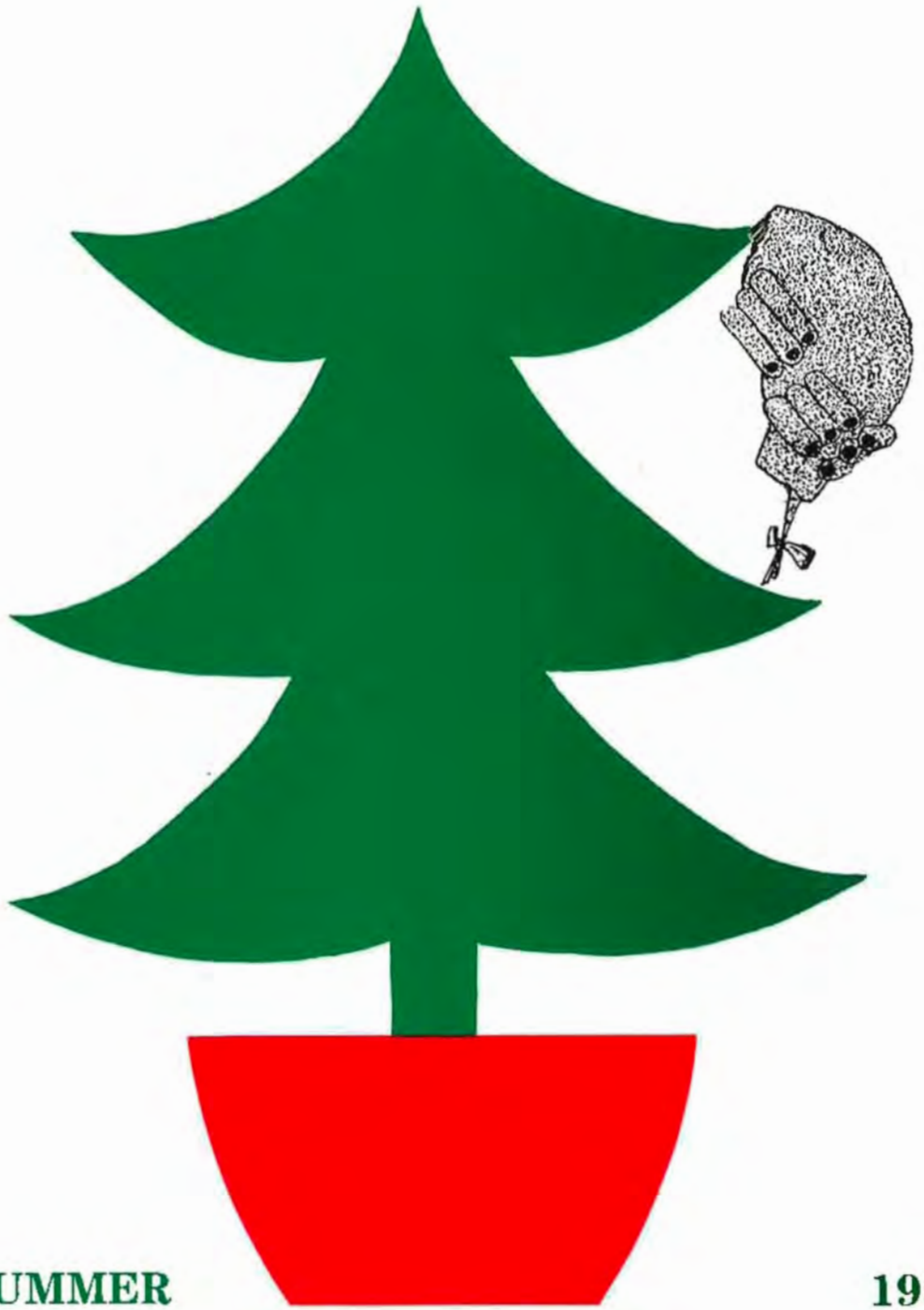
Victorian Bar News



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VICTORIAN BAR NEWS

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BAR COUNCIL REPORT

Dorothy Brennan

The Bar Council resolved to accept the resignation of its Executive Officer, Miss Dorothy Brennan as from 31st December 1985. The resolution acknowledged the fact that Miss Brennan's long and devoted service to the Victorian Bar has more than earned her a retirement which the Council hopes will be long and happy. It was further resolved that Mrs. Joan Smith be engaged to take over the functions presently carried out by Miss Brennan.

Symposium on Criminal Law and Criminal Justice System in Victoria

The Bar Council has received a proposal that there should be an annual Symposium held in Melbourne upon criminal law and the criminal justice system, Cummins Q.C. has been authorised to join a Convening Committee for that Symposium which will be held at Melbourne University early in 1986.

The Joint Standing Committee — Senior Master of the Supreme Court

Senior Master Mahony has indicated his intention of setting up a Joint Standing Committee with membership from the Law Institute, the Bar and himself to consider matters of mutual interest. Middleton has been nominated to serve upon that Committee.

Rights of the Crown to Stand Aside Jurors

The Legal Aid Commission and the Criminal Bar Association have expressed an interest in this topic and the Bar has written to the Director of Public Prosecutions in order to take part in discussions in relation to the Crown standing aside jurors.

Appointment of Addition Directors to Barristers' Chambers Limited

Although the articles of association provide for a maximum of nine, Barristers' Chambers Limited has for some time had only seven directors on its Board. Having regard to the heavy workload borne by those directors it has been resolved that, subject to their acceptance of appointment, Shaw Q.C. and Beaumont Q.C. be appointed to the Board of Barristers' Chambers Limited.

Fee Collection Committee

A proposal has been made that clerks should send monthly accounts in respect of each barrister's fees and in respect of each separate matter dealt with by each barrister. However the Fees Collection Committee is seeking views on this matter from the clerks.

Judicial Appointments

On November 1st 1985 the Chairman wrote to the Commonwealth and State Attorneys-General informing them of the resolution of the Bar Council that it opposes appointments to judicial office from practitioners who do not have experience as counsel practising in relevant Courts. Chernov argued that the practice of counsel in the Australian Courts provides valuable first hand experience of the application and practice of the law in the context of the adversary system.

Notice in Lifts

The Bar Council has reiterated its decision that notices may not be placed in lifts without permission of the Honorary Secretary.

Arrest of Malaysian Bar Council Vice-President

In response to letters from Lawasia and from the Law Council of Australia concerning the arrest of Mr Parem Cumaraswamy, the Vice President of the Malaysian Bar Council, the Bar Council resolved:

1. That the Victorian Bar Council views the arrest for sedition of a lawyer who speaks on behalf of his professional association on matters of public concern and importance as a distinct threat to the independence of the legal profession and reiterates its firm belief that lawyers must be left free to comment on such matters.

2. That a copy of Part 1 of this resolution be forwarded to the Prime Minister of Malaysia and to the Attorney-General of that country, and that the Law Council of Australia and the Federal Attorney-General be informed of the Bar Council's action.

Protraits

Arrangements have been put in train to have posthumous portraits painted of Sir Oliver Gillard and Maurice Ashkanazy Q.C.

People to People Citizen Ambassador Programme

On 20th November the Bar Council was invited to a reception by a group of some 30 lawyers from the United States of America who are touring Australasia to meet lawyers and to discuss matters of mutual interest. On 21st November Barnard Q.C. and a number of barristers attended a working breakfast organised by the visitors and then took them on a tour of Owen Dixon Chambers, the Essoign Club and the Supreme Court.

Legal Professional Fees Tribunal

The Bar Council has made submissions upon matters of interest to it arising out of the proposals to establish a Legal Professional Fees Tribunal. The introduction of the proposed legislation has been deferred to the Autumn Session. Its terms are still being considered.

Reception for Magistrates

The Bar Council entertained the five new Magistrates, Mr Dugan C.S.M. and members of the Young Barristers' Committee to a function to mark the appointment of the new Magistrates.

Annual Subscriptions

The following are the subscriptions for 1985/86

Queen's Counsel	$520.00
Over 10 years	345.00
Over 3 years but under 10 years	230.00
Over 1 year but under 3 years	145.00
Under 1 year	85.00
Readers	40.00
Interstate Queen's Counsel	70.00
Interstate Juniors	50.00
Solicitors-General, Attorneys-General and Directors of Public Prosecutions	75.00
Crown Prosecutors and Parliamentary Counsel	80.00
Retired Barristers	15.00
Other official Appointments	75.00

FOR THE NOTER UP

Add the following regrettably omitted from Judicial Statistics Consolidated in the Winter Edition.

Federal Court of Australia

Woodward J. (1972) 49 6.8.1928 1977 —

Delete: Supreme Court Starke J. (Retired)

FAREWELL STARKE J.

Sir John Starke has long been an object of admiration, even fascination, to the Bar. When on a Friday he lurches into the Essoign Club like some towering panda there is no embarrassment or reluctance even in the most junior to join his table. His lunch is meagre — whether this be the result of his ascetic nature or as atonement for some long gone excess we dare not ask.

His conversation is gruff, his observations most penetrating and his style at times irreverent. In one born to the law and educated at conservative establishments, this irreverence has had an appeal to young barristers. They thrill to hear of his confrontation with a hostile lecturer, even though they do not remember P.D. Phillips Q.C. They like to suppose him a rebellious and independent soldier emerging from the war unscathed and, of course, commissioned. They delight to hear told and retold of his fearless advocacy, for the lowest before the highest, and dare to think they would have done likewise, if only they had been favoured with his enormous physical and moral stature.

At his Farewell mention was made of his generosity — how he would make his chambers in Selborne available for conferences by Juniors; how he would assist and encourage younger barristers, even his opponents; his readiness to acknowledge a good point persisted in. His work on the Parole Board provided ample scope for this humanity.

His reputation as a judge whether at first instance or on appeal was that of a fair man and no mean lawyer. The Victorian Reports from 1964 to date bear witness to that.

It was no surprise that on 29th November his Farewell saw the Banco Court packed with one of the largest crowds of admirers and well-wishers that had been seen for a long time at a Farewell. And when Sir John Starke rose and left the Bench for the last time he turned and said "May God Bless you all". No person there failed silently to return the benediction.

ATTORNEY-GENERAL'S COLUMN

In the just completed Spring session of State Parliament a number of Bills of interest to the Bar passed all stages while a number remain on the Notice Paper for debate in the Autumn session next year. Within my portfolio the following Bills are the more important and will be proclaimed in due course:

LEGISLATION PASSED

Crimes (Amendment) Bill

The recent controversy over rape in marriage highlighted the change in community attitudes which has taken place since the **Crimes (Sexual Offences) Act** 1980. This Bill abrogates spousal immunity in marriage as well as effecting other significant amendments to the Crimes Act. A new Division 12 is inserted into the Act to implement the recommendations of the Criminal Law Working Group on the law of attempt. This division complements an earlier report of the group now contained in the **Crimes (Conspiracy and Incitement) Act** 1984. In addition to the law relating to offences against the person has been given a much needed simplification. The Bill also implements a number of the recommendations of the Shorter Trials Committee Report including a requirement that the D.P.P. consent to conspiracy charges. Further, where a defendant in a trial seeks to exclude evidence on the basis of judicial discretion then the court is now given the power to hear evidence on behalf of the accused before hearing evidence on behalf of the Crown.

Evidence (Amendment) Bill

This Bill makes a number of unrelated amendments to the principal Act. Of interest are provisions making any admission or agreement made at a Family Mediation Centre not admissible in any court or legal proceedings. The Commonwealth Government has funded a Pilot Mediation Centre at Noble Park and this legislation is required to underpin its operation. The Bill also implements the recommendations of the Shorter Trials Committee that a judge at a pre-trial hearing or at a trial may give orders that the proof of uncontested matters be otherwise than in accordance with the strict rules of evidence. Such orders may be revoked by the trial judge subsequently.

Associations Incorporation (Miscellaneous Amendments) Bill

A significant problem with the principal Act has been the restrictions on trading contained within it. A number of community organisations are currently barred from utilizing the benefits of the Act. The Bill liberalizes the present restrictions on trading as well as making it easier for unincorporated associations to apply. Another major amendment in the Bill is to provide a statutory provision which clearly establishes that members of incorporated associations do at least have standing to maintain legal action. It provides that the rules of an association constitute a contract between the members of the association and enables the court, upon application, to make orders giving directions for the performance and observance of the rules thus allowing members to have injustices within their organisation righted.

Equal Opportunity (Amendment) Bill

The Equal Opportunity Board presently consists of three persons. More flexibility will be available as the Board deals with its expanded jurisdiction by a provision in this Bill which provides for a panel of Board members. The Bill also provides that the Board may conduct preliminary conferences in order to clarify the matters before it.

