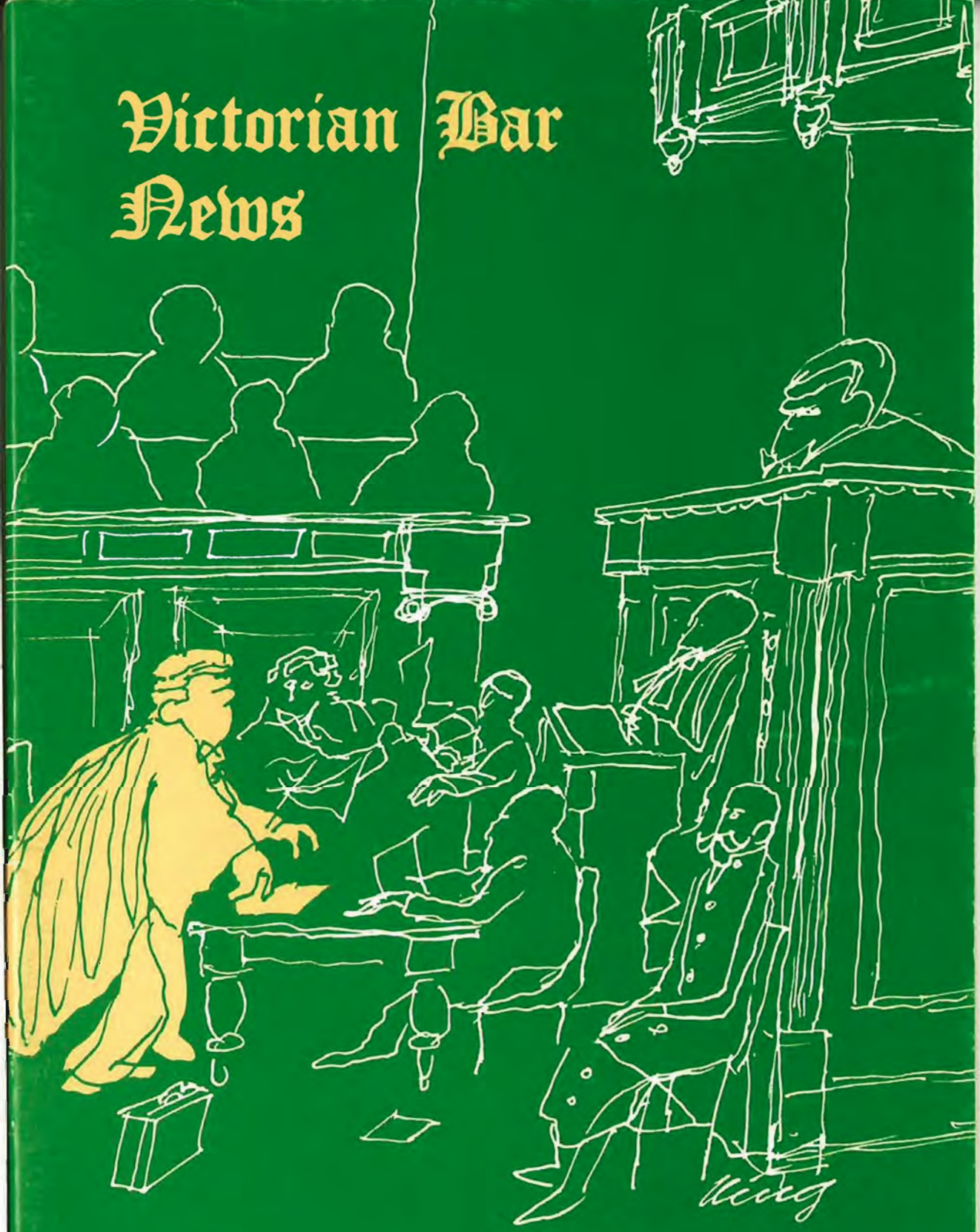
Victorian Bar News



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VICTORIAN BAR NEWS

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The Editors' Backsheet

Peter Heerey Q.C.

Paul Elliott

This is the second issue of Bar News since the well earned retirement of former editors David Byrne Q.C. and David Ross. The Bar owes a great debt to their imagination, enthusiasm, talent and hard work. We are determind to maintain the high standards which Bar News achieved under their leadership.

We plan to retain virtually all the familiar features of Bar News but also to introduce some new ones, for example this column. It will not be an editorial like those in the daily press where governments are admonished and solutions proferred for the problems of the nation and the world. Rather it will be a modest attempt to communicate (in a meaningful way) to those 1000 plus members of the Bar out there some ideas about life at the Bar and the Bar's place in the scheme of things. Of course, any views expressed will not necessarily be those of the Bar, the Bar Council (or even the Editors).

We particularly want to see short items of comment and opinion from members of the Bar. Some of those penetrating insights or devastating throw away lines which are presently wasted in the lifts and across coffee tables deserve a wider audience. So keep the cards and letters rolling in — typed if possible, but we'd much prefer handwritten pieces to none at all. Don't worry about grammar, syntax, spelling or the laws of libel and contempt of court. We can sort those things out. Criticism (whether constructive or not) will be welcome. However, we would draw to our readers' attention a tentative ruling of the Chairman of the Ethics Committee that horsewhipping an editor of the Bar News would probably constitute a disciplinary offence.

We are also looking for substantial articles. It would be most helpful if potential contributors could discuss ideas for articles with us in advance of preparation. The rejection of an unsolicited 5,000 words on "Some Interesting Features of the Paraguayan Land Titles System" would be distressing for all concerned.

Helen Symon's excellent article on the BHP takeover litigation provokes the thought that recent claims of excessive legalism and litigation in the takeover area ("Keep Take-overs out of Courts" etc.) fail to take account of the actual issues involved in these actions.

It is one thing to say that the NCSC should have wide policy making and regulatory powers to control takeovers. But in fact much of the BHP litigation was concerned with claims that there had been breaches of the general law, for example the law which imposes fiduciary duties on directors of companies, the law against misleading and deceptive conduct contained in the **Trade Pratices Act** and the law that a body established by statute can only act lawfully if it complies with that statute.

It is simply not possible, let alone desirable, to create a no man's land so that any activities of those engaged in takeover battles (including regulatory agencies) are exempted from the general law and unexaminable in the courts.

There is the quite separate and difficult issue as to how the resources of the court systems, and more particularly available judge-power, can cope with such a huge outburst of complex litigation. The respectful comment is made that the Victorian Supreme Court, the Federal Court in Victoria and the High Court seem to have coped remarkably well to date. It should not be a matter for anguish and hand-wringing that the courts are suddenly faced with an unexpected rash of litigation. After all, deciding cases is what courts and judges are for. If any of the cases which arise can be shown to be frivolous or without arguable merit, long established procedures are available to have them shunted out of the court system at an early stage.

But there are, as a number of judges have forcibly pointed out, important questions of fairness bearing on the rights of other litigants to have their cases heard with reasonable despatch. The listing of cases and the assessment of competing claims for priorities is an important part of the whole judicial process. It is quite unreasonable to suggest that parties alleging breaches of the general law should be denied access to the courts simply because these breaches arose out of activities in some particular commercial arena. But access to the courts necessarily involves either taking one's place in the queue or making out a convincing case for priority in all the circumstances, and the fact that cases involve sums beyond the dreams of avarice is not, and should not be, the only consideration, or even perhaps a major one.

. . .

"Judge gave Chart to Jurors" screamed the headline on the front page of the Melbourne "Sun" of 15th August. On closer examination, this "exclusive" story concerned a recent murder trial before Hampel J. in which an automatism defence was raised. His Honour had given to the jury a diagrammatic chart which outlined the decision making course required. Did the accused act conscioulsy voluntarily and deliberately? If so, was there an intent to kill or do grievous bodily harm? etc. etc. Although not mentioned in the "Sun", even the limited investigative resources of Bar News has been able to establish that the chart was given to the jury with the consent of the Crown and the accused. And, as one might expect, the chart was accompanied by a detailed oral explanation of the law by his Honour in his charge to the jury.

Apparently Melbourne solicitor Mr. Frank Galbally was persuaded to comment on the matter. As quoted in the "Sun", Mr. Galbally said, "I do not know of a case where this type of document has been given to the jury before. It has been a rigid and inflexible principle of law that no document should be given to jurors when they are considering the case and their verdict except those that are tendered lawfully as exhibits. Once they are given a document that is not part of the evidence they may be distracted from the real evidence and concentrate on the document."

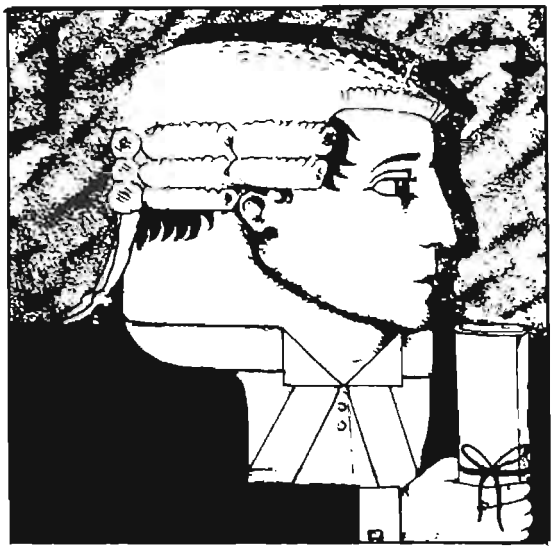
Most barristers with experience in criminal and civil jury trials would take issue both with the assertion that such a principle exists and the justification advanced for it.

Coincidentally, the most recent issue of the Australian Law Journal contains a report of a murder appeal from Tasmania where the trial judge made available to the jury what was described by Mason, Wilson and Deane JJ as a "written memorandum dealing with matters of law": **Boughey v R.** (1986) 60 ALJR 422, 424.

Counsel for the applicant did not suggest there was any supposed "rigid and inflexible principle of the law" which would have prevented the use of the document. Nor is there any hint in the judgments of the High Court that the trial judge's use of a document which was not an exhibit was in any way irregular, or even unusual.

THE EDITORS

Bar Council Report



Law Reform Committee

The Law Reform Committee has received numerous requests from the Government and the Opposition for reports and advice regarding proposed new legislation and amendments to legislation. The Committee wishes to draw upon the resources of the Junior Bar in meeting this need. The Richard Griffith Library is to be used to display current law reform material.

Annual General Meeting — September 1986

It has been resolved that a General Meeting of the Bar be convened for next month for the purpose of considering draft amendments to Rules 32 and 41. Amended Rule 32 will contain machinery for dealing with defaulters who have failed to obtain professional indemnity insurance, with the ultimate penalty for non-compliance being for a defaulter to be struck off the Roll of Counsel. A new Rule 41 will provide for annual bar subscriptions; the ultimate sanction for default, also, to be striking off. A new Rule, Rule 41A, will provide that unless before 1st December a member pays a subscription for the then current financial year, or informs the Treasurer in writing that he does not authorise his clerk to pay it, then the member shall be deemed to have authorised his clerk to pay the subscription on his behalf.

Motorcare

A committee has been appointed to raise funds from members of the Bar to support a joint advertising campaign by the Bar and the Law Institute against the Transport Accident Bill. Collections for the advertising campaign are now being arranged.

Appeals From Magistrates' Courts

The Bar Council has resolved to advise the Attorney-General that the Bar's position in relation to Appeals from Magistrates' Courts is: —

(i) that there be a right of appeal from decisions of Magistrates' courts in civil cases to the Supreme Court on questions of fact and of law;

(ii) that the appeal procedures be, in substance, the same as in the case of an appeal from the County Court to the Full Court;

(iii) that the appeal be to a single Judge of the Supreme Court;

(iv) that any further appeal be only by leave of either the Appeal Judge or the Full Court;

(v) that provision be made for the recording of proceedings in civil cases and Magistrates' Courts as soon as possible;

(vi) that pending the making of such provision, the record of proceedings for the purposes of an appeal in civil cases from Magistrates' Courts be constituted by the Magistrate's notes (as in the case of the notes of a County Court Judge) for the purpose of appeal, and that provision be made requiring Magistrates to make notes in civil cases.

SUE CRENNAN

Ethics Committee Report

Since 1st December 1985, the date of the last report, the Ethics Committee has received 24 complaints against members of counsel. The Committee is currently investigating 22 complaints and during the period to this report 22 investigations were completed.

Of the investigations conducted and completed the Committee resolved in 18 instances that the material presented did not demonstrate that a disciplinary offence had been committed by the barrister.

Under Section 14B of the **Legal Profession Practice Act** a barrister commits a disciplinary offence if —

(a) he is guilty of professional misconduct;

(b) he is guilty of improper conduct in a professional respect;

(c) he infringes a ruling made and published by the Victorian Bar Council on a matter of professional conduct or practice; or

(d) he is guilty of any other conduct for which a barrister could be struck off the Roll of Practitioners by the Supreme Court.

Counsel may be interested to note that a substantial number of the complaints dealt with by the Committee, and those received during the last nine months, have concerned the quantum of fees charged by counsel. Another group of complaints concern allegations of forced settlements or settlements agreed to by counsel without proper explanation to the client. The Committee has held three summary hearings pursuant to Section 14F of the Act and laid charges against a barrister before the Barristers Disciplinary Tribunal under Section 14E.

The first summary hearing concerned allegations that a barrister had been guilty of professional misconduct in addressing a jury in a matter tending to mislead that jury and, or alternatively, making submissions to that jury in a manner inconsistent with an agreement reached with prosecuting counsel.

The Committee having heard evidence on the matter resolved that no offence had been made out.

The second hearing involved allegations that a barrister had:

(a) failed to appear in court when holding a brief to do so;

(b) failed to return a brief within a reasonable time after the return date of such appearance; and

(c) failed to respond to correspondence from the Ethics Committee when requested to do so.

Each of the offences was found to have been committed and the barrister was fined the sum of $300 on the first charge, $200 on the second and $100 on the third charge. The barrister was also ordered to pay compensation for any loss suffered by the lay client arising out of the barrister's failure to appear as required.

The third hearing concerned offences alleged to have been committed in a Police Station. The barrister was charged with improper conduct in a professional respect in that he had conducted himself in a manner intending to impugn the integrity of the profession The circumstances involved abusive and argumentative behaviour towards a member of the Victorian Police Force and a failure on the part of the barrister to leave the office of a member of the Force when requested to do so.

The Committee heard evidence upon the complaint and resolved that the offence had been committed and that the barrister be fined the sum of $100.

MICHAEL COLBRAN

THE Attorney General's COLUMN

Court Reorganization

The proposed regionalization of the administration of Magistrates Courts has now taken place. The State has been divided into eight regions with a co-ordinating Magistrate in charge of each region. There are four regions in Metropolitan Melbourne and four regions in regional Victoria. There is a headquarters court which is the base for the co-ordinating Magistrate and the area manager in each region. The regional organization will facilitate better management of the courts system. The mention system will be extended across the whole State. The regional organization will also facilitate the computerization of the courts.

Court Buildings

In late July the refurbished Sale Courthouse was officially reopened. The courthouse has been restored at a cost of $1.6 million and contains a Supreme Court/County Court room, a Magistrates Court room, and a separate Family Court facility. The courthouse has been faithfully restored in a manner appropriate to its historic classification and, together with the Wangaratta Courthouse, provides a good example of the way in which some of our older courts can be successfully refurbished to provide very functional facilities. Work is continuing on the refurbishment at Mildura. Work has commenced on the new Coroners Court complex at South Melbourne. The complex will house the Coroners Court and morgue and will be the home of the Institute of Forensic Pathology. The Institute of Forensic Pathology has come into being following the proclamation of the Coroners Act and Dr. Vern Plueckhan is the Acting Director.

Work is proceeding on the provision of County Court judges chambers in the new Barristers Chambers building which will facilitate the establishment of additional criminal courts in the existing County Court building during 1987.

Design work is proceeding on a new Central Criminal Court. A feasibility study is being carried out in relation to the establishment of a new Melbourne Magistrates Court.

Refurbishment of the Supreme Court is continuing and now five courts have been carpeted. Repainting of corridors upstairs and downstairs in the court is proceeding. The word processor centre in the renovated caretaker's flat at the back of the Supreme Court has been established with seven work processors now in operation. Word processing facilities will be established in the County Court during the month of September.

Computerization

In addition to the provision of word processing facilities to the Supreme Court and the County Court, plans have now been finalized for the introduction of computer assisted transcript in the Supreme Court and the County Court. It is now expected that computer assisted transcripts will be in operation by next January.

The computerization program for the courts is proceeding and it is expected that the criminal jurisdiction of the Magistrates Court will be computerized during the first half of 1987 with the civil jurisdiction to follow. Computerization of court records, registries and cash management will then be progressively introduced through to the middle of 1989 when it will be completed.

The Elsternwick Magistrates Court has been opened as the first computerized court in Victoria. The court is the headquarters for the operation of the PERIN system being the system for the enforcement of on-the-spot fines. This computerized system will replace the old Alternative Procedure system and will provide enormous savings in the time of both police and the magistracy. This system has been expanded to include a number of regulatory offences under the Companies Code.

Simplification of Court Forms

Work is proceeding well on the project to simplify the 20 most commonly used court forms. This work has been carried out under the supervision of Professor Robert Eagleson, the Professor of English at Sydney University, who is working with the Victorian Law Reform Commission and the office of Parliamentary Counsel during 1986 on Plain English projects. The Information and Summons form used in Magistrates Courts has been simplified and is now in use. It is anticipated that it will not only be easier for individuals to understand but also that it will save the equivalent of 30 jobs in Police and Law. Accompanying instructions for persons charged with offences in the Magistrates Courts are now available in 10 different languages. Work is proceeding in relation to the simplification of other court forms and considerable administrative efficiencies will be achieved as well as ensuring that the forms are appropriate for conversion to electronic form during the course of 1987 when the Magistrates Courts are computerized.

Victorian Law Reform Commission

The Victorian Law Reform Commission has released discussion papers in relation to its sexual offences reference and in relation to its Plain English reference. The discussion papers are to be welcomed. The Sexual Offences Discussion Paper suggests considerable simplification of the law relating to sexual offences. The Plain English Discussion Paper is of significance both in this country and in other countries as we are now attracting international attention in our Plain English drafting and simplification of court forms.

I have recently given a reference to the Law Reform Commission in relation to land law. The review will examine the adequacy of existing laws on land and titles and make recommendations for reform. The review will complement work being done on the computerization of the Titles Office. Work has commenced on the reference. The Bar is represented on the Consultants Group by John Hockley and Nimal Wikrama. Any member of the Bar who is interested in this area should contact the Commissioner in charge of the reference, Ms Jude Wallace

Spring Legislative Program

A number of Bills are on the list for the spring legislative program.

Crimes (Confiscation of Assets) Bill.

It is intended to introduce a Bill to allow courts to freeze and, where appropriate confiscate, the assets of people charged and convicted of criminal offences. Similar legislation has already been introduced in New South Wales and South Australia. Reciprocal arrangements are being made as a result of discussion of the Standing Committee of Attorneys General.

Commonwealth Powers (Family Law — Children) Bill.

The purpose of this Bill is to refer to the Commonwealth power to legislate for the custody, access, guardianship and maintenance of ex-nuptial children. The reference will preserve State powers in the child welfare area. The Bill will pave the way for the Family Court of Australia to assume full jurisdiction over Family Law matters involving all the children, whether or not there is a relevant marriage in existence Other States which intend to make a similar reference to the Commonwealth are South Australia, Tasmania and New South Wales.

Crimes (Proceedings) Bill.

This Bill implements the recommendations of the committee convened by the Director of Public Prosecutions in relation to committal proceedings. The Bill introduces a new test for committal for trial, namely, "Is the evidence of sufficient weight to support a conviction?" This test replaces the existing tests. The Bill also extends the use of the hand up brief procedures and provides for the hand up brief procedure to be available in cases of treason, murder, attempted murder and conspiracy to murder. The Bill also makes a number of changes to streamline hand up brief procedures including a requirement that the brief be served 28 days before the hearing instead of the present 14 days. The Bill also makes some reforms in relation to mentally ill defendants and allows the courts to make a range of orders consistent with the objectives of the Mental Health Act and the Intellectually Disabled Persons Services Act.

De Facto Relationships Bill.

This Bill is intended to clarify the property rights of de facto partners and to provide limited rights of maintenance and enable de facto partners to enter cohabitation and separation agreements. It follows broadly similar legislation which is in operation in New South Wales.

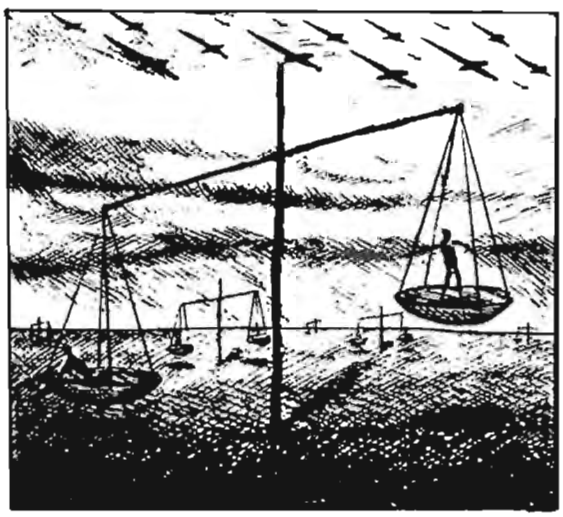
Supreme Court Bill.
This Bill replaces the existing Supreme Court Act and will reform the law relating to jurisdiction and procedure of the Supreme Court. It will also deal with the taxation of barristers' fees.

Magistrates (Procedures) Bill.
This Bill will implement the recommendations of the Hill Committee Report to enable the arbitration of claims in the Magistrates Courts under $3,000 and to facilitate the introduction of pre-trial conferences. It will also extend the jurisdiction of the Magistrates Courts to deal with disputes relating to strata titles.

Corrections Bill.
The Corrections Bill has been widely circulated and has been the subject of consultation for some time. I expect that the legislation will be introduced in September. It will consolidate the law relating to the administration of the Office of Corrections, the administration of prisons and the administration of community correction centres. It will provide for the first time a statutory code of prisoners' rights.

