this exchange of correspondence, it has come to the attention of the Bar Council that a bugging device has in fact been found in the telephone of a member of the Victorian Bar. The Bar Council has no knowledge as to who placed this device or on whose behalf it might have been placed.**

**If any counsel has had a similar experience please report the matter in writing to the Executive Director, Victorian Bar, 12th Floor, Owen Dixon Chambers.**



## BAR CRICKET



**Seniors v Juniors: Action at the Brunswick Street Oval**

### **Seniors v Juniors**

On the 3rd March 1985, a "Senior Bar Eleven" played a "Junior Bar Eleven" at the Fitzroy Cricket Ground. The Brunswick Street Oval presented a picturesque setting for the match, its old red brick walls have been removed leaving a clear view of the surrounding terrace houses.

As a gesture to encourage their youthful protagonists the seniors agreed to two modifications to the conventional rules of the one day match. A batsman is not permitted to lose his wicket without scoring and, at the other end of his innings, he is obliged to retire after making 40 runs. The rules then being agreed, the two teams tossed to commence the first match for the to-be-coveted Gillard trophy. The identity of this prize is not yet known. When Gillard QC finally hangs up his boots, socks, pads, gloves and other equipment, he holds out the promise of donating an appropriate item as a perpetual trophy.

The weather was fine and the Senior Bar batted first, making a total of 211 from their allotted 40 overs. Ross Middleton, Chris Connor and Bill Gillard batted to compulsory retirement. Jeremy Gobbo bowled steadily with figures of none for 27 off 11 overs. He was disappointed that the rule which prevented a batsman from making a duck deprived him of two wickets — both of them that of Tony Neal. Tim Tobin took 2/21 and Simon Wilson 1/14.

The Juniors started brightly with Cooper and Gobbo each making his forty run quota, although it must be said that Gobbo shouldered arms at the first ball and was grateful for the rule which permitted him to bat on. Tobin's sparkling 23 consolidated the innings and it began to look like a close thing. But the rot set in and the scoring rate slumped dramatically. After the 30th over, they never really looked like making the required number of runs. Some tight bowling from Connor early and Gillard in the middle of the

innings, made their task even harder. In the course of the Junior Bar innings, Bill Gillard put Gus Logie to shame when fielding off his own bowling at short point, he threw down the wicket to run out David Brookes and win acclaim as "the man of the match".

Congratulations and thanks to Tony Magee who, in his capacity as President of the Fitzroy Cricket Club, organized the match and arranged for the luncheon.

### **Sydney Tour**

On the Labour Day long weekend, twelve Bar cricketers crossed the Murray to wrest the "Sub-standard Trophy" from the New South Wales Bar. The match was to be played on the Saturday at the Primary Club Oval at Wyong about two hours' drive north of Sydney. But overnight rain on the Friday made the pitch unsuitable and the contest was adjourned to the Sunday. This proved to be a bonus for the Victorians as one of the Sydney stars managed to drop a motor mower on his big toe on the Saturday morning, thereby rendering himself unfit to play. Another suffered an unfortunate muscle injury when working out on the Saturday night and was unable to take the field.

The Wyong ground is situated in a lovely valley surrounded by native trees. The pitch was slightly damp, but otherwise in excellent condition. The visitors won the toss and after consulting with the groundsmen, invited the N.S.W. Bar to bat.

Opening bowlers, Harper and Connor, bowled well and after nine overs the opposition were struggling at 0/29. In his fifth over, Connor secured wickets in two consecutive balls and the game started to swing our way. But the N.S.W. team fought back to be 2/85 at lunch. The first afternoon session saw some fine bowling from Middleton, Mathews, Harper and Connor, and with some excellent fielding especially by Connor. Eventually the N.S.W. team collapsed from 2/109 to 10/159 at compulsory closure after 40 overs. Best bowling performances were those of David Harper (4/28 off 10 overs), Chris Connor (3/24 off 10 overs), Steven Mathews (2/30 off 7 overs) and Ross Middleton (1/38 off 10 overs). Chris Connor took three very good out-field catches.

Geoff Chettle opened the Victorian Bar innings brightly: he took 2 runs off the second ball. But this



**(L. to R. Back Row) Tony Neal, David Harper, Bill Gillard, Chris Connor, Bruce McTaggart, Ross Middleton, Michael Gregurek, Simon Wilson.**  
**(Front Row) Steven Mathews, Andrew Ramsey, George Beaumont.**



