VICTORIAN BAR NEWS

Autumn 1987

VICTORIAN BAR NEWS

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The Editors' Backsheet

The New Building

Anyone who has had to cope with the most modest kitchen renovation understands the capacity for trauma that any building project entails.

Is it possible to hammer in a nail and borrow a dollar for the purpose without strident claim and counterclaim of delay, variation, faulty workmanship, defective materials, waiver, estoppel, etc., etc.? At times one must think not.

Spare a thought then for the enormity of the task on which the Bar embarked in the construction of that magnificent edifice called (at the time of writing) Owen Dixon Chambers West.

The task of representing the Bar's interests as building proprietor (via Barristers Chambers Limited) fell on a body which became known as The Building Panel. Chaired by **Peter O'Callaghan Q.C.,** those members who constituted the Panel throughout the whole construction period were **Peter Liddell Q.C., David Byrne Q.C., David Harper Q.C., Maurice Phipps, Brind Woinarski** and **Ken Liversidge.** Also members for shorter periods were **Alex Chernov Q.C., Ray Finkelstein Q.C.** and **Rob Webster.**

Throughout the period of more than two years the Panel met at least once a week, usually at strange hours like 7.30 a.m. No time for circulars!

Their work resulted in an exceptionally smooth performance of the construction programme and administration of the building contract. As already noted, such a result does not happen by accident, but by unrelenting hard work, careful thought and attention to detail.

On our information, particular tribute is warranted in the case of two members. **Peter O'Callaghan Q.C.** conceals beneath an affable Irish charm a steely determination and broad vision which kept the project driving forward. **David Byrne Q.C.,** in real life an expert in building law and also a former editor of Bar News, brought to bear an intellectual grasp of the intricate detail of contract administration which was a basic foundation of the Panel's achievement.

Help for Contributors

We are very appreciative of the work done by our contributors. We realize, that, in many cases, this may interfere with their own professional work with the risk of default judgments, striking out and other unpleasant consequences.

As a service to our contributors therefore, we have used some of the limitless funds made available to us by the Bar Council to brief an up and coming commercial junior (who for ethical reasons must remain nameless). We have received from him a precedent of an affidavit which we trust will be of use.

1. I am the solicitor for the plaintiff/ defendant herein.

2. On .....I delivered a brief to Counsel to draw/settle a Defence/ Interrogatories/Answers.

3. On.....I telephoned Counsel and enquired why the work had not been done and the brief returned.

4. Counsel informed me, and I verily believe, that he/she had been approached by a person purporting to be an editor of a publication called 'Victorian Bar News' in the Essoign Club/at the Metropolitan/at Fitzsimmons/at Campari's/ outside the Practice Court and asked to write an article/take photographs/ compile a crossword/draw a cartoon for the said publication.

5. I am further informed by Counsel, and verily believe, that he/she responded to this request in a politely evasive and non committal manner and fully believed that this would be the last he/she would hear of the matter.

6. However, as I am further informed by Counsel, and verily believe, the said purported editor thereafter hounded and harassed Counsel, alleging that a definite and unequivocal undertaking binding in honour (and probably legally as well) had been made and threatening dire sanctions such as exposure in the 'Lunch' column of the said publication.

7. As a consequence, as I am further informed by Counsel, and verily believe, he/she (without admission of liability) considered that the simplest course might be to write the said article/take the said photographs/compile the said crossword/draw the said cartoon, which he/she proceeded to do.

8. As a further consequence, as I am informed by Counsel, and verily believe, not only was/were the said Defence/Interrogatories/Answers not drawn/settled, but the said purported editor now wants Counsel to write for the said publication a piece entitled 'Late Return of Paperwork, a Growing Scandal at the Bar'.'

Trial by Circular (cont.)

It seems our impression (Editors' Backsheet, Spring '86) that circularists '**Sam' Spry Q.C.** and **Charles Francis Q.C.** had withdrawn from the field was quite premature. In the best Bar traditions of paperwork hastily churned out before the Christmas break, a further flurry of circulars emerged in December.

As mere humble scribblers, we were somewhat bemused by this barrage concerning low tricks and high finance. However, we cannot but note that if it was all that simple to finance the Bar's new building by fixed interest mortgage 'as was the case with ODC', it is a great pity the circularists did not share their knowledge of such matters with BCL and the Bar Council over the period May 1982 to September 1984 when the project was being canvassed with (we were on the point of saying hawked around) numerous developers and financiers.

And, whether financial ingenues or not, we can recognize a clean hit when we see one. One matter on which the circularists sternly sought information was the loss of rent producing space currently occupied by the State Bank. It was politely pointed out by BCL Chairman **Sek Hulme Q.C.** that the vacating of the space in question was a condition of the planning permit.

Erratum, we were wrong, Mea Culpa Department

Inside the cover of Summer '86 Bar News was a note on the four Victorian Judges pictured on the cover which identified them 'from top running clockwise'. In fact, it would be a funny old clock. Sir William Stawell was correctly identified as the one at the top but the one on the right was Sir Edmund Barry the one on the left Sir Edward Williams and the one on the bottom Sir Robert Molesworth.

This error was in no way the fault of **David Henshall** whose handsome covers have been a feature of Bar News over the years. Nor was it the fault of our printers. Those readers with a special interest in the law relating to circumstantial evidence will have a fair idea where the blame lies.

In mitigation, we would point out that in the same week as Summer '86 Bar News was published, TIME Australia ran a story on the MI5 case in Sydney. It was illustrated by pictures of the defendant Mr. Peter Wright and British Cabinet Secretary Sir Robert Armstrong, the only trouble being that the captions were reversed.

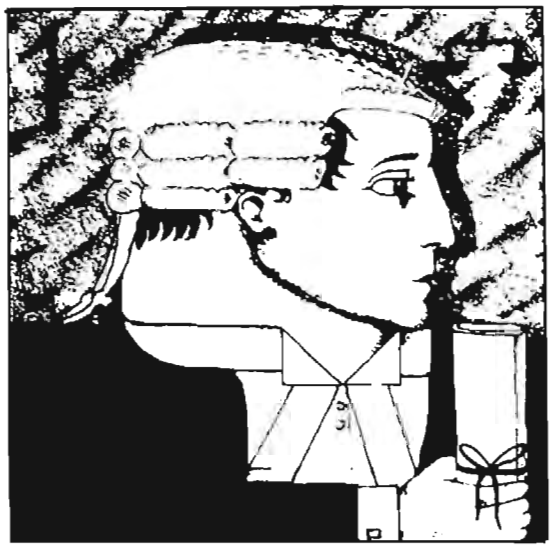
Unreported Judgments

The recent Practice Note on unreported judgments is welcome. Unreported judgments have always been a pest, none more so than the notorious 'purple gutsers' beloved of Crown Prosecutors. The Society for Promoting the Amendment of the Law in its report in 1849 attacked the then present system of reporting under which '...the law expounded in Westminster Hall may not only remain for years concealed from the public, but the professed reporter himself, or the Counsel in the case, may alone be in possession of the decisions, at the risk of their being used at any moment to contradict the law as universally received amongst the profession...Is a paper evidencing in the law of England to be buttoned up in the side pocket of a judge, or to serve for a mouse to sit upon in the dusty corner of a private library? If the law of England is to be adduced from ajudged cases, let the reports of those ajudged cases be certain, known, and authenticated.' Cited in **Council of Law Reporting v. Attorney General** [1971] 2 WLR 550, 557.