Coroners Bill

A number of reviews have recommended that the powers of the Coroner be clarified and codified as they are currently contained in an ill-defined mix of statute and common law. This Bill does codify those powers as well as establishing the Office of State Coroner who will head the coronial system. The Coroner will be independent of the judiciary and may be a judge, a magistrate or a practitioner. The Coroner's powers will now be limited to a finding of the cause of death, thus separating off the committal function. The Victorian Institute of Forensic Pathology is established under the Bill with the Director holding a concurrent appointment as Professor of Forensic Medicine at Monash University. There has been a deliberate effort in this Bill to write in plain English and members will be struck by its new format and style. The Bill represents a long awaited complete overhaul of the coronial system in this state and will be of benefit to all Victorians.

Interpretation of Legislation (Further Amendment) Bill

In accordance with its Plain English policy the Government is committed to the simplification of the format and language of legislation. Following a Ministerial Statement on Plain English in May this year this Bill implements a number of the matters canvassed in that Ministerial Statement. The Bill provides that from next year long and short titles will be deleted from Acts, a new system of numbering Acts similar to the Commwealth will be introduced and there will be a short form of commencement clause. The Bill will also enable short form of delegation clause to be used and provides that a power to make an instrument will include a power to amend or repeal it without an express statement to that effect.

Juries (Amendment) Bill

The confidentiality of jury deliberations has been spectacularly breached in recent times and on 15th August the Bar Council passed a resolution urging legislation to ensure the continuing confidentaility of jury deliberation This Bill creates three offences; an offence of publishing statements made, opinions expressed or arguments advanced in the course of jury deliberations; an offence of soliciting or obtaining disclosure of that information if he or she knows that it is likely to be published. I have taken the view that this legislation is essential for the protection of jurors and the jury system in the administration of justice.

Legal Profession Practice (Amendment) Bill

The primary aim of this Bill is to establish a self insurance scheme for claims against solicitors for professional negligence. The Bill also provides however for minor changes to the legislative provisions in relation to the Barristers Disciplinary Tribunal and the disciplinary provisions relating to solicitors. Following recommendations of the Lay Observer, the Bar Ethics Committee and the Barristers Disciplinary Tribunal may now award up to $3,000 to a complainant. Also the Lay Observer may now investigate the merits of a rejected complaint.

Magistrates (Summary Proceedings) (Amendment) Bill

This Bill establishes a new procedure for the enforcement of minor infringment notices issued under traffic Acts and other regulatory enactments. It will also extend to penalty notices under the Companies Code. The Bill also provides for the forfeiture of articles where a person is convicted under Section 91 of the **Crimes Act** and provides that offences under the **Occupational Health and Safety Act** 1985 may be triable either way.

The Penalties and Sentences Bill

This Bill seeks to consolidate sentencing laws in one statute. In particular the general sentencing provisions contained in the following Act — Community Welfare Services, Magistrates Court, Magistrates (Summary Proceedings), Supreme Court, Mental Health, Alcohol and Drug Dependant Persons of the Crimes Act are consolidated as far as possible. The Bill also makes a number of changes to the operation of sentences following a Sentencing Discussion Paper released earlier in the year. The Bill modifies the pre-release program and creates a new sentencing option of a suspended sentence. In addition the Bill implements the recommendation of the Shorter Trials Committee that a court may take into account a plea of guilty in passing a sentence.

Wrongs (Contribution) Bill

The present Part IV of the **Wrongs Act** is based on 1935 English legislation. The Engish law was subject to a major review by the Law Commission in 1977 resulting in legislation in 1978. the Victorian provisions were the subject of a report by the Chief Justice's Law Reform Committee in 1979 recommending the adoption of the English legislation. This Bill implements the Report of the Chief Justice's Committee and will bring Victoria's law into line with that in England It will prevent a number of injustices and inequities which have arisen under the old law and lawyers will be assisted by the uniformity with the English provisions.

LEGISLATION REMAINING ON THE NOTICE PAPER

Legal Aid Commission (Amendment Bill)

This Bill makes a number of miscellaneous amendments to the Legal Aid Commission Act. The Commission itself will be expanded by one member elected by the staff and Legal Aid Committees will be known as the Legal Aid Review Committee. Clause 17 provides that the Commission may offer to practitioners lump sum fees for the performance of legal services after consultation with the Law Institute and Bar Council. The Bill makes a number of changes to the provisions governing the security for the granting of legal aid.

The three Bills discussed above will remain on the notice paper for public comment and debate until next year. I would welcome the views of members of the Bar on the contents of those Bill and I would like to take this opportunity to thank members of the Bar for the very helpful comments which have been made to me on legislation which has already passed. Without this readily provided professional input and assistance the statute book of the state would be much poorer. I look forward to the continuing involvement of members of the Bar in the legislative process.

Courts Amendment Bill

The Report of the Civil Justice Committee provides a blue print for the revamping of the administration of civil justice in this state. A number of its recommendations have been implemented, a major one being the establishment of the Courts Advisory Council. This Bill further implements a number of its recommendations and a major feature is the establishment of reserve judge positions on the County and Supreme Courts. Judges who have attained the age of 60 years and have served 10 years may elect to retire from full-time duty as a judge. The Chief Justice may then certify to the Attorney-General that is is desirable that the judge return to perform the duties of a judge for a period of not exceeding 6 months. This will allow a closer matching of judge power with case loads are recommended by the Committee. The Bill also proposes to reduce the retiring age of judges and masters to 70 in line with practice throughout the nation. Another major feature of the bill is the harmonisation of the jurisdiction of the County Court with that of the Supreme Court. The general jurisdiction of the County Court will be raised to $100,000 and its powers will be brought into line with those of the Supreme Court within that jursidictional limit. The County Court will also be given the same jursidiction as the Supreme Court in relation to contempt and the power to award costs against practitioners personally. The Bill also establishes Council of County Court judges and of Magistrates reflecting the Government's view that sound administration of the courts requires a significant role to be played by members of the courts in their planning and development. Magistrates will also be given full rule making powers. This bill will have a significant effect on the operation of Victoria's courts and complements a number of administrative actions taken to ensure that proper priniciples of judicial administration are applied to our court system.

Administrative Law (University Visitor) Bill

The **Administrative Law Act** 1978 simplified the methods of judicial supervision of administrative tribunals. The actions of a university Visitor were exempt from the Act, but under this Bill a person affected by the decisions of a Tribunal may apply for a review pursuant to the Act. Where the court makes an order to review the decision of a Tribunal a Visitor of a university will have no jurisdiction over the matter. The Bill reflects the Government's concern that matters which come before the exclusive jurisdiction of the Visitor are many and varied and can affect the future livelihood and career of an individual. The Visitor's exclusive jurisdiction is not in accordance with the recent developments and is out of line with the position in other tertiary educational institutions.

Kennan

YOUNG BARRISTERS' COMMITTEE

The Young Barristers' Committee went into unintentional recess for Spring. The more alert Young Barristers' will have realised that a Gremlin produced our own "How to Vote" situation. After considerable delay fresh nominations were called and the following were elected to the Committee:—

G.M. Randall	(Aickin Chambers)
A.C. Marshall	(Owen Dixon Chambers)
P.R. Gibbons	(Equity Chambers)
T.A. Munro	(Stawell Chambers)
A.J. McIntosh	(Aickin Chambers)

These members joined the existing Committee Members:—

H.A. Burchill	(Four Courts Chambers)
J. Isles	(Equity Chambers)
T. Hurley	(Four Courts Chambers)
D. Wiener	(Four Courts Chambers)
P. Trevorah	(Owen Dixon Chambers)

At the first meeting of the newly constituted Young Barristers' Committee it was decided that accommodation issues were of particular concern to the young barristers. A special Sub-Committee has been formed the ensure that young barristers are kept properly informed and that there is a particular input to the interests of young barristers. A further Sub-Committee which relates to civil business in the Magistrates' Courts has also been formed as it would seem that there may well be considerable changes in Civil business in the Magistrates' Courts in the next twelve months.

The Young Barristers' Committee provides an effective way of having the point of view of young barristers placed before the Bar Council. I would urge all young barristers who have any problems, or better still, any constructive suggestions to enhance life at the Bar to seek out a member of the Young Barristers' Committee and bring the matter to his or her attention. The Committee has only one purpose and that is to promote the interests of the young barristers and accordingly do not hesitate to bring to the attention of the Committee members matters which they may not themselves have noted. We look forward to an active and fruitful year in 1986.

Randall

DOROTHY BRENNAN

In the Bar Council's Annual Report of 1968/69 there appears for the first time, under the description "Administrative Officer", the name "Miss D.M. Brennan". The Chairman was then Connor Q.C., and The Vice-Chairman Coldham D.F.C., Q.C. At the end of this year, after 17 years' continuous work for the Bar, Dorothy Brennan will retire. Few barristers — if any — have done more work for Bar Councils, and the Bar generally, than has Dorothy.

After a short spell in the Union Bank, Dorothy cut her teeth in the law with 5 years at Henderson & Ball, beginning as typist and ending in charge of the typing pool. One assumes that it was there that she developed the executive experience that later helped her manage 12 Chairmen of the Bar. Dorothy then worked for 5 years for three notable barristers, John Lewis, Grattan Gunson and Sam Cohen before taking off to England in 1960 for 2 years. For 12 months she worked as secretary to Sir Keith Joseph (now Minister for Education and Science and a close adviser to Mrs. Thatcher), having a whole suite in Curzon Street to herself and a maid in a black dress pouring coffee from a silver tray. Returning in 1962 Dorothy worked for 12 months with Clemenger's Advertising Agency, thinking that she was sick of the law. She was wrong. In 1963 she went to work for C.A. Sweeney J. as his associate, in the days when women associates were few and far between, a position she held for 6 years. Dorothy then worked for Stephen Q.C. for 3 weeks as his secretary. She must have greatly impressed the present Govern-General because she was immediately offered the position with the Bar Council she has held ever since.

The Bar was a very different place in 1968. There were less than 400 members on the practising list and the Bar Council had no accommodation for its employees at all. Temporary space was found in the secretary's room next to the chambers of Sir James Tait Q.C. and there Dorothy stayed for 4 years. In 1973 Dorothy became the Bar Council's Executive Officer. In her years with the Bar Council Dorothy carried out a large proportion of its administrative work as well as being the Chairman's secretary. No barrister could understand judicial foibles better than Dorothy. Her Chairmen included Connor J., Coldham J., Kaye J., W.O. Harris J., McGarvie J., K.H. Marks J., and Judge Lazarus.

The Bar Council meeting Dorothy remembers best is the one during which David Ross put his head in the door to announce that the Law Institute was on fire. Relations between the Bar and the Law Institute were then less than cordial. Their later improvement may have been aided by the Bar Council making available the Council Chamber for Law Institute Council meetings. Dorothy's most forgettable Bar Council dinner was the one organized to enable the Bar to honour Lord Wilberforce on one of his visits to Australia. The dinner was well attended but not entirely successful because the powers-that-be had omitted to invite the guest of honour. Temporarily bereft of the divine guidance that informed so many of his judgments, Lord Wilberforce did not attend the dinner.

Dorothy has peformed invaluable work for the Bar. When she leaves, the Bar's most important filing and record system will also depart because it is largely in her head. She says that she has greatly enjoyed her work for the Bar, that she has great admiration for all barristers — and that they earn and deserve every cent they make. We are, to employ the barrister's usual understatement, very grateful indeed for all she has done for us, in so many ways. We will miss her greatly.

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WIG STANDS

There is in New South Wales a Mr. Darlow who works as a wood turner. He has for some time now made wooden wig stands for members of the New South Wales Bar. He will make one in the wood of your choice for $140 inclusive of delivery and sales tax. A sample of his work, in mahogany is available for inspection in Miss Brennan's office on 12th Floor Owen Dixon Chambers. Further inquiries should be addressed to her.

LAW REFORM COMMITTEE REPORT

The following matters have been discussed by the Law Reform Committee over the last three months.

Barristers acting as Arbitrators

In the Spring edition of the **Victorian Bar News** it was stated that the Committee had written to the executive committee of the Bar requesting a ruling on whether Barristers may act as Arbitrators and whether they can publish their name in a list and book published by the Institute for Arbitrators. At a meeting of the Bar Council held on 24th September 1985 it was resolved:—

(1) That a Barrister may act as an Arbitrator.

(2) That a Barrister's name and professional qualifications and experience may be published in a list or book provided by the Institute of Arbitrators but so as not to infringe the Rules in Chapter 14 of Gowans ("**The Victorian Bar: Professional Conduct, Practice and Etiquette**, Sir Gregory Gowans, Law Book Co. 1979)

This ruling has resulted in barristers acting as arbitrators in various disputes, thus enlarging the pool of talent available for international Arbitrations to be conducted at the Australian Centre for International Commercial Arbitration in the World Trade Centre in Melbourne It is hoped that an increasing number of barristers take advantage of the opportunity provided by the change in the Bar Rules.