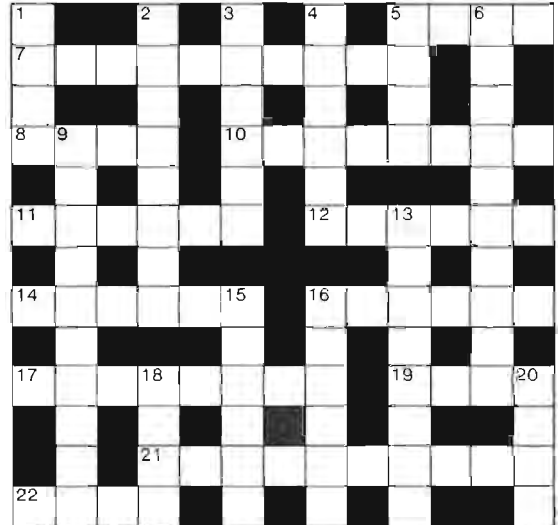
**Roger Gyles Q.C. handing the Trophy to Bill Gillard Q.C.**

was not to last. He was brilliantly caught off the next ball and we started to think that the task ahead was not an easy one. Our fears seemed well placed when, 3/39, Chris Connor joined Bruce McTaggart, who was on 15. But they were still there when we passed the opposition in the 38th over. Both batted very well placing shots all around the ground. Connor hit three sixes and McTaggart one. Connor was unanimously acclaimed "man of the match". The team thanks Bill and Judy Gillard for organizing such an entertaining and successful "tour".

The Captain, for his part, wishes to thank all the members of the team for playing so well, but hopes that in future there will be less chiefs and more indians on the field! The Bar team was — Gillard Q.C. (Capt.), G. Beaumont, D. Harper, C. Connor, R. Middleton, B. McTaggart, S. Mathews, S. Wilson, M. Gregurek, A. Ramsey, T. Neal and G. Chettle. Our thanks to our New South Wales hosts who generously observed the tradition of permitting the visitors to win. We look forward to breaking the tradition next year.

**S.K. WILSON**

## **CAPTAIN'S CRYPTIC No. 51**



### **Across**

5. payment under contract for use (4)
7. accept risk under insurance policy (10)
8. command (4)
10. major road is like a bloody conduit (8)
11. a common man becomes bishop's hats (6)
12. another Irish name in the County (6)
14. the seller (6)
16. gum the numerals (6)
17. makes an outlaw (8)
19. my sainted Sally (4)
21. purchase before general offer (10)
22. small beers (4)

### **Down**

1. Supreme Court judge till yesteryear (4)
2. impeded as in discretion (8)
3. takes the oath (6)
4. case published to start (6)
5. sit on a case (4)
6. war damage by loser (10)
9. relating to evidence (10)
13. undertaking to pay another's debt (8)
15. give up as to Caesar (6)
16. take as being true (6)
18. snakes of Cleopatra (4)
20. fork prong (4)

**Solution page 37**

# VERBATIM

Shavin was cross-examining a witness expert gemmologist

**Shavin:**

So that when you have not seen a necklace and you are starting to assign to it colours and categories, it is very much an exercise in guesswork, is it not?

**Witness:**

I would say it would be an educated opinion, the same as people come for an opinion to you. You may not win, you may not lose, but they will come for an opinion.

**Shavin:**

It might be right and it might be wrong?

**Witness:**

Correct

**Shavin:**

And your valuation might be right and it might be wrong?

**Witness:**

I bet you mine would be better than yours.

**His Honour:**

You must not be rough on counsel, like that, you know.

Cor. Smithers J.  
Federal Court  
26th February 1985

• • •

On an Application to strike a Plaintiff's personal injury claim out for failure to answer Interrogatories, Fox advised the Judge that the Plaintiff was appearing in person. His Honour asked the Plaintiff why he had not answered the Interrogatories and why he did not have representation. He was told by the Plaintiff that he had dismissed his solicitors.

**His Honour:**

Well have you got a good case then?

**Plaintiff:**

Well your Honour, I went to see my solicitor, and he said even though I was in the wrong I would get some money out of it.

**His Honour:**

Well no wonder you changed your solicitor.

Cor. Judge McNab  
County Court Chambers  
4th December 1984

Tom Lynch for the prosecution appeared to have picked up a bad habit in the course of opening the Crown case. He persisted in referring to himself as "we".

Counsel for the accused Boris Kayser, concerned at this lapse, continually interrupted with:

"Where is your leader?"

Eventually Lynch appeared to be cured.

In due course, for other reasons, the jury was discharged and Lynch had to open afresh. Imagine Kayser's dismay to hear the same lapse.

"Where is your leader?"

Lynch without faltering, explained to the jury, "The Queen and I have laid this presentment."

**R v Wilson**

Cor Judge Murdoch  
7th March 1985

• • •

His Honour was delivering judgment in a criminal appeal:

Ananias, Casanova, and Baron Munchausen have long enjoyed historical recognition in the academy of illustrious liars. But had that mendaciously talented trio been present to hear the sweep and scope of the carefully structured and unblushingly articulated perjury presented on the hearing of this appeal, they would, without demur, have relinquished the accolade hitherto bestowed upon them, and conceded at once their status to be no more than mere artless narrators of simple fables for the amusement of young children.