Indeed, we can think of a strong case for the restriction on the citation of **reported** decisions.

THE EDITORS

Bar Council Report



HONORARY SECRETARY

Ian Sutherland resigned as Honorary Secretary with effect 9th October 1986 and has been replaced by Robin Brett. Paul Cosgrave has been appointed Assistant Honorary Secretary.

PROFESSIONAL INDEMNITY INSURANCE

A subcommittee of the Bar Council comprising E.W. Gillard Q.C. and A.W. McDonald Q.C. has been appointed to examine Professional Indemnity Insurance for the Bar for 1988.

ETHICS COMMITTEE

The Bar Council accepted with regret the resignation of J.E. Barnard Q.C. from the Chairmanship of the Ethics Committee and thanked him for his outstanding work during his term of office. He has been replaced by P.A. Liddell Q.C.

OWEN DIXON CHAMBERS WEST

The Opening of Owen Dixon Chambers West will take place on 1st May 1987. The Chief Justice of Australia, the Honourable Sir Anthony Mason C.B.E., will officially open the building.

LEO CUSSEN INSTITUTE

His Honour Judge Ogden retired as the Bar's appointee on the Leo Cussen Institute in December 1986. He has been replaced by the Honourable Mr. Justice Hampel. M.E.J. Black Q.C. continues as the Bar's other appointee to the Institute.

VICTORIAN COUNCIL OF PROFESSIONS

P.H. Kearney has retired from the Bar and consequently has retired as the Bar's representative on the Victorian Council of Professions. He is replaced by C.H. Francis Q.C. R.P. Dalton Q.C. continues also to represent the Bar on the Council.

LEGAL AID COMMISSION

A.J. Kirkham Q.C. resigned as a member of the Legal Aid Commission and is replaced by B.R. Dove Q.C., with B.D. Bongiorno Q.C. as his alternate.

A.B.A. CONFERENCES LONDON/DUBLIN JULY 1987

The Australian Bar Association will conduct conferences in London commencing 5th July 1987 and then Dublin commencing 12th July 1987. The conferences are supported by the Bar Council.

CITATION OF BAR NEWS

We are delighted to announce the receipt of recent advice from the prestigious **Société Internationale des Journaux Legaux** in Geneva that Victorian Bar News has been admitted to membership and accorded a **citation registré** in the form (1987) 60 Vic B.N.

We had originally thought that 'V.B.N.' might be sufficient, but it was pointed out that confusion might arise with **Vermont Bar Notes** or **Venezuelana Barristerio y Notario.**

THE EDITORS

Ethics Committee Report

In the period of approximately six months since the last report the committee has received 22 complaints.

The complaints have included such matters as:

(a) failing properly to prepare cases;
(b) failing to be in court when holding a brief to do so;
(c) failing to return briefs when it is necessary to do so, a reasonable time before the relevant hearing;
(d) failing to complete and return paper work briefs within a reasonable time;
(e) loss of client's documents;
(f) reneguing on an agreement made with counsel concerning the costs of an adjournment application.

Currently 28 complaints are under investigation.

Country Solicitor 1: (Outside Circuit Court) Stop worrying Bill, we'll settle this lot without these hungry barristers.
Country Solicitor 2: But Kevin the cases are listed first up tomorrow.
Country Solicitor 1: So what . . . Does 'em good to put them on the drip!!

The committee has completed 17 investigations, resolving in five instances to deal with the matters by way of summary hearing.

One summary hearing was held pursuant to Section 14F of the Legal Profession Practice Act. This concerned a complaint that a barrister had renegued upon an arrangement made with a police prosecutor. It was alleged that the barrister, having advised the informant that certain civilian witnesses would not be required to give evidence of ownership and value in a theft case, subsequently demanded their presence for cross examination.

The committee found the complaint to be well founded and resolved to reprimand the barrister concerned.

The committee has also laid charges against a barrister pursuant to Section 14E before the Barristers' Disciplinary Tribunal. This matter has not yet been dealt with by the Tribunal.

John Barnard Q.C. retired from the Bar Council at the end of 1986. He had been for the past five years Chairman of the committee and had been a member of it since 1979. Peter Liddell Q.C. has also been appointed as the new Chairman.

Martin Shannon Q.C. also retired from the committee and his place has been taken by Bernard Bongiorno Q.C.

The committee takes this opportunity to note its gratitude to both Barnard and Shannon.

The committee is now constituted as follows:

P.A. Liddell Q.C., J.J. Hedigan Q.C., A.G. Uren Q.C., H.R. Hansen Q.C., B.D. Bongiorno Q.C., M. Rozenes Q.C., Mrs. B. Hooper, C.J. Ryan and M.J. Colbran (Secretary)

Dr. K. McKenzie is the Lay Observer appointed to attend and assist the committee in its deliverations.

MICHAEL COLBRAN

THE Attorney General's COLUMN

LEGISLATIVE PROGRAM AUTUMN SESSION

During this session I propose to introduce a large number of Bills, including some which lapsed on the prorogation of Parliament.

Criminal Law

The Crimes (Grand Juries) Bill will abolish the grand jury procedure, which is clearly a remnant of another era. Save for last year's much publicised case, this procedure was last invoked in 1940.

The Crimes (Amendment) Bill and the Evidence (Amendment) Bill will contain a package of measures dealing with interstate and international aspects of crime, including execution of search warrants for interstate offences, expansion of relevant theft related offences and a new scheme for taking evidence on commission.

The Crimes (Family Violence) Bill provides for intervention orders in cases of domestic violence. These orders, which may be granted by a magistrate, can be used to restrict the defendant's access to the victim and in serious cases the defendant may be prohibited from coming to or remaining at the family home.