Human Right Legislation

The Committee has been kept informed as to the passage or lack thereof of the above legislation through the Commonwealth Parliament by the Law Council of Australia. The Law Council of Australia has been active in attempting to gain support for its proposal that an opportunity be given for a much deeper examination of this legislation.

Matrimonial Law Reform

The Australian Law Reform Commission's Report on Matrimonal Law Reform by Professor D. Hambly has been released. Professor Hambly has also visited Melbourne seeking views of members of the profession to the changes proposed in his Report. Members of the Bar practising in Family Law have availed themselves of the opportunity to discuss with Professor Hambly the matters raised in the Report.

De Facto Relationships

The Bar has received a letter from the Attorney-General requesting comment on the possibility of introducing legislation in Victoria similar to the **De Facto Relationship Act** 1984 (N.S.W) which came into force on the 1st July 1985. This legislation had its origins in a report from the New South Wales Law Reform Commission.

The Attorney-General sought comments on:—

(i) The adequacy of the New South Wales legislation as a model for Victoria.

(ii) Any variations which might be desirable.

(iii) Omissions or difficulties highlighted by the New South Wales legislation.

The Committee is grateful for the response provided by J.V. Kay and the Family Law Committee of the Bar.

Wills (Amendment) Bill 1985

The Committee has received for consideration a proposal by the Shadow Attorney-General, the Hon. Bruce Chamberlain, M.L.C., which would provide for the partial revocation of a Will on the dissolution or annulment of a marriage. The Bill is largely based on the 44th Report of the Law Reform Commission of South Australia 1977. The Committee has written to the sponsor of this private member's bill suggesting that

Pt. IV of **Administration of Probate Act** 1958 be amended so that ex-wives, who are not in receipt of maintainance and who have not made a property application under the Family Law Act 1975 be covered by the proposed Bill.

Evidence Report

The Committee has received a letter from T.H. Smith Q.C. Commissioner, who is anxious to obtain the views of members of the Bar on matters raised in his recent report.

In particular the Bar has been requested to provide comments on various aspects of the Report, namely:—

(i) Witnesses
Competence and compellability of witnesses.
Sworn and unsworn evidence.

(ii) Relevance and hearsay evidence.

(iii) Relevance and opinion evidence.

(iv) Relevance and admissions and improperly obtained evidence (including voir dire)

(v) Relevance in evidence of judgments and convictions.

(vi) Privileges and evidence excluded in the public interest (other than, client legal; settlement negotiations; reaons of judge/juror.

(vii) Aspects of proof.
Judicial notice.
Facilitation of proof

The Committee is working closely with the Criminal Bar Association in attempting to provide a meaningful response to the Commission's requests.

If any member of the Bar would like to comment on any of the above topics or any of the other matters raised in the Report please contact John Hockley: phone 7444.

The Committee is pleased that two of its members have taken silk, namely P.C. Heerey and T.H. Smith. The contributions of both membes to the various law reform proposals have been significant. It is hoped that Peter and Tim will remain members of the Law Reform Committee.

The Committee would like to thank four members of the Bar who have responded promptly to requests from the Committee.

John Hockley

ETHICS COMMITTEE

Since 1st June 1985 there have been 21 complaints forwarded to the Ethics Committee. Of these, six have been dealt with.

Since 1st June 1985 the Ethics Committee has in total completed 18 matters. Of these, four were concluded with the holding of a summary hearing. In two cases charges laid were found proven:

(a) In one case three counts of professional misconduct were found proven against a barrister. On three separate occasions he had ridiculed and abused members of the Victoria Police while performing security duties at court.

In the circumstances of this case, and taking into account a submission of particular hardship which would arise were the barrister suspended, the Committee resolved to fine the barrister $500 on each charge.

(b) In the other case, it was found that the barrister had failed to report to the solicitor on the outcome of a hearing and had failed to provide a memorandum of Advice as requested and after having undertaken to do so. In respect of this latter charge the committee imposed a fine of $200.

The barrister was also reprimanded for failing to respond to correspondence from the Ethics Committee.

As at the date of this report 20 matters remain under the consideration of the Committee.

Colbran

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ASIAN LAW CENTRE

The establishment of the A.C.I.C.A. as a national arbitration centre serving the Pacific Basin coincides with a proposal for the establishment of an Asian Law Centre within the University of Melbourne Law School.

The Centre will, initially at least, be concerned with Chinese and Japanese law particularly in the area of trade and commerce. It will undertake and promote the teaching of these legal systems within Australian Universities. It will conduct and encourage special courses in subjects of interest to lawyers and businessmen. It will also establish and maintain a major specialised collection of published material relating to Chinese and Japanese law.

Members wishing to obtain assistance in Asian law or seeking further information about the Centre are encouraged to contact Professor Malcolm Smith, Professor Michael Crommelin or Miss Mary Hiscock at Melbourne University.

A MESS OF PUTTAGE

Sir John Starke tell us that one of the least fulfilling tasks faced by an advocate in criminal courts is the cross-examination of an apparently honest policeman with a good memory, properly prepared paperwork, a thorough knowledge of the proper police procedures and a corroborator who is equally well prepared, in an attempt to find some skerrick of support for his client's assertion that he has been set-up, bricked and beaten in the course of the investigation of an offence which is of monumental inconsequence to anyone, including the police.

If, at the end of the day, the only matter of note to have emerged from an exhaustive and devious cross-examination is that the witness was at the time a recently retired Christian brother who had joined the force because of the practical opportunities it afforded him for social work, it is with a sickening sense of despair that counsel contemplates the next step — doing his "puttage". He, demonstrating the courage of which barristers are renowned, ploughs ahead, ignoring the derisory smirks of judge and jurors, as Constable F.X. O'Sullivan convincingly proclaims to be foul and outrageous lies each of the allegations it is counsel's misfortune to have to put audibly.

If you were one of those who, on 29th November, attended the first Criminal Bar Association professional education seminar, on the rule in *Browne v. Dunn* (1893) 6 R 67, you should by now have some idea of how to approach, (or avoid approaching), the Constable O'Sullivans who have been sent to torment us.

This gathering marked the first occasion on which a bar organisation has arranged a seminar designed for the further professional education of members of the general bar. The success of the seminar was assured by the support of approximately one hundred barristers, many of whom were not members of the Association. Unfortunately, because of lack of space, some who wished to attend could not be accepted. There will be further seminars conducted during 1986, and it is proposed that formats and venues will vary according to the subject and the level of interest shown.

The application on the "puttage" rule to a particular fact situation has often been thought by barristers to require the same sort of "intuitive synthesis" of diverse unarticulated considerations as the Full Court in *Williscroft v. R.* told us judges are capable of when sentencing. David Ross, whose efforts are greatly appreciated by the Association, prepared notes on the topic and enlisted the kind help of their Honours Crockett J. and Judge Kelly to assist us to determine how the rule is applied and what consequences flow from non-compliance with it.

It emerged from the seminar that the reason why counsel have considerable difficulty with the rule in *Brown v. Dunn* is that it is essentially a rule of fairness. It requires, on its face, that we forego the obtuse and disguised approach which is often seen to be the essence of the craft of cross-examination. It requires that a witness, before he is branded a liar or a thug, should be given the opportunity of meeting the allegations which are to be put. The question asked by counsel who does not wish to project his punches is — How little can I put consistent with compliance with the rule?

In *Brown v. Dunn* itself Lord Herschell said (at pp 70,71):

"...where it is intended to suggest that a witness is not speaking the truth on a particular point, ...(it is essential) to direct his attention to the fact by some questions... showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain... the story circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit".

Lord Halsbury (at p77) commented that it is "absolutely unjust" to fail to put witnesses on notice and then "to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to".

The consequences of non-compliance with the rule will not necessarily only be to invoke the express displeasure of the trial judge. It may be a ground for granting leave to recall witnesses inrebuttal. It may be that the jury will be told that the failure to cross-examine on an issue is a good reason for accepting evidence which is later attacked. It may lead to a verdict being overturned if the failure to cross-examine has led to an unfair trial. What, it is argued, is an extreme example of the application of the rule appears in a recent judgment of the N.S.W. Court of Criminal Appeal. In *R. v. Schneidas (No. 2)* (1981) 4 A.C.R. 101 that court upheld a trial judge's ruling that an unrepresented accused could not call witnesses to establish a matter which had been put, but inadequately put, in cross-examination.

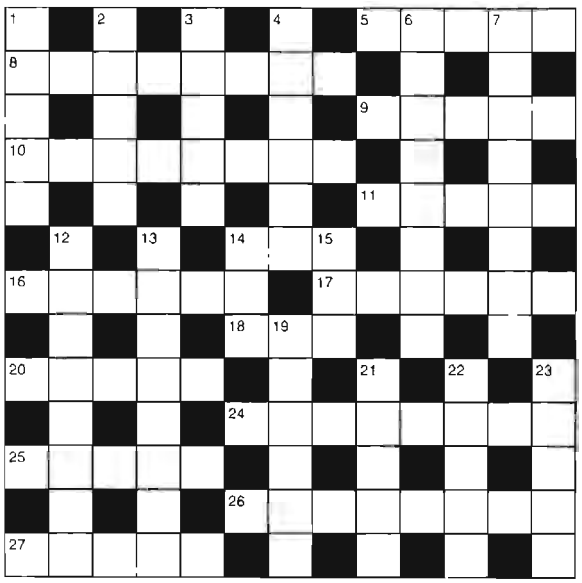
Assuming some matters have to be put to Constable O'Sullivan, how should it be done? The authorities and practical experience suggest that questions of the "I put

to you", "I suggest" genre are gauche and to be avoided. But if, at the end of the day, the "puttage" has to be done, there were some suggestions at the seminar which might help. One alternative considered was to recite your allegations as a litany in a bored and detached fashion, (rolling your eyes if able), in a manner calculated to indicate that the questions are a mere formality in response to which you do not expect anything other than a formal predictable, (and dishonest) answer. Another suggested method and minimising the impact of the inevitable indignant denial was to ask a question along the lines of "No doubt constable you would deny any suggestion that my client was maltreated/wasn't there/can't understand English/has a wooden leg etc... (as appropriate)".

You may ask — What authority is there for the propositions referred to in this article? What concrete examples are available to help me judge how far I must go in doing my "puttage". The answers to these and other questions will be available to those who send me $2 for a copy of the paper by David Ross.

Tovey.

CAPTAIN'S CRYPTIC NO.54



Across

5. Trial arguments (5)
8. Written on a document, but not necessarily on the back; *Ninette Trading v. Kenworthy* (1980) V.R. 510. (8)Z
9. Prick (5)
10. Evict a Melbourne footballer (8)
11. 2205 lb (5)
14. Imitator of life (3)
16. Queenslander, but now a Federal Judge (3)
17. Hunting, especially by this Police Squad (6)
18. Japanese woman's sash (3)
20. Elegance and favour (5)
24. Fee simple (8)
25. Divest with violence, or for reward (5)
26. Write yesterday's letter today (8)
27. Sounds like a salary increase is coming up (5)

Down

1. Little book is now scurrilous (5)
2. Decision consecrated to the highest principle (2, 3)
3. Last element of contract (5)
4. The more frequently chosen evil (6)
6. An expense relating to property (8)
7. Clause in old conveyance (8)
12. Quarrelsome person reprieved by Act 7884 s. 2(2). (8)
13. Places where barristers' swings and swings go round (8)
14. Before (3)
15. Disabled pensioner (3)
19. Lowest rank in the peerage (6)
21. Flat palindrome (5)
22. Widely distributed homnivorous beast of prey (5)
23. Non-workaholic (5)

(Solution to Captain's Cryptic No. 54 Page 31)

THE (FAMILY COURT) JUDGE'S SONG

A rearrangement of 'The Judge's Song' from 'Trial by Jury' by Gilbert and Sullivan

When I, good friends, was called to the Bar,
I'd an appetite fresh and hearty,
But I was, as many young barristers are,
An impecunious party.
I'd attract small briefs with minimal fees,
A thief or an evil prowler,
Until one day I came across,
A copy of Broun and Fowler.

Chorus:
Until one day he came across
A copy of Broun and Fowler.

In the Family Court I walked in a trance,
And uttered many a sigh,
For I thought I would never get a chance,
Of addressing Mr Justice Nygh.
But soon I tired of logic sound,
And judgments which did not falter,
So appeal in hand I wen to the "Full"
This boring path to alter.

Chorus:
So appeal in hand he went to the "Full"
This boring path to alter.

In Marland House the Full Court sat,
And heard my plaintive pleadings,
They listened close, but with planes to catch,
They soon cut short proceedings.
The Respondent was not called upon,
His brief-fee he did drool on,
As they said while quickly leaving the bench,
"There is no point to rule on."

Chorus:
As they said while quickly leaving the bench
"There is no point to rule on."