J.H. KENNAN

Law Reform Committee Report



Appointment of Mr. Justice Kay

Prior to his appointment to the Family Court of Australia, Mr. Justice Kay was a most active member of the Law Reform committee. His Honour made substantial contribution to the work of the Committee over a number of years, particularly in family law and related areas where his thoughtful and well researched reports reflected his extensive knowledge and experience. The Committee joins the rest of the Bar in welcoming his Honour's appointment and wishing him a long and satisfying career on the Bench.

Victorian Law Reform Commission

The Committee expresses its appreciation to Professor David Kelly, Chairman of the Victorian Law Commission, who attended a meeting of the Committee and gave the members present a valuable insight into the work of the Commission. Professor Kelly has also been good enough to write an article which is published elsewhere in this issue.

One of the matters raised by Professor Kelly — the reform of miscellaneous and relatively minor legal issues — has already prompted a response from the Committee. The illogical distinction between powers created inter vivos and those created by will (**Tatham v Huxtable** (1950) 81 CLR 639) has been drawn to the Commission's attention.

The Committee looks forward to a close working relationship with the Commission.

Health Services Complaints Office

A member of the Committee and also a former member of the Bar brought to the attention of the Committee the very wide powers that are proposed to be conferred upon the Health Services Complaints Office under the Health Services Complaints Bill 1986.

The Committee considered that the legislation, which was objectionable in itself as well as having serious implications for the legal profession, should be vigorously opposed by the Bar and that support should be given to the medical profession in this regard. At the request of the Committee, one of its members prepared a report for the Bar Council.

Committee chairman and Bar Council member Alan McDonald Q.C. later reported that the Bar Council had endorsed the views of the Committee and that the Chairman of the Bar Council had sent to the relevant authorities a strong letter detailing objections to the legislation.

The Chairman also reported that the Victorian Bar had been informed by Mr. Richard Young, President of the Victorian Council of Professions, that he had attended a meeting, accompanied by representatives of the AMA, with the Premier, Mr. Cain, the Minister for Health, Mr. David White and three Government advisers. The outcome of the meeting was that Mr. Cain agreed that the Bill required considerable revision and proposed that the name of Mr. John Finemore Q.C., a former Chief Parliamentary Counsel, to negotiate the provisions with the aim of producing a piece of legislation acceptable to all. Mr. Young stated that this proposal appeared to be a satisfactory result in an important and potentially dangerous affair, and one which had very wide implications for the professional community.

Assistance on Law Reform Matters from the Junior Bar

The Chairman has indicated that the Committee intends to draw on the resources and skills of the Junior Bar in regard to Law Reform matters. There are many proposals to reform various branches of the law which require some considerable research before any meaningful comment on the Law Reform Proposals can be made. The Chairman is investigating with the Bar Council and its committees various proposals in which the Junior Bar may become more involved in the process of commenting on Law Reform proposals.

Land Law References

The Law Reform Commission of Victoria has been given a reference by the State Government to examine, report and make recommendations on the following references in relation to Land Law.

- Torrens System Register Book
- Torrens System State Guarantee
- Restrictive Covenants & Easements
- Torrens System Priority
- Mortgages and Judgment Debt
- Relationship between Transfer of Land Act and Property Law Act

In framing its recommedations the Commission has been directed to ensure that any proposed legislation is appropriate and comprehensive and that its provisions are as simple as possible, clearly written in plain English and with stated objectives. The Commission has also been directed to consider all relevant reports and any action taken by the State Government to implement them.

The Victorian Bar has been asked to nominate the representatives to act as Honorary Consultants to Law Reform Commission of Victoria in regard to the above references. Nimal Wikrama and John Hockley have been nominated. Hockley has attended two meetings. Wikrama has been in Italy ascertaining the possibilities of the market for an Italian version of Voumard's "The Sale of Land" and even a Venetian sequel to that text titled "The Sale of Submerged Land." A new supplement to Brooking's Building Contracts on "Building Regulations in Pisa" is also under active consideration.

Report of Enquiry into Options for Dying with Dignity

The Social Development Committee sent the Law Reform Committee a report: entitled — "Dying with Dignity". The Committee has requested that it be kept informed of any further developments in this area and would be prepared to comment on any proposed legislation.

Victim Impact Statement

Boris Kayser reported to the Committee that members of the Criminal Bar Association had attended a meeting of the Legal and Constitutional Committee of the Victorian Parliament to discuss the role of victims in the sentencing process. A Task Force had presented a view to the Committee that a Judge, prior to sentencing, be supplied with a "Victim Impact Statement". The representatives of Criminal Bar Association forcefully presented the view that such a statement was not needed. The representatives of judicial discretion would consider all relevant matters.

Plain English Seminars

The Law Reform Commission of Victoria has requested the Committee and the Bar Council to assist it to organise seminars, which barristers may attend, to discuss the Plain English Reference. It is hoped that any member of the Bar who has ever experienced difficulties in interpreting an Act of the Victorian Parliament will attend such seminars and express their views in a forthright manner to the Commissioner in Charge of this reference. Members of the Bar will informed at a later date of the date, time and place of any such seminars.

JOHN HOCKLEY

Criminal Bar Association Report

Fees

Following difficulties in relation to the question of preparation fees payable by the Legal Aid Commission, a meeting was held between members of the Committee of the Criminal Bar Association and members of the Commission to discuss the problem. A fairly frank exchange of views occurred and only time will tell whether any beneficial effect has occurred as a result. It is presently proposed to make a detailed submission to the Commission covering all matters of fees payable in the criminal jurisdiction.

s. 460 Crimes Act

Recently, two reports have been released which involve members of the Criminal Bar Association. The first one was the report of the Consultative Committee on Police Powers of Investigation, reporting on Section 460 of the Crimes Act. That report was released in April of this year.

In the words of John Coldrey Q.C., Chairman of the Committee, in his Preface to the Report:

"In essence, the Committee's proposals envisage a return to the de facto situation which existed prior to the judicial decisions of 1983 branding common place investigatory practices as illegal. The committee recognised that the granting of legal status to these procedures in 1986, carried with it, the potential for burgeoning disputes, not only as to the voluntariness of statements obtained from suspects, but also as to the reasonableness (involving the propriety) of police behaviour. It was, therefore, essential in the Committee's view that where the law permitted deferral of the normal legal processes to enable consensual investigator activities to occur, a means exists to monitor as effectively as possible, the interaction between the investigator and the detainee. It was the opinion of the Committee, that the best method currently available to achieve this, is the independent audio recording of conversations."

That report is available for inspection from the Secretary of the Criminal Bar Association.

Committals

A report of the Advisory Committee on Committal Proceedings was released in February of this year and that Committee was also chaired by the Director of Public Prosecutions. The Bar was represented by the Chairman of the Criminal Bar Association, Colin Lovitt. The recommendations of that Committee referred to the standard of proof and the procedure to be adopted at committal hearings. The Committee recommended that the affect of the ruling in **R. v Graham Dean Arthur & Ors., exparte Christos Kapodistrias** be legislatively abolished and that subject to certain procedural rules, an informant be obliged to call all witnesses who are the subject of notice given under Section 45(9) of the **Magistrates (Summary Proceedings) Act.** That report is also available for perusal.

LEX LASRY

Young Barristers' Committee Report

The Young Barristers' Committee has recommended that if articles of Clerkship are abolished and replaced by a Leo Cussen Course then practitioners wishing to sign the Bar Roll should be qualified to obtain a full practising certificate as a solicitor.

The Young Barristers' Committee has also been actively concerned with the proposed amendments to the **Magistrates' Court Act** which have the effect of not only considerably enlarging the jurisdiction but also of introducing conciliation and arbitration procedures. The issued raised by the proposals are complex. An active and dedicated committee is therefore needed to ensure that the views of young barristers are put forward to the Bar Council. In those circumstances it was especially disappointing that at the recent elections there were insufficient nominations to fill the number of vacancies.

The Young Barristers' Committee proposes to hold a social function on Show Eve, September, 24th, 2986. Please reserve this date. Particulars of the function willl be circulated shortly.

M. RANDALL

Report of Personal Injuries Bar Association

The Victorian Personal Injuries Bar Association has, collectively and individually, devoted a considerable amount of time to studying the implementation of the Work Care scheme. More recently, the "Transport Accident Bill", which was introduced into State Parliament in May, 1896 has led to a detailed consideration of the proposed Motor Care scheme and its ramifications. Members of the Association, and in particular, the Chairman, Barry Dove Q.C., have been actively involved in the formulation of position papers, strategies and submissions, to represent the view of the Association.

The Association has, also, continually monitored the Supreme Court and County Court listing procedures. The role of Counsel in pre-trial conferences in both the Supreme Court and the County Court has also been studied.

With respect to listings and pre-trial conferences, submissions have been made where it has been considered appropriate to do so.

THOMAS WODAK

Law Council of Australia Report

Legislation by ambush: President Michael Gill has written to the Prime Minister proposing the drawing up of guidelines to be followed by the Government when it feels it cannot avoid legislating retrospectively. The capital gains tax, in particular, has revived concern about this practice under which the taxpayer is 'ambushed' by laws that turn out to be different from what it appeared they would be from the Government's announcement of its intention to introduce them.

Legal costs: The Secretariat is monitoring progress of the second round of reviews by the Federal Costs Advisory Committee of federal costs scales, on which submissions have been made.

Submissions update: Recent submissions by the Law Council (including its Sections and Committees) to the Government and other authorities have:

- proposed changes in the structure of the High Court costs scale
- sought the appointment of more Family Court judges
- supported proposals fror references of family law powers from the States to the Commonwealth
- commented on a Discussion Paper of the Australian Law Reform Commission on Contempt and Family Law, urging in particular that the law in this area encourage greater respect for the Family Court
- urged the Commonwealth to accept by legislation a duty of care in respect of the security of persons in federal court buildings
- criticised the increasing use of retrospective legislation and offered assistance in the formulation of guidelines to govern this practice (see note above)
- argued for more flexibility in the interpretation of the debt/equity ratio under the foreign investment rules so as to attract increased investment from overseas
- commented on a departmental paper discussing current issues in takeover and merger regulation, making the point that while the present scheme may be complex, the difficulties of understanding and interpretation are exacerbated by frequent amendment of the codes
- proposed the omission of S.148 (i) of the Fringe Benefits Tax Act so that the tax would be limted to benefits provided in respect of employment
- supported amendment of the Australian sea cargo liability rules by the incorporation in legislation of the Visby Protocol and Drawing Rights Protocol of the Hague Rules
- commented on matters raised in the context of the Government's review of regulation of the financial sector, arguing for simpler, clearer and more consistent standards for control of the different parts of the financial system
- submitted that taxpayers hould keep their right to choose whether a tax assessment is reviewed by a court or by the Administrative Appeals Tribunal, and giving strong support to the transfer of jurisdiction from Taxation Boards of Review to the AAT

— proposed exemption from capital gains tax of transactions after the announcement of the proposed tax but before legislation was introduced and which, on the available information, could not reasonably have been expected to have attracted the tax
— criticised the amendment of S.74 of the Trade Practices Act to cover professional services and sought reconsideration with a view to having the position rectified
— proposed that standard rules be followed by the Federal Court in respect of procedures applied on the return of subpoenas duces tecum
— emphasised to the House of Representatives Standing Committee on Transport and safety the need for increased driver education, vehicle safety controls and other measures to reduce road trauma.

Wardship Witness: "Could you repeat the question, I don't understand the meaning of, 'Male chauvinistic pig mongrel tyrant woman hater.' "

Legal expenses insurance: Plans to implement this scheme are proceeding (although not as quickly as was hoped) and launching of the scheme is expected soon.

Legal aid family law scale: The Family Law Section and the Costs (Federal) Committee are working on a proposal to put to the Government under which there would be automatic adjustment of the legal aid family law scale of costs whenever the Family Court scale is adjusted. This would bring to an end the problem of an ever-widening gap between the two scales — a gap reduced by the recent two-stage increase in the legal aid family law scale, but which will grow again in the absence of an understanding about future adjustments.

Indemnity study: A Law Council committee chaired by Ian Bowden of the NSW Law Society is examining the possibility of setting up a national scheme of professional indemnity insurance for lawyers.

Self-employed super: The Taxation Committee of the Business Law Section is monitoring the response to a submission it made to the Taxation Office seeking a better deal in relation to superannuation arrangements for lawyers and other self-employed persons.

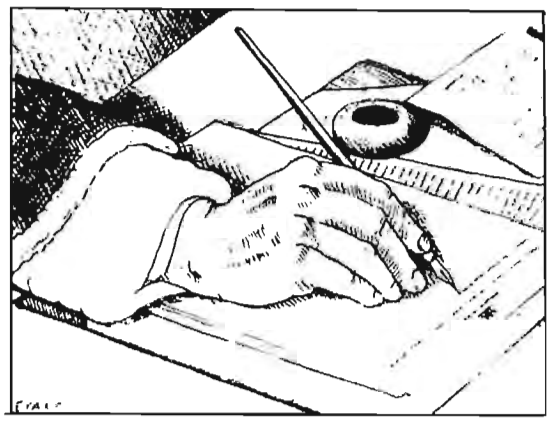
Members' meeting: The first meeting of individual members of the Law Council following constitutional changes expected to be approved at the AGM in October will take place at the 24th Australian Legal Convention in Perth in September next year. The proposal has been approved in principle by the Council.

New members coming in: Applications for membership are now arriving as the Law Council enters the second year in which individual membership has been available. Existing members have been invited to renew. The growth of Sections — at least two more, possibly three, are planned — will increase opportunities for practitioners to involve themselves more directly in the national affairs of their profession.

Courts contacts: Arrangements have been made for consultation with the judges of the High Court and Federal Court on matters in which the courts and the legal profession have common interests. The first of what are certain to be very useful meetings have taken place.

Law Council of Australia
GPO Box 1989 Canberra A.C.T. 2601

Welcome



Mr Justice Kay

At a meeting of the executive of the Law Council of Australia's Family Law Section held at Bowral, NSW, in 1985, two members of the Victorian Bar "burnt the midnight oil" one night and produced a parody on 'The Judge's Song' from Gilbert and Sullivan's 'Trial by Jury'. The full text of their efforts appeared in the Summer 1985 edition of 'Bar News'. For present purposes, the passage extracted below will suffice:

"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."

"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,
....."

and so it goes on. Although there must be doubts as to whether this demonstration of literary talent played any part in the decision-making process, the fact remains that within 12 months of the appearance of the 'Family Court Judge's Song', the Attorney-General thought it wise to appoint one of its co-authors to the Family Court bench.

So it was that The Honourable Mr Justice Joseph Victor Kay was sworn in as a judge of the Family Court of Australia on 17th June 1986. The next morning, even the commodious premises of the Accident Compensation Tribunal on the 22nd floor of Marland House were inadequate to house the large crowd of well-wishers who attended to hear his Honour welcomed to the bench. From the statements, both public and private, of members of the judiciary, both arms of the profession, and the leaders of the profession's family law interest groups it was apparent that this was an extremely popular appointment, widely perceived as both timely and likely to enhance the status of the Family Court bench.

More now of the man. His Honour was born at Melbourne on 21st April 1945 to Polish-born parents, both of whom arrived in Australia in the late 1920's. After matriculating from Melbourne Boys' High School in 1962, his Honour studied law at Melbourne University, graduating in 1966. Articles of clerkship followed, (Aarons & Co) and, in 1968 his Honour was admitted to practice and came straight to the bar, reading with Rod Joske, since 1976 the Honourable Mr Justice Joske of the Family Court of Australia.

An affinity for family law emerged at an early stage of his Honour's practice at the bar, and by the early '70's, he was appearing regularly in the matrimonial causes jurisdiction in the Supreme Court. The establishment of the Family Court and the commencement of the Family Law Act in 1976 imposed dramatic change in the area of family law, changes which many of the older members of the bar specialising in family law were never to accept or adapt to. For his Honour, the change was not only a matter of adapting to new laws and procedures, but also to the fact that in 1976, seven of the then leading barristers specialising in family law were appointed to judicial office, leaving relatively junior barristers, such as his Honour then was, to guide the bar and the profession, as a whole through the all-important formative years of the Family Court's development.

In addition to his ever-expanding practice, his Honour participated actively in the development and reform of family law in the first ten years of the Family Law Act's operation. During 1975, 76 and 77 he was a member of the Melbourne-based Committee 'A', established by the Law Council of Australia, to monitor the progress of the new Act. In later years, the Law Council formed a national committee on

family law, and when Abe Monester QC was no longer able to devote the time required to represent the Victorian Bar on that committee, his Honour was seen as the logical replacement. That committee was replaced, in 1985, by the Family Law Section of the Law Council of Australia and his Honour was a foundation member of the executive of that section, a position he held until his appointment.

In 1983, his Honour was appointed to a two-year term as a member of the Family Law Council, an appointment which demonstrated that the Government regarded him as at the forefront of the profession, and capable of contribututing to the Government's advisory body on family law matters. His peer-group's confidence in his Honour's abilities was again demonstrated when the Family Law Bar Association was formed some two years ago, and his Honour was elected chairman.

Mr Justice Kay

His contributions to the 'Family Court Judge's Song' were not his Honour's only writings on the subject of family law. From 1975 to 1980, his Honour edited family law case reports and notes for the Federal Law Reports. Since its emergence in 1985 he has been a regular contributor to the 'Australian Family Lawyer'. His articles and case-notes are widely read and highly regarded.

No welcome to his Honour would tell more than half the story if reference to his family was omitted. His wife Yvonne has been a constant source of support to his Honour throughout his career, as he was quick to acknowledge in his response to the speeches of welcome on 18th June, 1986. But Yvonne and their two children, Jacqui, 14, and Josh, 12, were not the only family members present at his Honour's welcome. At a guess, thirty or more were there from an extended family which spans both hemispheres and which has survived one of the darkest eras in modern history.

What emerges is that his Honour goes to the bench of the Family Court with the approval and support of all who know him personally and professionally. The Bar wishes his Honour a long and satisfying career on the bench.

Judge Hanlon

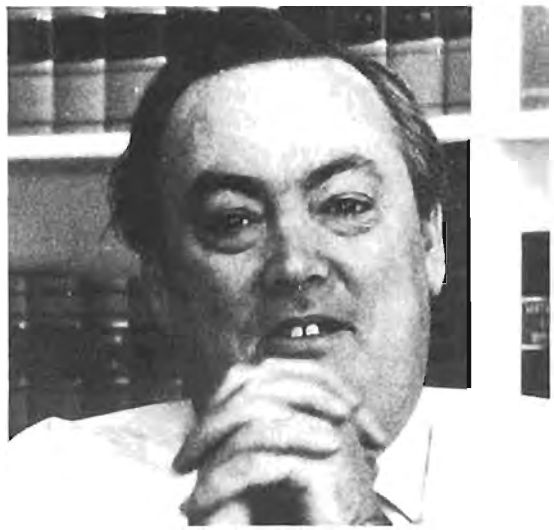
John Rupert Hanlon, Q.C., was appointed to the County Court Bench on 5th May, 1986 thereby becoming the much heralded Judge "Hangin' Hank".

At his unofficial welcome in the County Court, (more of the official welcome later), his friends, relations and colleagues suffered the usual predictable self-aggrandising historically-oriented faint praise suggesting that this immense bug-eyed monolith, now simmering malevolently in his purple dressing gown, had once been athletic and studious and was about to miraculously metamorphise into a judge of compassion, warmth, understanding and charity.

Those of us who are familiar with him were not fooled for a moment! Those in Court would not have swallowed the story either if they had considered the following damming evidence:

We heard that he has been a long time supporter of the Collingwood Football Club: one wonders if, at the end of a long season of trials he will demonstrate the dreaded jurywobbles.

We were told that he has for many years enjoyed holidays in Vanuatu where he receives right royal treatment from the natives who actually believe he is the King of Tonga.



Judge Hanlon

He read with Southwell J.

He admits attending school and playing tennis with Bernie Teague.

In spite of this, he does have some qualities to make an excellent Judge. He has practised for many years sitting in Judgment on his friends at the Victorian Amateur Sports Club bar. His unsolicited and readily delivered opinions demonstrate with remarkable clarity the fallacy of every proposition that anyone else is foolish enough to put to him.

His Honour's official welcome was held on the previous Thursday in his Chambers, the Flower Drum Restaurant, presided over by his former Master and permanent junior Mr. Gilbert Lau. This welcome was attended by a motly crew of former readers, former colleagues and (subsequently) former friends. One of the attenders is now also a former driver. Long-time chambers associate David Blackburn was able to manipulate his appearances in several other restaurants in order to attend.

Other similar welcomes ensued and several days later the much tireder and more emotional Judge announced that he was "welcomed out".

His Honour was educated at De La Salle College, Malvern, and Melbourne University where he excelled at golf and became the only undergraduate editor of 'De Minimis'. He served Articles of Clerkship at the firm of Hall & Wilcox and was called to the Bar in 1962 and subsequently took Silk in November, 1977. He conducted a busy general Common Law practice and was Counsel assisting in the Minogue Inquiry into the Motor Car Act in 1977 and the Housing Commission Inquiry between 1979 and 1981. He is married to Heather and they have three sons. His hobbies as described by Dove, Q.C. are "eating, drinking and an occasional leisurely round of golf at Anglesea".

His Honour has been warmly and appreciatively received by those members of the Bar who have by now appeared before him. It might be said that nobody who knew His Honour doubted his capacity to handle his duties with intelligence, comprehension and common-sense. He is a man with a broad experience of life and a great sense of humour. The Bar wishes him well.

Giannarelli's Case — Barristers' Liability For Negligence

Bar Council Member and Essoign Club Secretary ***Michael McInerney*** *writes on a recent decision of great importance to the Bar.*

Members of this Bar would no doubt have noticed with more than a passing interest the headlines in our daily newspapers in May of this year informing the general public of its right to sue barristers for negligence. The basis for such was a decision of his Honour Mr. Justice Marks in the case of **E. Giannarelli & Ors. -v- B. Shulkes & Ors.** (1)

This case involved a claim for damages for professional negligence against solicitors and barristers.