Children's Court Bill

I will introduce a Bill to revise and consolidate the Childrens Court Act. This Bill will provide a new range of flexible sentencing options and reform bail procedures in the Criminal Division of the Children's Court. The age of criminal responsibility will be raised from 8 to 10 years in accordance with the recommendation of the Carney Report and the common law presumption of innocence will be given statutory recognition.

CrossVesting Bill

The Jurisdiction of Courts (Cross Vesting) Bill is part of a reciprocal scheme with the Commonwealth which provides for the transfer of civil matters between Federal and State courts.

I will also introduce a Bill to give similar protection to the proceedings of Neighbourhood Mediation Centres as for judicial proceedings. Four of these centres will be opened later this year.

Legal Profession Bill

The Legal Profession (Guarantee Fund & Related Amendments) Bill will allow the incorporation of legal practices. It also seeks to change the way in which the Solicitors Guarantee Fund is used to fund the Legal Aid Commission, the Victorian Law Foundation, the Leo Cussen Institute and the Law Reform Commission.

Judicial Salaries Bill

The Judicial Salaries Bill establishes a new formula for calculating the salaries of Supreme Court and County Court judges. It implements some of the recommendations of the Robinson Inquiry on Judicial Remuneration conducted last year. The main effect of the Bill will be to tie changes, in certain circumstances, in the remuneration of Victorian judges to changes in the remuneration of Federal judges.

Companies and Securities Bill

The Companies and Securities (Miscellaneous Amendments) Bill makes a number of amendments to Victorian legislation about companies and securities as a consequence of changes to Commonwealth legislation. The main amendments deal with changes to the way in which the National Companies and Securities Commission conducts its hearings. The Bill also seeks to extend the use of the PERIN system to enforce certain breaches of futures industry legislation.

Adelaide Meeting of the Ministerial Council and Standing Committee of Attorneys-General

The Ministerial Council and Standing Committee of Attorneys General met in Adelaide in early March. The Ministerial Council made a number of important decisions, and in particular settled the contents of the Companies and Securities (Miscellaneous Amendments) Bill 1987 which will be released as an exposure draft later this year.

The Role of the Courts in Takeovers

The Bill will contain amendments to the provisions of the Companies and Securities Legislation dealing with appeals against NCSC and CAC decisions. It is intended that the complete review of these decisions now possible through the courts will be replaced by a more limited form of judicial review based on the grounds set out in the Administrative Decisions (Judicial Review) Act. This further amendment will allow the courts to refuse applications for review in cases where, in the opinion of the court, to allow such applications would interfere with the due and orderly conduct of NCSC investigations or hearings. These changes should ensure that the regulation of the securities market is performed by the regulators established for that purpose, the NCSC and the Corporate Affairs Commissions, rather than the courts. It is intended to give a clear signal to the courts that it is not appropriate for courts to intervene to substitute their opinions for those of the NCSC where broad discretions have been vested in the NCSC under the Cooperative Scheme.

BHP/Elders Cross-d0-Shareholding Report

The Companies and Securities (Miscellaneous Amendment) Bill will also cover changes recommended as a result of the NCSC's inquiry into the BHP/Elders cross shareholding. These amendments include restricting the sale of personal holdings by directors of target companies in takeovers, empowering the NCSC to seek the opinion of the courts on question of law, and widening the scope of Section 129 of the Companies Code so as to prohibit assistance by a company which improves the operating or borrowing capacity of persons purchasing the company's shares.

Balanced Property Group Report

The 1987 Bill will also include amendments arising from the recommendations of the report into the crash of the Balanced Property Trust Group in New South Wales. These amendments are intended to crack down on 'fly by night' property trust promoters and prevent abuse of the privileges of limited liability. They will ensure that promoters are personally liable to unit holders where there has been negligence, a breach of fiduciary duty or an issue of units without an approved deed.

NCSC Resources and Funding

The Ministerial Council also considered a number of proposals for increasing the resources available to the NCSC. The Ministerial Council considers that the NCSC does not have the resources required to fulfil its functions, particularly in relation to inquiries of national and international significance, and that the NCSC should be permitted to raise additional funds through some form of self funding. The NCSC has been directed to present detailed submissions on funding options and the areas on which additional funds would be spent at the next Ministerial Council meeting in Sydney in May.

Computer Crime

The Standing Committee of Attorneys General has decided that uniform national legislation on computer crime is not necessary and that legislation is to remain a matter for each State. The Standing Committee considers, however, that existing criminal law in relation to fraud and property offences should be reexamined to ensure that such law is adequate to cover conduct involving computers. The Standing Committee has recommended that States intending to legislate for new offences should, as far as possible, ensure that the same kind of conduct is criminalized.

Melbourne Magistrates Court Civil Registry Computer System

The Magistrates Court Civil System (MCCS) came into operation in January this year. The system replaces a large number of manual tasks such as producing notices of hearing and maintaining manual diaries. Court staff will now be free to concentrate on the more important aspects of case flow management. It is particularly important that the system has been installed in the Melbourne

Court which handles approximately 85% of all Victorian Magistrates Court civil work. Case related information will now be more accessible to solicitors and parties to a case as the MCCS allows the case to be retrieved by reference to the name of any part to the case or the case number, whereas previously the file could only be retrieved by number.

Terminals will be available at the court for use by solicitors and members of the public to access court records. The MCCS will also provide a complete and accurate record of the case history. The introduction of the MCCS is another step forward in the program of streamlining the administration of courts through the introduction of new technology. It is hoped that the computer system in the criminal jurisdiction of the Magistrates Court will commence at the Broadmeadows Court later this year, and then be extended to the rest of the Magistrates Court in stages.

Law Reform Commission Report on Criminal Responsibility

I recently received the Law Reform Commission's Report 'Criminal Responsibility: Intention and Gross Intoxication'. The Commission concluded that the law as stated in **O'Connor's Case** is correct, and recommended that the Commission be given a wider reference on the criminal responsibility of all people who commit proscribed acts involuntarily or unintentionally, whatever the cause of such conduct. I have now given this wider reference to the Commission. I commend the report to all barristers practising in this area. The Commission would welcome comments on its report.

Criminal Bar Association Report

Executive and Committee

1987 sees a new Executive and Committee for the Association following last year's Annual General Meeting. This well oiled machine is served by the following for the next twelve months:

Robert Richter Q.C. - Chairman
Mark Weinberg Q.C. - Vice Chairman
Michael Tovey - Treasurer
Lex Lasry - Secretary

Michael Rozenes Q.C.
Peter Faris Q.C.
John Barnett
John Dee
Boris Kayser
Aaron Schwartz
Bob Kent
Colin Lovitt
Lillian Lieder
Nick Pappas
Jim Dounias

Committee meetings are held on the last Monday of the month. Members of the Association are reminded to communicate matters of concern to the Secretary a few days at least prior to the meetings so that they can be discussed and dealt with. As always members are needed to man (or woman) a series of sub committees and when the request comes, we trust it will be accepted.