After seventeen females in a row,
To the family Court bench did trail,
The Attorney-General thought it wise,
To appoint a token male.
"You'll soon get used to the job," said he,
"And a very nice job you'll find it,
You can leave the bench at a quarter-to-three,
And nobody will mind it."

Chorus:
"You can leave the bench at a quarter-to-three
And nobody will mind it."

So I took the job the very next day,
Returning briefs a plenty,
All were pleased but the bank which saw,
That my cheque account was empty.
Procedures sound I soon evolved,
My lists ran smooth as honey,
Till Registrars took away my powers,
— It cost the litigants money.

Chorus:
Till Registrars took away his powers,
It cost the litigants money.

The only work now left to me,
Is Full Court on appeal,
Without any cases to trouble the Court,
The dust sets on the seal.
With mediation all the rage,
I yawn through every session,
And only red or white with lunch,
Requires judicial discretion.

*Chorus:*And only red or white with lunch
Requires judicial discretion.

(Reprinted from Australian Family Lawyer)

By Trad & Anon (of the Vic. Bar

DELAYS AND EFFICIENCY IN CIVIL LITIGATION

(A Report by The Australian Institute of Judicial Administration Inc.)

I think that this review might offend some people. If so, they should read no further. If they do read further, I hope that they will recall the immortal words of Voltaire (or Rousseau). They will know the ones that I mean. The book (paperback, 214 pages etc.) has been revised and reprinted since publication, so there must be some demand for it. I got the review copy from the editor, so I cannot tell you what it costs to buy. I can however tell you that it cost $93,5000 in donations to produce, because it says so in the Foreward. This book's contents are to be used as a base on which the Institute will conduct research projects to recommend the most effective ways of reducing delays and improving efficiency of the Courts in identified areas. We are told that "Nothing like this has ever been done in Australia". It thus falls to be judged by its aims and its claims (and its cost.)

The book's task is to identify the parts of the process of civil litigation which produce substantial delay. Recommendations are to be the next step, although some conclusions are stated. I think that if you read the conclusions you will see what the book is — a fairly simple recitation of things already known to practitioners, garnished with a number of statistics and figures most of which are not really of much use. The book will be of interest to outsiders, in letting them see how the various processes of the law work. As a scientific work of actual use in solving problems, I do not think that it will do much. It is rather like one of those Government statistics pocketbooks. Interesting, but not really very useful.

Let me give some examples of what I mean. In paragraph 6.5 and following, the delay caused by the concentration of some sorts of work in the hands of some practitioners is referred to. There is nothing new there. Nor is barristers' delay in drafting documents (6.11) or solicitors giving each other time (6.12). Human nature being what it is, it is scarcely earth shattering to be told that "some barristers commented that they would do work more quickly for solicitors' firms which were prompt payers, although others said that the nature of the work, its urgency or when it arrived were determinative. One barrister said that if he faced a liquidity problem he would work longer hours and complete less urgent work more quickly" (6.3). Actually, the last-mentioned barrister will always have a liquidity problem if he thinks that doing his paperwork quickly will produce quick cash. What on earth is the use of being told that "even though plaintiffs are very successful overall in obtaining relief they do not necessarily recover substantial amounts when money damages are sought (3.32)? Or that "some solicitors interviewed for the project commented that clients changing solicitors caused delay" (5.8)? The researchers even bothered to confirm this by their survey! Can the researcher really have been taken in by the following information "Barristers said that they tried to do their chamber work quickly, although they knew of instances where **other** barristers were slow through taking on too much work" (6.11) (my emphasis)?

In some cases, it is not noticed that things are not really as the figures would make them seem. For example, no doubt pre-trial conferences are inducing before-trial settlements in motorcar cases (19.14). But is this due to the pre-trial process, or to the making of reasonable offers by the major insurers, together with a refusal to agree to a later increase and an insistence on costs if a payment into court is later accepted by a plaintiff? Has any thought been given to the delays which the stocking of lists with unsettlable cases produces? Or to the extensive extra costs which a system of judge control of interlocutory steps in an action through specialist lists or directions proceedings inevitably produces? And of what possible use (in context) is the information contained in the following sentences "One aim of the Readiness hearings in the Equity division in New South Wales is to involve counsel before the date of trial is set so that more accurate assessments of hearing time can be given. Clearly it is an advantage if a court has knowledge about the accuracy in the past of a lawyer's estimate of hearing times". Now no doubt all this is true, but it is so obvious as to be at once useless and is also a professional joke — most assessments of time are wrong by a factor of 1.5 at least, and probably more in many cases.

Another thing about some of the figures. If it is intended to draw some conclusion from the number of hearing days of cases, (table 13.2) is a sample of 59 juries, 96 personal injuries causes, 82 causes and 60 miscellaneous causes (in Victoria) a high enough proportion of the total? Or as to the disposition of cases profiles (table 4.2) is a total case sample of 59 juries, 17 personal injuries causes, 17 causes and 20 miscellaneous causes (in Victoria) a large enough proportion of the total for the purpose? I would myself think not.

Anyhow, read the book for yourself and see what you think.

I am afraid that the book is the product of a judicial statistics industry, which will endeavour to solve the delay problem by use of figures, ignoring the basic elements which really cause delay. It did not cost me $93,500 to find out what they are. They are human nature, over work, ignorance and lack of resources. Like the poor, the first and third will always be with us. The second and fourth have as their root cause lack of money.

Let me look at the last — at lack of judicial resources. Here the book does contain something useful. The judge/issued process ratio in Victoria in 1983 was 22:13, 391 (or 1:608) in New South Wales 37:12422 (1:385). Why is New South Wales so much better off? If the pace of litigation figures given in tables 4.4 are based on a sufficiently large sample to be useful, then the substantial time taken from setting down to disposition (when the action should be ready to go on from the setting down date) can only be explained by the lack of facilities at the disposition end. This is the table:

I tended to get the impression from the book that the delay problem is to be laid at the door of the unfortunate litigant and his legal advisers. But in other areas of human endeavour, persons whose business is not being done usually perceive the provision of more people to do the business as the answer to their problem. Thus, if more people want to travel on aeroplanes, more aeroplanes are provided. The same for hotel rooms. The prospective traveller or tourist is not told to stay at home. But delays in hearing cases are met by the response that "it is no use throwing judges at the problem" (Estey C.J., at the last Conference in Melbourne). Why are seekers of justice a problem? Why are they told to go away and accommodate themselves to the meagre resources provided by an indulgent State? Some of them will no doubt reflect on the tale of the bed of Procrustes as they go away. In other areas a provider of services would estimate the need for those services and then calculate the resources necessay to provide them. Only if the cost of the provision of the resources was too great would measures be taken to curb demand. This may happen in the health area, but what evidence is there that it has happened in the legal area? Is the cost of provision of judicial resources too great? If not, why not provide more? Why not start with an assessment of need?

A.G. UREN

	Accident to Commencement*	Commencement to Setting down	Setting down to Disposition	Commencement to Disposition	Accident to Disposition
N.S.W					
Jury List	699	233	463	653	1331
Non-Jury list	622	286	493	709	1271
Equity-g. list	n.a.	357	178	347	n.a.
VIC.					
Jury List	513	541	309	782	1218
Causes Pl	554	569	399	883	1389
Causes	n.a.	664	312	877	n.a.
Misc. Causes	n.a.	166	198	350	n.a.
A.C.T.					
A & B lists	586	686	234	373	1164

* Personal injury cases only

THE CONTINUING EVOLUTION OF THE COMMERCIAL LIST

In November 1892 Queen Victoria extended the scope of a Commission enquiring into the judicial system in England to ascertain whether —

> "It would be for the public advantage to establish Tribunals of Commerce for the cognizance of disputes relating to commercial transactions or to any and what classes of such transactions and, if so, in what manner and with what jurisdiction such Tribunals ought to be constituted and in what relations, if any, they ought to stand to the Courts of ordinary Civil Jurisdiction..."

The Commissioners approached interested business sections and enquired as to the desirability of establishing special Tribunals for determining Commercial cases. They received a variety response, The Liverpool Underwriters Association considered that Tribunals of Commerce which were composed partly of merchants and partly of lawyers would be an advantage. It said that "special knowledge and experience is required in decision of such cases. The Manufacturers and Merchants expressed "the hope of having cases decided by persons practically acquainted with the particular trade "...." to remedy serious wellknown evils" they referred to "great delay caused by the present system" and the need for "simplicity and expedition of procedure, economy of cost and correctness of decision".

In February 1895 a Commercial Causes note in the High Court of Justice was posted that —

> "The Judges of the Queens Bench Division desire to make in accordance with the existing Rules and Orders, further provision for the despatch of Commercial business as herein provided...

1. Commercial Cause means a Commercial Cause arising out of the ordinary transactions of merchants and traders, amongst others, those relating to the construction of Mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency, and mercantile usages.
2. A separate list of summonses in Commercial Causes will be kept at Chambers. A separate list will also be kept for the entry of such causes for trial, no cause shall be entered in such list which has not been dealt with by a Judge charged with commercial business, upon application by either party for that purpose or upon summons for directions or otherwise.
3. The Commercial Cause Judge made any time after appearance and without pleadings make such order as he thinks fit for the speedy determination, in accordance with the existing Rules of the questions really in controversy between the parties.
4. Summonses may be entered in the List of Commercial summonses on or after Wednesday the 20th day of February next; these will be heard by Mr. Justice Matthew, who on Friday the 1st day of March next, will sit, and thenceforth and will, until further notice, and as far as is practicable, continue to sit de die in diem for the despatch of commercial business. Where necessary, other Judges of the Queens Bench Division will assist in the disposal of commercial business.

The object of the Commercial Causes Rules as introduced in England was to achieve definition of the real matters in issue as early as possible with as few technicalities and as few interlocutory proceedings as were consistent with an orderly trial. Colman: The Practice and Procedure of the Commercial Court (Lloyds of London Press 1983).

According to Colman, the businesslike atmosphere established by the early Judges lasted until the time of the Second World War. By then the dead hand of the proceduralists had caused loss of speed, a loss of efficiency, a loss of informality of procedure, with long and elaborate pleadings, and in addition the Commercial Judges took a less positive line on orders for transfer to the Commercial List so that those parties (or their legal advisers) who set out to increase the length of proceedings by technicalities were succeeding in doing so. In 1958 only 27 actions were set down for trial and only 15 actions were actually tried.

In 1960 the Lord Chancellor appointed a Commercial Court Users Conference to enqure into the reason for the decline of the Commercial Court and to recommend reforms. That led to a report in 1960 which stated that it was "the unanimous opinion of the conference that the commercial community earnestly desires that the commercial court shall continue to be available for the adjudication of commercial disputes". It stated that there had been a diminution in business due to amalgamation amongst commercial entities diminishing the number of potential litigants, the inherent dislike by the commercial community, the dislike of old examination and cross-examination and the increasing cost and delays of litigation. The committee recommended that it was essential that "the Judges should be chose uniquely from among those who practise in the Court before the Bar. " A revised definition of Commercial Cause was introduced in 1964 so that a Commercial Cause was —

> "In this order "Commercial Action" includes any cause arising out of the ordinary transactions of merchants and traders and, without prejudice to the generality of the foregoing words, any cause relating to the construction of a mercantile document, the export or import of merchandise, affreightment, insurance, banking, mercantile agency and mercantile usage."

That definition is to be contrasted with the definition which provided in Victoria prior to the recent amendment to the Commercial List Rule namely —

> "Any action which commenced after the 1st day of February 1979 arising out of the ordinary transactions of merchants and traders or relating to the construction of merchantile documents, export or import of merchandise, affreightment, insurance, banking, mercantile agency oar mercantile usages."

Until recently the Commercial List in the State of Victoria was presided over by Mr. Justice O'Bryan. His Honour had strong and clearly expressed views on the operation of the Commercial Lists. Those views are set our in an article by His Honour entitled **"The Commercial Causes Jurisdiction"** which is made available to Readers as part of the Bar Readers' Course. In Branicki v Brott [1983] I V.R. 423 Mr. Justice O'Bryan said that —

> "The Commercial List is relatively new in this State. It came into existence on the 1st February 1979, (S.R. 109 of 1978) as an arrangement made by the Judges of the Court with regard to the mode of dealing with commercial cases. The Rule did not establish a new Court nor did they establish a division of the Court. A certain class of case was given preferential treatment with a view to dealing with such cases in the most suitable and expeditious way possible".

Mr. Justice O'Bryan had clear views as to the meaning of the definition of Commercial Cause. He was concerned that the Commercial List not become over burdened by cases which only marginally fell within the definition. He felt that the effect of allowing too many cases into the List would be that the service which the list could provide for the commercial community would be accordingly diminished. He argued for the desirability of consistency in construing the definition of Commercial Cause.