The plaintiffs in **Giannarelli** were three brothers who had been summoned to appear before the Costigan Royal Commission. In the course of giving

Michael McInerney

evidence each denied having maintained accounts in false names at the Carlton branch of the National Bank. In the face of documentary evidence, their denials were admitted to be untrue. The plaintiffs were charged with perjury at common law and under section 314 of the **Crimes Act 1958 (Vic).** They were tried before Murphy J. in the Supreme Court and, on conviction, two of the Plaintiffs were sentenced to two years' imprisonment with a minimum of 18 months. The other received a good behaviour bond. An appeal to the Court of Criminal Appeal was dismissed. However, an application for special leave to appeal to the High Court was successful; the appeal was allowed and the sentences quashed. By this stage two of the Plaintiffs had served some eight months of their terms of imprisonment.

The point on which the Plaintiffs succeeded in the High Court had not been raised previously. T.E.F. Hughes Q.C. argued that section 6DD of the **Royal Commissions Act 1906 (Cth)** had the effect that evidence could not be given of the statements made before the Royal Commission. The High Court agreed.

In the action the Plaintiffs sued the solicitors and counsel who had defended them at the committal, trial and before the Court of Criminal Appeal. In essence, their complaint was that the defendants were negligent in failing to take the section 6DD point. The Statement of Claim also alleges that the solicitor at the committal and trial and the solicitors on the appeal to the Court of Criminal Appeal both suggested in written memoranda that the point be taken.

Some of the barrister defendants obtained an order for the trial of points of law as a preliminary issue under 0.25 r.2 of the Rules of the Supreme Court and these were the proceedings which came on before Marks J.

The points of law formulated by the parties raised the fundamental question whether barristers in Victoria are immune from suit for negligence and, if so, to what extent. The proceedings before Marks J. were conducted on the assumption that the facts alleged in the Statement of Claim were true and constituted professional negligence. Thus his Honour's decision does not involve any finding that any of the barrister or solicitor defendants were in fact negligent.

Cliff Pannam Q.C. and Michael Shand appeared for the plaintiffs, Peter Heerey Q.C. and A.L. Cavanough for the solicitor at the committal and trial, David Byrne Q.C. and Mark Bevan-John for the solicitor on the appeal to the Court of Criminal Appeal and Brian Shaw Q.C., Russell Berglund and J. Santamaria for the barrister defendants.

The judgement involved interpretation of section 10(2) of the **Legal Professional Practice Act 1958,** together with a consideration of what, if any, relationship there was between that provision and the common law immunity from suit for negligence enjoyed by the English Bar, as defined by **Rondel -v- Worsley.** (2)

Section 10(2) provides:-

"Every barrister shall be liable for negligence as a barrister to the client on whose behalf he has been employed to the same extent as a solicitor was on the 23rd of November, One thousand eight hundred and ninety-one liable to his client for negligence as a solicitor".

A solicitor in Victoria prior to 1891 was liable in negligence when conducting litigation, whether the negligence occurred in or out of Court. The Bar at this time was a separate profession and entry thereto was governed by a Board of Examiners for barristers, there being a separate Board for attorneys. Reference is made in the judgement of his Honour to **A Multitude of Counsellors** by Sir Arthur Dean

which describes the composition of the Victorian Bar between 1850 and 1891. In 1891 there was no doubt that there was an unqualified immunity for barristers against negligence suits, the foundation for such immunity being the absence of contract. See **Swinfen -v- Lord Chelmsford.** (3)

The precursor of section 10(2) of the 1958 Act was section 5 of the **Legal Profession practice Act** 1891. A perusal of the Parliamentary debates at the time (now permissible by section 35(b) (ii) of the **Interpretation of Legislation Act 1984**) would indicate that this Act prompted vehement discussion within the legislature. Marks J. was of the view that the debate indicated that the objectives of the Bill were "...abolition of the privilege of immunity and what was perceived as the unmanageable position of the barristers at the time." The major proponent of the Bill was the member for South Gippsland in the Legislative Assembly who, it would appear had been seeking to have Bills of a similar ilk passed for a period of some 15 years. The debates do not reveal any basis for his endeavour. Examples of barristers' conduct which raised concern were that they allegedly often left cases in midstream, and:-

"At the present time a barrister might take briefs in cases to be heard in various Courts, and may only appear in one of them although he is paid in respect of them all." (4)

;or in a similar vein:-

"...a barrister received a fee of 30 - 40 guineas to appear before the Full Court to argue a question of law affecting a very important matter in connection with the public service of the Colony and, instead of attending to his engagement, went away on a shooting expedition." (5)

The disarming justification for these practices was said to be that the client paid for the chance that the barrister might appear for him and the certainty that he would not appear against him! It should be noted that in the same debate Mr. L.L. Smith in defence of the profession stated:-

"He would, however, put on one side the question of fees because he was sure that no gentleman ever took fees and failed to appear intentionally." (6)

My own view is that the debates would indicate the motivation to be a political one, namely the fusion of the professions of barrister and solicitor. The reported excesses of barristers were seen, no doubt, as a means to achieve that end, or alternatively to justify the same. While the debates show that by fusing the professions it was felt that a barrister would and should bear the same responsibility as a solicitor in regard to his clients, I found no evidence of any consideration of the more general question of immunity from action for negligence when appearing in Court. The major motivations of the proponents of the Bill seem to have been to ensure that barristers arrived, did the work they were paid for, and were put on the same level as solicitors.

Counsel: With respect, Your Honour, I would have thought that, in conceptual terms, what has fallen from your Honour is a not inappropriate resolution of the dilemma.
Client to co-accused: I think he means "Yes".

In essence. section 5 remained unchanged over a period of nearly 100 years. When one considers the brilliant advocates who practised at this Bar in that time, it is indeed remarkable that there has been no judicial consideration prior to **Giannarelli** of the meaning of section 10(2), or, more particularly no reported negligence actions against barristers concerning their actions in court. One would like to believe that the reason for this was not ignorance of the section, but the high standard of advocacy provided by this Bar. The relevant portion of the section, as it was originally passed, read as follows:-

"....every barrister shall **in future** be liable for negligence as a barrister to the client on whose behalf he has been employed to the same extent as a solicitor **is now..."**
(emphasis added).

The words "in future" were not omitted until the consolidation of 1928 and therefore the section could have been considered to be a transisional provision relating to barristers admitted before 1891, and not in any way interfering with the ongoing common law immunity of barristers. Whatever the reason, one can only conclude that for the majority of the last 95 years it was presumed that a barrister was, indeed, immune from such action. As already indicated, there does not appear to be any record of any such suit in Victoria.

The decision of **Hedley Byrne & Co. Limited -v- Heller & Partners Limited** (7) and its dramatic effect upon the law of negligence certainly prompted a review of the long standing immunity that barristers had enjoyed. The question came up for direct consideration by the House of Lords in **Rondel -v- Worsley.**

The immunity was upheld on the basis of public policy with the justifications for such being, amongst other, the following concepts:-

1. the overriding duty of a barrister to the Court;
2. the fear of a barrister practising preventive advocacy;
3. the fact that a barrister cannot pick or choose his clients;
4. the problem of continual re-trial of issues;
5. the floodgates argument.

The decision was specific in confining the immunity to the English Bar and to the conditions which prevailed in regard to that Bar and some members of the House of Lords warned that what might satisfy the demands of public interest in England would not necessarily do so in other countries. The public policy arguments advanced by the House of Lords in this decision have been subject to ongoing criticism. Considerable doubt has also been expressed as to the applicability of the decision to a fused profession, such as exists in Victoria.

Perhaps the unique facts of the case made it all too easy for the House of Lords to adopt the above public policy considerations. The plaintiff was a rent collector for the notorious English slum landlord Rachman. He complained that he had been wrongly convicted of using a knife in an assault, when in fact he tore the complainant's hand off manually and almost bit his ear off. He was most aggrieved at the reflection on his prowess by his conviction for using a knife. The plaintiff's qualifications as a "rent collector and caretaker" were that he "had been a professional wrestler and was versed in judo and kindred sciences". (8)

The House of Lords again considered the immunity in **Saif Ali -v- Sidney Mitchell & Co.** (9) where the claim was clearly meritorious. A barrister in drafting a statement of claim in a passenger's personal injuries claim had failed to include both drivers as defendants. It was determined that it was appropriate, again on public policy considerations, to limit the immunity so that the immunity in regard to actions taken outside the courtroom must have an "intimate connection" with the proceedings in court. It is of interest that it was a majority decision; the two dissenting Law Lords were of the view that the immunity should extend "beyond the actual conduct of a case in court and was applicable to all stages of a barrister's working connection with litigation whether pending or only in contemplation." (10)

Where the professions are amalgamated within the Commonwealth it would appear that the immunity has generally been upheld, except in Canada. The immunity and its public policy justification was specifically considered in that country in **Demarco -v- Ungaro.** (11) The allegation of negligence was that the barrister had failed to lead evidence which he knew was available and would support the plaintiff's case. It should be pointed out that the profession in Canada is fully fused and all lawyers, be they barristers or solicitors, contract directly with the clients and may sue for their fees. It was found that the public policy reasons were entirely valid for England, but none were compelling in relation to Canada (Ontario). Krever J. considered the various public policy arguments in support of the immunity and was of the view that the principal argrment in favour of no immunity was indeed the interests of the public at large. In the decision his Honour remarked that there was a consensus among Canadian legal writers that a duty of care should be imposed. Such a view is expressed by professor Osborne, Professor of Law, University of Manitoba, in an article headed "Barristers' Immunity In New Zealand" (12) where he argues strongly that the immunity should not be retained in New Zealand.

The above discussion of the common law immunity sets in context the decision which had to be made by Marks J.. His Honour found that since 1891 Victoria has had a fused profession which permits one mode of entry and enables persons, once

admitted, to practice as either barristers or solicitors. He held that the Act of 1891 put barristers and solicitors on the same footing and as such, imposed liability for negligence upon barristers. His Honour found that the:-

"...House of Lords made it clear that they spoke principally of what may be regarded as a "local rule" or more precisely as arising from the usage and peculiar constitution of the English Bar."...In England a solicitor still does not have audience in the Supreme Court of Judicature even, so it seems, to announce the terms of an apology in settlement of a defamation action..." (13)

His Honour concluded: —

"In Victoria, barristers and solicitors are, in my opinion, liable for professional negligence and do not enjoy the immunity for which **Rondel** and **Saif Ali** are authorities". (14)

The decision is subject to an appeal to the Full Court and will be watched with interest by all members of this Bar. Suffice to say this decision points to the wisdom of the rule of practice at this Bar that all members must have professional negligence insurance. The rule requiring such insurance became mandatory on 30th June 1984.

REFERENCES

1. (Unreported) 9 May, 1986
2. (1969) 1 A.C. 191
3. 157 E.R. 1436
4. Parliamentary Debates - 1891 Session p.280
5. Parliamentary Debates - 1891 Session p.280
6. Parliamentary Debates - 1891 Session p.282
7. (1964) A.C. 465
8. (1966) 2 WLR 950 at 967
9. (1980) A.C. 198
10. (1980) A.C. 235
11. (1979) 95 D.L.R. (3d) 385
12. New Zealand Law Journal - Janurary 1986 at p.17
13. p.28 of the unreported judgement
14. p.29 of the unreported judgement

POSTCRIPT

The Parliamentary Debates of 1891 also demonstrate the marked decline in the standard of parliamentary oratory since that time. Bar News has already published (Autumn 1986 p.29), the stirring comparison between solicitors and the Bar in terms of Mallee scrub and Gippsland mountain giants drawn by Sir W.J. Clarke. Dr. W.E. Hearn, a member of the Legislative council, as well as Professor of Law at Melbourne University, also opposed the legislation by calling up the vast antiquity of the history of the Bar. In speaking on that part of the Bill which is now section 10(1) and which gave barristers the right to sue for their fees, Dr. Hearn said: —

"When I first read the Clause, I wondered whether Mr. Beaver had ever thought of the antiquity of the rule it will repeal. That rule is 2,088 years old. It was 204 B.C. when the Roman tribune, Marcus Cincius, induced the assembly of the Roman people to pass their famous law concerning fees and gifts. That rule was handed down from the orators of the republic to the advocati of the empire. From the advocati it passed to the legal advisers of the barbarian kings; from them the sergeants conteurs of the Norman kings received it; thence in unbroken succession, the rule has come to us and now it is brought before us in this House to be brushed away as a mere speck of antique dirt". (Legislative Council Debates 20th August 1891, p.352.)

B.H.P., Bell And The Bar

*In this article **Helen Symon** takes us on a tour d'horizon of the bewildering litigation sparked by the attempted takeover of BHP by Mr. Holmes a' Court's Bell Group.*

The attempted take-over of the Broken Hill Proprietary Company Limited ("BHP") by Bell Resources Holdings Pty. Ltd. (part of the Bell Group of companies controlled by Mr. Robert Holmes a' Court) has begun a campaign which has, to no small extent, been fought by its protagonists, using the law as their favoured weapon. But this has been no polite

duel. Rather, the combatants have marshalled their armies and engaged in bitter, desperate warfare in a foray ranging from the Listing Court and the Practice Court, through the Federal Court to the High Court. And, like all good wars, it drew in new forces until fires were burning on all fronts. The warriors in this extraordinary war were, by and large, members of our own Bar of whose sterling exploits we shall here tell.

If is difficult to say where the saga began. Bell Resources Ltd. made an offer to BHP shareholders in 1984 which was the subject of an injunction application before Hampel J. (**BHP v. Bell Resources Ltd.** [1984] 8 ACLR 609). Chernov, Q.C. and Santamaria contended for BHP on that occasion whilst Bell's defence was conducted by Hulme, Q.C. and Callaway. In 1985 a dispute relating to royalties for Bass Strait oil and gas was heard by Murray J. (**BHP Petroleum Pty. Ltd. v. Oil Basins Ltd.** [1985] V.R. 725). BHP's force was in formation at this stage with Stephen Charles, Q.C., Ken Hayne, Q.C. and Ray Finkelstein, all of whom have figured largely in the more recent proceedings, then carrying the flag. J.D. Merralls, Q.C. and J.G. Santamaria went into the fray for the defendant in whom Bell Resources Ltd. had a controlling interest. Early this year, BHP sought to restrain its broker, Potter Partners, from advising the Bell Group. An old campaigner for BHP, Brian Shaw, Q.C. appeared with Finkelstein for BHP whilst Alan Goldberg, Q.C. and G.A.A. Nettle protected the interests of Potter Partners.

However, these might now be seen as the preliminary skirmishes. Following the registration, on February 17, 1986, of Bell's offer to BHP shareholders and the accompanying part A statement required by section 16 of the Companies (Acquisition of Shares) (Victoria) Code the fight began in earnest and the two protagonists grouped their forces. The BHP forces were consolidated during the early stages of proceedings instituted shortly after the registration of Bell's offer and part A statement. BHP issued a writ, notice of appeal and notice of motion against the NCSC in respect of the registration. Charles, Q.C., Finkelstein and Neil Young were briefed in this matter for BHP. However, the first proceedings which reached the courts were in respect of a declaration made by the NCSC as to the multiplier effect of Bell's offer. The offer to BHP shareholders was for half of their holdings. The effect of the NCSC declaration was that a BHP shareholder was permitted to sell the other half of his holding to a third party under his control which could then sell half of that to Bell pursuant to the offer, on-selling the other half until, effectively, the original shareholder had the benefit of the sale to Bell of virtually his entire shareholding. BHP issued a writ, notice of appeal and notice of motion against the NCSC attacking the declaration which came before Marks J. on February 27, 1986 with Douglas Graham, Q.C. and Ross Robson appearing for BHP. On the afternoon of February 27, 1986, they were joined by Charles, Q.C., Finkelstein and Young and it was successfully contended that the issues surrounding the declaration and the registration of the offer and part A statement should be heard together. Hence, the BHP forces became Charles, Q.C., Robson, Finkelstein and Young, instructed by Messrs. Arthur Robinson & Hedderwicks. Throughout these proceedings, Alex Chernov, Q.C. and Julian Burnside, with early assistance from John Karkar, appeared for the NCSC and Bell Resources Ltd. and Bell Resources Holdings Ltd. who joined the fray on February 27, 1986, detailed Alan Goldberg, Q.C., F.H. Callaway and David Shavin to represent them.

At the outset of these proceedings, Marks J. granted an injunction restraining the defendants from taking futher steps in relation to the offer or sending it or the part A statement to any BHP shareholder. The matters proceeded before Marks J. for some three weeks, with the main issue being Bell's ability to finance its bid. The hearing reached a climax with the issue being Bell's ability to finance its bid. The hearing reached a climax with the issue by Bell of a notice of motion seeking to have set aside a subpoena for the production of the financing documents. Bell's application was dismissed with no leave to appeal being granted and before its application for leave to appeal before the Full Court was heard the offer, itself, was withdrawn. Subsequently, the matter returned before Marks J. who decided that the matter should proceed, notwithstanding Bell's withdrawal of the offer. On March 26, 1986, however, the parties consented to adjourn the "multiplier" proceedings sine die and to an order that the registration of the offer and part A statement be set aside. The parties, further, consented to declarations that Bell's offer failed to comply with the Companies (Acquisition of Shares) (Victoria) Code and a permanent injunction against making any further offer in the same terms. Neil Forsyth, Q.C. made his first appearance on the field for Bell at this point although he had already played a major role in laying the foundations of the defence and planning future strategy. Marks J. ordered that Bell pay all the costs of the proceedings to date. Shortly after this, on April 8, 1986, Messrs. Arnold Bloch Leibler took on the contest from Messrs. Blake

& Riggall and issued a notice of motion on behalf of Bell seeking that the order for costs be vacated or, alternatively, that there be leave to appeal. On April 8, 1986 Ron Merkel, Q.C. with Geoffrey Gibson, appearing for Bell, against the previously mentioned BHP and NCSC forces, were refused that leave to appeal.

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At approximately the same time as the Supreme Court applications were made, the Trade Practices Commission instituted proceedings in the Federal Court against BHP, Bell Resources Ltd. and Bell Resources Holdings Ltd. challenging the registration of Bell's offer and part A statement on the basis that Bell's take-over bid, if successful, would result in a transfer of monopoly in breach of section 50 of the **Trade Practices Act 1974**. The BHP forces lined up as previously mentioned whilst Golderg, Q.C. and Callaway defended for Bell against Chernov, Q.C. and Peter Jopling for the Trade Practices Commission. Smithers J. simply ordered that Bell be restrained from proceeding with the offer or distribution of the part A statement without 2 days' notice and the main contest was left to be fought in the Supreme Court, partly because the Federal Court proceedings would become academic if the part A statement were declared invalid and partly because the Federal Government had announced possible action to amend section 50. These proceedings died a natural death with the withdrawal of the offer and part A statement.

Towards the end of all this, BHP launched a flank attack an Bell through BHP subsidiaries which had acquired substantial shareholdings in Bell companies. Two actions were commenced, although they became redundant once the offer and part A statement were withdrawn. The first of these was commenced by way of writ, issued on March 24, 1986 by Pelican Bay Developments Pty. Ltd., a subsidiary of BHP, suing as a shareholder in Bell Resources Ltd. Various breaches of duty were alleged on the part of the directors of Bell Resources Ltd., who were named as defendants along with Bell Resources Ltd., itself, and the parent company, Bell Group Limited. The statement of claim suggested that whatever view one took of the Bell directors' actions, there was a breach of duty. Firstly, it was alleged that the offer to BHP shareholders by Bell Resources Holdings Pty. Ltd. of 1 share in Bell Resources Ltd. plus $2 50 for every BHP share would have the effect of diminishing the shareholding of the parent company, Bell Resources Group Ltd., in Bell Resources Ltd., with the result that control might be lost. However, the Bell directors had called a meeting of shareholders for the submission of a resolution that Bell Resources Ltd. shares should be alloted to Bell Group Ltd. This was also alleged to be a breach of duty and the statement of claim sought injunctions to restrain the directors from holding the meeting or submitting the resolution on the basis that the sole purpose of such action must be to ensure that Bell Group Ltd. maintain control of Bell Resources Ltd. and Bell Resources Holdings Ltd. This action was adjourned sine die on April 4, 1986, following the withdrawal of Bell's offer and part A statement with T.E.F. Hughes, Q.C. (Sydney), Merkel, Q.C. and Gibson now appearing for Bell and its directors.

In the second of these actions, BHP Nominees Pty. Ltd., another subsidiary of BHP, had acquired a substantial shareholding in Bell Resources Ltd. over the period February 27, 1986 to March 13, 1986. It commenced an action, on April 2, 1986, seeking declarations that it was competent, as a shareholder, to vote at the abovementioned proposed meeting of shareholders, challenging Bell allegations that it was not. This action also became redundant once Bell's offer and part A statement were withdrawn.

Bell had also alleged, by letter dated March 26, 1986, from its solicitors, Messrs. Arnold Bloch Leibler, to each of the directors of BHP, that the directors' decision that BHP and its subsidiaries make substantial purchases of Bell Resources Ltd. shares constituted a breach of their duties as directors. In

response to this, the BHP directors, on April 2, 1986 issued a generally endorsed writ seeking declarations that this decision did not constitute a breach of duty. The defendant, Bell Resources Ltd., filed a defence and counterclaim on May 21, 1986 attacking the decision to make the share purchases. It contained a catalogue of duties allegedly breached thereby, including claims that the directors had acted contrary to the interests of BHP shareholders; that they had conducted the affairs of BHP in a manner that was oppressive, unfairly prejudicial and unfairly discriminatory towards Bell Resources Ltd. and Bell Resources Holdings Ltd., who had made a lawful offer to BHP shareholders; and that the directors' dominant purpose was to buttress their positions as directors. Declarations were sought in respect of the alleged misconduct together with orders for compensation to be paid by the directors to BHP in respect of alleged losses occasioned to the BHP Group by the purchase of the shares and injunctions restraining the directors from making improper use of their position or gaining an advantage for themselves. The defence and counterclaim were drawn by Hughes, Q.C. (Sydney), Merkel, Q.C., Gibson and C.M. Maxwell and replied to by defence to counterclaim drawn by Hayne, Q.C. (who replaced Charles, Q.C., following this AWOL in Noosa during the school holidays!), Finkelstein and Young. The matter is proceeding (as they say in "The Age").