Judge Villeneuve-Smith  
December 1984

# LEGGE'S LAW LEXICON

## "S"

**Safe system of work** — A rule of law expounded by the High Court in terms which are intended to or at least certain to confuse the Supreme Court of N.S.W.

**salus populi est suprema lex** — The National Health Act

**salvage** — Acceptance of a payment into court on the 10th day of the trial.

**scandalous** — Irrelevant abuse.

**scheme of arrangement** — A device of company law designed to prevent the prosecution of fraudulent directors.

**scintilla juris** — The body of law applied in the running down jurisdiction.

**sedition** — A psychotic fear of the power of words which occasionally afflicts right wing politicians.

**seduction** — The first time is the worst *R. v Moon* (1910) 1 K.B. 818.

**self-defence** — Reasonable slaughter.

**Severance pay** — Hush money to a departing secretary.

**sex is no disability** — L.P.P. Act s.6.

**sexual harassment** — The difference between overtime and dinner at Glo Glo's.

**ship's husband** — A very peculiar agent.

**short cause** — *Evda Nominees Pty. Ltd. v Victoria* 52 A.L.R. 401.

**sign manual** — A vocabulary for mutes.

**simple trust** — Giving credit to a debt collecting Solicitor instructing in a criminal case.

**sinking fund** — A debenture of Barristers Chambers Ltd.

**Solicitor-General** — The haven from which ex-Chairmen of the Bar Council never return.

**solvent** — A politician who has been defamed in N.S.W.

**spouse** — A gruntee at the breakfast table.

**stakeholder** — The principal actor in an auto da fe.

**Standing Orders** — The announcement made by a tipstaff four times each day.

**Star Chamber** — Any court favoured by the presence of McPhee Q.C.

**statute barred** — The defence of a debt collecting solicitor to a claim for barrister's fees (see simple).

**Statute of Frauds** — The Income Tax Assessment Act.

**stay of execution** — A hangman with arthritis.

**subornation** — A conference in the whispering jurisdiction.

**suggestio falsi** — An unsworn Statement

**sui generis** — Dowling Q.C.

**summary judgment** — "As God's my judge I am not guilty". "He's not - I am - You are - 12 years."

**superior court** — Any tribunal presided over by a member of the Victorian Bar.

**syssitia** — ???

# LAWYER'S BOOKSHELF

**Libels, Lampoons & Litigants:** Famous Australian Libel Cases by Graham L. Fricke; Hutchinsons of Australia; 1984; IX & 216 Pages.

His Honour Judge Fricke's latest book is on the subject of defamation. It sets itself to canvass not just the legal issues involved nor even the facts of the various cases as they fell to be decided. Rather it attempts to provide a factual background to the personalities involved including a lead up to the actual item of contention and in some cases a past script of subsequent events.

Unlike another recent book on defamation previously reviewed in these columns, Pullens **Guilty Secrets**, the present book does not take any position on the desirability of having or retaining defamation as a cause of action or criminal offence. His Honour is content to bring out the inherent conflict in any such proceedings between the conflicting interests of free speech and the protection of reputation, and the Courts' attempts to maintain some sort of balance between them. Perhaps the closest thing to a "message" to be found in the book occurs in the last passage of the introduction where the author notes that it is the complexity of the laws of libel rather than their inherent stringency which unduly inhibits the publication of information by the media and expresses the hope that the book might give impetus to the appeal for uniform defamation legislation.

Hunt J. of the N.S.W. Supreme Court (who as counsel himself took part in some of the cases discussed in the book) notes in the Foreword that, although there have been previous collections of defamation cases in which the authors have presented the background and surrounding circumstances in some detail, these have been largely concerned with English cases. This is the first occasion it has been done with Australian cases.

## **Preparation of Criminal Trials in Victoria:**

Edited by Richard M. Read; 148 Pages; 1984  
Government Printer, Melbourne; Recommended  
retail price \$14.00.

There you are standing under the verandah at the Melbourne Magistrates' Court, avoiding the rain, talking to the Informant in your client's case, making a pre-plea plea, ascertaining ignorance on the part of your client, when, with a sudden rush of blood the Informant says "But your client fizzed". With that startling revelation the Informant summarily departs leaving you in a non-blissful state of ignorance.

The book is divided up into three parts with each part dealing with separate categories of Plaintiffs. The first part deals with cases involving what are statistically the most likely of litigants in a defamation action, the politicians; the second with those brought by sportsmen, migrants, Thespians and writers and the third and smallest by detectives, felons, and architects. Many famous and well known cases are covered but also some relatively obscure ones.