On 2nd December 1985 the Supreme Court (Commercial List) Rules 1985 came into operation. The Rules followed recommendations from the Commercial Causes Users Committee. McDonald QC and Hayes were the Bar's representatives on that Committee. The Committee comprised Solicitors, representatives of industry, Mr. Justice Marks, Mr. Justice Ormiston and the Bar representatives. Mr. Lindsay Naylor, a partner from Arthur Robinson & Hedderwicks was a member of the Committee. He was instrumental in the provision of a lot of background material relating to the operation of the Commercial List in England, some of which has been utilised in the preparation of this article.

The new Commercial Rules introduce the following significant changes —

(a) "Commercial Cause" is given an expanded definition to mean "any cause or action commenced after 2 December 1985 arising out of ordinary commercial transactions..." and includes "any cause or action in which, in the opinion of the Judge in charge, there is in relation thereto an issue that has importance in trade or commerce";

(b) Actions are to be entered into the Commercial List by endorsing the top left hand corner of the Writ with the words "Commercial List";

(c) Upon the issue of the Writ endorsed with the words "Commercial Causes List" the Plaintiff shall take out a summons for directions to be served with the Writ or notice of the Writ and to be made returnable on the date specified on the summons being the date occuring a reasonable time after it is served;

(d) A summons for directions may be brought on for further hearing from time to time by any party on giving reasonable notice to the other party into the Court;

(e) The Judge in charge of the Commercial List shall have wide powers to give directions as to pleadings, interlocutory steps, exchanging lists of authoritites, exchanging experts reports, having matters determined by referees and other like matters;

(f) The Judge in charge of the List may dispense with pleadings or any interlocutory steps or the proof of a fact not bona fide in dispute;

(g) Any party may apply and the Court may of its own motion order that an action be removed from the Commercial List.

In 1986 three Judges will be available throughout the year to hear cases in the Commercial List. Mr. Justice Marks will sit every Friday morning at 10.00 a.m. to hear application for directions. Mr. Justice Ormiston will be one of the Judges available throughout the year to hear cases in the Commercial List. The identity of the third Judge is not yet known. The Judge in charge of the Commercial List has expressed his intention of supervising the adherence to timetables which are fixed by directions and providing actions against avoidable delay. Mr. Justice Marks stated in Court on 29 November 1985 that on the return of the summons for directions parties will be encouraged to agree upon interlocutory and trial procedures which will make early hearing feasible and economical as to length. His Honour stated that it will be expected that as much information as possible about the claim will be provided in the initiating process irrespective of whether the form is by general endorsement, statement of claim, points of claim or otherwise.

Thus the 1985 Commercial List Rules are part of the continuing evolution of the Commercial List in this State. The definition of Commercial Cause is now so broad that potentially most Civil litigation could be brought into the list. For example, many disputes arising in company matters such as company take over cases, may involve issues that have importance in trade or commerce or may be seen to arise out of ordinary commercial transactions.

There is a distinct departure from Mr. Justice O'Bryan's stated preference for strictly adhering to the definition of Commercial Cause and to prevent the list becoming over burdened by cases which only marginally fell within the definition. There are now three Judges available to hear Commercial Cases rather than one as was the case when Mr. Justice O'Bryan was in charge of the List.

The fundamental changes to the Commercial List Rules have been motivated by factors similar to those that led to Queen Victoria's Commission of enquiry in 1892, and to the introduction of the Commercial Rules in England in 1895 and to the redefinition of those Rules in England in 1964. The Commercial list Rules endeavour to meet the ever-pressing need for cheaper, simpler and quicker commercial litigation. This will place litigants and practitioners under significant pressure in commercial cases and in many cases may interfere with deeply entrenched habits. The expectation of the Commercial Causes Users Committee in making the recommendations that led to the Commercial List Rules was that commercial cases would be heard within a short time of the commencement of proceedings. Many cases may be able to be heard within three months or earlier of the issue of the initiating process. An important function of the Commercial Causes Users Committee during 1986 will be to monitor the operation of the Commercial List to ensure that litigants are not denied natural justice by over zealous application of the Commercial List Rules. Members of the Bar may contact McDonald or Hayes if their experience of the Commercial List suggests the need for further change.

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OATH OF OFFICE

If you want to be admitted to practise law in the Tribal Court South Dakota you are required to take this oath:

I, do solemnly swear, or affirm that: I will support the Constitution of the Cheyenne River Siouh Tribe; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except just as I believe to be honestly debatable under the law of the land; I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honour, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law; I will maintain confidence and preserve inviolate the secret of my client, and will accept no compensation in connection with his or her business except from his or her or with his or her knowledge or approval; I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by justice of the cause which I am charged; I will never reject from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice.

Martin Shannon

Admitted:	2.4.59
Signed:	8.2.62
Read with:	Odgen
Readers:	Malcolm Charlton
Don McIvor	Francis Tiernan
Malcolm Speed	

Peter Cadden Heerey

Admitted:	1.3.1963
Signed:	10.5.1967
Read with:	Gobbo
Readers:	Lou Papaleo
Zoltan Friedman	Sally Brown
Tony Cavanough	Sue Kenny
Michael Fleming	Tim North
Michael Corrigan	Kevin Bell

John Anthony Strahan

Admitted:	1.4.1963
Signed:	9.6.1966
Read with:	Dawson
Readers:	John Udorovic
Murray Kellam	Graham Skene
Ian Williams	

Jacob Isaac Fajgenbaum

Admitted:	1.4.1963
Signed:	25.10.1967
Read with:	Brusey
Readers:	Mark Weinberg
	Harry Reicher (part)
Robin Brett	Terence Patrick Murphy
Leslie Glick	Kurt Esser
Timothy Margetts	Phillips Bornstein
Geoffrey Bloch	

W SILKS

Bernard Daniel Bongiorno

Admitted:	1.3.1967
Signed:	25.7.1968
Read with:	Neesham
Readers:	Roger Franich
Carl Price	Bruce Lee
Kathryn Norman	Michael Crennan
David Beach	

Thomas Harrison "Tim" Smith

Admitted:	2.4.64
Signed:	25.2.65
Read with:	Stephen
Readers:	I.R. Henry (part)
Ian Sutherland	Bruce Miller
Peter Bick	Pieter Thomasz

Frederick George Beaumont

Admitted:	1.3.1968
Signed:	8.5.1969
Read with:	Jenkinson
Readers:	J. Bessell
	Tony Nolan

Robert Richter

Admitted:	2.4.1970
Signed:	5.8.1971
Read with:	Castan
Readers:	Jeremy Ruskin
John Dickinson	David Parsons
Carol Healey	

John McLaren Emmerson

Admitted:	1.3.1976
Signed:	11.3.1976
Read with:	Batt
Readers:	Bruce Cain

And From Interstate

Christopher Grenville Gee, Q.C. (N.S.W.)
David Daniel Levine, Q.C. (N.S.W.)
Richard John Burbidge, Q.C. (W.A.)
Ian Douglas Temby, Q.C. (W.A.)
Donald Edward Grieve, Q.C. (N.S.W.)
Francis Lister Harrison, Q.C. (Qld.)
Charles Simon Camas Sheller, Q.C. (N.S.W.)

The New Silks announced their appointment to the Full Court on 2nd December. Our cub reporter, Lucinda Strahan, was there. She filed the following, perhaps biassed, report.

Mr Kennan the Attorney-General said I have the pleasure to say that Mr ~~Thon~~ John ~~&~~ Anthony Strahan ~~is~~ has been apointed a Q.C. then the judge said do ~~go~~ you move and dad stood up and bowed. Then the judge said all ~~the~~ this thing. While the judge is ~~th~~ saying this nobody moves or talks. Then the tipstaff says STAND god save the queen & thankyou ladies and gettemen

ADMINISTRATIVE DECISIONS — JUDICIAL REVIEW

The Adminstrative Decisions (Judical Review) Act (Cth) was passed in 1977. It fulfils the same function in the Commonwealth arena as the Administrative Law Act 1978 (Vic) performs in the State arena. The Judicial Review Act may be contrasted with the provisions of the Administrative Appeals Tribunal Act 1975 (Cth). The contrast is revealed in the basis on which relief is granted. Under the Judicial Review Act relief is granted by the Federal Court where a decision has been made in breach of codified form of the Common Law Rules of natural justice which are set out in S.5 (1) Judicial Review Act. The Administrative Appeals Tribunal will grant relief on the merits of the decision after a reconsideration of both the evidence and the merits of the decision.

The Judicial Review Act is one of three ways the Federal Court can supervise the decisions of Commonwealth Agencies. The Federal Court is also given power by S39B Judiciary Act 1901 to exercise the jurisdiction conferred on the High Court by the Constitution to issue prerogative Writs against Officers of the Commonwealth. Further the Federal Court is given specific power under some legislation to reconsider some decisions.

Grounds of Review

The grounds on which a decision of an Administrative nature made under a Commonwealth enactment may be challenged are set out in S5 of the Judicial Review Act. The grounds are set out in nine paragraphs. Of these the most heavily relied upon are those in para. 5 (1) (a) — breach of the rules of natural justice — para 5 (1) (e) — improper exercise of power conferred by the enactment — and para 5 (1) (f) — error of law.

The ground of breach of the rules of natural justice is made out when the rules which apply by their own force are breached in the making of a decision. The current view is that the rules are not imported into decision making by the Judicial Review Act. This current view is subject to the reserved decision of the High Court in *Kioa v. The Minister for Immigration* (reported before the Full Federal Court at (1984) 55 A.L.R. 669). Thus before relief will be granted an Applicant must demonstrate a legitimate expectation which attracts the rules of natural justice and a decision afecting that expectation made in breach of those rules. The use of this ground is exemplified in decisions where public servants have attempted to review decisions of promotional or disciplinary bodies within the public service. The authorities reveal that as prohibited non-citizens (i.e. illegal immigrants) have no expectation that they may remain in Australia the rules of natural justice do not govern decisions affecting presence in Australia.

A review of the authorities reveals that the most successful basis on which decisions have been challenged is on the ground that the making of the decisions was affected by an error of law. This ground for Application steers completely away from any consideration of the merits of the decision. The error of law asserted generally reveals itself as a question of statutory interpretation. The recent decisions in *Austin v. Tax Agents Board of N.S.W.* (1985) 16 A.T.R. 486 reveals the possible confluence of the two grounds of challenging a decision for error of law and for breach of natural justice. S16 (2) Income Tax Assessment Act 1936, prohibites officers from disclosing information acquired in the course of their duty. The Board considered that this prevented it from disclosing to a tax agent adverse information it had received about him before it would decline to renew his licence as a tax agent. Mr. Justice Morling quashed the decision of the Board on the basis that it had erred in law in its interpretation of the restriction imposed by S16 (2). While His Honour did not find it necessary to decide the point it is submitted that the error of law manifested itself in a breach of the rules of natural justice because Mr. Austin was not given an opportunity to know or answer the allegations against him before his licence was not renewed.

The ground of reviewing a decision because it was an improper exercise of the power conferred by an enactment is given in Paragraph 5 (1) (e). This ground is expanded to include nine matters set out in sub-section 5 (2). Within these nine grounds are grounds which come as close to permitting a challenge to be made to a decision on its merits as is to be found anywhere in the Judicial Review Act. Two of the nine grounds set out in sub-section 5 (2) concern the taking of irrelevant considerations into account, and the failure to take relevant matters into account: paras 5 (2) (a) and 5 (2) (b) respectively. The question of what is a "relevant" matter in the absence of guidance in the Statute which authorized the decision under review is generally analysed by reference to the often quoted dicta of Deane J., when a Judge in the Federal Court, reported in *Sean Investments v. MacKeller* (1981-82) 38 A.L.R. 363 at p.375:

> "In a case such as the present, where relevant considerations are not specified, it is largely for the decision-maker in the light of matters placed before him by the parties, to determine which matter he regards as relevant and the comparative importance to be accorded to matters which he so regards. The ground or failure to take into account a relevant consideration will only be made good if it is shown that the decision-maker has failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide".

Two comments may be made on this ground. The first being that even where relevant matters have been taken into account an Applicant has the possibility of convincing the Federal court that the decision-maker did not have regard to the relevant matters "in any real sense": *Turner v. Minister for Immigration* (1981) 35 A.L.R. 388 at 392. The second comment is that material placed before the staff of a decision-maker which is either misconveyed to the decision-maker or not conveyed to him at all has been held to be constructively before the decision-maker: *Videto v. Minister for Immigration* — 6th September 1985.

The ground of reviewing a decision because it was an improper exercise of power is further expanded by Judicial Review Act S5 (2) (g) to include an exercise of power that was so unreasonable that no person could have so exercised the power. Decisions such as that of the Full Court in *McVeigh v. Willarra Pty. Ltd.* (1984) 57 A.L.R. 344 at 353 reveal the Applicant must establish the decision was preverse in the sense that not reasonable person could have reached it before this ground is made out. The relevant authoritites are considered in the decision in *Videto*.