Shortly before the NCSC inquiry was announced on April 14, 1986 (of which more anon), BHP commenced two actions, one against the Adelaide Steamship Company Ltd. and its subsidiaries ("The Adsteam Group") and their principal, Janis Spalvins and the other against Bell Group Ltd., its subsidiaries ("the Bell Group") and Robert Holmes a'Court, in which BHP alleged breach by these defendants of the substantial shareholding provisions of the **Companies (Victoria) Code** and "insider trading" in breach of section 128 of the **Securities Industry (Victoria) Code**. These actions were based upon put and call option agreements entered into between the Bell Group and the Adsteam Group on April 27, 1985 which became public knowledge, according to the statements of claim, on or about October 7, 1985. It is alleged that, had the agreements become public prior to that, the price of BHP shares would have been materially affected. In addition, it was said that respective defendants had acquired at least 10% of BHP of which BHP should have been notified pursuant to the Code. There have been a number of directions hearings in these matters with the action against the Bell Group being fixed for hearing on October 6, 1986 with a mention date in September. The action against the Adsteam Group was discontinued on May 16, 1986. E.W. Gillard, Q.C., David Derham and Rodney Garrett, instructed by Messrs. Phillips Fox appeared for the Adsteam Group at the directions hearings. BHP's interests were variously represented by members of its detail with the addition of Middleton whilst Forsyth, Q.C., Merkel, Q.C., Callaway and Nettle all took part, at various stages, for Bell. The NCSC also had a part in this skirmish, using a variety of counsel, including Michael Dowling, Q.C., J. Cantwell, Payne and Wilson. Beach J. presided over the directions hearings and the Full Court, comprising the Chief Justice, King and Southwell JJ. was also engaged in the fray on May 23, 1986 to hear an appeal by Bell from an order of Beach J. ordering that the Bell Group give discovery in the action. The motion was struck out.

Bell chose the Federal Court in which to launch its next salvo. On March 21, 1986 BHP released a profit forecast in order, no doubt, to persuade its shareholders to hang on to their shares. In this action, Bell alleged that the profit forecast was false and misleading in breach of section 52 of the **Trade Practices Act.** Smithers J. heard argument over the latter part of April from Cliff Pannam, Q.C. and Robson for BHP and the Bell contingent which had now consolidated as Hughes, Q.C. (Sydney), Merkel, Q.C., Gibson and Maxwell. Forsyth, Q.C., and Callaway carried on the campaign from the background. On May 27, 1986 Smithers J. dismissed the application on the basis that the document which BHP released was nothing more nor less than it purported to be, namely, a forecast, and was therefore, not false and misleading. Not be outdone, the NCSC commenced an offensive of its own with all manner of repercussions, not the least of which was the engagement of a new campaigner in the form of Elders IXL Limited, its subsidiaries, ("Elders IXL") and its principal, John Elliot. The NCSC announced on April 14, 1986 that it was to conduct a public inquiry to investigate the cross-acquisition of shares on April 10 & 11, 1986 by BHP and Elders IXL in order to ascertain whether this constituted unacceptable conduct within section 60 of the Companies (Acquisition of Shares) (Victoria) Code. It was thought that the said cross-acquisitions may have been made for the purpose of defending BHP against the take-over bid by Bell.

Messrs. Corrs, Pavey Whiting & Byrne took on the campaign for Elders IXL and marshalled a force consisting of Jeffrey Sher, Q.C., Alan Archibald, Q.C., Alan Myers and Kirs Hargrave. Hayne, Q.C., Young and John Middleton attended for BHP, whilst Merkel, Q.C. and Maxwell conducted a guerilla

operation on behalf of Bell, seeking leave to intervene at various junctures. Douglas Meagher, Q.C. Ren Wild assisted the NCSC. On any particular day one would find any number of other skirmishers on this field appearing, principally, for banks who had been summoned to produce evidence and documents. They included Arthur Webb, Q.C., John Dwyer, Q.C., Goldberg, Q.C., Don Ryan, Q.C., P.G. Kovacs, Jeffrey Loewenstein, P.R. Hayes, John Karkar and W.T. Houghton together with various battlers from Sydney and Adelaide. Ron Castan Q.C. was also in attendance but in the somewhat novel role of a witness, he having given advice to BHP's directors concerning the transactions at the heart of the inquiry.

The inquiry commenced on April 21, 1986 and continued for almost two and half months, at the conclusion of which the NCSC made no declaration in respect of the conduct of BHP or Elders. IXL. However, the announcement of the inquiry ushered in a new flurry of litigation, firstly, in the High Court where on April 22, 1986, Dawson J. granted BHP and Elders IXL interim injunctions restraining the NCSC from holding the inquiry in public. The Full Court of the High Court, comprising Mason, Wilson, Brennan, Deane and Dawson JJ. dissolved the injunctions on May 14, 1986 ((1986) 60 ALJR 437) in addition to refusing the further applications of Elders IXL and BHP to restrain the holding of the inquiry. The basis of the applications was that the NCSC had no jurisdiction to conduct an inquiry to investigate contraventions of the companies and securities legislation which were only suspected. In these proceedings, BHP was represented by Hayne Q.C., Young and Middleton, Elders IXL by Sher Q.C., Archibald Q.C. and Myers and the NCSC by Meagher Q.C. and Rachelle Lewitan. Merkel Q.C. and Maxwell appeared for Bell Group Ltd. and Bell Resources Ltd. which had applied for leave to appear as an intervener or amicus curiae. It might be thought that Bell was more suited to the role of intervener than amicus curiae by this stage!

In the Supreme Court, Fullagar J. heard a challenge to the NCSC's decision to take certain evidence in private. He refused to grant an injuction restraining the NCSC in this respect, contrary to the arguments of BHP, represented by Hayne, Q.C., Young and Middleton and Elders, represented by Sher, Q.C., John Larkins, Q.C. and David Harper, that this constituted a breach of natural justice. Meagher, Q.C. and Wild defended the interests of the NCSC. Shortly thereafter, Crockett, King and Beach JJ. refused Elders' and BHP's applications for injunctions pending appeal to the Full Court after hearing from the combatants in slightly different formation: Finkelstein and Middleton for BHP, Archibald Q.C. and Hargrave for Elders and Chernov Q.C. and Lewitan for the NCSC. The same formation, save that Chernov, Q.C. was, on this occasion accompanied by T. Ginnane, moved the Full Court, comprising the Chief Justice, King and Southwell JJ. on May 23, 1986 for priority hearing of the appeals, but to no avail. Elders IXL then applied to the Listing Master who was, no doubt, moved by the presence of Archibald Q.C. and Hargrave opposed to P. Smith, solicitor for the NCSC, to order a speedy trial for Elders' appeal. The Master's order indicated that the speedy trial was contemplated to take place in August. However, as the inquiry is now at an end, it is probable that the action will not proceed.

I hear it was a great speech Mr. Junior Silk.

In the midst of all this fury, Bell's second offer and part A statement was registered and challenged in the Supreme Court. The counsel lined up as before save that Bell had Forsyth, Q.C. and Callaway to defend the actions. Hughes, Q.C. (Sydney) appeared for Bell on the first day before transferring his attention to the Federal Court "profit forecast" proceedings. By the time this matter was heard the battle was raging on so many fronts that it slipped quietly by without the fracas that the first Part A proceedings provoked. This second Part A Statement was upheld.

On June 2, 1986, BHP sought, in the Federal Court, an order to review pursuant to the **Administrative Decisions (Judicial Review) Act 1977**, following the granting of leave to Bell to cross-examine BHP witnesses at the inquiry BHP contended that the decision was unjust, in the circumstances, as it gave Bell scope to extract from BHP witnesses information which might be useful to Bell in its take-over bid or in relation to other

proceedings arising therefrom. Jenkinson J. made an ex parte order staying the decision to allow the cross-examination and heard all the parties on June 3, 1986 when Young appeared for BHP, Cantwell for the NCSC and Merkel, Q.C. and Maxwell for Bell, which was then joined in the proceedings. On June 4, 1986 at 9.45 a.m. Jenkinson J. heard and refused an application for discharge of his ex parte order, leaving it to continue pending the hearing of the application for interlocutory relief sought in BHP's order to review. The matter was referred into court before Woodward J. at 10.15 a.m. who refused to grant interlocutory relief and discharged the order made by Jenkinson J. leaving Bell free to cross-examine BHP's witnesses at the inquiry.

On May 22, 1986, the NCSC expanded its inquiry to include share transactions between Elders IXL and BHP from April 11 to May 22 and opened up a new arena altogether by declaring that the purchase of 53 million shares in BHP by Beid Pty. Ltd. constituted unacceptable conduct. Allan Hawkins controlled Beid Pty. Ltd., a subsidiary of Equiticorp Tasman Pty. Ltd. and Richard Pratt had an interest in Equiticorp Tasman Pty. Ltd. The conduct of both gentlemen was also declared to be unacceptable, apparently on the basis of an association between Richard Pratt and John Elliott of Elders IXL, which had, hitherto, been seen as possibly assisting BHP defend against the take-over bid by Bell. Elders IXL filed its documents challenging the declaration the following Wednesday. Shortly thereafter, Messrs. Mallesons, acting for the Pratt Group issued a notice of motion and notice of appeal seeking to have the declaration overturned. Sher, Q.C., and Hargrave appeared for Elliott and Elders IXL; S.E.K. Hulme, Q.C. and Karkar took up the cause for Pratt and D. Horton, Q.C. (Sydney), Philip Mandie, Q.C. and S.K. Wilson appeared for Hawkins, instructed by Messrs. Freehill, Hollingdale and Page. John Batt, Q.C and Sue Crennan appeared for the NCSC while Forsyth, Q.C. and Noel Magee were refused leave to take part on behalf of Bell. Marks J. took the view that these proceedings did not concern Bell. The case was conducted on the basis of an agreed statement of facts which set our the association between Elliott, Pratt and their respective companies. In a judgement delivered on June 10, 1986 Marks J. found the alleged association to be indirect, to say the least, and severely criticized NCSC officials Henry Bosch and Ray Schoer.

Two days later, Elders IXL issued a writ seeking to restrain the NCSC and its officers from proceeding further with the inquiry on the ground of bias. BHP commenced similar proceedings on June 20, 1986. Victoria's Solicitor-General, Hartog Berkeley, Q.C., was engaged by the Ministerial Council for Companies and Securities, at the instance of Victorian Attorney-General, James Kennan, to represent the NCSC. Then ensued some pretty manoeuvring worthy of the chess board as the NCSC and the Victorian Attorney-General contended that the proceedings should be heard in the High Court. They issued a notice of motion on June 17, 1986 returnable on August 8, 1986 challenging the Supreme Court's jurisdiction to hear the matter.

BHP and Elders IXL immediately discontinued their Supreme Court proceedings and issued in the High Court. They then issued chamber summonses contending that the matters should be remitted to the Supreme court. On June 20, 1986 Dawson J. heard from Archibald, Q.C. and Hargrave for Elders IXL; Hulme, Q.C. and Peter Buchanan, Q.C., Karkar and Robin Brett for BHP, and Berkeley, Q.C., Dowling, Q.C. and Ginnane for the NCSC and the Victorian Attorney-General. On June 25, Dawson J. held that the actions should be remitted, saying that it was not appropriate that the matters be heard in the High Court's original jurisdiction because they involved extensive investigation into allegations of fact. On June 28, 1986, the matters returned before Marks J. on a directions hearing and the actions were set down for hearing on August 11, 1986. As the NCSC decided not to make a declaration at the end of its inquiry, the cases did not commence on that day, but may, of course, yet be revived.

After a number of quiet weeks during July, the parties have, recently, exchanged fresh fusillades. On July 24, 1986 BHP issued new proceedings against The Adelaide Steamship Company Ltd., ("Adsteam"), Bell Resources Ltd. and one of its subsidiaries, Weeks Petroleum Ltd. ("Weeks"), alleging that the defendants were in breach of section 11 of the **Companies (Acquisition of Shares) (Victoria) Code** by reason of the acquisition of BHP shares by the defendants pursuant to the put and call option agreement made between Adsteam and Weeks on April 27, 1985. Section 11 effectively prohibits substantial acquisitions of shares in a company by any person already holding 20% or more of its voting shares, except where the acquisition is made pursuant to a formal take-over scheme.

On July 29, 1986, John Strahan Q.C. and Harry Reicher sought orders from Southwell J. to compel BHP to attend to the transfer to Bell of those shares which had formed the subject of acceptances of Bell's take-over offer. Buchanan, Q.C., Karkar and Robertson successfully argued for dismissal of the motion.

Notwithstanding this new outbreak of hostilities, all remains relatively quiet. Bell's second offer to BHP shareholders has expired, the NCSC inquiry is over and a number of actions continue quietly on their way to a hearing. Are the forces for the various parties plotting their new strategies? Is the Companies and securities legislation even now being combed for new ways to launch an attack? Does the present deadly quiet signal the imminence of Armageddon?!

Whatever happens next, the litigation so far has seen an extraordinary contribution from many members of this Bar, not only on their feet, in court, but at their desks and conference tables, as well as, no doubt, in their beds, under their showers and in their cars going to and from chambers!

Magistrates from the Bar

Appointment to the Magisterial Bench from the Bar is a major innovation in Victoria. ***Judy Loren*** *finds a positive and thoughtful approach among these new appointees to their new and important role in the job of justice.*

Over the next 12 months, 11 ex-barristers will recieve over $600,000 from the State Government. That is the salary of 11 barristers recently appointed as Stipendiary Magistrates in Victoria. Kennan's handpicked Victorian XI have opened the batting for the barristers by leaping from the Bar to Magistrates' Court Bench and the trend continues.

By the end of the year, according to one source, it is expected that more than 50% of the Magistrates' Court Bench will comprise new appointments. It is foreseeable that many will come from the Bar. The appointment of Magistrates from the Bar is a radical move. Almost 25% of the appointees are women. These barristers have left the Bar, its independence, its financial rewards and its camaraderie to become employees of the State, at a fixed salary of $55,938 p.a., 4 weeks annual leave with 17½% loading, 15 days sick leave, $2,228 p.a. expense of office, $791 p.a. commuting allowance, and maternity and paternity leave.

The recent appointments represent a major new dimension in the career prospects of barristers. Many members of the Bar must have pondered on the factors which influenced the appointees to make this major change and wonder how the new perspective compares with their former professional life.

Attraction to a judicial appointment and an increase in the prestige of a Magistrates' Court appointment are reason enough for **Raffael Barberio**, 36, on the Bench since February this year. At the Bar for 12 years, he had worked mainly in criminal, civil and family law. He foresaw a difficult future at the Bar, with major changes occurring and rents increasing. "Good contacts and family backing are important. I am not sure that the Bar will be an effective institution in the future. You need to be egotistical and self-centred to continue in practice. The camaraderie which exists in theory does not exist in practice to that degree." He never sees himself returning to the Bar. "I still have my independence and I'm not cluttered with bureaucracy. Nor do I need to abide by a pro-forma approach. The hours may be more regulated, but at the Bar you sometimes had to come early and leave late."

Rod Crisp, 38, was disillusioned with the Bar when he left in 1982 for the Small Claims and Residential Tenancies Tribunals. He spent nine years at the Bar doing general Magistrates and County Court work and the occasional Family and Supreme Court work. "Initially the Bar was bliss", but then things changed for him. He was tired of chasing money and briefs. He became conscious of the "hierarchy at the Bar". "It's not conducive to the welfare of the middle and lower members trying to obtain chambers." He'd thought that going to Small Claims might lead somewhere but he wasn't more definite than that. Relaxed and laidback, you can see he's happy. "I wouldn't go back to the Bar. Here you're totally autonomous. Its a bit of a myth at the Bar. The Magistracy has the best aspects of being a barrister without the negative parts, there are no worries, no problems about running late. I always saw it as an attractive role from the Bar table, but I feared it would be boring. Luckily it isn't so."

Judy Loren

By contrast **Rowan McIndoe**, 40, can't explain why he applied for the job. He was happy at the Bar, first reading with Frank Vincent and later running a civil and commercially-based practice having moved away from criminal law. He came to the Bar after holding teaching positions. "At the Bar my interest was always in personalities more than in cases. I was sick of flogging causes. What is made of a case is more up to me now than what I did as a barrister. At this stage of my life, the Magistracy makes more sense to me, has more intrinsic merit than my work at the Bar. One of the frustrating things at the Bar is the pressures that arise from being a lone shark in search of a pre-dominated result irrespective of the merits of the case. Being on the other side of the Bar table acts as an antidote - you can assess the merits."

During her seven year stay **Sally Brown**, 36, never saw the Bar as a ladder with steps, the way some do. She'd always liked variety and her career at the Bar was not intended to put a stop to her approach to life. Her practice had reached a plateau and she wasn't certain she wanted to give it "another shove". But if some might interpret such a need for variety as frivolous, just a few minutes in her company would be enough to convince that the opposite is true. Her answers appear carefully considered. "In the short term it was an immense relief to leave behind the nightly clients, their problems, and the enforced intimacy their presence created. Now I no longer work weekends. What I miss from the Bar is the camaraderie, the comfort of my chambers and the flexibility." But intellectually Sally Brown has fixed upon the challenge of the Bench - applying analytical skills developed at the Bar to the wider range of areas she judges from the Bench. Her way of looking at cases had altered. She used to look at it from her side and the other's — in order to test it. "I take things at face value more. I let it all flow in and give it weight." Some views have been reinforced - like her opinion of gratuitous violence. She obviously has no regrets about the job, after years of employment as a solicitor, a lecturer and finally self employment as a barrister. Obviously, it is not an issue for her that the Magistrates' Courts supervise day to day practical problems and not takeover bids. She sees the sheer bulk of the work, its variety, its challenges and is excited. "The large quantity of work means it must be done differently to the High Court. Now with the new Magistrates from the Bar, the Magistrates' Bench has a broarder perception of legal principles to facts, and where that stops, a bigger perception of balance than the "old guard" but the end result may be the same. They get the experience by a process of introspection." She aims to be an efficient administrator while she is sitting and to do the job well. "A balance of efficiency and courtesy is very impoetant to the litigants. Being humane is also important The style used in controlling a courtroom can be quite powerful and as a Magistrate there are more elements to control in a court than those as a barister." And what of complaints about barristers? "My worst general complaint is time estimates."
She was teased at the City Court the first time she left the Bench grumbling "bloody barrister" following a barrister's grossly incorrect time estimate. But the good barristers make her work easier. Other times she groans inwardly if she sees a barrister making the mistakes she did, and tries to be tolerant.

She shares with **Margaret Rizkalla** and **Linda Dessau** both aged 33, the distinction of being amongst the first four women Magistrates in Victoria. With four women out of 71 Magistrates, the appointments appear to be lagging 41 years behind England where the first woman was appointed a Metropolitan Magistrate in 1945. Both Margaret Rizkalla and Linda Dessau came from the emotionally charged atmosphere of the Small Claims and Residential Tenancies Tribunals.

Both women have young children and have worked four years at the Bar. Linda Dessau has also spent three years as Crown Counsel in Hong Kong with

barrister-husband Tony Howard. Linda was concerned about the stresses of the Bar with a small baby - the daily and nightly conferences. "The stress on the Banch is less than the stress of handling a client and a case. It is cleaner on the Bench, you don't have the client before, during and after. You have control over the proceedings and you're not as vulnerable to their idiosyncracies as the barrister is".

The Small Claims Tribunal gave her a taste of dicision making and she liked it. Linda Dessau gives the impression of competence, of being on the move. She decided long ago about dicision making, "You're either able to do it or not". She found she could, without losing sleep over it. "No use being a ditherer or a worrier". Initially, in the Small Claims Tribunal she felt the room perspective was wrong from the bench and the isolation was disturbing, making it harder to concentrate on the case. But she adjusted well. It is obvious to any observer, that her efficency doesn't make her insensitive to people's feelings. She feels very strongly that there is no excuse for "court leaders" to be anything but polite and helpful. She objects strongly to "rough justice". "Barristers, having been advocates in superior courts will bring to the Bench the manners and the court demeanour they have learnt at the Bar". Her priorities are clear. "While a good legal mind is an asset, more important are common sense and compassion. The new Magistrates will have more experience in the rules of evidence and advocacy, more legal skills. Hopefully those chosen are intelligent and compassionate. If so, they will be able to acquire the strengths of the old Magistracy. These are intimacies with the working of the court system and the ability to keep in touch with what happens in the court". She holds very determined ideas about the roles of each of the participants in the legal process. "The Bar Council shouldn't be shy of entering the fray if something is wrong in one of the courts. The Council owes it to the community. The Bar Council's prime function is to maintain a system of justice that does the community proud. The Bar Council should take an active role in ensuring that all areas of the judiciary are performing well. If we expect people to respect the system, the system has to be deserving of respect. In the past the system has sometimes taken that respect for granted".

But where does the future lie?"You can't appoint a whole lot of people in their mid-30's and forget about them Its good now, but later they will be old. It is not a problem the Government has had before. The Government must accept that eventually some who might have excelled might leave unless they are given a County Court appointment. That mobility is important or in 20 years you'll have old jaded Magistrates. The advantage in the promotion is that you would get someone tried, true and tested to sit in the higher jurisdiction".