Criminal Law Association

The National Criminal Law Association was recently launched by the retired Chief Justice of the High Court, Sir Harry Gibbs. It is intended, certainly by the committee of this new body, that we should be affiliated with it since we are the largest single group of our type in the country. We do recommend that members of this Association join although membership will cost $75 per annum in addition to the $10 it costs to belong to our Association. The benefits of a national body are mainly concerned with its ability to lobby for law reform at a unified Federal level and to co-ordinate

and collate the views of criminal lawyers from all over Australia on matters of significance. Membership forms will be circulated shortly to members of the Victorian Criminal Bar Association. Further enquiries should be directed either to the Chairman or the Secretary.

Listings

Despite the best endeavours of the Criminal Trial Listing Directorate, the commencing date of any given criminal trial, particularly in the County Court, often takes on a mystery that confounds both counsel and client alike.

As at the end of January 1987, in the Supreme Court, there were 39 cases pending affecting 65 accused. In the County Court there are 779 cases affecting nearly 1000 accused persons. In both Courts, but in particular the Supreme Court, there are a number of 'super trials' which will inevitably clog the system and slow down the disposition of shorter more conventional cases. The rate of disposition is not increasing as might be expected and the only way to meet the continuing backlog of cases is the appointment of more judges and the assignment of more judges to criminal courts. We will be pursuing this matter again during the year.

Male Barrister: Now what do I have to do to get your briefs . . . ?
Female Solicitor: Hope that a hydrogen bomb hits and you're the last barrister on earth . . .

Contingency Briefing

It has come to our notice that limited briefs from the Legal Aid Commission are occurring on a regular basis and particularly in the so-called 'super trial' type of cases. They often involve counsel being briefed for the limited purpose of, for example, conducting a voir dire regarding confessional evidence and then, if the evidence is not excluded, having no further role to play in the trial. This, in our view, is a matter that requires considerable discussion because of the difficulties caused both counsel briefed and his or her client. Insofar as a brief of this kind raises any ethical difficulties then that is a problem to be settled by the Ethics Committee. However we are concerned that some appropriate general principles be established as to the circumstances in which such briefs might be delivered and either accepted or rejected. The views of our members with experience in the matter would be appreciated.

Criminal Law Conference - London - July

The invitation list for this conference is now closed and has been for some time. In the event of any cancellations occurring we will contact those who recently expressed interest in going but missed out on the Australia quota.

Dinner

The next social extravaganza will be a members only dinner to be held towards the end of April. Do not (repeat 'do **not**') send money, bribes or offers of payment in kind to Lovitt as yet as details have not been finalised but the evening can be anticipated to be in the finest tradition of Association dinners with a somewhat 'creative' guest list.

LEX LASRY

The Law Council of Australia Report

Criminal Law Section Launched

In co-operation with the State and Territory Criminal Lawyers Associations, the Law Council has joined in the launching of two new organisations for Australia's criminal lawyers.

They are the Criminal Lawyers Association of Australia and the Criminal Law Section of the Law Council. There will be close working relations between them.

Both were launched by Sir Harry Gibbs shortly before he retired as Chief Justice of Australia. The new bodies will look at such matters as criminal law reform, the criminal justice system, appointment of judges in criminal jurisdictions, the needs of Magistrates Courts, prison conditions and the role of politicians and the media in criminal law matters.

The success of the Law Council's existing Sections suggests that the new Section, working closely with the Association, will provide a valuable focus for the interests and activities of criminal lawyers. Adelaide barrister Kevin Borick will be President of the Association and inaugural Chairman of the Section.

An application form for membership of the Section and/or the Association will be published in Law News in March.

Limitation of liability

The committee set up by the Council to examine this matter has held its first meeting, chaired by Miss Elizabeth Nosworthy, President of the Queensland Law Society.

The committee is looking at problems caused by the difficulty in obtaining, and the high cost of, professional indemnity insurance, and the related matter of incorporation of legal practices. At its first meeting the committee reviewed work already done on these matters by a number of the Law Council's constituent bodies. Its aim is to work towards a co-ordinated approach to the problem, which is a significant one for the profession.

First Honorary Member

The Law Council has admitted the Rt. Hon. Sir Harry Gibbs GCMG KBE as its first Honorary Member. The admission took place at a function in Canberra attended by Justices of the High Court, representatives of constituent bodies and the Law Council Executive.

The President of the Law Council, Daryl William Q.C., represented the Council at the ceremonial sittings of the High Court to farewell Sir Harry, and to welcome the new Chief Justice (Sir Anthony Mason) and new Justices Toohey and Gaudron.

Superannuation

Lawyers and other self-employed persons have an interest in better arrangements for the provision of superannuation. The Law Council's Law Practice Management Section is working with the Taxation Committee of the Business Law Section to identify what is available to self-employed persons, and what the Council might press for by way of improvements.

Family Court of Australia

The future of the Family Court is a matter of wide concern. The Law Council's Family Law Section and the Courts (Federal) Committee have been considering proposals that might give the Family Court more status and thus generate more respect for its decisions.

A committee established by the Council (chaired by the Secretary-General) has now completed a report on the matter. In essence, the committee sees real difficulties in the two basic approaches considered so far - integration with the Federal Court or cross-vesting of jurisdiction with State courts. The committee believes that, in the longer term the concept of the Family Court as a single-jurisdiction court should be abandoned.

In the shorter term, the committee says, the Family Court should continue in existence but with appeals in family law matters being dealt with by the Federal Court. At the same time, some judges of the Family Court should be given Federal Court commissions enabling them to take part in family law and other matters in that court as appropriate.

The committee's recommendations will be considered by the Council at its meeting in Hobart in April.

Concern on Child Support Plan

The Law Council has told the Government it is very concerned at proposals being considered for reform of the maintenance system. In a submission by the Family Law Section, serious flaws in the proposal were pointed out.

The Section opposed assessment of maintenance by the Tax Office using a statutory formula that could lead to injustice in particular cases. The Section said the level of maintenance should be raised, and that principles laid down by the Family Court should be written into the Family Law Act as guidelines for maintenance assessment.

It was also suggested that applications for supporting parent benefits should take account of the existence of potentially liable non-custodial parents.

Tribute to Lionel Murphy

*This address was given by the **Hon. Mr. Justice Kirby,** President of the N.S.W. Court of Appeal, at the State Memorial Service held at the Sydney Town Hall on 27th October 1986.*

LIONEL MURPHY - JURIST

When a public figure dies, his fellow citizens should gather to consider his achievements. In the presence of the reminder of death, they should for a time pause in their conflicts and differences.