The relief the Federal court may, in its discretion, give is set our in Judicial Review Act S16. The Court may quash the decision, remit the matter to the decision-maker, declare the rights of the parties or give directions ordering the parties to do, or refrain from any act.

Some of the issues that have emerged in decisions under the Judicial Review Act in 1985 are —

The Interlocutory Battle Ground

By S15 Judicial Review Act the making of an Application to the Federal Court does not of itself stay the operation of a decision. This Section empowers a Judge to suspend the operation of a decision on such conditions as he thinks fit. Interlocutory Applications seeking the stay of decisions most commonly before the Federal Court in the context of the Migration Act. An Interlocutory Application to a Judge for a stay of a Deportation Order customarily follows the arrest of a prohibited non-citizen and accompanies the Application for a review of the decision to deport the prohibited non-citizen. The Application for Interlocutory Order is made pursuant to Federal Court Rules Order 19 and the jurisdiction of the Federal court given by S23 Federal Court of Australia Act 1976 is generally invoked in aid of the power given by S15 Judicial Review Act. The test applied is generally the "serious question to be tried and balance of convenience" test adopted by the High Court in the *Australian Coarse Grain Pools* case (1982) 46 A.L.R. 398; however there is dicta to the effect that the Federal Court may have regard to whether circumstances exist which make it just that the Courts give the Interlocutory stay sought without emphasising whether the connotation of whether circumstances exist which make it just that the Courts give the Interlocutory stay sought without emphasising whether the connotation of whether an Applicant has a prima facie case: *Perkins v. Cuthill* (1981) 52 F.L.R. 236 at p.238. Any tension between the application of the two tests is generally resolved in favour of the *Australian Coarse Grain Pool* test: see the decision of Wilcox J. in *Azemoudeh v. Minister for Immigration* — 10 October 1985.

The accrued jurisdiction

The Federal Court is given such original jurisdiction as is vested in it by laws of the Commonwealth Parliament

in S19 Federal Court of Australia Act. By S16 of the Judicial Review Act the Court is given jurisdiction to make the Orders outlined above on Application made to review appropriate decisions. However by S21, 22 Federal Court Act the Court is given power to give all remedies so that all matters of controversy between the parties may be completely determined. These provisions have given rise to a jurisdiction in the Federal Court to grant relief in relation to a non-Federal claim where the Court has before it a Federal claim and both claims depend on common transactions and facts so as to arise out of a common substratum of facts. While of more wide spread utility in Trade Practices ligitation the accrued jurisdiction has recently permitted an Applicant who initially sought only judicial review of a decision under the Customs Act 1901 (Cth) to seize motor vehicles to amend his Application to also seek damages and other relief based on the detention and conversion of the motor vehicles: *Tetron International v. Luckman* — 7 August 1985. In this regard it is interesting to contrast the decision of Marks J. reported in *Rosenthal v. Philips* (1985) V.R. 409. Between these two decisions it would appear that both State Supreme Courts and the Federal Court have jurisdiction in detinue over goods seized by Commonwealth Officials. It is submitted that the future may see applications for Judicial Review of decisions which effect rights such as the right to import, broadcast, operate aircraft or receive assistance from the Commonwealth in the health field coupled with more aggressive for relief in the accrued jurisdiction.

Decision under Commonwealth or State Acts

The High Court decision in *Glasson v. Parkes Rural Distributors Pty. Ltd.* (1984) 58 A.L.J.R. 471 indicated the subtlety that can attend determining whether a Commonwealth or State Official making a decision authorised under joint Federal and State legislation can be reviewed under the Judicial Review Act. The decisions of Fisher J. in *Perry v. D.P.P. (Cth)* — 31 May 1985 — and the Full Federal Court in *Woss v. Jacobsen* — 5 June 1985 — reveal the interesting jurisdictional complications where appeals lie to both State Courts and the Federal Court in proceedings where extradition is sought under the Service and Execution of Process Act 1901 (Cth).

Decisions under an Act or a Contract

The difficulties in seeking judicial review of decisions by statutory bodies to terminate the services of staff were revealed in the earlier decision of *Burns v. Australian National University* (1982) 43 A.L.R. 25. These issues were ventilated again in *Australian Film Commission v. Maybey* (1985) 59 A.L.R. 25 where the Court concluded on the facts before it that the decision to terminate employment was made in the exercise of contractual rights and not by reference to any statute incorporated into the Contract of employment as was the case in *Chittick v. Ackland* (1984) 53 A.L.R. 143.

Decisions under an Act for Prerogative Power

Defining whether the decision of Commonwealth Officials have been made otherwise than "under an enactment", as that phrase is defined in S3 Judicial Review Act, has led to some noteworthy decisions in 1985. In *A.B.E. Copiers Pty. Ltd. v. The Secretary Department of Administrative Services* Fox J. in a decision given on 17th June 1985 held the decision of the Secretary to make a recommendation in regard to the acceptance of tenders was not made under an enactment, in particular the Audit Act 1901. In the Full court decision in *A.C.T. Health Authority v. Berkeley Cleaning* given on 2 June 1985 the Full Court in a joint judgment held that the decisions of the authority to reject one tender for failing to comply with tender requirements, and to accept a rival tender, were reviewable as made under the Health Commission Ordinance 1975 (A.C.T.). More recently in *Balnaves v. Deputy Commissioner of Taxation* — decision given 1 October 1985 — the Full Court, in a joint judgment, held that a scheme created by the Commissioner which permitted some tax agents to submit the returns of their clients over staggered periods of time was a scheme giveing effect to the power given by S161 Income Tax Assessment Act. The Full Court therefore upheld the appeal from the Primary Judge who had concluded that as the scheme had no explicit statutory basis any decision implementing the scheme was not made under an enactment thus not reviewable. It is submitted that more decisions of the Commonwealth Government may be taken in future without a formal statutory foothold. This would have the effect of reducing the prospect of such decisions being subject to review in the Federal Court under the Judical Review Act, and leave those subject to the decision to seek relief by means of prerogative Writs under S39B Judiciary Act.

Statistics

Statistics provided by the Federal Court Registry reveal the number and source of Applications to the court under the Judicial Review Act, and their disposal, for the calendar year 1984 and up to the end of October 1985.

State	Total	Finalized by Judgment	Finalized by Other means	Current
		1984		
NSW	104	42	43	19
VIC	61	12	22	27
QLD	27	10	13	4
SA	13	1	8	4
WA	28	15	7	6
TAS	4	1	2	1
ACT	11	3	6	2
NT	-	-	-	-
		1985		
NSW	83	18	26	39
VIC	50	7	11	32
QLD	16	2	6	8
SA	28	4	10	14
WA	24	12	3	9
TAS	2	-	-	2
ACT	10	2	4	4
NT	1	1	-	

It is submitted that these figures reveal that either those who dwell upon the shores of the Great Harbour are more litigious that the rest of the community (as often thought), or are more zealously governed.

HURLEY

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FOR THE PERIPATETIC

Australian Bar Association 2nd Conference

Alice Springs and Uluru — August 1986
Enquiries: E.W. Gillard Q.C.

Labour Lawyers — 9th National Conference

Perth — 18-20 September 1987
Enquiries: The Secretary
Society for Labour Lawyers (W.A.)
G.P.O. Box P 1596
Perth 6001

24th Australian Legal Convention

Perth — 20-25 September 1987

Young Lawyers International Association Congress

Vancouver — 24-29 August 1986
The Congress working sessions will include topics such as Commercial Agency — Comparative Aspects, Code of Conduct for the international lawyer, Legal Aspects of high-tech human reproduction.
Enquiries: Francis Warwick
C/- Messrs. A Robinson and Hedderwicks
447 Collin Street
Melbourne

CASENOTE:

ELEVENTH MIRONTRON PTY LTD

V

VAN WIN PTY LTD

(Full Court 21st October 1985)

On the 21st October 1985, the Full Court (Kaye, Gray & Phillips JJ.) delivered judgement in *Eleventh Mirontron Pty. Ltd. & Anor. v. Van Win Pty. Ltd.*, dismissing an appeal from an order of Nathan J. striking out a Third Party Notice issued by the City of Kew against its consulting engineer on the ground that no cause of action was disclosed because the claim made was statute barred. The judgment is important because of its treatment of the claim by the City of Kew for negligent advice and the time limit the Court apparently imposed upon a defendant seeking to pass on to a third party his liability in damages to the plaintiff.

The proceedings arose out of a building contract for the construction of a dwelling house in Kew. Apparently in June 1978 a suspended concrete floor slab and areas of brickwork cracked. The Builder sued for unpaid progress payments and the Proprietor counterclaimed for damages for breach of contract. Subsequently, in 1981, the Proprietor added to its Counterclaim a claim of damages against the City of Kew and the municipality was given Notice of the Counterclaim in 1982. The municipality was the relevant authority administering the Uniform Building Regulations and the claim against it was for damages for negligence in the issue of a permit and in the supervision of construction.

In September 1984 (that is, more than 6 years after the cracking of the floor slab and brickwork), the City of Kew obtained leave to issue third party proceedings against its consulting engineer. It sought "indemnity or contribution" in respect of any sum it might be ordered to pay the Proprietor. It alleged that the permit had been issued in reliance upon the engineer's certificate that the proposed structure would be sound. It alleged that the engineer's advice was negligent in consequence of which the City "has or may suffer loss and damage". As particulars of damage, the City claimed all that the Proprietor recovered against it, together with the costs of defending itself. In the alternative, it claimed contribution towards the amount recovered by the Proprietor. Finally, it sought a declaration that the engineer was liable to indemnify it or make contribution towards whatever sum the City of Kew might be ordered to pay to the Proprietor.

Gray and Phillips JJ. concurred in the judgment delivered by Kaye J. in the Full Court. According to that judgment, the City of Kew pleaded that the consulting engineer was under a duty of care to the Proprietor as well as to the municipality. During the hearing of the appeal, the City of Kew abandoned its claim for an indemnity and contribution and obtained leave to add damages to its claims for relief. Moreover,it is said that Counsel for the municipality, before the Full Court, accepted that the City of Kew's claim against the engineer for contribution under Part IV of the Wrongs Act was barred, contending instead that its claim for damages for negligence against the engineer was commenced within the time allowed by s.5 (1) of the Limitation of Actions Act. It is plain enough in the early parts of the judgment that Kaye J. was directing attention, but for what was called "the alternative claim for damages" against the consulting engineer.

In relation to that claim, Kaye J. concluded that the cause of action was not complete since no damage had been suffered. His Honour pointed out that on the pleadings there was a duty of care owed by the engineer to the City of Kew, a duty of care which was breached by a failure to advise with due care and skill, but damage

was alleged only *in futuro*. In His Honour's view, the injury or harm for which the municipality claimed damages was financial loss consequent upon the engineer's negligence. That, His Honour said, the municipality "will incur only when called upon to satisfy a judgment in favour of the Proprietor and in defending itself against the Proprietor's claim". Accordingly, "the City of Kew's cause of action against (the engineer) has not yet arisen": "on its face, the pleading . . . . . does not disclose a cause of action".

Of course, in itself the conclusion that the cause of action was not yet complete with regard to damage, may be no bar to third party proceedings under Order 16(A), for "one of the peculiarities of third party procedure is that it enables litigation on (such claims) to take place before there is any liability": *Port of Melbourne Authority v. Anshun Pty. Ltd.* (1981) 147 C.L.R. 589 at 595. But (according to Counsel engaged in the hearing before the Full Court) during argument, the bench expressed concern about how to limit the time within which the municipality's claim against the engineer might be mounted. If indeed the cause of action was not complete until liability to the Proprietor was fixed on the City of Kew (whether by judgment, admission or otherwise), then it was possible for the municipality's claim against the engineer to be mounted many, many years after the events giving rise to the litigation. In argument, that possibly appeared to trouble their Honours.

Perhaps this explains the latter part of the judgment. For, after concluding that the cause of action for damages in negligence was not yet complete for want of existing damage, Kaye J. dealt with the abandoned. His Honour treated the dispute as "in substance and in effect" a claim for "contribution and indemnity" in respect of the municipality's liability as a tortfeasor to the Proprietor, relief being sought on the ground that the engineer was also a tortfeasor. As a claim for contribution (or indemnity, if understood to mean 100% contribution), the City of Kew's claim against the engineer was statute barred. The cause of action was statutory, not founded in tort, and as the right to contribution depended upon the Wrongs Act s.24 (1), His Honour held that the proceedings had to be instituted within the time fixed by s.24 (4) (a). In the circumstances, "the City of Kew's proceedings for contribution against (the engineer) were required by s.24 (4) (a) (ii) . . . . . to be commenced within 12 months after the service of the Counterclaim upon it. It follows that the third party proceedings are manifestly statute barred". (This was in essence the reason given by Nathan J. for striking out the third party notice in the first place.)