Peter Meely, aged 37, spent 11 years at the Bar, before accepting a Magistrates' Court appointment

Iain West, aged 37, left a practice of 10 years at the Bar for the Bench. He chose the greater diversification of work on the Bench only to be wounded in the Russell Street bombing. Fortunately he recovered sufficiently from his injuries to be back on the Bench. "At the Bar you get bogged down in one area. The constant stress of criminal trials is great. The stress here lies in sentencing, but it's not constant. The work on the bench is really an extension of the barrister's role without the bias to one client. When you are briefed as a barrister you attempt to adjudicate the matter anyway". In the light of his experiences court security is a priority issue. It is a concern mentioned only by those Magistrates who, as ex-barristers, have worked in the Small Claims Tribunal. "There is not a great deal of court security for Magistrates. There should be a parking prohibition of 100 m. radius around the Magistrates' Court, and there should be police attendance at every court. The media don't help by dramatizing matters. My knowledge of what happened in the Russell Street bombing when compared with media reports made me wonder whether it is the same incident".

Graeme Johnstone, 41, spent nine years at the Bar. He knows all about security problems having worked at the Small Claims Tribunal. "The tribunals deal with people's emotions. They [the tribunals] are all about the small things which upset them [the people] the most. The nature of the tribunal's proceedings are informal even thought the tribunal often sits in a court room. As a result, the losing party would quite regularly hurl abuse at you. It is also more difficult to control the running of the case, because of a lack of understanding by parties. Tribunals are emotionally demanding. The parties use their emotions to achieve a result. A lot of people throw their heart into a Small Claims case. A decision maker must feel safe." When he first left the Bar he went to the Residential Tenancies Tribunal and it felt strange. He wanted experience in decision making and liked dealing with people and their problems. It was lonely and isolated until more Bar members were appointed. He missed the camaraderie at the Bar He believes the Bar doesn't keep in touch with the Magistracy. There is a gradual recognition but it's slow. "But as you get more barristers coming to the Bench and the increase in jurisdiction, you will get more recognition that a Magistrates' Court deals with 80% of the cases in the State."

In common with those others from the Tribunals' area, he deeply feels the need to treat the public with courtesy and make them feel at ease, while still maintaining the formality of the court. "I can't abide counsel who are aggressive with witnesses. People are scared enough in court. It doesn't work and the Magistrates spend time trying to control counsel instead of listening. Work in the Magistrates' Court isn't as difficult emotionally as the Tribunal. "But," he stressed, "the judiciary and profession have a lot to learn from it. The stress on the Bench is in the variety, the workload and the sentencing."

Rod Crisp was of the same opinion. "Work on the bench is easier than work in the tribunal. The parties in the Tribunal need to be directed how to behave, as well as continuously reassured that they are not getting a raw deal. For a barrister the work is like having a conference with clients to convince them how to plead or why they lost. The Bench isn't stressful, the Bar can slot straight into this" Permanently based at Prahran, in reality one of the last of the true police courts, he sees 60% of Victoria's drug cases. "You have to make sure the hopelessness doesn't get you down. With the high turnover you can't adopt progressive sentencing. Each druggie attempting to reform is bound to have a few failures and the Magistrate is bound to persevere. Eligibility for bail depends on the issue of acceptable risk and bailing a drug offender is a calculated risk. But there are ways to make them an acceptable risk". Rod Crisp is perceptive enough to have worked out the pitfalls of the job. "You are under a lot of pressure to avoid looking weak in court particularly through sentencing. You must remember that ultimately you are in charge and sentencing is a secret process and there is a myriad of factors that can justify your decision. You must not ignore what observers might think."

Sentencing is difficult in **Bill O'Day**'s eyes as well. Aged 40, he spent 15 years at the Bar in crime, family law and civil litigation. "Barristerial work doesn't develop sentencing skills. It's a worry. Sitting on the bench means looking at both sides of the argument, it's a jolt to look at the other side". He left the Bar in need of a change. He achieved that goal on the Bench. "It has freshened me up. The absence of clients reduces the pressure. Conversely, I like to think I can influence people from the Bench, give them the opportunity to try again." One of the unexpected insights gained from his new job was the realization of how well the adversary system worked. "It highlights very clearly the strengths and weaknesses of each case. As a practitioner you don't notice it."

Hal Hallenstein, a year older, left the Bar to escape a heavy workload, only to find himself in the busier job of State Coroner. He spent 14 years at the Bar, the last few mainly in the Magistrates' Courts jurisdiction. "I have a young family but I wasn't seeing them I was working very hard and I didn't know that I could physically keep it up for the next 20 years. The cases brought their own type of stress. You could prepare cases, but it was still like doing exams. You didn't have total control. Now I'm involved in setting up a State Coronial system, and the hours are just as long. It is a big administrative job which could easily be full-time, and then there's still the court work." The irony of the situation does not excape Hal Hallenstein "For the first 12 months I was a Stipendiary Magistrate in court. Then I left on holidays. On my return I was told it would be appropriate if I took u, the coronial job. My initial feeling was horror. It ; such a specialised area. Hardly a barrister or solicitor outside this system knows how the administrative side works." Eventually he grew to love it. "The sheer variety makes it much more interesting than a straight Magistrate's job. But it's not possible to talk about the work at the dinner table. People don't want to hear about death".

Rod Crisp's complaints lie in a different direction. After more than a year on the Bench, he's still surprised by the number of barristers who appear without knowing the legislation. "Some don't know the maximum penalty and shrug their shoulders in reply, others don't know they have a "no-case" because they are unprepared. Some barristers don't know much about .05 cases. They call experts but don't understand the technicalities, so they ask the experts to tell their story in their own words." Margaret Rizkalla also sees room for improvement. "The Magistrates' Court is changing and the civil and criminal jurisdications are large. A lot of the practitioners now have to put more work into pleas than before. There is a lot of misunderstanding about how to put things and barristers argue with the Bench even after a ruling is made. The workload is heavy, and the unrepresented cases clog up the system."

What changes would help? Ideally, Rod Crisp would like to see the Bar prosecute in the Magistrates' Court, a sentiment shared with Graeme Johnstone and Linda Dessau. "Generally, police prosecutors see themselves as policemen first, they go in hard to protect their own at any suggestion of impropriety. They are one-eyed, and don't understand a prosecutor should sometimes sit on the fence and not participate. They are better off as informants and the single role would take a lot of pressure off them. It is an important Magisterial function to keep the police in line."

Rod Crisp believes the 11 barristers were appointed in this particular age range "to get mileage out of them in terms of judicial administration, and to ensure their active participation in organisation."

The new 11 have a daunting task ahead. On their shoulders rests the greater proportion of the administration of justice in the State. It remains to be seen whether this bold new move, the appointment of the 11 new Magistrates, will result in an improved system or just a propagation of the old.

Will the new 11 put to rest the historical doubts of the desirability of appointment from the Bar to the Magistracy? If so, the Attorney-General may find more applicants from the Bar than appointments available. If not, the first 11 may become the last 11.

A Last Hurrah — Privy Council Days

Section 11 of the Australia Act 1986 brought to an end the right of appeal from Australian Courts to the Privy Council. Bar News Editor ***Peter Heerey Q.C.*** *looks back (in no anger at all) at the delights and hazards of work before the Judicial Committee.*

Standing in the sunshine of a London autumn morning outside the foyer of the Dorchester Hotel, waiting for a cab for the short ride to Downing Street, a pleasing distraction is provided by the departure of the Sultan of Brunei in a powder blue Rolls Royce coupe with wire wheels (yes, wire wheels), several huge bodyguards and an accompanying entourage of Mercedes Benz saloons with more bodyguards. The thought crosses one's mind that, trying to be as objective as one can, there is much to be said for the retention of appeals to the Privy Council.

The Judicial Committee of the Privy Council is housed in an elegant 18th century building on the corner of Whitehall and Downing Street. Number 10 is further up the street on the other side. For security reasons the entry to Downing Street (which is a cul-de-sac or, as the politically cynical might put it, a dead end street) is guarded by a police barrier. Therefore one murmurs "Privy Council" in what one hopes is a suitably well bred fashion to the attendant bobbies and is ushered through an envious throng of camera laden visitors from Kansas City.

A recurrent theme in the advice of those with experience in the Privy Council is the importance of making early contact with George. There is no real equivalent in any Australian court system to the position which this estimable person holds. He has some of the duties of a tipstaff, but there is much more than that. He will order your lunch, arrange for photocopying and generally do everything possible to make even losing an appeal the experience of a lifetime.

In particular, the early assistance of George is invaluable in the selection of a room — or, more accurately, **the** room. As with much of British society, the working arrangements provided for Counsel have a carefully structured inequality. There is one superb room on the corner of the first floor overlooking Downing Street and Whitehall with a large boardroom table, plenty of chairs, a set of Weekly Law Reports, and an ambience reminiscent of the reading room of a good club. If you don't snaffle that room, the only alternative is a table in the library.

The Judicial Committee sit in a beautifully proportioned oak-panelled room with windows opening out to Downing Street on one side and a garden with lawns and chestnut trees on the other. Although the room itself is quite large (approximately 50 feet by 40 feet) the semi-circular table at which their Lordships sit is at least half-way down the room. Counsel address the Judicial Committee from a small lectern which would not be much more than 12 feet away from the nearest Law Lord. Other Counsel and instructing solicitors sit at small tables on either side of the lectern and at right angles to their Lordships' table. A short distance away around the walls are benches for members of the public. Because all participants are so close together, and on the same level, the proceedings tend to take on a rather intimate style.

In an ordinary court of course, proceedings commence with everybody waiting in the courtroom, there is a loud knock and the judge enters. In the Privy Council, presumably because of its historical origin as a committee, the reverse happens. Counsel, solicitors and everybody else gather in a small anteroom. There is a loud knock and George announces "Counsel please". There are two doors, marked "Appellant" and "Respondent" respectively.

Counsel then enter through their appropriate doors, bow to the members of the Judicial Committee, who are already seated, and take their places at the tables for Counsel. Counsel are robed but their Lordships are not.

Privy Council litigation revolves around the "Case". The Rules require each party to file and serve a printed Case. There is no Notice of Appeal as such. In its Case each party summarises the issues (usually in a disarmingly impartial but nevertheless discreetly partisan way) and puts forward its legal and factual argument, together with reference to "the Record", the equivalent of appeal books. The Respondent's case is not an answer to the Appellant's. The Rules have the effect that each party must file its Case before seeing a copy of its oponent's.

Because so much of the parties' cases are presented in written form, oral argument tends to be much shorter. For example, in the case with which we were concerned, **Hamersley Iron Pty. Ltd. v. National Mutual Life Association** (1985) 64 ALR 19, the trial (in the Supreme Court of Western Australia) took three weeks, the appeal to the Full Court five days and the appeal in the Privy Council only two days.

Sitting on the appeal were Lord Keith of Kinkel, Lord Roskill, Lord Brandon of Oakbank, Lord Templeman and Lord Mackay of Clashfern.

Lord Keith, a gruff, powerfully built, but not unkindly man, might well in his youth have filled an effective place in the front row of a Scottish International Rugby pack. Lord Roskill, with Harold Lloyd glasses, had a courteous, rather headmasterish style. Lord Brandon, who had earned a distinguished war record in Burma, had a speciality of sotto voce asides to his bretheren which were (one suspects not accidentally) not all that sotto at all. Lord Mackay, a recent appointment, was a large and gentle Scot with an entry in Who's Who which disclosed an eminent career in philosophy and mathematics as well as the law.

Lord Templeman had a style which can best be described as breezy. In our appeal, there were essentially two points. The first point had been lost by the Appellant at trial and had not found favour with any of the Judges in the Full Court. The second point had been upheld by the trial Judge and by the minority Judge in the Full Court Before the Privy Council Frank Callaway for the Appellant was stoutly pressing on with the first point. Lord Templeman remarked "On your second point, your're pushing at an open door as far as I'm concerned. In fact I'm agog to hear what the Respondent has to say about it. But I can't see there's anything in your first point."

As things turned out, the Appellant succeeded, and much credit is due to Frank Callaway, whose leader S.E.K. Hulme Q.C., was at a late stage prevented by illness from appearing. It is no detraction from Frank's advocacy to record the historical fact that the Appellant succeeded on an argument which had been abandoned in the Full Court, but which was revived by the Judicial Committee itself.

Sadly, in the weekend before our appeal commenced, Lord Diplock died. We saw him sitting in the week before on a New South Wales appeal. He was a tiny, frail man who had suffered for many years from chronic respiratory ailments. While the other Law Lords used volumes of law reports, he was physically unable to work with anything more than photocopies. It was very apparent that the intellectual force and clarity of his written judicial work was matched by his sheer physical courage. At the commencement of proceedings on the Monday, Doug Williamson Q.C., being the senior member of the Australian and English Bars present, responded appropriately to a short eulogy delivered by Lord Keith.

Australian appeals to the Privy Council are now of course no more. Many, probably most, will say that this is an overdue step and that we should have long ago followed the course of Canada and India. On the other hand, it is intriguing to note that Commonwealth countries such as Singapore, which is a republic, and Malaysia, which has its own sovereign, both of which are every bit as nationalist-sensitive as Australia, still retain appeals.

From a view point of litigation customer service, a litigant now wanting to appeal from a State Full Court faces the cost and delay of a special leave application to the High Court with the (usually) totally unpredictable prospect of having his appeal dismissed without a hearing on its merits, and further cost and delay for the appeal itself, if special leave is granted. Then there is the further delay, often for many months, until judgment is delivered. The April 1986 issue of the Australian Law Journal Reports contain seven reserved judgments of the High Court with an average time between hearing and judgment of 4.4 months (a further four judgments were delivered in effect ex tempore). Volume 3 of the 1984 Weekly Law Reports (the latest bound volume available at the time of writing) contains nine reports of Privy Council appeals with a corresponding average period between hearing and judgment of 1.6 months.

The advantages in terms of the speed and, in most cases, the prospect of at least having an appeal heard on its merits were further accentuated in those jurisdictions, such as New South Wales, where it was possible to appeal direct from a single judge to the Privy Council. Balanced against these advantages, the extra cost of a hearing in London, which really boiled down to travel and accommodation expenses, in many instances might have been money well spent.

Of course any reader who detects a wistful note about this argument will be absolutely right. It's hard to see an Australian political party campaigning for the restoration of Privy Council appeals to win back the seat of Swingsville.

The history of the Privy Council is that of the British Empire itself. Admirers of such evocative works as the James Morris trilogy will derive much pleasure from contemplation of the exotic litigation from Canadian prairie, Malayan jungle and South African veldt which has wended its way over the past two centuries or more to this oak-panelled room in Downing Street, to be determined by British judges fresh from cases in the House of Lords dealing with drainage rights under the Liverpool Corporation Act and mighty tussles between the Duke of Westminster and the Inland Revenue Commissioners.

No case better illustrates this heady atmosphere than **Srimati Bibhati Devi v. Kumar Ramendra Narayan Roy** [1946] AC 508.

In prosaic legal terms **Srimati** is the leading case on the doctrine of concurrent findings of fact, that is to say the principle that the Privy Council will not, except in very special circumstances, intervene when a primary judge and the intermediate appeal court have made the same findings of fact.

But the facts of **Srimati** evoke a world of adventure and romance reminiscent of Kipling at his best.

The plaintiff claimed to be the second Kumar (son), and consequently one of the heirs of a very wealthy landowner in East Bengal who had died in 1901. In 1909 the second Kumar, together with his wife (the defendant) and a large accompanying party travelled to Darjeeling and took up residence in a large rented house which was called with entrancing appropriateness, "Step Aside". The second Kumar had been suffering for some time from tertiary syphillis. The defendant's case was that the second Kumar died shortly before midnight on 8th May and was cremated the following morning.

The plaintiff's case was as follows. About seven or eight o'clock in the evening on 8th May, he was thought to be dead and his body was carried in a funeral procession to the sasan (cremation place). A violent storm broke out and the funeral party left and took shelter. Some sanyasis (ascetics) who were nearby heard sounds coming from the sasan. The plaintiff was found to be alive so the sanyasis released him and, in the words of the report (at p. 512),

"...took him away, looked after him and took him with them in their wanderings."

After the storm, the funeral party found the body was gone, but it was apparently a simple matter to procure another one and the procession and cremation continued as planned. The second Kumar for many years suffered a complete loss of memory. His later adventures are described in the report (at p. 512):

"He lived and garbed himself as a sanyasi would, smeared himself with ashes and grew long matted hair and a beard. Some eleven years later he recalled that he came from Dacca, but not who or what he was; that in December, 1920, or January, 1921, he reached Dacca, and took up a position on the Buckland Bund, a public walk on the margin of the river Burigana, at Dacca, where people promenade, morning and evening, for pleasure or health. He could be found seated at the same spot, day and night, with a burning dhuni (ascetic's fire) before him. Then followed a period of gradual recognition or suspicion of him as the second Kumar by certain people, which culminated in the removal of the ashes, and after greatly increased recognition of him as the second Kumar by relatives and others, a declaration by him of of his identity as the second Kumar in the presence of many people on May 4, 19821, and that mainly on the insistence of his sister Jyotirmoyee, who accepted him as such and was one of his principal witnesses."

The trial took **608** days, and in 1936 judgment was announced in favour of the plaintiff. An appeal by the defendant to a court of appeal in India failed, as did the appeal to the Privy Council, which lasted 28 sitting days.

Their Lordships noted the "unusual magnitude and complication" of the case and expressed their "gratitude and admiration for the untiring skill and breadth of mind with which Mr. Page (counsel for the appellant) has conducted his case". No order was made as to costs.

Truly an appearance before this unique institution is an experience which will long be remembered by those who have had the good fortune to receive this most prized of briefs.

The Role of the Victorian Law Reform Commission

David St.L. Kelly *chairs the Law Reform Commission of Victoria. He was formerly Secretary to the Law Department, Professor of Law at the University of Adelaide and a Commissioner of the Australian Law Reform Commission.*

I am grateful to the Editors of "Victorian Bar News" for the opportunity to talk to you about the Law Reform Commission and its work. First, a word about its structure.

The Commission is made up of four full-time Commissioners and ten part-time Commissioners. As you would expect most of the Commissioners are lawyers. These include two Supreme Court Judges, two Professors of Law and two practising Solicitors. Some people, particularly some economists, have said that law reform is too important to be left to lawyers. They will find some comfort in the fact that our part-time Commissioners include an economist, a social scientist and a publisher. Each of them brings to the Commission special insights which have proved invaluable.

The Commission employs a number of research, administrative and secretarial staff to assist in the preparation of its reports and to perform general administrative tasks. The chief staff member is the Executive Director. He is responsible both for the research staff and for the administrative and secretarial staff. He works directly with the Chairperson.

The main function of the Commission is to make reports to the Attorney-General on matters which he has referred to it. The requirement of a reference has the value of ensuring that the work done by the Commission is in areas on which the Government is anxious to obtain advice. It increases the chance of implementation of the Commission's recommendations. Those who devote themselves to law reform work are not satisfied with glossy publications. They want results. Results are not guaranteed by the fact that the Commission works only on references from the Attorney-General. But they are certainly made more likely.

There is one area, however, in which the Commission does not require a reference from the Attorney-General. Under section 6(1) of the Act, the Commission is entitled to 'self start' on relatively minor legal matters, provided that the preparation of a report will not involve the use of substantial resources. This power has yet to be exercised. I hope that it will be used at least annually as a means of collecting and reporting on legal anomalies drawn to our attention by the judiciary, the legal profession and government administrators, in particular. Any member of the Bar who discovers an anomaly which might readily be put right is encouraged to draw my attention to it, either directly or through the Bar Council Law Reform Committee.

The value of having the Commission as the focal point in these matters is that it can deliver a report to the Attorney-General dealing with a number of anomalies, and include draft legislation to rectify them. There is obviously more chance of obtaining scarce time on the legislative program for correcting a group of anomalies than for correcting them individually.

Under the previous Chairperson, Professor Louis Waller, the Commission presented reports on the Sentence for Murder and Unsworn Statements in 1985. Each of these reports has been implemented, with minor modifications. At present the Commission is working on eight references. Two of them, Homocide and Automatism (intoxication), were inherited from the previous Law Reform Commissioners. A discussion paper on the Mental Element in Murder and Manslaughter will be published later in the year. The work on Automatism, being an examination of the law laid down in **O'Connor's Case** (1981)146 C.L.R.64 is nearly complete. A report will be presented to the Attorney-General by 30 September 1986. [A report of the Criminal Bar Association published in Bar News, Winter 1985, incorrectly stated that "a report on this reference had already been submitted to the A-G". We thank the Deputy Chairperson to the Law Reform Commission, Dr Jocelynne A. Scutt, for drawing this to our attention. The Editors.]

The present Attorney-General, the Hon. Jim Kennan M.L.C., has given the Commission 6 new references. A brief description of each may help to indicate the range of work we are now undertaking.

Medicine Science and the Law

This reference requires the Commission to monitor medical and scientific developments and to report on whether existing law is adequate to cope with those developments. Two areas have been identified for investigation. The first is the subject of Informed Consent, a central question being whether the duty placed on doctors to provide patients with information concerning the risks of treatment should be more onerous than suggested in **Sidaway's Case** (1985)2 W.L.R.480. The critical issue is whether the standard for disclosure should be the judgement of a reasonable doctor or that of a reasonable patient.

The second subject is that of Gene Modification. Following the discovery of DNA and its double-helix structure, the possibility has arisen of making genetic modifications to both existing and future organisms by the introduction of genetic material from a totally different plant or animal. The benefits to the community could be enormous. Certain human diseases might eventually be eradicated. But there are also risks. One question is whether there should be some regulation of experiments and of releases of modified organisms into the environment. Another is whether and in what circumstances gene modification in humans should be allowed. Discussion papers on Informed Consent and Gene Modification will be published later in 1986.

Sexual Offences

This reference covers both substantive law and evidence procedure. A report on rape and allied sexual offences is due at the end of 1986; one on child sexual offences by mid-1987. A discussion paper on rape and allied offences is being published in August 1986. The tentative recommendations should have the effect of reducing the complexity of the law and the consequent cost of trials.

Commercial Sales and Leases

A report dealing with the possible repeal of the **Hire-Purchase Act** and with consequential amendments to the **Credit Act 1984** will be published in August 1986. Further work on the reference has been suspended for the time being.

Plain English

This reference is directed towards improvements in legislative drafting and in the design and language of bureaucratic forms. A discussion paper in which numerous problems with present techniques are identified will be published in August 1986. The final report is due in December 1986.