When a friend dies, those who knew and loved him, should come together to speak in his praise. They should reflect upon the lessons in his life for their own. And they should remember their own mortality.

I am here to speak of Lionel Murphy, the lawyer and the man.

As a jurist he was, by any account, unique. As a man he was a warm and loving person whose generous spirit and optimism brightened our Commonwealth.

Where other lawyers sourly disdained an international perspective in law, he saw in it the hope of humanity. He perceived the urgent need to develop and contribute to a world legal order. In times of nuclear weapons, he realised that the survival of all of us requires the elevation of the rule of law to a global dimension. Here was no parochial, provincial lawyer. His was not a crippled conception of his chosen discipline.

Where littler people laughed at his aspirations, he disdained a modest perspective. For him, the law remained, to the end, an idealistic, almost romantic, instrument for achieving peace and justice, at home and abroad.

Where other lawyers were blinded in their search for legal principle by the dazzling jurisprudence of England, Lionel Murphy roamed over a wider field. His sources were deeper and even richer. They helped liberate his mind. By the processes of serendipity and lateral thinking, these deeper sources led him to brave and new ideas. They were ideas often seen as threatening because of their unorthodoxy or originality. He used his

independence, as a judge, to advance those ideas. Fortunately, he was, to the end, robust enough to rebuff the scoffing of enemies and the condescension of half friends.

Where others were indifferent to science and technology and their implication for our law, he devoured scientific literature. Rightly, he saw this as the great engine of our time. He once told me that the only Imperial bauble which could tempt him, was Fellowship of the Royal Society (FRS). Sadly this did not come his way. But in tribute to him, scientists named a new found supernova - sparkling in a far away galaxy - after him.

Where others were indifferent to the operation of the law in society and contemptuous of the frank acknowledgment of policy in judicial decisions, he faced those issues boldly, as in future will be a commonplace. He had a passion for justice for the under privileged that can be sadly rare amongst lawyers at the top. And he had the courage to do something about it. Happily he also had the personality to influence those about him to move to the same directions.

Where others saw the rules of procedure as a harness shackling their originality and their effort to do justice, Lionel Murphy saw them as they are: man-made obstacles. At least in the highest court of our country, they could and should be adapted as justice, principle and modern needs required.

When lesser spirits were indifferent to injustice in the law, he spoke out with abundant humanity. He was an authentic oracle not for all it is true - but for the opinion of the tolerant, liberal, civilised and caring members of the Australian community.

Internationalism, Technology, Philosophy, Humanitarianism, Courage. These were his professional touchstones. They were present in rare combination.

LIONEL MURPHY - THE MAN

And this brings me to Lionel the man.
At all times that I knew him, he was a loving and charitable man. Blood not water ran through his veins. Most people here knew him as a public figure. I knew him as a dear friend.

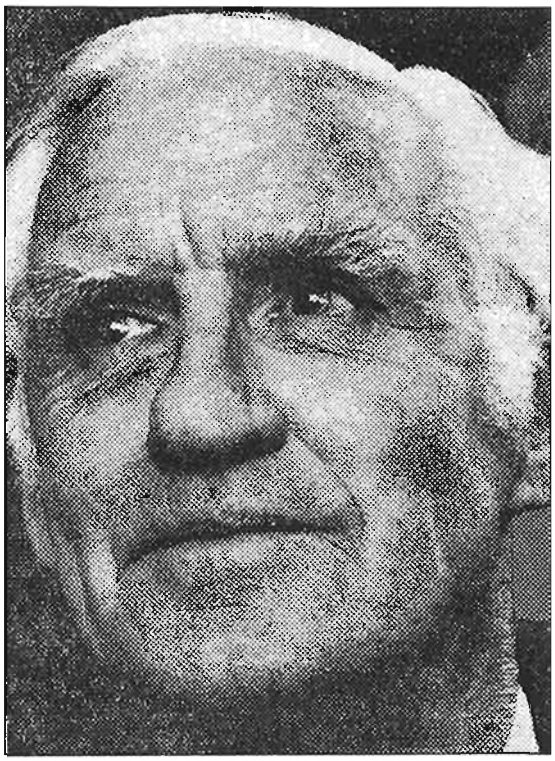
He would telephone. And that warm familiar voice would talk with enthusiasm about a principle of law; offer encouragement or instil optimism; urge forward the thrust of reform - believing, with another evangelist, John Wesley that 'these things shall be'.

Never in all the years I knew him, did I hear him utter a single uncharitable word about those who hated or assailed him. Even in the recent years of trial, he was full of charity and kindliness. His concern was not for himself - but for others, for Ingrid, for his family and for principle, as he saw it. His injunction to us today would be, I am sure, to set aside entirely petty hatreds and recriminations. It would be to lift our sights to the way in which we can all, individually, each one of us, contribute to a kindlier and more sensitive world.

Lionel Murphy had enthusiasm in the old Greek sense. When I spoke to him, shortly before he died, he was full of courage and fight. It is true that his warm and resonant voice had lost some of its power. His prodigious energy was flagging. But he had lost none of his optimism and dedication. And none of his faith in the law, in the independent judiciary and in a better world.

Lionel Murphy was a public figure for our time. The human body dies. The enigma of life and death is not unravelled. But the powerful, restless spirit of this special man is still with us. It is out there in the galaxy with his super nova. It is here in our country, liberated from the law books. it is here in this hall, with us - his friends.

Obituary



SIR ALISTAIR ADAM

In his report on Alistair Adam in October 1911 the headmaster of Scotch College wrote 'the little fellow is a consistent plodder. He is still very shy though not nervous.' In 1916 in a report marked A Excellent the form master wrote:

> "He impresses me with his keenness of intelligence. He will be a good scholar ere long I think".

Those who knew Alistair later would not recognise any element of plodding, but would understand how preceptive his school masters had been.

Alistair was a brilliant scholar, an able teacher, an artful barrister, a judge of the highest calibre and a much loved man not only by those who knew him well but also by those who had dealings with him.

He was born a twin in Greenock, Scotland on St. Andrews Day 1902. He was baptized in the United Free Church of Scotland by his father's friend and colleague the Rev. Alexander Duncan Grant after whom he was named. He was always known as Alistair and somewhat surprisingly was able to convince the Governor upon being knighted that his title should be Sir Alistair rather than Sir Alexander. He always claimed that his success in this was due to Sir Owen Dixon telling the Governor that Scots always pronounce Alexander as Alistair.