Although not of course to the same extent as the recent history of the County Court Judges published earlier in the same year by the author's fellow County Court Judge, Judge Hewitt, this is a book in which the author's skills as an historian, as well as that of a lawyer, have played a considerable part. As such the book retains the reader's interest and, as it is reasonably short, can be read in a sitting. The format is for each chapter to deal with one or more cases which in turn are illustrative of a particular aspect or aspects of the law of defamation. In this way the various rules and expectations are introduced which enables their complexities and uses to be grasped by a layman.

As with any endeavour to cover adequately a broad area involving both laymen and professionals, certain compromises have to be made. It may be that in keeping the legal concepts involved relatively simple, the book will be more helpful to laymen particularly those who might desire to know more about the subject. Lawyers also, will find the book of interest for the fleshing out of the various cases of value and will provide greater insight and understanding that the knowledge of such detail provides.

DAVID SHARP

The principle is, as always, *Ignorantia Eorum Quae Quis Scire Tenetur Non Excusat* (Ignorance of those things which everyone is bound to know does not constitute an excuse). You immediately reach for your briefcase and pull from it your copy of Preparation of Criminal Trials in Victoria ("**Preparation**"). Turning to the paragraph headed "Police Phraseology" (Page 13), there it is. "Fizzed" if a

policeman says that an accused has 'fizzed', he has given information to the Police about other crimes or about other criminals."

**Preparation** represents a compilation of lectures given by law officers including the then Director of Public Prosecutions (now Mr. Justice Phillips), various Prosecutors for the Queen and Mr. W. J. Reilly of the Office of the Solicitor to the D.P.P., to members of the staff of the Solicitor to the D.P.P. designed to acquaint them with aspects of Crown practice which arise in the course of preparing criminal trials. Following the completion of the lecture programme the Director considered that the material that had been prepared should be reproduced in the form of a book, to enable the information to be more widely available. The task of editing the book was entrusted to Richard M. Read, Prosecutor for the Queen.

The introductory lecture deals with the responsibilities of the Prosecutor and was given by the then Director of Public Prosecutions - J.H. Phillips, Q.C. The candour of the substance of the lecture does much to remove the mystique that was often attributed to those who were responsible for framing Presentments and ultimately prosecuting Trials. Although there is an oblique reference to the practice of "plea bargaining" castigated in **R v Marshall** [1981] VR 725, the aspiring criminal lawyer and his more experienced brother, are gently led to the more acceptable practice described by the former D.P.P. as "The consideration of offers to plead guilty to a lesser charge". (Page 3). This does not amount to an offer to treat by the D.P.P. in every case, but the inclusion of this section suggests the possibility of a speedy and just disposition of need-less contests in an area where there is often cruel delay of criminal process and hardship for the victim. The role of Crown Prosecutor, with respect to the calling of witnesses, is dealt with in some detail with a reference to **R v Apostilidis** (1984) 58 ALJR 371. The analysis of that decision is both informative and greatly helpful especially to those who only occasionally "don the helmet". Most interesting is the concluding portion of the lecture which exhorts those who prosecute to put down the pen and pick up the sword, decrying what is said, or was once heard to be said, "It's not important to try one's best on behalf of the Crown, because it doesn't really matter if the accused is acquitted".

In his lecture "Preparation of the Crown Case in a Criminal Trial in Victoria" Richard M. Read lives up to his reputation for thoroughness and detail. It is understandably the longest lecture and occupies some 40 pages of the 148 pages in the book. In introducing the lecture, Read ranges far and wide in his material which of necessity means that he cannot dwell on detail. However, the task he has set himself is a difficult one even for those familiar with the criminal jurisdiction. The lecture is informative and compendiously deals with the nice issues involved and encountered in criminal trials. Few authorities

are referred to, but then again it would appear that preparation officers listening to this lecture after working hours would be more concerned with catching the right train home than listening to a detailed treatise on the law. Such authorities that are referred to are to the point and assist in an understanding of the material.

Mr. W. J. Reilly in his lecture entitled "The General Professional and Administrative Functions of a Preparation Officer in the Office of the Director of Public Prosecutions" lifts the lid on Birkdale House and tells us something of the functions of those who can be seen working at their desks when one peers through the slit windows of the County Court. Publicly revealed and defined for the first time is the term "Police Queries" (Page 56).

The lecture "Drafting Presentments" was given by J.T. Hassett then Prosecutor for the Queen (now Judge of the County Court). Despite the lecture's apparent brevity it is indicative of the lecturer's detailed and comprehensive knowledge of the topic. The art of drawing a Presentment involves a keen understanding of both the facts and the appropriate law and one cannot help but feel that the lecturer sought to and did master both when putting pen to paper. An intimate understanding of the topic is reflected by such references as "the 'Trotter' problem" and "lumping" or "bulking" offences which deal with aspects of duplicity.

Crimes of violence are dealt with by R.L. Langton, Prosecutor for the Queen. While the lecture is short, it raises essentially the question of intent. Though no case law is referred to in the lecture it represents a thumbnail sketch of some views held by Langton, especially where the nature and severity of injuries may found an inference of intent.