The difficulty with the judgment when it proceeds to consider the City of Kew's claim as a claim for contribution is to perceive the basis upon which it to proceeded. It is early recited that before the Full Court the municipality abandoned its claim for indemnity and contribution, and until the latter part of the judgment, His Honour concentrates on the City of Kew's claim in negligence based upon an alleged duty of care owed by the engineer to the municipality, not the Proprietor. Yet such a duty can never found a claim for contribution under the Wrongs Act; for a claim for contribution is based upon a duty owed, not to the claimant for contribution, but to some "third party and stranger to that suit (for contribution), the plaintiff in the action" — a quotation from the judgment of Donaldson L.J. in *Ronex Properties Pty. Ltd. v. John Laing Construction Ltd.* (1983) Q.B. 398 at 407 which Kaye J. himself specifically adopted.

There seem to be two alternative possibilities concerning the significance of the latter part of the judgment. First the Full Court was dealing with the City of Kew's claim for negligence based upon a duty of care allegedly owed by the engineer to it, the municipality. The Court imposed on this claim a limitation on the institution of those proceedings which limitation is derived from s.24 of the Wrongs Act (notwithstanding that that claim for negligence was not in truth a claim for contribution). The second possibility is that the Full Court was dealing with the municipality's alternative claim against the engineer which was founded on a duty of care owed by the engineer to the Proprietor. A breach of this duty would be sufficient to sustain a true claim for contribution and in this case, the restrictions imposed by Wrongs Act s.24 (4) (a) on the institution of proceedings were directly applicable. The difficulty with the second possibility lies in the fact that, according to the judgment, counsel for the City of Kew had already conceded that the claim for contribution was statute barred, so that that claim was scarely in issue. The difficulty with the first possibly is to perceive some sound basis upon which to apply to an ordinary claim or damages for negligence, a limitation period spelled out in relation to claims for contribution.

In these circumstances, it is difficult to be clear about what the Full Court judgment stands for. Does it mean only that a defendant, seeking to pass on to a third party liability in damages to the plaintiff has no cause of action until that liability to the plaintiff falls to be satisfied — and meanwhile, a claim therefore is premature (in which case it will be necessary one day to canvass the effect of the *Anshun* decision where the claim is launched in third party proceedings)? Or does it stand for the proposition that even though such a claim be otherwise premature, the defendant must institute proceedings against the third party within the time limits spelled out in the Wrongs Act in respect of a suit for contribution (notwithstanding that the claim by the defendant is based upon a duty of care allegedly owed to the defendant and not to the plaintiff in the action)?

There is perhaps another area for some argument. Insofar as the Full Court perceived a problem because the City of Kew's cause of action had not yet arisen, is it plain beyond argument that the municipality's claim was indeed for damage which was "inchoate", as concluded by Kaye J.? His Honour himself drew attention to the confusion that arises "if the distinction between damage occasioned by a tortious act and

damages resulting or flowing from such damage, injury or harm is not kep clear". Granted that the claim here was for economic loss because the damage was only the liability of the City of Kew to answer the claim of the Proprietor and to defend itself against the claim, was that damage not sustained when the municipality itself incurred liability? Was it only the damages that were *in futuro*, not the damage? Or was it necessary for some payments to be made in satisfaction of the liability before any "financial loss" was actually suffered?

Claims for economic loss have only recently been admitted in appropriate cases, so that decisions on what appear to be like questions in other ares (e.g. s.24 of the Wrongs Act itself) can be readily distinguised: see and cf *Australian Iron & Steel Pty. Ltd. v. G.I.O. (N.S.W.)* (1978) 2 N.S.W.L.R. 59 at 62. If damages was in truth suffered by the City of Kew when it became liablie to the Proprietor (without the need for any judgment or other ascertainment of that liability or any payment in satisfaction thereof), the cause of action of the municipality agains the engineer was then complete — and the claim would have been statute barred 6 years after the events giving rise to liability in the municipality to the Proprietor. The problem of the municipality thus launching its claim against the engineer many, many years after those events disappears.

How then should the Full Court judgment be treated, for practical purposes? On one view, it imposes a limitation on claims by a defendant against a third party, even if not strictly speaking claims for contribution. To the extent that the decision imposes a limitation on the time for instituting proceedings, it would be prudent to follow it. On another view, the decision establishes only that in some cases where a defendant seeks to pass on to a third party the defendant's own liability to the plaintiff, the cause of action is not complete until the defendant is required to meet his liability to the plaintiff. However, to the extent that the decision appears to liberalise the time within which proceedings can be brought, it might be unsafe to place upon it too much reliance. Either way, as appeals are no longer permitted to the High Court without special leave and as such leave may not readily be granted in a case involving merely local practice, it is probably the Full Court which will be called upon ultimately to elucidate the effect of this recent decision.

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NATIONAL FAMILY LAW CONFERENCE PLANNED FOR SYDNEY NEXT YEAR

The Law Council's Family Law Section has arranged a second major family law conference in Sydney in June 1986.

The conference, at the Regent Hotel, Sydney's leading conference venue, will cover all aspects of family law and is expected to attract practitioners from throughout Australia and every country with a modern system of family law.

Judges of the Family Court of Australia and at least two leading overseas speakers will address delegates at the conference, which will run from the afternoon of Thursday, June 26 until 1 pm on Sunday June 29, 1986.

In addition to 17 work sessions over the three days, an excellent social program has been arranged, including a cocktail party, breakfasts and lunches with interesting speakers, a visit to the theatre for the smash hits "CATS", a Sydney harbour dinner cruise and a dinner-dance.

The conference program will include delivery of the Seventh David Opas Memorial Lecture. The lecture will be given by Stuart V. Walzer, D. Juris (Harvard), of Los Angeles. Mr Walzer is President of the Southern California Chapter of the American Academy of Matrimonial Lawyers and is regarded as one of the leading Californian practitioners in matrimonial property law.

Mr Walzer will talk about the division of business and professional goodwill and other intangible assets on divorce. Two other plenary session will be held during the conference. In one, on the subject of superannuation, the speaker will be the Hon. Mr Justice Nygh, of the Family Court (NSW) and the commentator will be the Hon. Mr Justce K.A. Murray, of the Family court (SA).

The final plenary session will be one in which there will be a panel of leading family law authorities who will respond to questions from the audience.

Planning for the 1986 Sydney conference follows the outstanding success of the "Family Law in 84" Family Law Conference held in Hobart under the sponsorship of the then Family Law Committee of the Law Council. The Committee, now the Executive of the Family Law Section of the Law Council, believes a national court system makes it vital that practitioners should meet on a national conference as also giving Australian practitioners the opportunity to meet practitioners from other countries, particulary the United States.

Inquiries about the conference should be directed to Capital Conferences Pty Ltd, PO Box E345, Queen Victoria Terrace, ACT 2600 or Telephone (062) 314 203.

MILESTONES 1985

During the year past the following milestones were attained:

	SIGNED FOR ROLL	ADMITTED TO PRACTICE
65 YEARS		
J.H. Moore (Judge Ret.)	8. 3.20	—
60 YEARS		
Sir John Norris (J. Ret.)	11. 6.25	—
55 YEARS		
Sir Douglas Little (J. Ret.)	14. 6.30	—
40 YEARS		
Sir Kevin Anderson (J. Ret.)	24.11.45	—
35 YEARS		
Master Brett	3. 3.50	—
Judge Shillito	3. 2.50	—
Strauss J.	3. 2.50	—
A.P. Webb Q.C. (1966)	28. 4.50	--
W.E. Paterson Q.C. (1969)	28. 4.50	--
G.W. Colman	9. 6.50	1. 5.50
Marks J.	1. 9.50	1. 9.50
P.E. McGavin	6.10.50	2.10.50
Judge Byrne	1.12.50	1.10.50
30 YEARS		
Chief Judge Waldron	4. 3.55	—
Brooking J.	4. 3.55	—
Judge Cullity	4. 3.55	—
Hon. H. Storey Q.C. (1955)	29. 4.55	—
J.C. Finnemore Q.C. (1970)	14.10.55	—
J.P. Wright	14.10.55	—
J.G. Coleman	14.10.55	—
H.H. Ednie	14.10.55	3.10.55
Sir Billy Snedden Q.C. (1964)	19.12.55	1. 9.55

25 YEARS

G.S.H. Buckner Q.C. (1977)	29. 2.60	—
R.R. Vernon	29. 2.60	—
B. Bourke	1. 4.60	—
G.A.N. Brown	1. 4.60	1. 3.60
Tadgell J.	1. 4.60	1. 3.60
Judge Villeneuve-Smith	28. 4.60	1. 4.60
J.D. Merralls Q.C. (1974)	28. 4.60	1. 4.60
N.R. McPhee Q.C. (1971)	25. 8.60	1. 3.60
J. Kaufman	27.10.60	1. 8.60
J.G. Howden	24.11.60	—

20 YEARS

Smithers J. — First appointed: 18 January 1965

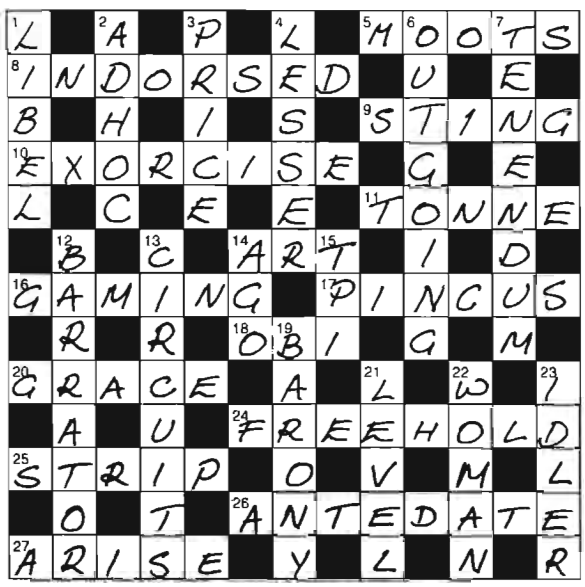
Judge Crossley	25. 2.65	—
P.D. Cummins Q.C. (1978)	22. 4.65	—
Robinson J.	6. 5.65	—
E.W. Gillard Q.C. (1979)	24. 6.65	—
D.M. Ryan Q.C. (1980)	22. 7.65	1. 4.65
D.J. Ashley Q.C. (1983)	17. 8.65	1. 4.65
A. Graham Q.C. (1984)	17. 8.65	1. 3.65
A.H. Goldberg Q.C. (1978)	30. 9.65	—
D.M. Byrne Q.C. (1982)	30. 9.65	—

Judge Leckie — appointed: 26 October 1965

10 YEARS

Fullagar J. — appointed (Supreme Court): 18 February 1975
Asche S.J. — appointed: 29 August 1975
Judge Hogg — appointed: 9 September 1975
Judge Ravech — appointed: 14 October 1975

Solutions to Captain's Cryptic No. 54



VERBATIM

Old habits die hard. Snedden Q.C. has resumed practice after a long parliamentary career. He recently appeared for the plaintiff in a personal injuries case at Ballarat.

Sneddon asked a question in chief. Jeff Moore for the Defendant objected and the objection was upheld. Snedden asked the question again, and again the objection was upheld. He asked the same question a third time. As you might expect Moore objected again. This was more than Snedden could bear:

"If the Honourable member will only resume his seat I can get on with the evidence".

Cor. Judge Spence
12th November 1985

• • •

Donoghue (otherwise McAlister) revisited.

It is just after 9 o'clock on a recent Monday. Barrister is handing out the day's instructions to an efficient secretary: ..."and would you please phone the Manager of ... where I bought some frozen broccoli on Saturday. When it was thawed I found it included the best part of a snail. No, make that most of a snail!"

He returns again triumphant at 4.30 to receive her report.

Secretary:
The Manager asked me whether the offending item had a shell. I said it did not.

Barrister:
Oh well, in that case it might only have been a slug.

(We would not normally stoop to publish such a tired story. But Chris Johnson assures as that it is verbatim — Eds.)

• • •

"There are two heresies I would like to see extirpated. The first that it is justifiable to appoint judges whose point of view is generally favourable to the government in power. The second is that the judiciary should somehow be made representative of the community; that is should be recruited from a wider and widening class — from solicitors, academics, women and ethnic groups".

Gibbs C.J.
at Luncheon of Sydney Uni.
Law Graduates Assocation
16 September 1986
("Age" 17 Sept. 1981).

• • •

The Prosecutor was cross-examining a Defendant in a case of assaulting Police.

Prosecutor:
What happened then?

Defendant:
Well, then this gentleman attempted to grab my wife.

Prosectuor:
But, he was wearing a police uniform was he not?

Defendant:
Yes.

Prosecutor
(triumphant):
Then, he was not a gentleman — he was a policeman!

Magistrate:
Mr. Prosecutor, some police like to think of themselves as both.

Prosecutor:
Er ... yes ... I withdraw that your Worship.