Alistair graduated M.A., LL.M. from Melbourne University and was articled to his brother at Weigall and Crowther. In 1927 and 1928 he was associate to Sir Hayden Starke. His contact with the High Court at that time was the basis for many entertaining stories and anecdotes over the later years.

He came to the Bar in 1928 and read with Sir Wilfred Fullagar. His early years at the Bar were not easy as the Depression was on and there was very little work. Nevertheless, Alistair's practice developed and he fairly quickly established a traditional equity practice. That he was an able barrister is demonstrated in the report of **Kirk v Sutherland** [1949] VLR 39 where Lowe, J. is reported as follows:

> "[Since delivering the above judgment I have come across the case of **Wheeler v Baldwin** (1934) 52 CLR 609 in which Starke, Dixon and Evatt JJ, express views as to the nature of the title acquired by an adverse possessor, which seem to accord with the conclusion at which I have arrived. The Act 32 Henry VIII .9, sec.2, dealing with pretenced titles, which is referred to in their judgments, is not, I think, in force in this State by reason of the Property Law Act 1928, se.19(1)(b) and the prior legislation which that section embodies, and of The Imperial Acts Application Act 1922. On this last question, Mr. A.D.G. Adam of counsel has furnished me with a note which I think so useful that I append it hereto:"

There follows a note characteristic of Alistair for its brevity and lucidity.

Between 1932 and 1951 Alistair was independent lecturer in Real Property at the University of Melbourne. It is accepted that as a teacher he was exceptional; being able to bring to life this dryest of subjects and convey to his students in clear terms the mysteries of artificial and complex principles while at the same time introducing wit and humour.

He took silk in 1949 and was appointed to the Bench in 1957. At his welcome he said this:

> "I believe it to be the primary duty of a judge to maintain untarnished at all costs the dignity of his office and its reputation for absolute integrity and impartiality... dignity for the office may of course be secured by an unhuman attitude of aloofness but so long as the profession recognises to the full the difficult role of the judge and is at all times ready to help him fill that role with true dignity, I, for one, fail to see a sound reason why elevation to the Bench need create personal barriers".

He then quoted Polonius' immortal advice and concluded:

> "I will indeed by happy if when my time comes to vacate this high office it can be said of me with truth 'He gave satisfaction as a judge'."

On many occasions like the opening of the legal year in country circuits Mr. Justice Adam emphasised his view that a judge gained wisdom and insight by entering the life of the community. These were no bare words for him - he practised what he preached. I think that everybody who appeared before him either as solicitor, barrister or litigant and anybody who reads his judgments could truthfully say he gave satisfaction and more as a judge.

It is perhaps the law's loss that Alistair was not appointed to the High Court. Alistair told me that in the early 1960's R.G. Menzies proposed to appoint him there and he had even arranged who was to be his associate. But when the late Dr. Evatt was appointed the Chief Justice of New South Wales, Menzies told Alistair that he couldn't leave Mr. Justice Owen on that Bench as he had been the Royal Commissioner into the Communist Party. Owen was appointed instead of and much to the disappointment of Adam. Nevertheless he wasn't bitter and continued to be a very fine judge.

Alistair died in September of last year and his much loved wife Nora died five days later. It seems appropriate that a long and happy marriage should terminate with the closeness with which it was enjoyed.

There is not space here to do justice to this very fine, loving and witty man. Suffice then to honour him and regret his passing.

M.A.A.

ALEXANDER DUNCAN GRANT (SIR ALISTAIR) ADAM

Born: 30th November 1902
Admitted on the motion of Owen Dixon K.C. and Wilfred Fullagar 1st March 1928
Signed Bar Roll: 3rd August 1928
Read with Wilfred (later Sir Wilfred) Fullagar
Took Silk: February 1950
Appointed to Supreme Court Bench: 21st May 1957
Knighted: 1st January 1970
Retired: 30th November 1974
Died: 20th September 1986

Readers: Keith (later Sir Keith) Aickin, John Campton (now Judge Campton) Richard Newton (later Mr. Justice Newton)

Two Views On The Judgements of Lionel Murphy J.

There has been no shortage of published views on the late ***Mr. Justice Lionel Murphy,*** *his legal, political and judicial career, his qualities as a man and his place in the nation's history.*

What follows, however, is a much more limited exercise.

Bar News asked two leading members of the Bar, ***Ross Sundberg*** *Q.C. and* ***Cliff Pannam*** *Q.C. for a critical assessment of the late judge's judgments from the viewpoint of a practising lawyer.*

ROSS SUNDBERG Q.C.:

At a ceremonial sitting of the High Court on 5th November 1986 Gibbs C.J. said that Murphy J.'s 'judicial method ... did not command universal assent'. The Chief Justice was of course speaking on behalf of the Court, and that, together with the occasion on which the remark was made, perhaps explain what would be accepted by most as something of an understatement.

This appraisal is of Murphy J.'s judgments. It is not an assessment of his quality as a judge. That would be an easier task, because there is a fair measure of agreement about the qualities a person should possess before it is appropriate to make him a judge. Chief Justice Gibbs has put the matter shortly - 'legal excellence and experience coupled with good character and suitable temperament': **The Appointment of Judges** (1987) 61 A.L.J. 7, at p.11. The three constants are thus character, legal excellence and experience, and temperament. The fact that there is general agreement about the need for these qualities in the holder of judicial office provides a stable base for a pre-appointment assessment. That does not mean that an appointor will necessarily get it right. It may not be his fault. Years of outward humility may be replaced by judicial arrogance and insensitivity. The practical good sense of a barrister may be converted by judicial opportunism into pettifogging pedantry. Character thought good may be shown bad as the truth outs. But when the judicial time is done it will not be difficult to obtain a wide measure of agreement as to whether a judge was temperamentally suited to the job and whether he displayed the required degree of legal excellence. But, as I have said, that is not what this assessment is about. And because the substantial uniformity of view that exists about desirable judicial qualities does not, I think, exist in relation to the qualities that mark out a good judgment, the task of assessing the worth of a decade of judgments is much harder than that of assessing a judge's overall merit after a comparable period. Obviously any assessment of legal excellence, or intellectual and judgmental ability, will take account of published judgments, and accordingly there will be an overlap between the two inquiries. What then are to be the criteria of excellence of a judgment? If there were general agreement as to those, there might not be all that much disagreement about the result of applying the tests to a particular judge's products. But there will not be general agreement about the starting point. Some will say that a judgment, at least of an appellate court, should be a painstakingly thorough examination of the subject in question, and might cite Isaacs J. as the paradigm. Others will say a judgment should be as short as possible, consistently with exposing the reasons for the decision. Rich J. might be accounted the exemplar. Yet others might say that any appellate judge should emulate the style of Sir Owen Dixon and leave it at that. But not all would agree even with the last view, let alone the other two. Thus at an event to mark Sir Owen Dixon's retirement as Chief Justice, an experienced judge told me that in his own ten years of judicial work he had never been assisted by anything Sir Owen had written. But despite the scope for disagreement that exists as to the appropriate criteria for assessment, one must make an attempt. The following is suggested as a check list for a judgment of a member of an appellate court:

(1) The judgment should be expressed in clear terms.