In his lecture on "Sexual Offences in Victoria", I.W. Heath, Prosecutor for the Queen, deals with such important topics as prescribed time limits and "New sexual offences provisions in the Crimes Act 1958". Reference is made to the relatively new term namely "Sexual Penetration" which is defined in Section 2A(2) of the Crimes Act 1958. In the end Heath encourages the reader to see his book which was written in conjunction with his then brother Prosecutor J.T. Hassett "Indictable Offences in Victoria".

"Forensic Science in its Application to the Criminal Trial", was a lecture delivered by K.J. Bowen, Prosecutor for the Queen. In introducing the lecture Bowen indicated that his aim was to provide a concise and non-technical introduction to those aspects of forensic science that are most likely to be met in the preparation of a criminal trial.

Issues such as continuity, photographs and their admissibility, document examination, botanical examinations, finger prints, firearms, and identification of body fluids are dealt with in some detail. The lecture is both interesting and thought provoking and raises matters which should be kept in mind by all practising in the criminal jurisdiction. Reference is

made to a number of authorities which deal with the topics raised in the lecture and there is an interesting section dealing with questions for the firearm expert.

In his lecture "Preparation of Commercial Crime Prosecutions" P.A. Willee, then Prosecutor for the Queen now General Counsel Assisting the National Crime Authority, asks the question "What is commercial crime?". The answer we are told is "Commercial crime cases have traditionally, if facetiously, been defined as anything which has lain in the 'too hard' basket for more than six weeks or secreted behind a filing cabinet on the pretext of having slipped off the opt". This would appear to be Willee at his best. Those familiar with so-called "commercial crime prosecutions" might say that where Willee speaks of six weeks or more, six years or more might be an appropriate substitution. Willee took on a difficult task when he was attached to the Commercial Crime Group and it appears that a pragmatic approach was essential to rid the backlog of cases. This approach is clearly discernible from the lecture. Such headings as "Explaining the Importance of the Prosecution to a Victim" and "Determining Whether a Case is Appropriate for the Commercial Crime Group" might be said, inferentially to illustrate the difficulties experienced by those involved in commercial crime prosecution. In his conclusion, Willee

describes a formidable list of tasks required to be performed by the Preparation Officer rendering that poor unfortunate to be seen as almost, if not, a human computer.

In the final lecture "Documentary evidence in commercial crime prosecutions" is dealt with by M.J. Strong, then a Prosecutor for the Queen. In considering the value of such evidence the point is made that documents may be used by the Crown, not only to create its own case, but to show that an accused has been untruthful.

In his foreword to the book Attorney-General Jim Kennan said that the book "will add very significantly to the competence and efficiency with which prosecutions are prepared and carried out in the State as well as adding to the competence and efficiency with which those proceedings are defended". **Preparation** is not put forward as a standard text which is to be used as a reference, but rather as a means by which those engaged in the practice of criminal law will have a fuller and better understanding of how the prosecution approaches and carries out its task in making out its case. To this extent the book succeeds in its purpose. It is therefore ultimately a useful aid.

**SHWARTZ**

**Historical Records of Victoria:** Foundation Series, Volume 1, Beginnings of Permanent Government; editor-in-chief Michael Cannon; edited by Pauline Jones; 570 pages, published for the Public Record Office, Victoria, by the Government Printing Office, Victoria. Clothbound \$22.95; paperback \$15.00.

The Victorian Public Record Office has a special statutory responsibility, pursuant to the provisions of the Public Records Act 1973, to arrange for the preservation, management and utilization of Victoria's public records, and among his many duties the Keeper of Public Records may arrange for the publication of any public record under his control. Some of Victoria's earliest documents are held, appropriately for the Garden State, in the Repository of the Public Record Office at Cherry Lane, Laverton. To date four handsome volumes in a Foundation Series entitled **Historical Records of Victoria** (or HRV for short) have been published by the Victorian Government Printing Office for the Public Record Office. These bear the following individual titles: The Beginnings of Permanent Government, Aborigines of Port Phillip, Aborigines and Protectors, and The Early Development of Melbourne 1836-1839. A further three volumes, provisionally entitled Communications, Trade and Transport; Crown Lands and Survey; and Public Finance of Port Phillip, together with a cumulative index will complete this noteworthy Foundation Series.

Although volume one of the published quartet, The Beginnings of Permanent Government, first appeared in 1981, a review is apposite considering the topicality of many of the hitherto unpublished public records which cover roughly the period 1836-1840. The material has been arranged in three main groups of which Part III deals with Law and Order. The twenty chapters of this Part are sub-divided into Police Organization and Operation, Development of Law Court, and Beginning of Crown Law Department, Offences and Allegations, and Prisons. It is to be regretted that the flavour of some original documents has been lost in the "sanitized" reproduction which has edited out the plethora of nineteenth century capital letters and standardized much punctuation and spelling, particularly of place names. On the other hand, Volume One is equipped with a very detailed index studded with useful dates and particulars of positions held by early colonial officials.