Land Law

This series of references is being examined in close collaboration with the Department of Property and Services, where the Titles Office is now located. The reference covers a wide range of issues including indefeasibility, covenants and easements, and forced sale of registered land. A series of discussion papers and reports is contemplated during 1986 and 1987.

Occupational Regulation

This reference is being conducted jointly with the Regulation Review Unit in the Department of Industry, Technology and Resources. Its aim is to establish proper criteria for occupational regulation and then to apply those criteria to a list of occupations whose regulation is the responsibility of the Attorney-General or the Minister for Police and Emergency Services. Deregulation of the legal profession is not covered by this reference.

For each of these references, I have formed a Division of the Commission and named a particular Commissioner as the Commissioner in charge of the reference. Neither the Division nor the Commissioner in charge works in isolation, however. The terms of reference are widely circulated and submissions or presentations are received from interested parties. Experts in the relevant area are consulted on a continuing basis, either informally or by appointment as Consultants to the Commission. These appointments can only be made with the approval of the Attorney-General. The Consultants attend formal meetings of the Division and comment on draft discussion papers and reports. Members of the Bar who have assisted the Commission in this way include Messrs Ian Gray, Ian Heath, Richard Read and Michael Tobey (Sexual Offences) and Messrs John Hockley and P.N. Wikrama (Land Law)

The Victorian Bar, collectively and individually, has been extremely active in law reform over recent years. One remarkable achievement was its involvement with the Australian Institute of Judicial Administration in the Shorter Trials Committee. It is my confident hope that, through its individual members and through the Bar Council Law Reform Committee, the Bar will continue to make the knowledge and experience of its members available in law reform activity, particularly to the Victorian Law Reform Commission. The Law Reform Commission and the quality of its reports would certainly be much the poorer without that assistance.

Discount For A Plea Of Guilty

A note on a recent decision of the Court of Criminal Appeal by ***David Ross.***

In a recent decision, the Victorian Court of Criminal appeal dealt with the effect on sentence of a plea of guilty. The court comprised Young C.J. King and Beach J.J. The case was **R v. Morton** 12th June 1986.

The applicant had pleaded guilty to an attempted rape committed on 3rd February 1986. On 11th March 1986 he was sentenced to five years imprisonment with a minimum of four years before becoming eligible for parole.

The sentencing judge had thought the only limiting penalty was that for the completed offence which is ten years. In fact by **Crimes Act** section 45(2) the maximum for attempted rape is 5 years. In judgment the court dealt with Interpretation of **Legislation Act 1984** section 52 and **Penalties and Sentences Act 1985** section 4, and in the result allowed the appeal and resentenced him to two years six months with a minimum of one year nine months.

"During the plea reference was made to section 4 of the **Penalties and Sentences Act 1985** (No. 10260). That section which came into operation on 12th February 1986 reads:

"4. (1) A Court in passing sentence for an offence on a person who pleaded guilty to the offence may take into account in fixing the sentence the fact that the person pleaded guilty.

(2) If under sub-section (1) a court reduces the sentence that it would otherwise have passed on a person the court must state that fact when passing sentence.

(3) The failure of a court to comply with sub-section (2) does not invalidate any sentence imposed by it."

In his second report to this Court, which was provoked by the addition of the new grounds of appeal, the learned judge raised the question whether the section applies to offences committed prior to 12th February 1986. There is no reason why it should not so apply provided that the Court passed sentence after 12th February 1986 and the Crown did not contend otherwise.

It was suggested in argument that section 52 of the **Interpretation of Legislation Act 1984** (No. 10096) was applicable. That section which is under the heading "Provision as to penalty applicable where penalty is varied after commission of offence" reads as follows:

"52. Where on or after the commencement of this Act a person is convicted of an offence under an Act or subordinate instrument and the penalty that may be imposed in respect of the offence was varied between the time of the commission of the offence and the time of the conviction, the penalty that may be imposed in respect of the offence is the penalty that could have been imposed in respect of the offence had the conviction been made at the same time as the offence was committed or the penalty that could have been imposed in respect of the offence had the offence been committed at the same time as the conviction was made, whichever is the lesser."

This section can have no direct application to the present case for it is concerned with the penalty that may be imposed when the penalty for an offence of which a person is convicted has been varied between the time of the commission of the offence and the time of the conviction. No such variation took place here. The offence was committed on 3rd February 1986 and the conviction was recorded on 11th March 1986. On both dates the maximum penalty that might be imposed was five years' imprisonment. It may be noted, however, that the section negatives the effect of the decisions in **D.P.P. v. Lamb** [1941] 2 K.B. 89; **Buckman v. Button** [1943] K.B. 405 and **R. v. Oliver** [1944] K.B. 68.

The words of section 4 (1) confer upon a court when passing sentence on a person who has pleaded guilty to an offence a power or authority to take into account in fixing the sentence the fact that the person pleaded guilty. The language is necessarily prospective; that is to say it speaks of a court passing sentence after the section comes into operation but nothing in the language used suggests that it is intended to apply only to a sentence passed for an offence committed after the section came into force. If that had been the intention of Parliament the words "committed after the coming into operation of this section" would have been inserted after the word "offence" (where first occuring).

In these circumstances there is no need to consider further the question whether the operation of the section is retrospective. "There is an old and well known saying with regard to new laws, that you are not by a new law to affect for the worse, the position in which a man already finds himself at the time when the law is actually passed": **Re Raison, ex parte Raison** (1891) 63 L.T. 709 at p.710. But there is no reason to restrict the operation of a section which confers a benefit upon a person. The fact that a benefit is conferred outweighs the presumption against retrospectivity: see Bennion, Statutory Interpretation, (1984), p.445.

If sub-section (1) stood alone, it might be regarded merely as declaratory of the existing law, but the reference in the sub-section simply to the fact of the plea of guilty without qualification suggests that something more was intended. Parliament must be taken to know the law and the courts in this State have for a long time taken a plea of guilty into account when passing sentence in any case in which they have considered it appropriate to do so: see e.g. **R. v. Gray** [1977] V.R. 225. Sub-section (2) confirms that something more than a mere declaration of the existing law is intended. That sub-section shows first of all that the taking into account of a plea of guilty, if it has an effect at all upon the sentence passed, is to operate to reduce not to increase the sentence. So much might again be regarded as no more than declaratory. But having regard to the principles stated in **R. v. Gray,** the absence of any words of limitation in sub-section (1) or in sub-section (2) and the absence of any direction as to the purposes for which or the circumstances in which a plea of guilty may be taken into account in fixing a sentence lead inevitably to the conclusion that a plea of guilty may be taken into account regardless of whether or not it is also indicative of some other quality or attribute such as remorse which is regarded as relevant for sentencing purposes. The existence of sub-section (2) with its mandatory requirement upon the court, if it "under sub-section (1)" reduces the sentence it would otherwise have passed, to state that fact when passing sentence, shows the intention of Parliament to encourage the practice of a court taking a plea of guilty into account in an accused's favour.

The judgment of the majority in **R. v. Gray** contains (at pp.230-233) a discussion of the occasions upon which and the extent to which it was, prior to the passing of section 4, appropriate for a court to allow a plea of guilty to operate in mitigation of sentence. It is unnecessary to rehearse what is there said, but in summary their Honours McInerney and Crockett, J.J. indicated that it was for a sentencing judge to evaluate a plea of guilty and having done so to give it such effect, if any, in reduction of sentence as he thought proper. Nothing in section 4 renders that process unnecessary or inappropriate. But their Honours went on to suggest (at pp.232-3) that pleas of guilty which are not designed to serve the public interest and in which the accused's self-interest is completely dominant and pleas of guilty to lesser offences than those originally charged as a result of "plea bargaining" between the accused or his advisers and the Crown will not ordinarily weigh heavily in the accused's favour. This part of their Honours' judgment may be modified by the new section.

The result of this consideration of the section is that a court may always take a plea of guilty into account in mitigation of sentence even though it is solely motivated by self-interest and even though it is a plea to lesser offences than those originally charged or intended to be charged. Doubtless, however, a plea of guilty which is indicative of remorse or of some other mitigating quality will ordinarily carry more weight than a plea dictated solely by self-interest. Nevertheless, Parliament having indicated, by the requirement that a court state the fact that it has reduced the sentence that it would otherwise have passed on account of a plea of guilty, that encouragement is to be given to pleas of guilty, such a plea should ordinarily be taken into account in the accused's favour. But nothing in this judgment should be taken as indicating a requirement that a court should pass a sentence that in all the circumstances it considers to be inapporpriate.

Sub-section (2) of section 4 requires a court to state the fact that it has reduced the sentence that it would otherwise have passed. The requirement is to state the fact not the amount of the reduction and although there is nothing to prohibit a court's stating the amount of the reduction, it will generally be impossible or misleading to do so unless a similar quantification is placed upon all the other elements or considerations that have led to the calculation of the sentence actually imposed. Indeed it would generally be highly undesirable to do so..."

An Important Precedent

Coles v Haveland (1591) Cro. Eliz. 250 (Mich. 33 and 34 Eliz. 1 1591)
Kings Bench and Common Pleas.

Stevens the younger moved upon a postea that the words were: "Though hast strained a mare (meaning that he had carnal knowledge)." "And although it was urged that these were normal words for buggery yet it seems that action does not lie. And Stevens said to me that if he had shown this matter in his declaration, that such word 'strained' was taken and understood in the country where it was spoken for the commission of buggery, then it seems that it would be good. And for that reason he said that in the farthest parts of the North those who drive other men's beasts into outplaces or commons to the end that others should steal them there and carry them away are called 'outputters' and those who take (them) are called 'limmers'. So, to call one 'an outputter' or 'limmer' without express showing in the count of the special matter will not bear an action. See my old book for calling a thief in French. And note in the said case of Stevens the jury found that the defendant did speak the words '(meaning he knew carnally)'. And this Michaelmas term 33 and 34 Eliz. judgment was for the plaintiff in the King's Bench.

This case is of great importance in two respects. First it explains the origins of the phrase used by many judges.

"It seems to me that your argument is **straining** the words of the legislation."

Hence the very laudable approach of our Attorney General in his plain English legislation to avoid further "straining".

The parliamentary draftsman kindly applied the new tenets of drafting to the above old authority and the result is as follows.

"Stevens le puisne mova sur un postea que les parols fueront thou has strayned a mare innuendo que avoit carnal cognition et coment que fuit urge que ceux fueront usual parols pur buggarie uncore semble action ne gest."

This, therefore, is a fine example of the "new speak" approach to drafting, and is, of course, much clearer than the original.

The second important aspect of the case is its application as a precedent to the laws of the Australian States. All clients must be advised that if they intend travelling to the "farthest parts of the North" or "in les extreame partes de North" i.e. Queensland, then to avoid defamation actions, they must watch what they say. Words up there may have a different meaning to words down south.

So to say,

"I can see strain in your eyes" or *"The strain is getting to you"* could lead to an action on the case. Further calling politicians *"out putters"* and *"limmers"* should be advised against as it could cause an action in the Ecclessiastical Courts, crimen imponunt, ecommunicamus. The remedium being the striking off of the hand.

(Authority:
The Selden Society,
Selected Cases on Defamation to 1600
by R.M. Helmholtz.
First Edition 1985).

PAUL ELLIOTT

The Unsworn Statement: A Seventeenth Century Example

The unsworn statement, which judges call a grosser name (1) — has, it appears, a longer history than had been thought. Hermione's speech from "**The Winters Tale**", well known to most barristers as a plea at bar, appears on closer examination to be an early form of the procedure allowed by section 25 of the **Evidence Act 1958** (Vic.). It will be recalled that Hermione is arraigned before her husband, the King, (2) on a number of charges including adultery. (3) Her statement is reported at 1610 WS (WT) III (ii) at 21 ff., and reproduced below.

Since what I am to say must be but that
Which contradicts my accusation, and
The testimony on my part no other
But what comes from myself, (a) it shall scarce boot me
To say 'Not guilty' (b) mine integrity
Being counted falsehood, shall, as I express it,
Be so receiv'd. But thus: if powers divine
Behold our human actions, as they do, (c)
I doubt not then but innocence shall make
False accusation (d) blush, and tyranny
Tremble at patience. (e) You, my lord, best know, —
Who least will seem to do so, (f) — my past life
Hath been as continent, as chaste, as true, (g)
As I am now unhappy; which is more
Than history can pattern, though devis'd
And play'd to take spectators. For behold me,
A fellow of the royal bed, (h) which owe
A moiety of the throne, a great king's daughter,
The mother to a hopeful prince, here standing

(1) Coward's Castle.

(2) The maxim nemo debet esse index in sua causa does not apply to the Crown See Broome **Legal Maxims** 1894.

(3) No longer an indictable offence and in law servered from marriage. But **quaere** as to whether it gives rise to a tortious liability. See **Nervous shock.** [To prate and talk for life and honour 'fore Who please to come and hear.] (i)

(a) It appears that this statement is 'in lieu of' rather than 'in addition to' any evidence on her behalf. Hermione may have been in some difficulties had she called other evidence since this statement was made before Act 24 Vic. No.100 came into operation.

(b) Plainly a change of plea would not be readily permitted at this point. In any event, a jury once sworn must decide on the question of guilt. The preferred reading is that this is no more than a repetition of the plea of not guilty already taken, but in equivocal terms.

(c) **Quaere** whether the Crown may reopen to present evidence in rebuttal. In any event, an accused person is limited in his statement to 'facts relevant to the issues before the Court....He does not have a general licence to make a statement about anything he wishes'. **R. v. Perceval and Gordon** (1981) VR 624, 629.

(d) If the accused were subject to cross-examination then operation of section 399 of the **Crimes Act** might, if she had prior convictions, put her in peril. Has she crossed 'the line between a mere denial of the charge in emphatic language and imputations against the prosecution witnesses'? (See Bourke **Criminal Law — Victoria** par. 8408)

(e) The accused here seems to be putting her character in issue — if her patience is referred to. It is to be hoped that by 'tyranny' no contumelious reference to the court is intended.

(f) This improper invitation to the Court to take judicial notice of the matters alluded to is made no better by the impudent suggestion of **mala fides** on the part of the Court itself.

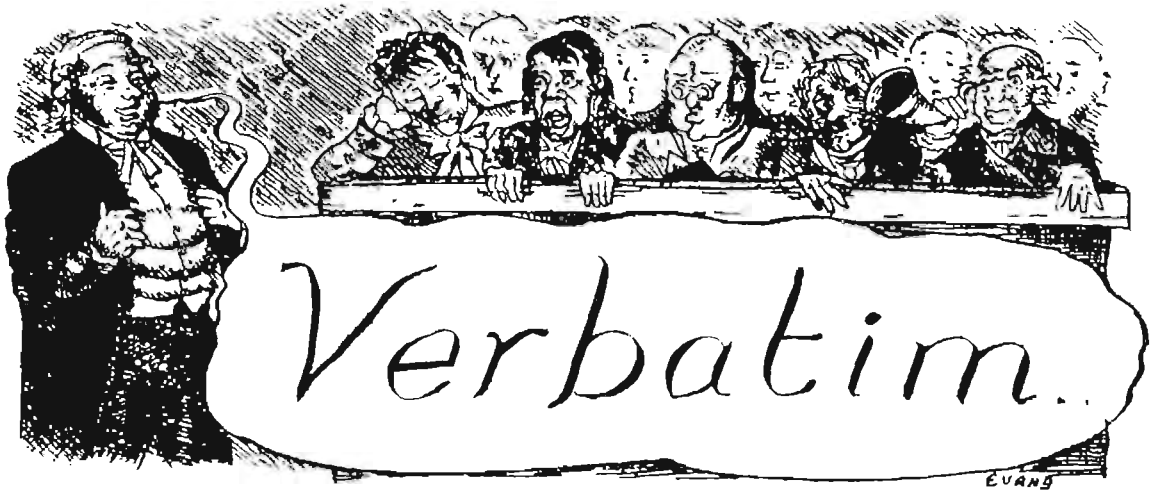
(g) Hermione has clearly put her character in issue and the prosecution could rely upon section 295(7) of the Crimes Act in such circumstances. It appears from the Court records that the discretion of the prosecutor, as too often is the case in such matters, has been exercised in favour of the accused. It is unlikely that a person of Hermione's position who comes before the Court on such a charge had no prior history.

(h) 'Scandalous or mischievous matter may, unless relevant, be excluded'. **R. v. Perceval and Gordon** (Ibid).

(i) This charge has not been heard in closed court. The reference by the accused to her 'embarrassment' is unlikely to find sympathetic ears. The public interest in the proposition that justice be seen to be done clearly out weighs any consideration of the accused's 'reputation'.

The entirety of this unsworn statement (including those passages which, **per taedium**, have not been reproduced) indicates a misconceived and theatrical approach which no modern court would tolerate. It is contumelious in part, and places the accused at risk. It has plainly been 'ghosted', however incompetently, by those advising the accused. (See Bar rules) It is very proper that modern courts do not welcome quotation from the Bar Table of passages from the works of the author of this lamentable speech.

M.J. CRENNAN



Morcombe v. Motor Accidents Board AAT (Vic) per Coram Deputy President J.H. Forrest 31st July 1986

The Motor Car Accidents in general terms provides compensation for injuries which are caused by or arise out of the use of a motor car. Can that compensation so provided be extended to a case of a fall from a "horse"?

As if to emphasize this point, the Administrative Appeals Tribunal, and the parties in this case, held a view of the "locus in quo" amongst the wilds (and indeed the snow) of Burrumbeet. On its return to the Court House, the Tribunal was confronted by a sight which at any rate the Deputy President had not seen in thirty five years of attendance as Counsel and Judge at the Ballarat Court. Tethered to a parking meter, (which was showing "expired", probably from shock) saddled, and bridled, stood a horse on the footpath of Camp Street somewhere near the feet of a rather startled "Perseus".

D.P.P. v David Paul Sharpe and Stephen Knight

County Court at Bendigo
Sitting at Castlemaine August 1986
Coram Judge Nixon
P. Jones Prosecuting
Chettle for Sharpe

On trial for assault causing grievous bodily harm, the accused was alleged (inter alia) to have stabbed the victim with a very large wooden Balinese carved spoon after having broken it across the victim's skull.

Chettle: (During the course of a dramatic and powerful address to the jury making his point that the broken stub of the spoon could not possibly have stabbed anything let alone the victim.)
"Look at it ladies and gentlemen of the jury!!"
(Grasping exhibit "C", the broken spoon, with much vigour, verve and aplomb).

"It would not stab a sausage!!" *(Forte allegro raising spoon high above head and stretching out his left hand so as to spell bind the good citizens of the jury.)*

"Just look!!!!"

(Plunging the ragged end of the spoon into his outstretched naked palm, not once, but again and again and again ---- and yet again. Hushed silence.)

Chettle places left hand, fist now lightly clenched in his trouser pocket.

In somewhat more restrained tones Chettle continues his address with the offending hand thrust firmly in his now dampish pocket.

It was rumoured that the prosecutor and his instructor were seen the next day, in the vicinity of the court, with their left hands firmly bandaged. These rumours could not be substantiated. The spoon was duly convicted of stabbing a barrister, but acquitted of stabbing a sausage.

. . .

Sale Magistrates' Court

February1986
Coram Connelly S.M.
(Police Prosecution, Informant giving evidence in chief.)

Informant: "We then placed the Defendant in the divisional van with the intention of conveying him to the Bairnsdale police station. During the course

of the journey the Defendant banged repeatedly on the door of the van. I stopped the vehicle and had a conversation with the Defendant.

I said: "What is your reason for banging in the van". He said: "Please let me out. I must fornicate, I need to fornicate."
I then complied with the Defendant's wishes, allowed him to alight from the van, he duly fornicated, and I placed him back in the van. Sometime further down the road the Defendant again banged on the van and requested that he be released so that he could again fornicate. I complied with his wishes and he duly fornicated ----

His Worship: Just a moment, senior, don't you mean urinate?

Informant: "Fornicate, urinate, its all the same to me, your worship."

. . .

Russell v City of Prahan
Planning Appeals Tribunal.
15th May 1986.
Coram Chairman Barton and Mr. Logan.
Hooper Q.C. for Applicant
(Discussion concerning time and possible length of the hearing).

Mr. Chairman: "Mr. Hooper, I don't think there's much difficulty. I'm sitting on a tip at Flinders on Monday, Tuesday and Wednesday as is my collegue here and after, well, I've got a little bent time and Mr. Logan is fairly free."

. . .

R. v De Carteret
Coram Brooking J.
20th July 1986

Charles Francis Q.C., appearing for an accused whose bail had been terminated in the usual way at the end of the evidence, informed the trial judge that his client was beginning to "move into a state of alcoholic withdrawal" and urgently needed either liquor or medication.

Mr. Francis: Your Honour, if he had two bottles he would be right.
His Honour: Now?
Mr Francis: Now.
His Honour: Well ----
Mr. Francis: The other alternative, Your Honour, would be to take him to the Central Medical Clinic and he could obtain a prescription there.
His Honour: Or call upon the indefatigable police surgeon, as we always seem to do, but that would take time.
Mr. Francis: I mention a bottle of beer, your Honour, because it is a quick and practical solution, but I would respectfully agree it is a most unusual application to make to a judge.
His Honour: I suppose it could be said, in view of his addiction, that I am not going to put him into an unfit state to continue his trial; the object of this is to keep him in a fit state to continue his trial by having alcohol.
Mr. Francis: I have discussed it with him throughout the trial, and he has to have ----
His Honour: Two bottles of beer is well within the normal limits so far as this trial is concerned. You are quite satisfied that if he has two bottles of beer now he will be better able to continue ----
Mr. Francis: I don't know that he will be better, but he will be in a better condition with two bottles of beer than with nothing.
His Honour: Well, Mr. Prosecutor?
Mr. Langton: Your Honour, I have really nothing to say about this, except the simple and practical solution would appear to be the preferable one.
His Honour: Yes. Well, I will direct that this prisoner be allowed to drink two bottles of beer as soon as they can be provided, notwithstanding that he will continue in custody. They may be taken to him by his legal advisers and solicitors, and I will have a message sent to the jury immediately. I think the best thing to tell them is that one of the accused men is mildly indisposed ----

. . .