(2) It should do justice to the issues with which the case is concerned.

(3) It should address and deal with the arguments offered by the parties; in particular it should explain why the unsuccessful party's submissions were rejected.

(4) It should disclose the course of reasoning leading to the conclusion reached.
(5) It should, if the subject matter of the appeal allows, offer guidance for the future use of legal advisers and other courts.
(6) It should explore any leading cases on the particular topic in question and accept, discard or explain them.

One may now enter upon an assessment of Murphy J.'s judgments on the basis of these criteria.

As to the first, Murphy J. scores well. His prose is direct, firm and clear. This is particularly so in his forceful judgments dealing with the conduct of criminal trials. His judgments are without pretension. Many could be understood by the man on the Clapham omnibus who had nothing better to read than a law report. His writing does not have Lord Denning's catching, colourful fluency. Nor the classical structure and tuning of a Dixon or a Fullagar. If these latter characteristics can be achieved without loss of clarity, or any other essential, well and good. But it would be wrong to require a judge to measure up in these respects; a judgment is neither a thriller nor a novel. Colour, entertainment and fluency are like icing on a cake. Splendid if you like icing.

The second and third criteria may be taken together. As to these, Murphy J. does not fare so well. His performance was uneven. Certainly when a case or topic took his fancy, he was capable of writing a judgment which compared well with those of some of his brethren, though he did not always do so. Amongst the cases that excited his interest, and elicited judgments of some quality, canvassing all the issues and arguments, are those concerned with the criminal law, industrial law, constitutional questions and personal injuries (workers compensation, and industrial and other accidents). For the most part it is his contributions on these topics that have been selected for inclusion in the two recently published collections of his judgments: **The Judgments of Lionel Murphy,** and **Lionel Murphy - The Rule of Law.** In many cases which perhaps did not set Murphy J.'s interest aflame, his views were often expressed in a perfunctory manner, and he did not descend to the detailed examination of issues and arguments that would enable a high score on these items. It is a tribute to current and other recent justices that they have given their best to all cases, even though the subject, such as the interpretation of union rules in a demarcation dispute, was hardly stimulating. Even to cases in areas of special interest to him (such as the powers of the Family Court) Murphy J. sometimes wrote judgments which were little more than the statement of his conclusions.

The fourth criterion concerns the reasons for decision. The most important thing about a case is the result. But a litigant, especially one who has lost, is entitled to know why. But in his judgments Murphy J. did not always reason his way to a conclusion. He was often assertive of a result. It is true that not all the High Court's work permits of reasoning that convinces, or indeed of reasoning at all. Whether a particular law is with respect to 'marriage' or really about property or stamp duty is a question of impression. 'Reasoning' is apt to be no more than a laboured exercise in camouflage. But even in such cases judges should be required to say why they reach a particular conclusion. They should not be permitted to say: here is the result, take it or leave it. His score is not high on this criterion.

The fifth criterion asserts as desirable that a judgment of a member of an appellate court should offer guidance for the future. The compilers of a university case book, who must select from multiple judgments those which best state legal principle and synthesise and explain the cases, will not often select a judgment of Murphy J., at least if that is the basis on which the selection is made. Sometimes his judgment will be passed over because, on matters such as s.92 of the Constitution, he was not part of the mainstream. But usually his judgment will not feature because it will not attempt to elicit propositions to guide judges, teachers and students of the future to understand the area of law with which the case is concerned. A judge of an ultimate appellate court should make this effort. Obviously the case at hand is the prime consideration. And there is no need for a judgment to constitute an essay or monograph on the overall topic under consideration. There have occasionally been justices whose attention to the Court's general work load has suffered from an undue concern to write a definitive account of an area of interest to them. That is not advocated. If it could ever have been done without detriment to the attention given to other cases, current work loads now make it impossible. But a court which, by the special leave device, selects from a range of cases those involving questions of law of importance, especially of Australia-wide importance, and thus to a considerable extent

determines its own work load, by that very device has assumed the obligation, if that obligation did not in any event exist, to lay down guidelines for the future and to deal with conflicting authorities. It should do more than merely solve the particular case. And each member of the Court is under that obligation. So in my view Murphy J. does not score well here.

Finally, the treatment of precedent. The judicial part of our legal system is based on precedent. The value of an adherence to precedent is that it provides those at the coal face with a guide to what is likely to be a court's decision on a particular set of facts. Only a small number of disputes ever reaches a court. The vast majority is dealt with upon the advice of a lawyer as to the legal rights or wrongs of the parties. In borderline cases it may be necessary to attempt to predict what a court would decide on the point. Predictability is vital in the ordinary run of cases, and its existence is very much in the public interest. Most litigants cannot afford the luxury of a trip to Canberra, or even William Street, to discuss the true state of the law. An appellate judge should therefore survey the field of apparently relevant case law, and apply, distinguish, or if necessary decline to follow, earlier decisions. That is not only how the law grows, but is the basis upon which one type of fact situation is seen to be different from another. And it is the way the parties' arguments will have run. The appellant's lawyer will have said that he should win because of certain earlier cases or what has been said in them. The respondent's counsel may have his own set of cases, and will attempt to distinguish his opponent's. It is true that courts do not exist for the benefit of counsel. But although the client may not understand the form of an argument based on earlier authority, or indeed why his lawyers insist on talking about the past, they are putting the client's argument, and it should be dealt with. That was not Murphy J.'s way. In some areas he simply ignored precedent. If he had a view about the way in what some provision of the Constitution or of a statute should operate, that was that. His judgment would not accord, or even attempt to deal, with earlier authority, except perhaps to say that he did not accept it. There is a considerable overlap between this and the preceding criterion, and Murphy J.'s score is much the same in relation to each.