Cor von Einem S.M.
Werribee Magistrates' Court
21 November 1985

• • •

Costigan:
"You never bumped into anything? . . . No?"
"Which left a . . . so if it happened . . .?"
Witness:
"Look, I've been driving — sitting on headers for over 40 years and it's like you standing there asking questions. You know what you're doing and I know what I'm doing."
Costigan:
"I am not too sure, sometimes, Mr. Carter."

Mildura S.C.
April 1985.

• • •

Pallaras reports from Hong Kong that an accused was recently arrained as follows:

> "Ko Shun-tak, you are charged that on the 14th day of October, 1985, at No. 1100, Canton Road, ground floor, Kowloon, having entered as a trespasser a building know as Tai Kwong Chinese Medicine and Dry Seafood Company, you did steal therein 216 taels of deer penis, 88 taels of deer's antler, 5 boxes of pillar ginseng, 15 boxes of Jilin ginseng, 106 taels of Korean ginseng, 64 taels of Pillar ginseng, 48 taels of American ginseng, 12 taels of Rhinoceros skin, 4 boxes of Bird's nest, 144 taels of Bird's nest in ball shape, 32 taels of dried orange peel, 24 taels of sea dragon, 40 taels of Aloeswood, 10 catties of shark fins, 6 boxes of mushrooms, 40 taels of Pseudo-ginseng, 10 cans of Abalone, 3 catties of flower glue, 5 boxes of deer's antler, 1.8 taels of bear glue, 2 boxes of Pien Tse Huange."

• • •

Some civil cases are very relaxed. During one recent hearing there was a pause in the evidence while the judge was deciding how to describe an exhibit. Pannam QC started talking to his junior. Finkelstein conferred with his instructor. The tipstaff asked the witness if there was a second page to that exhibit. The judge was fazed not one bit.

"This exhibit will read on the transcript like a James Joyce novel with us all speaking together."

Morgan v. Carrington & Ors.
Cor. P. Murphy J.
November 7, 1985

• • •

It might have degenerated into an unseemly brawl had not old fashioned manners prevailed.

Counsel was mentioning a matter in the Practice Court.

His Honour:
"Normal rules of seniority apply".

Hennessy:
"I think I win by miles".

His Honour:
"Not so sure. I see Mr. Bradshaw behind you."

Hennessy:
"We both were admitted to practice on 1st May 1936 and I signed first.';

Cor. Southwell J.
24th October, 1985.

• • •

The "Bar News" 1985 Award for exotic imagery goes to Brooking J. for the following passage:

"The bush boss was painted by the plaintiff's counsel as the genius of the forest, the tutelary spirit by which all logging operations were informed. He was not called at the trial, and so the jury were not vouchsafed a glimpse of this important character. In his examination of witnesses counsel hinted darkly that if, for example, a snigger were to indulge in some forest indiscretion, the bush boss would suddenly materialize, like the Erlkoenig, and pluck the miscreant from his tractor."

Brodribb Sawmilling Co v. Gray
(1984) V.R. 321 at 340-341

• • •

The Administrative Arrangements Order (No. 36) 1985 deals with arrangements arising out of the transfer of certain functions from the Health Commission of Victoria to the Department of Health. It contains the following provision which is noteworthy, not only as an example of kennanisation of the English language, but more so as a recognition of the incorruptibility of the bureaucratic flesh:

"Subject to Clause 5 of this Order, in respect of each item in the Schedule a reference to the Old Body in any Act, or any provision of an Act, specified in Column 2 or in any statutory or other instrument made under any Act, or any provision of an Act, specified in Column 2 shall be construed as a reference to the New Body."

Victorian Government Gazette
No. 104 — 6 October 1985 p. 3806

• • •

SPORTING NEWS

"Hard Luck Harry" was the Master of Ceremonies and the Auctioneer at the Bar's inaugural Melbourne Cup Calcutta held on Cup Eve. This proved to be a very pleasant evening and extremely profitable one for Mattei, Cashmore, Franich, Newton, Spicer and Gregurek. This group had the fortune to draw and retain "What A Nuisance" and each member ended up about $800 on the credit side of the ledger. They were charitable enough to sell "Tripsacum" to Hore-Lacy's table to soften the blow of heavy expenses being incurred by that table for the ill-fated purchase of "Kiwi" which ran down the track. Lee organised the event and we thoroughly recommend it to those who will be available in November 1986.

• • •

Strong and Shirref starred in the Bar Review and such a scene may be a nursery for future opera stars. Both have been in the Chorus for the Victoria State Opera at the State Theatre in Wagner's opera Lohengrin and have just completed a season. Shirref has done 3 other operas this year namely, La Boheme; The Barber of Seville and Rigoletto. Both Stong and Shirref will audition for the chorus of Don Giovanni and Eugene Onejin to be staged next year.

• • •

On a similar note to the above, Ramon Lopez is also a very keen singer. He was last heard singing not all that far away from the State Opera — namely, St. Kilda Road at about 3 am following the Criminal Bar Association Dinner on 23.10.85. Bruce Springsteen would have been quite jealous of Lopez's verson of "Born in the U.S.A."

Guy Gilbert has just returned from a 5 months stint in the desert in Eastern Sudan. He was appointed a Field Director of Community Aid Abroad and together with personnel from two other agencies was responsible for the administration of a project concerned with the welfare of 20,000 refugees from Ethiopia He employed staff of 150 including medical and nursing personnel and supervised the setting up of the camp from scratch. Hospital Buildings and Feeding Centres for malnourished children together with accommodation for all staff were constructed in trying conditions as the temperature was regularly 45° C. A cold beer was out of the question unless one was prepared to put up with a "whipping" which was the normal punishment for a breach of the strict moslem law. Gilbert had hoped to see the Chairman of the Sudan Bar Council soon after his arrival but this gentleman had been arrested immediately before a coup by a local political faction.

• • •

Stuart has just passed his 6th Grade Practical piano exam and is studying for this 7th grade. He claims the standard is equivalent to a practitioner in the Magistrates Court charging "top scale". This is a bit difficult to rationalise when one learned that 7th or 8th grade is required for students doing H.S.C.!

• • •

And as an inspiration for members who may be interested to know what recreations superior Court Judges pursue when they are not reading law reports, we offer the following information as it appears in Who's Who in Australia 1983.

High Court

Gibbs CJ	Nil
Mason J.	Gardening, Tennis
L. Murphy J.	Water skiing, gardening, tennis
Wilson J.	Engineering, cabinet making
Brennan J.	Gardening
Deane J.	Nil
Dawson J.	Squash

Federal Court

R. Smithers J.	Billiards, working on farm
Woodward J.	Nil
C.A. Sweeney J.	Nil
Northrop J.	Tennis
Keely J.	Tennis, reading
Davies J.	Golf, walking
Jenkinson J.	Nil
P. Gray J.	No entry.

Family Court

E. Evatt CJ	Nil
Asche SJ	Tennis, sailing, growing native plants, Australian poetry
Emery SJ	Nil
Strauss J.	Skiing, fishing
Lusink J.	Cooking, Gardening
Walsh J.	Sailing, Golf
Fieyvand J.	Golf
Hase J.	
Frederico J.	Nil
Joske J.	Golf, swimming
Fogarty J.	Australian Literature & History
A.A. Smithers J.	Tennis, squash, golf

Supreme Court

Young CJ	Nil
Crockett J.	Nil
Kaye J.	Golf, swimming, farming
Murphy J.	Gardening, golf, trout fishing
Murray J.	Nil
Fullagar J.	Lawn tennis, golf
McGarvie J.	Reading, sailing, tennis, bushwalking
O'Bryan J.	Tennis, golf
Brooking J.	Nil
Marks J.	Horsemanship
Gray J.	Golf, squash
King J.	Nil
Beach J.	Nil
Gobbo J.	Nil
Southwell J.	Golf, yachting, tennis
Tadgell J.	Woodworking, gardening
Nicholson J.	Sailing, fishing, racing
Hampel J.	Tennis, skiing
Ormiston J.	Nil
Nathan J.	Hunting, shooting, fishing
Phillips J.	Nil
Vincent J.	No entry

"FOUR EYES"

LEGGE'S LAW LEXICON
"W" "X" "Y" "Z"

Wager of battle — a payment in after a pre trial conference.

Wager of law — the historical method of interfering with the administration of justice.

Waived — a woman which is outlawed is called "waived" Co. Litt. 122b

Walking possession — a barrister's ownership of his library

Walking wounded — a workers compensation barrister

Want of jurisdiction — the state of mind of a golfing judge on Wednesday morning.

Warehouse — a place of storing marketable securities.

Warranty — any statement by a used car salesman.

Waste (equitable) — a partnership dispute.

Waste (permissive) — living in sin.

Waste (voluntary) — not living in sin.

Wasting assets — teenage children, middle aged secretaries and debentures in Barristers Chambers Ltd.

Wear and tear — a head of damage in the Family Court.

Weight of evidence — the quality of evidence is measured on the scale:—
12 police corroborators = 1 J.P.; 3 J.P.'s = 1 surburban solicitor.; 22 solicitors = 1 chairman of the Bar Council.; 10 chairman = 1 Solicitor-General, 1 ruck rover or 1 medical expert.; 8 footballers = 1 young female plaintiff.; 1 interpreter is the equal of 1 judge, 1 defendant, 2 instructors, 4 barristers and 12 jurors.

Welfare state — blessed are the poor.

White slave traffic — young men anxious to visit South America should see Act 10095.

Widow (Brighton) — a lady in a black tennis dress.

Wife — it is the husband's ancient duty to bury her [1946] 2 A.E.R. 49A.

Winding up (creditors) — insolvency without any of the perils of bankruptcy.

Without prejudice — a full court constituted by 1 migrant, 1 woman and 1 transvestite.

Without recourse — a barrister who puts to the witness a question suggested by his solicitor.

Without reserve — a Queensland aborigine.

Words of procreation — see Lawrence on Lady Chatterley's Lover. (1928) 495

Wounding with intent — the irony of a County Court judge.

Wrongs Act — a far fetched Victorian literary work combining in one unlikely plot the misfortunes of The Age the young at heart, Woolworths, T.A.A. and Peter Henry Cross [1978] V.R. 49.

Wrongful dismissal — [1982] Q.B. 1166. failure to suicide is in mitigation of damages.

Wrongful imprisonment — the state of a golfing judge with jurisdiction on Wednesday afternoons.

Yielding and playing — why this further injustic to women.

Zimmi — ? ? ?

THE END

MOVEMENT AT THE BAR

Members who have signed the Roll since the Spring Edition

B.S.J. O'KEEFE (N.S.W. Q.C.)
B.R. KENDALL (re-signed)
G.J.C. SILBERT (Crown Prosecutor)
I.D. TEMBY Q.C.
(Federal Director of Public Prosecutions)
(Miss) J.A. CAMPTON (re-signed)
F.P. DONOHOE (N.S.W.)

Kevin James ANDREWS	A.J. Myers Foley
John Edwin BARING	R.R.L. Lewis/Roberts
Edwin Charles BATT	J.F.M. Larkins/Stone
Bruce Norman CAINE	D.L. Harper/J.McL. Emmerson/Stone
Louise Margaret CROCKETT	J.W. Ramsden/Dever
Anne T. DALTON	T.F. Danos/Roberts
Solomon Rufus DAVIS	P.G. Nash/Stone
Sean Rory DERHAM	N. Moshinsky/Hyland
James DOUNIAS	L. Lasry/Hyland
Peter David FRECKLETON	R.C. Macaw/D.S. Levin/Muir
Morris GLAND	R.K. Davis/Roberts
Michael GROS	D. Perkins/Howells
Cecilie Vivien HALL	C.W. Rosen/Foley
Michael Charles HINES	P.R. Hayes/Dever
Linton Roy LETHLEAN	B.J. Bourke/Hyland
Peter Whyte LITHGOW	R.McK. Robson/Duncan
Peter Gerard McDERMOTT	J.F.E. Turner/Howells
Kirst Marion MACMILLIAN	N. Ackman/Dever
Peter Anthony O'CONNELL	J.P. Keenan/Hyland
Gaven Leonard RICE	H.McM. Wright/Foley
Lloyd Ruta SAMUEL	J. Rapke/Howells
Kenneth Fraser SPARKS	J. Zahara/Muir
Pieter Malcolm THOMASZ	T.H. Smith/Roberts
Gregory Bruce WICKS	J.D. McArdle/Foley

Members who have transferred to the Magistrates & Full Time Members of Statutory Tribunals List

(Mrs.) M.A. Rizkalla
(Mrs.) S.E. Brown

Members whose names have been removed at their own request

P.J. Grey
I.R. Miller
(Miss) C.J. Toop
D.I. Findlay
R.A. Elston
G.R. Schneider

Total in active practice — 975.

Net growth in number 1985 — 36.

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