Accident Compensation Commission v. Raif
Coram Accident Compensation Tribunal
(Judge Hart presiding)

It is necessary therefore to look closely at section 114 and a number of other sections.

I have no aspiration to be to the Accident Compensation Act what Champollion was to the hierogliphics of ancient Egypt or Rawlinson was to the cuneiform texts of ancient Assyria, but having wrestled with the Accident Compensation Act I have a better understanding of their achievements.

I add that any hope that the report in Hansard of Parliamentary speeches preceeding the introduction of the Accident Compensation Act would serve the function of a Rosetta stone unlocking the mysteries of the language used in the Act has proved forlorn.

. . .

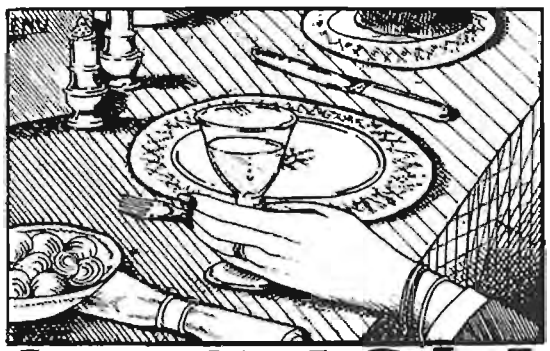
Administrative Appeals Tribunal
(Mrs. Joan Dwyer presiding)
25th July 1986

Mr. Isles: When you told Dr. Malios that you were in fact experiencing pain, did you say where you were feeling the pain?
The Interpreter: I have said already. Not only me that I have said that to the doctor, but it was the person that took me to the doctor, he said the same thing.
Mr. Isles: But did you tell him specifically that you were feeling pain in the neck and shoulder?
Mrs. Dwyer: That is a bit too leading.
Ms. Baczynski: It is almost like cross-examination.
Mr. Isles: Perhaps there may be an application to declare this witness hostile.
Mrs. Dwyer: We understand your difficulties. There is a question as to whether you will succeed in getting any helpful evidence from him, but I do not think you can lead on the crucial points. I do not think you can declare your own clients hostile. I think it was a joke.
Mr. Isles: A Friday afternoon assertion.
Mrs. Dwyer: I will tell you that we will adjourn at 4.15.

* * *

A communication was received from Pennsylvania Judges and Lawyers People to People Delegation addressed to

The Secretary
Victorian Bar Association
01 Dickson Chambers
205 William Street



L·U·N·C·H

Dear Fiona,

How goes it in France? Been to any good restaurants lately? Drunk lots of red wine, eaten plenty of stick loaves, munched on tons of camembert and brie? Well you don't have to go all the way to Paris to eat in the Paris style. You can get it here in Melbourne.

Last Friday I finally got Barney to take me out for a meal. You remember Barney - the short back and sides, clean cut looking solicitor I started going out with just before you left. He took me for lunch to a very exclusive Club on the 13th floor of this rather drab, decrepit building at the Marseilles end of William Street - 'The Seine Club" I think he called it. After we got out of the slowest lift in Melbourne - probably designed to make people think they were travelling to the top of the Eiffel Tower - we went past the servery for those dining "Al Fresco". It was crowded and there was a lot of jostling and loud animated conversation. Just as you would expect in any French Bistro I suppose.

Then we entered the Club and were confronted by this dapper bearded gent doing a more than passable imitation of a Gendarme. Well, he was waving his arms aroung a lot. He almost had me convinced until I saw his Mickey Mouse watches - one on each wrist. He gave Barney a bit of a hard time because he hadn't booked me in. The joke was that Barn isn't a member either!

After our aperitifs at the Bar we joined the food queue - whilst there appeared to be plenty of table service it seemed designed to take things away rather than bring food. I ordered the pork fillet and got something shaped like a baton. It put Barney to shame I can tell you. The fillet came with overweight greasy pomme frites and brussel sprouts al dente. Perry Mason went for the duck and got half a squab. He chose the rather tired looking salad bar to augment the pomme frites. At least they had mignette lettuce (pardon the spelling).

I then got quite a shock. Not so much because I ended up having to pay but rather because of the rapid rate of inflation twixt price board and cash register. My pork fillet mysteriously increased in price (but not value) from $7-50 to $9-00. Perhaps the cash register operator's inquiry concerning my liking for coffee was a trick question and I answered it wrongly. Is that a French custom, a sort of ersatz V.A.T. and service charge? Or was it a matter of the operator practising her forensic skills?

Whilst we waited for the proprietor, Michel, to bring a glass of the vin ordinaire (we liked the French touch he affected, he abused Barney quite vigorously!) Barn indulged in his favourite game of judge spotting. It wasn't too difficult because they all sat at this large round table. There was only one judge he couldn't

name - a rather elderly well built lady who chatted on incessantly to a rather bored audience.

Even Mr Justice Murphy was there. He looked much taller than on television and his nose did not look as large or as red. Just proves that the camera can lie.

It would be better if I didn't tell you about the food or the boring barristers' talk at our table although it would appear that I was fortunate enough to be on a table with the most brilliant of the up and coming advocates. Each of them appeared to have had a string of stunning victories over recent days.

Must go now, the boss wants to give me some more dictation. I hope your taste of France is more rewarding.

Write soon,
Phillipa

GRAHAM DEVRIES

Silk Delayed

In 1820 Queen Caroline, consort of George IV, was tried in the House of Lords on charges of adultery. She was defended by Brougham and Denman, who were distinguished Whig barristers of the day, although not yet Silks.

The King was so affronted by their role that he resolutely opposed their appointment as Silks. The Lord Chancellor at the time was Lord Eldon who by virtue of that office had the power to confer Silk. It was widely thought that his continued refusal sprang from a fear of giving offence to the King.

In 1827 Lord Eldon was succeeded by Lord Lyndhurst, who promptly confered Silk on Brougham and, the following year, on Denman. But the King did not relent easily. In Denman's case, the King's approval was only obtained after the aid of the Duke of Wellington was enlisted. The Iron Duke went to see the King, who refused to receive Denman personally. The hero of Waterloo reported to Denman "I have His Majesty's consent but, by God, it was the toughest job I ever had."

Source: Great Legal Fiascos.
by Stephen Turner
Arthur Barker Limited. (1985)

The Shortest Charge To A Jury

In 1830 Baron Alderson was trying an unrepresented prisoner at Northampton Assizes on a charge of stealing a pair of shoes.

Judge: Now, prisoner, is the time for you to say anything you desire in your defence. Speak to these twelve gentlemen in the jury box. What do you have to say as to those shoes.

Prisoner: My lord, I only took them away as a joke.

Judge: As a practical joke?

Prisoner: Yes, my lord.

Judge: How far did you carry them?

Prisoner: A mile and a half, my lord.

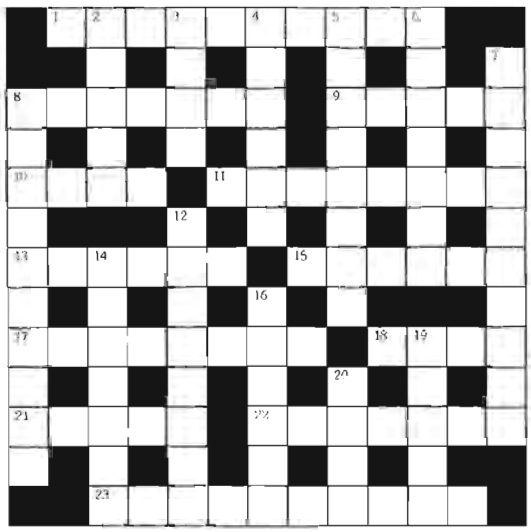
Judge: (to jury): I think that's carrying a joke a bit too far, what do you say, gentlemen?

Foreman: (after consulting jury): Guilty, my lord.

Judge: (to prisoner): Three months' imprisonment with hard labour.

Source: Great Legal Fiascos. by Stephen Turner Arthur Barker Limited. (1985)

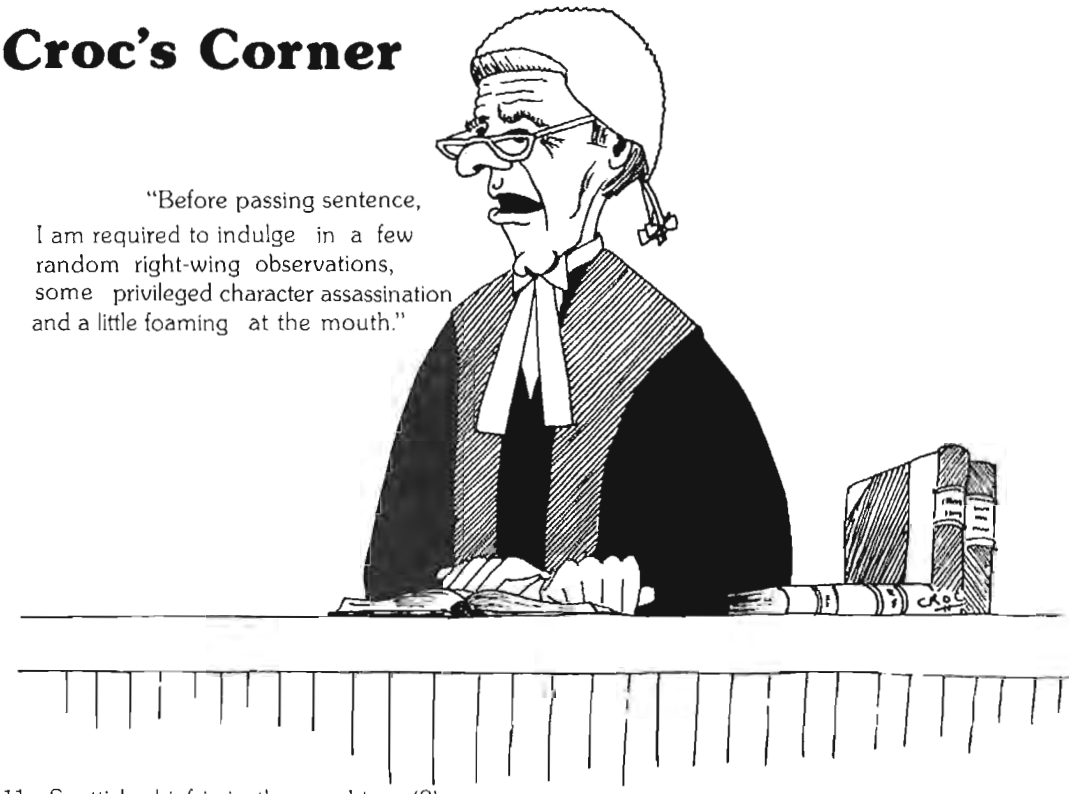
Captain's Cryptic No. 56



Across

1. Passive participants. (10)
8. At the very crux. (7)
9. Verdant island chief. (5)
10. Where is the end of the world? (4)

Croc's Corner



11. Scottish chief is in the sunshine. (8)
13. Irish chief is in the outback. (6)
15. Pet. (6)
17. Afflicts with great suffering. (8)
18. That which is used. (4)
21. Blacks Rock. (5)
22. Chocolate iced finger cakes. (7)
23. A dry in the market place. (10)

Down

2. Juvenile chief is in the garden. (5)
3. Labour which gets you in. (4)
4. Two of these nothings may give you a sore head. (6)
5. Both are useful for breakfast, or a novelty race. (3,5)
6. Source of sound for two ears. (7)
7. Simplifies or removes congestion. (10)
8. A husband, but not a wife, enjoys this right in respect of his spouse: **Wright v. Cedzick** (1930) 43 CLR 493. (10)
12. A into foreplay makes a flash prelude. (8)
14. Ear warmers. (7)
16. Premier chief is trafficable. (6)
19. Sounds like these steps in a fence have elegance. (5)
20. Other things. (4)

(Solution page 54)

Competition No.1

A new feature of the Bar News is a competition for the best entry on a set subject.

This month's subject:

A publisher's blurb on the latest, most expensive and useless series of loose-leaf reports or services.

50-100 words. Entries close 8th November 1986.

Prize: A bottle of reasonably good wine from the Essoign Club, to be selected by mutual agreement between the winner and the Editors. In default of agreement, the decision of the President of the Club will be final.

A Conveyancer's Lament

or When Quinn Came up like Thunder on the Road to Ballangeich (With apologies to Thos. E. Spencer)

In January 1986 at Warrnambool, O'Bryan J. and a jury heard an action by a farmer from Ballangeich against the Shire of Mortlake arising out of fire damage allegedly caused by sparks emitted by the Shire's road roller while driven by one Quinn. Abe Monester Q.C. and Stuart Campbell appeared for the plaintiff and Michael Dowling Q.C. and Richard Alston for the Shire. The hearing did not take place at the usual time for circuit sittings at Warnambool and consequently caused substantial disruption to the orderly practice of the profession in that city, as local solicitor ***Grenville Skewes*** *relates.*

A peaceful spot was Warrnambool, the lawyers all around
Amused themselves conveying land when buyers could be found
But conveyancing's erratic, and the consequences are
That keeping Common Lawyers helps keep incomes up to par
When times are hard and farms won't sell — an ebbing of the tide —
Some civil litigation can be useful on the side
At times like those we all rejoiced to share their modest fee
And knew nought about road rollers on the road to Ballangeich.

A peaceful spot was Warrnambool — the quietest in the land
Till Common Lawyers slipped the leash and things got out of hand
Instead of hibernating, save when circuit courts are down
And going back to sleep again when there's some real work to be done
(Say, blocks of land to be transferred, or agents to be won)
Like gremlins they have multiplied, they're thick upon the ground
They stay awake and seethe and mill, and clutter up the town
They've opened up the Legal Year (that's usually in May)
They've opened it in January, and they won't go away

I go down to the library in my self-effacing style
To dodge an irate client, or perhaps to snooze awhile
But now I find the library, which was once a peaceful spot
Has been quite taken over by a band of Hottentot
They curse and shout strange words about, known only to themselves
With frantic touch, they leap and clutch, the volumes from the shelves
The air is thick with experts and the floor with all their gear
It's certainly no place for nice conveyancers in here

There's no room in the parking lot for chaps to park their cars
For all the Toorak Tractors and their owner's Jaguars
And Stuart's Merc. and all his bags are scattered all around
And all Abe's notes on cases are now lost, and can't be found
So, from this scene of bedlam, off to Lynch's for a tot
Says Kevin "French Champagne? No way — that Dowling's drunk the lot
He drank us dry of Pol Roget, and then of Cliquot (Veuve)
Perhaps its Alston's oratory — it's gone and broke his nerve!!"

So I try to summon Bernie (she's my secretary, you see)
But she is not available, she's getting Stuart's tea
Or organizing lunch for Abe, or dinners for tonight
Or buying lobsters from a friend, for everyone in sight
And Jayne and Lisa tell me they are lugging books with Fred
I think (but can't be certain) it was "lugging" that they said
I wouldn't take on oath on it, and much less would affirm
When affirmations are done wrong, this Judge gets **very** stern).

This peaceful town of Warrnambool will soon revert once more
To Lawyers practicing the art of less exotic law
The two words "spark arrestor" will lose their arresting spark
And once again there'll be some room for those who wish to park

When restaurant proprietors for their missing custom weep
When country Common Lawyers can go back to well-earned sleep

When everyone whose been involved has long since spent his fee
They'll still remember rollers on the road to Ballangeich.

It is about 1.30 pm on a recent weekday at the Saloon Bar of the Kilkenny Inn. Two conservatively dressed, middleaged gentlemen are washing down a rather ordinary chicken chow mein with a cleansing ale.

Clerk "A": "So, you've decided to move into Owen Dixon West. It's rather expensive."
Clerk "Z": "It'll be worth every extra cent!"
Clerk "A": "Just for a bit of carpet instead of lino, matched partitioning, walls without patches and peeling paint, effective airconditioning and modern lighting."
Clerk "Z": "That ... and more."
Clerk "A": "You still will not get a telephone system that works."
Clerk "Z": "You can't have everything. ."
Clerk "A": "Well! What's the big attraction?"
Clerk "Z": "Architectural freedom."
Clerk "A": "Errrr"
Clerk "Z": "It means I can design my offices the way I want them, not the way that suited Fred and his list of 15 in 1965."
Clerk "A": "An office, is an office, is an office. A desk, a chair, a telephone and four walls."
Clerk "Z": "Not if you want to get about your job with least interference. My new rooms are going to consist of a small, bare reception area partitioned off from the rest with sound proofed wall to ceiling partitions with one door and a chute for barristers to put their outgoing briefs in. The reception area will contain pigeon holes for each of my boys, a notice board for my instructions and a receptionist to deal with enquiries. The door to the larger area will remain locked at all times except between 1pm and 2pm."
Clerk "A": "But that means that your boys will be denied access to you and your staff except at lunchtime when you all will be out anyway."
Clerk "Z": "Exactly!"
Clerk "A": "Why? What's the point? They only reek of alcohol and garlic after lunch."
Clerk "Z": "Don't you see, we wouldn't have to put up with complaints about people being out of Court the next day, complaints about double bookings, complaints about solicitors not paying promptly, needless accounts enquiries, questions about fees to be marked, complaints about briefs that haven't arrived, grizzles about high overdrafts and all of the rest. Without all of that me and my staff would be able to get on with our job."
Clerk "A": "You'd eliminate all direct dealings?"
Clerk "Z": "Barristers are supposed to be educated, intelligent people. You would think that they would have learnt when they are not in Court their place is by their telephone not in my office getting under my feet and wasting my staff's time. If it wasn't for barristers a clerk's job would be so much easier!!"

GRAHAM DEVRIES

Advertising Feature

Editors' Note: Supplies of Glycerite of Kephaline are now available in the sick room Owen Dixon Chambers and the Essoign Club.

Please contact Matron Murphy, agent for the manufacturers.

Cure for Overworked Barristers

Printed for the Proprietor by ALEX. M'KINLEY AND CO., 61 Queen-st. Published by C. F. MAXWELL, Chancery-lane, Melbourne.

Secret Instructions to Masters

The Bar News Insight Team of intrepid investigative reporters scores yet another sensational scoop. Fresh off the back of a truck comes the hitherto secret "Instructions to Masters" issued by the Bar Council.

Shortly a reader will enter your life. Your must recognise that your reader acquires a quite unique proprietary interest. He/she is a non-rent paying tenant for a fixed and irrevocable term of 9 months with a seemingly indefinite right of holding over. Theoretically the reader shares possession with the landlord, that is you. In practice your "sharing" is roughly equivalent to the rights enjoyed by Daniel in the Lions' Den.

You must therefore be prepared to share your library, your secretary, your refrigerator and the contents thereof, your bankcard, your motor car, your parking space and your very favourite solicitors.

You may have already observed that a telephone will be installed in your room for the use of your reader. This instrument will be used frequently by your reader. The intensity of its use will vary directly, with mathematical precision, with the importance and difficulty of the conferences you are conducting while your reader's calls are being made.

The subject matter of your reader's telephone calls will range from romantic assignations, to stock exchange dealings, to the organisation of political cabals, usually of a distinctly left wing character. Occasionally a solicitor may be spoken to, but such conversations will usually be confined to lunch arrangements in the most blatant disregard of the rules against touting.

The perils of readership may be illustrated by the following example, which is based on fact. A conference has been arranged in your Chambers for 11.30 a.m. to meet a new client and the senior partner in one of the very substantial Melbourne firms. It appears that this new matter will involve a junior brief to a fashionable and high charging Silk.

Naturally, there is no suggestion of any negotiated reduction of a two-thirds fee. Publicity and overseas travel will be involved. In short, it is a juicy brief indeed. As you walk along the cobbled lane back from the Practice Court the sun is shining and you reflect on your good fortune while softly whistling a popular air. You arrive back in chambers 10 minutes late — this is of course the ideal timing, not so late as to really irritate anyone but sufficiently late that it shows you are a busy junior with lots of important things to do. The client and senior partner are in the waiting room. You note approvingly the lizard skin attache case with the British Airways first class cabin tag. You greet them with a restrained and polished cheerfulness. You note fleetingly that your secretary has a slightly strange look on her face. She seems to be making mute gestures of helplessness and nodding in the direction of the closed door of your room. Unwisely, very unwisely, you sweep past and usher your new client and the senior partner into your room

There, seated at your desk, is your reader in the midst of a spirited conference with two gentlemen in blue singlets and tattoos. The air is blue with rather strange smelling smoke — perhaps only tobacco, but you have serious doubts. The two clients appear to be concerned with charges of child molestation and heroin trafficking. One of them is making a point very forcibly in colourful language about an alleged unsigned record of interview.

Your new client stands transfixed for a moment then turns. Your last glimpse is of a lizard skin attache case disappearing - quickly - out of your Chambers.

"Oh G'day" says your reader, "I'll be finished in half an hour. What about lunch?"

Lawyers Bookshelf

Fossil in the Sandstone
by Sir Kevin Anderson
Spectrum Publications
pp. 287 Cloth $25.00 Soft $13.95

Every ordinarily well-informed Victorian Barrister knows, or used to know, that the first Victorian Sir Charles Gavan Duffy was tried five times in the mid 19th Century, for Treason-Felony. None of the trials was successful, from the English viewpoint, and he was eventually released. He came to Australia, where he founded a famous Irish-Australian family, many of whom were distinguished in the Law. The Barrister who does not know these facts can discover them from the Australian Dictionary of Biography.

What he will not learn from the Australian Dictionary of Biography is that the mildness of the English in releasing Charles Gavan Duffy has not received universal approbation in Victoria, even from the Irish.

This gap in the collective consciousness is filled by the Honourable Sir Kevin Anderson's book "**Fossil in the Sandstone**".

The story displays Jack Cullity, at least as Irish as the Gavan Duffys, emerging, robed and raging, from the courtroom where the second Sir Charles Gavan Duffy was, in Cullity's view, dispensing with justice. "Damn the English. Damn the bloody English," he fumed, with a vehemence almost unknown to him. "Damn, damn, damn the English, I'll never forgive them."