Chapter 13 is soberly headed "Police appointments, resignations and conditions". It documents the fre-

quent dismissals and suspensions for drunkenness, misconduct, neglect of duty and taking of bribes by ordinary constables. These earned two shillings and ninepence a day while district constables were paid three shillings a day. Accordingly, the Police Magistrate of the rumbustious frontier settlement, Captain William Lonsdale (4th, or King's Own, Regiment) begged the Colonial Secretary in Sydney for four more ordinary constables to be appointed "as the population becomes more numerous, and some thefts have lately been committed during the night." Captain Lonsdale suggested a uniform dress for the constables and begged to propose "a plain blue jacket with round metal buttons, red waistcoat and blue or white trousers according to the season." The following month, the Colonial Storekeeper is shown to have supplied constables' staves for the police at Melbourne, charging them the cost price of two shillings each, which money "may however be returned if they produce the staves in good preservation at the end of two years."

The sorely pressed Captain Lonsdale appointed Will Wright, lately a district constable and overseer of waterworks in Hobarton (Van Diemen's Land), as Chief Constable from 6th August 1838, in place of John Batman's errant brother, Henry, who had been ordered to resign (and also to relinquish his post as a Commissioner of Crown Lands) for receiving a bribe and making a false statement. Wright was nicknamed "Tulip" on account of his colourful clothing which made the proposed uniform dress for constables seem dull by comparison. A typical appointment to the early police strength was that of James Caulfield, from 1st November 1838, and his curriculum vitae read "About 32 years of age. Condition, free. Previous occupation, groom. Has been steady whilst in the town. He is able bodied, Cannot read or write."

Even the official requisition forms make colourful reading. On New Year's Day 1839, the police office at Melbourne (happily no longer named "Bearbrass") requisitioned an official seal of steel, red and black sealing wax, wafers, licence forms of all descriptions required for packets, confectioners, and the selling of fermented and spirituous liquors at fairs, not to mention bail bonds (sheep stealing) and a quantity of "Returns of Convicts absconded and Runaways apprehended".

An earlier document of January 1837 records a complaint from Captain Lonsdale that the first Melbourne Police Office-cum-Magistrates' Court, which was a temporary weatherboarded hut, was so short-staffed that "I have the honour to suggest that probably a prisoner of the Crown might be found to do what is required in drawing up the various convictions, committals, and other business of a police office". The only available reference book was a copy of Mr Plunkett's Australian Magistrate which, however, lacked the form of oath to be taken by constables.

Appointed clerks came and went in a steady stream while James Smith, a businessman and Episcopalian preacher, held the fort as temporary clerk and it was not until late 1838 that the Clerk to the Bench of Magistrates at Melbourne was relieved of his tandem duties as Deputy Postmaster. On 3rd August 1838, Horatio Nelson Carrington (having earlier been denied a messenger), begged for some assistance in the Police Office as he found it impossible "to attend to my duties as Clerk of the Bench for the next 10 days for the following reasons:

"I am now acting here as Clerk of the Peace and Crown Prosecutor, the Court of Quarter Sessions commences on the 5th instant and there are upwards of 40 persons for trial. . . I have not had time to prepare myself in any one case or to draw one of the Informations and I must now be up day and night, until the sessions commence, to enable me to do justice to the situation I fill". In September 1837, in response to a memorial from Van Diemonian settlers who had shipped their flocks and herds to the mainland, Captain Lonsdale appointed a regimental colleague, Captain Foster Fyans, as Police Magistrate at Geelong with a small constabulary to preserve peace between the settlers and the aborigines, with the main object being "the protection and civilization of the native blacks".

Much earlier, William Buckley, The Wild White Man, a transportee whose adventures read like fiction, had absconded from Colonel Collins' Sorrento settlement on New Year's Eve, 1803, and joined the Geelong and Barwon tribes who supplied him with food. Buckley, a Cheshireman who had once belonged to the Grenadier Company of the 11th, or King's Own, Regiment at Gibraltar, made a timely appearance at John Batman's camp on the Bellarine Peninsula in July 1835. This amazing event was graphically recorded in the diary of Captain Phillip Parker King, who visited Port Phillip nearly two years later in HMS *Rattlesnake*. As Batman was at the Sorrento settlement with Colonel Collins of the Marines 32 years before, the reunion of Buckley and Batman presumably resembled the later famous encounter between Livingstone and Stanley. Foster Fyans appointed William Buckley as a paid interpreter and later Fyans wrote the following reminiscence of their first meeting: "I stared when I saw the monster of a man, he was six feet seven inches high, had resided with the blacks for 33 years". Fyans later recounted Buckley's sulkiness, laziness and discourtesy on the journey to Geelong and recalled how Buckley refused the proffered pork and damper, preferring to hack into an old tree 'extracting large grubs which he ate with much relish'.