"What's wrong, Cul?" asked one of his colleagues. "It's Duffy," exploded Cullity. "The English! They had Duffy's grandfather at their mercy. They should have hanged him. They let him live, and Duffy, in there," pointing to the courtroom "is the consequence. Damn, damn the English."

The book deals with Sir Kevin's 55 years as a Clerk of Courts, Solicitor, Barrister and Judge; with places, faces and characters; with juries; with judges; — saints, sages, and one frank horror; and most of all with Barristers. The book is randomly reminiscent, eschews chronology, and comes without an index — a complaint which one of the author's characters voiced of a Bible handed to him in Court for the purposes of quotation. Nor does the author find himself hampered by any overly strict compliance with relevance. Even if no-one contends that a particular story actually took place in Victoria, or even in Australia, that is not seen as a ground for leaving it out. In fact the writing is so relaxed, and shines in such bright contrast to many of the dull, worthy, solemn and pretentious examples of the genre, that one gets the impression that if a good riddle or a good recipe had occured to the author, he might have put them in too.

The title of the book came to the author in 1982 when he and a brother Judge were questioned by a lady they encounted in the street. She wanted to know where she could see some fossils in the sandstone of the Supreme Court building. Sir Kevin's pragmatic companion directed her to the office of the Sherriff. Sir Kevin regarded the direction unnecessary. The lady had found her fossil. He was it. He had been immured in sandstone for something like half a century — in the Moorabool freestone of the City Court, where he and his brother clerks played alley cricket at lunchtime, in the Stawell sandstone of the old Crown Solicitor's Office where Sir Kevin's brother clerks (but not Sir Kevin) manufactured orange gin in the dungeons, or in the Tasmanian freestone of the Supreme Court. The revels and gambols of Sir Kevin's fratricidal brethren in and around these walls are chronicled with candour and affection.

Sir Kevin's grandmother hailed from Kanturk in County Cork. His father was a Scot, a fact which explains Sir Kevin's Norwegian name. He came to the Bar in a hand-me-down gown donated to him by Elias Godfrey Coppel, and a wig that had belonged to the legendary Ah Ket. His favourite contemporaries were Maurice Ashanasy and Sir Oliver Gillard who, if they had any Irish origins, do not seem to have harped on them to the Jewish

Board of Deputies and the United Grand Lodge of Masons, over which bodies they repectively presided. One of the funniest characters in the book is Sir Alistair Adam, who so delighted in baiting Sassenachs that he had to be mildly reproved on one occasion, by an amiable Nigerian lawyer, who said that his conduct amounted to tribalism.

This reviewer's favourite vignette is of Napthali Henry Sonnenberg, in the course of a Plea.
" The assault was not a serious one. No real injury was done; these two youths had been friends; they moved in the same circles, and were members of the same Greek Club."
"Does that entitle him to asssault the victim?" the Magistrate enquired testily.
"I really don't know," said Sony gently."I haven't read the club rules."

Sir Kevin Anderson was and is a man to whom barristers frequently said "You should write a book", not intending thereby another scintillating work such as "Stamp Duties in Victoria" or "Prices and Land Sales Control Legislation" but a book of recollections. Sir Kevin has written such a book, and the Bar is in this, as in many things, very much in his debt. It is required reading for those who have some affection for Old Father Antick the Law.

Inevitably, it invites comparison with other works of reminiscence by lawyers in this State. It is far and away the best of them, and the explanation is perhaps in part to be found in this — you don't have to be half Irish and half Scot — but it helps.

E.D.L.

Civil Litigation
By P.W. Young

Butterworths, 1986, pp.i-283 $39.00

When the next intake completes the Bar Readers' Course in November, it is a fair bet that their attention will have been drawn on more than one occasion to the recent Butterworths' publication, entitled **Civil Litigation.** Hopefully many of their number will have taken the opportunity to read it, for the book, written by Mr Justice Peter Young of the NSW Supreme Court, provides an entertaining and perceptive insight into life at the Bar.

Subtitled "A Practice Guide for Advocates", the book is a very useful handbook of the "do's and don'ts" of civil litigation. It follows the exploits of the fictitious Brian Butterworth, a successful and remarkably knowledgeable junior of the NSW Bar (a character somewhat reminiscent of Roger Thursby of Henry Cecil's **Brothers-in-Law** series). In 41 chapters, each dealing with a separate aspect of civil litigation or a barrister's work, Butterworth weaves his way through the tangled web of an elaborate factual situation that provides him with almost every civil legal problem imaginable. With two young readers hanging on his every word, Butterworth gives helpful advice on appearances before a wide variety of tribunals and courts in such diverse matters as a coronial inquest, an application for an interlocutory injunction, custody proceedings, a building case and personal injuries litigation. Along the way, he provides handy hints on more practical matters such as trial preparation, interviewing witnesses, legal research and negotiatiing skills.

The author covers a great deal in a relatively short volume. However, that does not detract from the book's value, as it was not intended to be an authoritative coverage of the finer points of the law. Instead, its principal emphasis is on developing a correct approach to tackling problems, and re-inforcing the importance of identifying the relevant issues and keeping the real objectives of litigation foremost in the mind.

Two important qualifications for Victorian readers. The author relies heavily on NSW authorities to support propositions of law, and the description of practice and procedure in courts and tribunals is limited to that state, which on occasions differs greatly from the equivalent Victorian procedure (witnessed by the NSW Supreme Court judges' predeliction for adjourning mid-morning and sharing tea with counsel appearing before them).

This book may never replace Du Cann's **The Art of the Advocate,** but as a practical guide it is excellent. The author's style is light and highly readable, and he has succeeded, at least as far as this reviewer is concerned, in his stated aim of producing a book which

"advocates coming into the profession will take home with them and read ... a chapter a night until they have finished".

One suspects it will have the same appeal to advocates of many years standing.

CHRIS SPENCE

English Barristers' Income — Bar Takes On Lord Chancellor

The English Bar has been campaigning to raise Legal Aid fees. For this purpose they retained the accountancy firm Coopers and Lybrand to survey 24 sets of Chambers in London and provincial cities doing largely, but not entirely, criminal work.

The result was that in 1984/85 the median, before tax, income of barristers from 5 to 9 years call was £12,500 and for those of 10 to 15 years call, £15,000. The figures for the provinces were slightly less.

Faced with this report, the Lord Chancellor nevertheless rejected a claim for an increase between 30% — 40% in criminal legal aid fees and proposed an increase of 5% only.

The Bar successfully challenged this decision in the Courts on the basis that the Lord Chancellor had failed to consult or negotiate with representatives of the Bar before reaching his decision, this being in breach of expressed assurances that such negotiations and consultations would take place, and contrary to the legitimate expectation of such negotiations and consultations and had thereby acted unfairly. It was further argued that the Lord Chancellor failed properly to fulfill his statutory obligations to have regard to the principle of allowing fair remuneration according to the work actually and reasonably done.

The case was heard in March before Lord Lane, LCJ and Boreham and Taylor JJ. The action was in effect settled on the basis that the Lord Chancellor undertook to pursue further negotiations to an agreed timetable. The Court awarded the Bar its costs, which related only to solicitors costs. Counsel for the Bar provided their services free of charge.

Source: New South Wales Bar News, Autumn 1986. See also (1986) 60 ALJ 371

Conference Confabulations

Showdown at Ayers Rock

Gibbs C.J. was badly mauled at the casino. Not that he lost money. We know nothing of that. But we saw him at the blackjack tables. He was trying to look inconspicuous in a grey suit when the other players had shirt and jeans. the winsome dealer flicked the cards out to all the players. Sir Harry's were not quite straight. A lifetime of concern for the rightness of things could not allow that state of affairs to continue. He rearranged them. "Kindly stop touching the cards", said the winsome dealer, and as an afterthought through the teeth, "Sir". Sir Henry gave a nervous laugh but his mind was on other things. Even when you are the C.J. (H.C.) you can't just throw your money about like a man with no arms, no matter that you are at the $2 table. A hand or so later Sir Harry had not learnt his lesson. He touched the cards again. This time Security came over. "If you don't stop touching those cards, Sir, I'll have to ask you to leave the table". Poor Sir Harry. So many things to think of in a new jurisdiction. He withdrew.

At the conference they had this competition on who could win the most money in a given time at the Casino. Mandie Q.C. (Vic) bolted in. He has the true gambler in him. He started with $10 and went to the blackjack tables. He played for 10 minutes only and won $50. He then went to roulette and put $10 on number 6. The wheel spun around, the little ball dropped into number 6 and the croupiere handed $350 to lucky Phil. He then left!

Fortune is no stranger to this man. One day he went to the races and put $10 on a ridiculous quinella. Phil nearly laughed when it paid $5,500. True to form he went to a fine vehicle merchant the following day and paid cash from his bulging pockets. Those were the days when you could get an imported car for that price. This item is intended as a warning to those who negotiate with Mandie. Know that you are dealing with a man who will slap the cash into the kick without a flicker of emotion. This is his own cash. He is even cooler when he deals with other people's.

A.B.A. Chairman Stephen Charles had much to celebrate. He had finished his year as President and passed the buck on to Sydneysider Roger Gyles. He had given his paper to the conference at Yulara and it had been well received. He was getting stuck into the Harvey Wallbangers while an uncomplaining wife was laying out his clothes for the early start home in the morning. Next day on the plane he looked so smart - grey flannels and yachting jacket. Unfortunately his white shirt had not been left out when they loaded the bags. The former A.B.A. President had to make do with his red and white stripped pyjama coat. Oh well, it matched his eyes anyway.

The record for climbing Ayers rock (Uluru) is held by Kiwi marathon man John Walker - 12.5 minutes. Mortals can do it in about 45 minutes. Ross Robson and wife, Cathie, had been in training for the occasion. Trendy blue tracksuit and green leotards were selected for the attempt by one or other of them. Unfortunately no barrister was at the top to check their time when they arrived. We will have to take their word for it when they claim to have broken the 30 minute barrier.

One of the unusual contests devised for the conference was that of presenting within two minutes a submission most likely to fail. The Court for the purpose comprised Gibbs C.J., Glass J.A. and our own Kaye J. they had no difficulty in awarding the trophy to David Malcolm Q.C. of the Western Australian Bar. The team of juniors Twigg Q.C. (N.S.W.), Byrne Q.C. (Vic) and Elizabeth Cohen (N.S.W.) are already distancing themselves from his triumph of anti-advocacy.

There was, of course, a cricket match. With typical arrogance the N.S.W. delegates led by Gyles Q.C. challenged the Rest, and got thrashed for their trouble. Harper impressed with both bat and ball. Frank Jones (A.C.T.), captain of the Rest recorded an unbeaten 30 runs. Catch of the day (one of only two catches taken in the whole match) was that of Southwell J. His Honour, running backward at mid wicket took and held a high ball coming out of the sun. The batting team and the ladies sipping devonshire tea, champagne and cucumber sandwiches marked their approval with a ripple of polite applause.

Fiji — What a lot of Bula!

During this year's Bar vacation, a gathering of Melbourne lawyers and medical practitioners travelled to Fiji for the annual medico-legal conference. At departure time the Tullamarine lounge looked more like a day school as most delegates had seen fit to bring their little urchins to cash in on the Qantas offer of children's fares at $1 for each year of their age. Fortunately, those of us who booked our trip through Bill Gillard were uplifted to business class and escaped the traumas of "economy kids" save for a short period when Judge Tolhurst decided that he wanted to see the flight deck and procured the assistance of Peter Rose's daughter to act as his entree card.

The Author beached in Fiji before becoming an "hors d'oeuvres."

The Conference was held at the Fijian Resort much to the chagrin of Beach, J. who had made his annual pilgrimage to this tropical paradise to get away from his fellow lawyers and who delighted in pointing out that he was not registered as a delegate to the Conference and would be spending his mornings on the beach. Quite disgracefully, a number of delegates took a leaf from his palm-tree.

Ron Meldrum Q.C. delivered the opening lecture entitled "Is There Life After Common Law?" to which the answer seemed to be "Yes — but not a very pleasant one".

DAVID BYRNE Q.C.

Those delegates who were seen sunbathing and drinking during the Conference week included David Curtain, Don Ryan, Jamie Parish, Peter Rose, Graham Thomas, Judges Rolands Campton & Tolhurst and others who have paid the writer a substantial gratuity to avoid publication of their names.

Conferences such as this should be tax deductible, indeed some would even argue that the delegates should be paid to go to them when one considers the quality of relaxation one gets lying on a breach with 50 or 60 screaming children running up and down with frantic parents chasing after them and threatening them with return to "the room" where they will be looked after by the grand-daughter of a man who would have eaten them for hors-d'oeuvres.

The evening's entertainment consisted of attending on alternate nights the two restaurants at either end of the Hotel complex where one could pay up to A$20 for a bottle of Ben Ean Moselle.

After the Conference week, the delegates scattered to various Islands now owned and managed by former members of the Japanese Imperial Forces unable cope with repatriation.

Next year we believe the Conference is to be held at Sabas Borneo which is part of Malaysia and no doubt the more adventurous delegates will be able to take a closer look at that country's attitude to capital punishment.

S.K. WILSON

[**Editors' Note:** Can this be the kindly lovable S.K. Wilson who dons the mantle of Santa at the Bar Children's Christmas party?]

Sporting News

Monti has been admitted to the Bar in Dublin, Ireland. He is now to be known as Travor O'Monti. We are not sure of his primary motive in visiting Ireland but we do believe that his several famous studs include the Irish National Stud where eight prominent stallions stand. Whilst driving to one race meeting he took pity on a poorly dressed pathetic looking hitchiker - only to see the same gentleman later laying the odds as one of their established Bookmakers! He warns fellow members of the Bar that the cost of living in Ireland is approximately double the cost in Australia. Petrol is about $1.20 per litre and food, clothes, fares and accommodation are very expensive. He also spent time with Kozicki sailing along the coast of Turkey for two weeks with accent on swimming, windsurfing and consuming raki, the local intoxicating beverage.

A team of barristers and one Judge - all from New South Wales are to come to Melbourne in January 1987 and hope to play a golf match against a Victoria Bar and Bench side at Victoria Golf Club on 16th January, 1987. It is also proposed that a team from Melbourne visit Sydney in July 1987 to join forces in a composite Bar and Bench team against the combined Services. This match would be held at the Elanora Country Club. Those golfers wishing to be admitted in New south Wales could give consideration to this venture.

Meanwhile, the annual match between the Victorian Bar and Bench versus the Services will be held at Kew Golf Club on Friday, 28th November, 1986. Attempts to organise a venue on a sand belt course have proved unsuccessful. Any queries concerning the foregoing can be directed to Max Cashmore or Gavin Rice.

A group of 12 barristers has made a donation to the DOXA Foundation - to purchase a colt by Lefroy from TUPAKE. This equine marvel is being broken in and will be trained by John Meagher who trained the 1985 Melbourne Cup winner "What a Nuisance". We can expect this two year old to show up in the Blue Diamond in Autumn. We believe that the Syndicate, under the astute management of Barry Dove Q.C., should be good for a substantial loan in about six months time. Any of the following will no doubt oblige: Dove Q.C., Elizabeth Murphy, Lee Batten, Tony Cavanough, Couzens, Halpin, Hillman, Glen Johnston, Spicer, Colquhoun and Bill White.

"FOUR EYES"

Being A Lawyer For Black Australians

What would cause a lawyer to up stakes and work for Aborigines in Central Australia? The question does not have an easy answer, but plenty of lawyers have done just that and left thriving practices to do so. Most of the barristers who have worked in the Centre have been from the Victorian Bar, and most of the solicitors have come from N.S.W. What they appear to have in common is that quality which all lawyers revere: a desire to place themselves at the service of the disadvantaged and the powerless. Some of them believe that we all owe a debt to the indigenous citizens of this country who were dispossessed of their own lands by the legal fiction of terra nullius imposed by white conquerors.

In Central Australia there are at least two bodies working for Aborigines which use, and need, lawyers. One is the Central Land Council (CLC). The other is the Central Australia, Aboriginal Legal Aid Service (CAALAS).

CLC is primarily responsible for making land claims on behalf of aboriginal traditional owners. It also acts for the traditional owners in negotiating with mining companies. CLC needs someone to head its legal team. Previous incumbents of the position are Geoff Eames, Ross Howie, John Coldrey (all of the Victorian Bar) and Sydney commercial whiz Bruce Donald. Bruce says it is the most challenging and diverse practice he has ever been in, or could ever imagine. David Ross of the Victorian Bar is filling in until the end of August. The position is now styled Manager-Legal Services. Apply to Michael Hopkins, Manager-Administration, 33 Stuart Highway, Alice Springs, N.T., 5750, Phone: (089) 52 3800.

They throw in a house and car. They would want you for two years. The need is urgent.

CAALAS needs two lawyers mainly to go to Court for aborigines charged with crimes. With this job you would be frequently out in the traditional communities taking instructions and then appearing before a magistrate who would visit. There is also an opportunity to appear in the Supreme Court when it sits at Alice Springs. The principal legal officer is Richard Coates, a Melbourne Solicitor. Those who have worked for CAALAS include Vincent J., Hore-Lacy, Coldrey, Tippett, David Ross, Borchers, Lindner, F. Hogan, Waugh and Goetz of the Victorian Bar. Michael Bozic of the Sydney Bar has had a numberr of stints there too. Apply to Mrs. Pat Miller, Director, 55 Bath Street, Alice Springs, N.T. 5750, Phone: (089) 52 2933. Again it is a two year job.

They say that if you see the Todd flow three times you will always return to the Centre. It doesn't seem to need that sight to get lawyers back. Lawyers return there again and again. Just as well there is no surf in Alice Springs otherwise it would be paradise. But the desert and its people have a fascination that few can resist. Speak to those who have lived and worked there.

DAVID ROSS

Forthcoming Conferences

Aviation Law Assocation of Australia

The annual conferences of The Aviation Law Association of Australia have always proved popular and have been well attended by members of the Bar. This year's Melbourne conference will be held at Noah's Hotel from Thursday 16th October to Saturday 18th October.

The Melbourne Conference will cover a wide variety of topics. English barrister Harold Caplan will speak on "Aviation Insurance", Kuala Lumpur Advocate R.T.S. Khoo will speak on "Aviation Law in Singapore and Malaysia" and London solicitor Harvey Crush will speak on "Regulation of Air Transport in The United Kingdom and Its Relevance to Australia".

Other topics to be covered include "Aviation into the 1990's" (The Hon. Peter Morris M.P.) "Legal Liability of Pilots for Pilot Error" (Geoff Masel) "Problems Facing Owners, Operators and Pilots of Light Aircarft" (Peter Patroni) "Air Power in Australia's Defence" (Air Vice Marshall Peter Scully) and "Products Liability: The American Werewolf Abroad" (Ian Awford).

For further information contact — P. Rose.

CHARLES FRANCIS

Seminar on Government Illegality

Dates: 1-2 October 1986

Venue: Australian Institute of Criminology,
Colbee Court, Phillip, A.C.T.

Glenys Rousell
Australian Institute of Criminology
PO Box 28
WODEN ACT 2606
Phone: 062 83 3851

LAW COUNCIL OF AUSTRALIA

BUSINESS LAW SECTION

FIRST BI-ANNUAL BUSINESS LAWYERS CONFERENCE

SYDNEY: MONDAY, OCTOBER 27, 1986
TUESDAY, OCTOBER 28, 1986
HYATT KINGSGATE HOTEL

Brochures including Law Section has announced the first bi-annual Business Lawyers Conference, which will give lawyers who practice in any aspect of business law an opportunity to meet, hear presentations and take part in discussions on important issues in areas such as:

Banking and Finance
Company Law
Customs Law
Intellectual Property
Taxation
Trade Practices

Brochures including details of the programme and speakers will be sent to all members of the Business Law Section, and individual members of the Law Council of Australia

For further information contact

Majorie Nicoll
Business Law Section,
Law Council of Australia
Telephone: (062) 47 3788
Telex: AA 62406
DX 5719 Canberra

Jan Williams
Conference Secretariat,
The Meeting Planners Pty. Ltd
Telephone: (03) 62 7702
Telex: AA 38021
DX 575 Melbourne

Supreme Court Rules Seminar

At the request of His Honour Mr. Justice Brooking, the Chairman of the Supreme Court Rules Transition Committee, the Leo Cussen Institute is arranging a series of seminars on the new Supreme Court Rules.

The series will consist of four seminars to be held from 5.30 p.m. to 8.00 p.m. on Wednesday the 12th, 19th and 26th November and 3rd December at the State Bank theatrette on the corner of Bourke and Elizabeth Streets. The Chairman will be his Honour Mr. Justice Brooking. The speaker, Mrs. Susan Campbell, a solicitor and senior lecturer in law at Monash University, will present a 1 hour paper on each day follwed by a commentary from Neil Williams, ending with a panel, including the speakers, to answer questions.

Mrs Campbell's papers will be published and given to registrants when they attend and made available to others for purchase at the end of the series.

Solution to Captain's Cryptic

CLIRS Supreme Court Library

The Supreme Court Library has access to CLIRS (Computerised Legal Information Retrieval Service) and upon request staff will carry out searches for members of the profession, and can provide printouts of selected material. Information on data bases which are available may be obtained from the Librarian or members of his staff.

Movement at the Bar

Members returned to active practice

G. McEwen

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

G.D. Johnstone
P.H. Mealy
R.G. McIndoe
S.R. Molesworth
Miss L. Dessau

Members whose names have been removed at their own request

G. Gibson
D. Garnet-Thomas
P. Wilkinson
F.A. Casely
S.K. Derham
Miss M. Harding
H. Gillespie
T.A. Munro
B.S. Heathershaw
Miss K. Symons

Members who have granted leave of absence

A.J. McDonald
D.J. Ross
L.A. Harris
Miss F. Hogan
S.A. Shirrefs

Member who has been transferred to the Retired List of Council

N.C.J. Rustomjee

Raffael Barberio

Graeme Johnstone, S.M.

Rowan McIndoe, S.M.

Magistrates from the Bar

Sally Brown

Margaret Rizkalla