By August 1838, Fyans was asking the Colonial Secretary in Sydney for a strong iron chest to hold the licence moneys for pasturage in the Geelong district and the thrifty Colonial Storekeeper reported that a secondhand chest of the required dimensions costing £6 from a Sydney supplier

should be purchased in preference to a new London made chest for 20 guineas with Mordan's patent lock and two keys. That month Fyans had more pressing problems as he had earlier recommended that a Mr Henry Hesketh, who had been a cashier and book-keeper in the employ of the Derwent Company, should be appointed as a Clerk to the Bench at Geelong. Mr Hesketh was thus described by another referee, Major W.D. Mercer late of the 16th Lancers: "During nearly 12 months that he has had the charge here, he has behaved himself uniformly with great civility, honesty and sobriety, but his conduct, I am very sorry to say, for some days past, has been outrageous in the extreme, and there appears to me little doubt that he has gone (I may say) dangerously mad". Foster Fyans procrastinated about advising the Colonial Secretary of the incident in which Hesketh "fired two pistols at two gentlemen, fortunately neither took effect. The same night he made his escape, mounted his horse and since which time he has not been heard of". Fyans had earlier described how this unfortunate victim of Antipodean angst had "resided as Secretary in some department with Lord Byron for some years. . . I had hoped that he would turn out a treasure to me. . ." However, desperation and despair were not confined to the ranks of the Port Phillip gentlemen as evinced by the following terse paragraph from the Geelong Court Register, 26th July 1839, which concerned the appearance that day of Crown prisoner William Cox (per *Calcutta*) before C.W. Sievwright, magistrate and Foster Fyans, PM, "for absconding, and a distance of 50 miles from his station, and taken at Geelong on the night of 25th inst.

Corporal Bannon, Mounted Police, being duly sworn, deposes that:

I took this prisoner last night, being a runaway from his station, about 55 miles from this. The prisoner has nothing to say.

Sentence: To be worked in irons for 12 calendar months on the roads."

In 1837, as first Police Magistrate, Captain Lonsdale had been assisted by two relieving Justices of the Peace drawn from the military force. But from 17th July 1838 the Bench was upgraded to a Court of Petty Sessions with a wider jurisdiction, so that certain matters (excluding capital cases) no longer had to be remitted to Sydney for hearing. James Simpson, a former government official, who had settled on the Werribee River, was sworn in as a Magistrate on 4th October 1837 with a constable stationed on the entrance to the Werribee River, which Foster Fyans opined "would be a very beneficial thing, as boats are constantly passing in that direction from Melbourne, and laying in the river for days". There were troops of Mounted Police based at the Goulburn River and the Ovens River districts and in 1840 Foster Fyans was reluctantly transferred from Geelong to Portland in response to settlers' petitions.

By proclamation dated 14th August 1838, Sir George Gipps, Governor of New South Wales, established the Courts of Quarter Sessions at Melbourne and elsewhere. On 27th March 1839, an Irish barrister-at-law, Edward John Brewster, Esquire, was gazetted Chairman of Quarter Sessions and was also to act as Commissioner of the tardily constituted Court of Requests at Port Phillip, at £350 per annum. The chairman and officers of the short-lived military jury of the Court of Quarter Sessions sailed from Sydney on the ship *John Barry* on 20th April 1839, but military juries were statutorily abolished after 1 November 1840. On Boxing Day 1838, James Croke's appointment as Crown Clerk at Port Phillip was announced, which immediately raised the nice question of whether or not Croke's private practice as a barrister in civil suits would be incompatible with his clerical duties. Carrington resigned as Clerk of the Bench but wished to retain his other positions as Clerk of the Peace and Crown Prosecutor, with an increased salary. In a memorandum LaTrobe questioned Carrington's motives, suggesting that the "time and attention which the three several branches of public duty had demanded could be turned to greater profit in private practice". Carrington replied that "no individual can perform the joint duties of Crown Prosecutor, Clerk of the Peace and Clerk of the Bench with satisfaction to himself or the public as these duties clash with each other, a fact that must be well known to the Police Magistrate of this District." On 30th October 1839, Sir George Gipps resolved that Mr Croke could not "according to the etiquette of the profession act either as Clerk of the Peace or Clerk to the Petty Sessions".

The Return of the Number of Offenders Convicted in the Court of Quarter Sessions at Port Phillip during the year 1839 listed 27 felonies which were broken down into 20 simple larceny, 1 stealing property of master, 1 receiving stolen goods, 2 house breaking, 1 stealing from person, 2 killing cattle with no convictions recorded for one count of cattle stealing and one count of sheep stealing. The total number of 19 misdemeanours comprised 9 assault, 2 conspiracy, 1 libel, 3 perjury, 2 common nuisance, 1 assault to commit felony and 1 not assisting constable.

In 1925, the large strongly-bound ledger (dubbed the Melbourne Court Register for HRV purposes) which contained records of cases heard in 1836-1838 was rescued from the vault below the Melbourne Magistrates' Court by a then junior clerk, Mr W.J.S. Cuthill, who later became Chief Stipendiary Magistrate, and eventually placed in the safekeeping of the Public Record Office. Although the second volume containing records of cases heard in 1839 is missing, the lacunae have been filled using Foster Fyans' Geelong Court Register for 1838-1839.

Section C of Part III of Volume One contains a patchwork of offences and allegations including

deaths and inquests, assaults, riots and threats, the many assault cases involving John Pascoe Fawcner, proceedings under the Masters and Servants Act, theft cases, sheep killings and stealing by white men, bushranging and miscellaneous cases heard at Melbourne and at Geelong.

By 30th January 1840, Captain Lonsdale asked Superintendent LaTrobe to recommend the appointment of a Coroner in view of the increasing number of sudden deaths such as drownings, self-inflicted gunshot wounds and accidents "as I am certain the public would be better satisfied if these inquiries were made in the accustomed manner before a Coroner and jury than before a Magistrate only. The Melbourne Court Register entry for 21st July 1837 records how Thomas Fitzmaurice and George Penfold were sentenced to four hours in the stocks for fighting in the town after the informant, District Constable Henry Batman had given sworn evidence that both men had been drunk.

The recently published Volume Three of HRV, *The Early Development of Melbourne 1836-1839*, contains a wealth of illustrations including many superbly reproduced coloured plates and a detailed map of Melbourne buildings in 1838. Several of W.F.E. Liardet's primitive watercolours, painted much later from memory, had been included to flesh out the brief entries in the early court registers. One such drawing depicts the rudimentary shack which was converted into a Police Office-cum-Magistrates' Court by Captain Lonsdale, with the nearby watch-house built by convict labour in 1838 and a makeshift prison-hospital shed, with the stocks in the foreground. This small correctional complex stood near the present forecourt of the National Mutual Centre building in Collins Street. In 1838 the buildings in the town of early Melbourne mostly lay in the rectangle bounded by Spencer and Swanston Streets, and by Flinders and Bourke Streets, so that the stocks were set up in the civic centre of gravity (or hilarity?).

On 26th April 1838, the gaol and government store were burnt down by two aboriginal prisoners, Jin Jin and Bunja Logan by lighting a reed from the guard's candle and thrusting it into the thatch roof. A temporary building was rented at £1 a week and it was soon found necessary to line one of the two rooms with strong boards secured by iron fastenings outside and to render the loft above fit for the confinement of females, resulting in a rent increase of another fifteen shillings a week. However, on the night of 25th October 1838, the prisoner Thomas Flooden alias Hobbler (per ship *Calcutta*) escaped by making a hole in the wall of the temporary gaol, which also served as a receiving watch house for all cases. The Gaoler, George Wintle, complained to the Sheriff at this time that "the whole duty devolves on me as night constable, turnkey and gaoler" and asked for an assistant turnkey and yard constable. Captain Lonsdale posted a description of Flooden/Hobbler, giving notice to all constables to apprehend him.

Earlier, he was alleged to have absconded from Van Diemen's Land after not appearing to answer a charge of cattle stealing and other serious offences at Hobart Town. Aged about 40 years, height 5ft. 6in. with swarthy complexion and dark hair, the escaped prisoner was further described: "round shouldered, has an effeminate voice and smiling look, rather small mouth. Had on when he absconded — fustian shooting jacket and trousers, dark waistcoat and dirty straw hat." We learn from another communication of Captain Lonsdale dated 9th April 1839 that Flooden/Hobbler was subsequently apprehended on the road to Yass and escaped from the Mounted Police during a halt. Their description confirmed that the escapee had "a peculiar expression of countenance and a small, peculiar mouth".

In short, this first instalment of **Historical Records of Victoria** is a very good read and it is a pleasure to turn the pages of such a craftsmanlike job of printing. The specially commissioned archival paper has been named after the V.G.P.O. and the pages open out flat to display generous margins with the luxury of lots of white space, an attractive, clear typeface, excellent typesetting and binding. Over thirty black and white illustrations have been carefully chosen to bring the dramatis personae into sharper focus and to whet the reader's appetite for more stories of pioneers, police and prisoners. The Foundation Series has been skilfully edited so that while each volume stands alone, the value of the series will be much more than the sum of its parts as, for example, volume three contains a substantial section recording the use of convict labour interspersed with authentic coloured fold out plates which illuminate the events recorded in volume one.

**WHITEHEAD**



**SOLUTION TO CAPTAIN'S CRYPTIC  
No. 51**



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RAN IT UP  
FOR ME



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