Assessed in accordance with the criteria stated above Murphy J. does not score well overall. But apart from stressing the obvious fact that the assessments I have made in a contribution of only a few pages are necessarily generalisations, two other correctives should be noted. The first is that just as the law does not stand still, so the criteria here employed (assuming they are currently valid) may be superseded. On a different set of criteria Murphy J.'s judgments may in the future fare better or worse. But if the criteria are more or less sound, then it is my view that so long as that quality persists, future generations of judges, lawyers and students will not trouble to read many of his judgments in their search for guidance in the resolutions of disputes. Those who admired Murphy J., or are sympathetic to the views he espoused in some of his judgments, may well read them for pleasure. But that is a different thing. The second corrective is that the inquiry here embarked upon is of a somewhat artificial nature. Judges are not appointed only to write judgments. They are appointed to be judges. And that involves more than writing judgments. And that is why the checklist of appointment to the bench is not the same as that in accordance with which one assesses the calibre of a written judgment.

Murphy J. brought to the court a wide knowledge of the Constitution, of government, litigation, law reform and Parliamentary procedures. He also understood the condition of his fellow man. He was compassionate, and had a good judicial temperament. Although he felt strongly about the merits of particular themes and cases, he was not dismissive of those whose task it was to propound a contrary view. He knew the role of counsel, and on that account had more than once been browbeaten before the Court of which he later became a member. He would seek to persuade counsel away from a view he did not share, but was not intolerant. Equally, his contributions in the course of argument were helpful in eludicating the ramifications or consequences of an argument. Often Murphy J.'s hypothetical cases, designed to test a proposition or expose its weakness when applied to a slightly different case, were enlightning and influenced by ultimate presentation and understanding of an argument. The pity is that this considerable confluence of qualities - a wide-ranging knowledge of men and affairs, a mind of great capacity, a not inconsiderable influence on the course of argument in certain cases, and a good judicial temperament - will really be apparent only to those who either knew Murphy J. or saw him at work in the Court. The reader of the Commonwealth Law Reports in the future will not know from the printed word that he is reading the work of a judge endowed with a wide range of talents who for one reason or another did not display them in his writings.

CLIFF PANNAM Q.C.

In attempting to assess the value of Lionel Murphy's contribution to our jurisprudence two matters must be kept in mind. First, he was a Justice of the High Court of Australia. Second, he was not and never pretended to be a laywer's lawyer.

There are significant restraints upon State Supreme Court and Federal Court judges. They are either bound or greatly influenced by the decisions of appellate courts. They are expected to follow conventional judicial methodologies. In an ultimate appellate court there is room for much greater freedom. Each judge has the opportunity to move beyond the task of ascertaining the present state of the law on a particular subject. The judge may, if so minded, reject accepted or settled doctrine and attempt to formulate a view of the shape of the applicable law as it ought to be.

Of course some judges, even in ultimate appellate courts, are conservative. Murphy was certainly not.

> 'People will respect judge-made law only so long as they think it is rational and just': **S.G.I.C. v Trigwell** (1978) 142 CLR 617 at p.653.

And he was prepared, even eager, to change it if he thought that it was not.

But even Murphy's iconoclasm had its limits. It did not extend to commercial and property law. In these areas the need for certainty and predictability he saw as a countervailing value.

The barrier which confronts most practitioners when reading a Murphy judgment is his rejection of conventional judicial methodology. In general his judgments are short. The facts are truncated. There is little discussion of the decided cases. The citation of 'authority' to carry important propositions sometimes borders upon the bizarre. A reference to a paragraph in Corpus Juris Secundum; a few lines in the report of an international agency or a law reform commission; the decision of a single judge in a Canadian province; a passage in an annotation in the American Law Reports; an article in an obscure legal periodical; and so on. Truth to tell he reads better when all of this is left out as happens in the edited Judgments collected and published last year by Professor Blackshield et al.

All that this means is that he was not a conventional judge and was not a very good, nor even a much interested, technical lawyer. A proper appreciation of his contribution to our law is not assisted by carping criticisms of this aspect of his work. It all smacks of the attitude of those who derive greater pleasure from chasing a Denning citation to its frequently inaccurate source than from assessing the importance of the proposition to which it is attached.

There is not sufficient space here to attempt any detailed reference to particular Murphy judgments. I have my favourites: **Trigwell** (op. cit.); **Darby** (148 CLR 668 at pp. 642-653); **McInnis** (143 CLR 575 at pp. 583-593); **Gallagher** (152 CLR 238 at pp.245-253); **Dugan** (142 CLR 583 at pp. 606-616) and his various judgments on section 92 (e.g. **Buck v Bavone** 135 CLR 110 at pp. and **Uebergang v Australian Wheat Board** 145 CLR 266 at pp. 307-311); the cutting of the umbilical cord with England (e.g. **China Ocean Shipping Co.** 145 CLR 172; and **Viro** 141 CLR 88); and tax avoidance (e.g. **Everett** 143 CLR 440; and **Westraders** 144 CLR 55). He was a great communicator. They are all very readable. And pause. Can you bring to mind a 'favourite' judgment of any other judge of the High Court?

I recently browsed through all of Murphy's published judgments. It was an interesting exercise. There are only about 400 of them of which 130 odd were dissenting judgments. He participated in some 630 decisions over his 10 years as a member of the High Court (for the figures I am grateful to Professor Blackshield).

What I propose to do is to list some impressions which I formed as a result of my browsing.

1. Murphy was intrigued with, and very much influenced by, the approach of the United States Supreme Court to the interpretation of the great constitutional guarantees contained in the U.S. Constitution. He constantly propounded the view that the content of these guarantees were part and parcel of a federal common law and could, in appropriate circumstances, control the exercise of

legislative, administrative and judicial power in Australia. He was able to find a right to counsel; and prohibition on cruel and unusual punishments; a right to vote; a right to freedom of communication; a right to free speech; a right to access to the courts; a right not to be placed in triple jeopardy; and so on. He was also concerned to restore content to the specific guarantees in sections 80 and 116 of our Constitution. On the other hand he took the view that the High Court had created something of a monster out of section 92. It had been used to prevent proper governmental controls. He wanted to severly confine its operation. In all of this Murphy danced to the lonely beat of his own drum. He formulated and explored principles which were not even referred to, let alone rejected, by his brother judges. What emerges is Murphy's view that ultimately it is the High Court which stands between the people and excesses and impropriety in the exercise of governmental power. And he had formulated a framework of principle to define the frontier. I somehow think that his statement of the principle for dealing with the refusal of the State of Victoria to give an undertaking not to hang **Tait** would have been somewhat grander than the preservation of property point deployed by Sir Owen Dixon.

2. Murphy detested the tax avoidance industry and the artificial schemes which had received the blessing of the High Court. He was scathing of his brother judges. 'Literal interpretations of the Act have allowed tax avoidance devices to succeed and have encouraged their growth': **F.C. of T. v S.A. Battery Makers Pty. Ltd.** 140 CLR 645 at 673. His views have been vindicated.

3. It is in the area of the criminal law that I defy any lawyer to cavil with the proposition that Murphy's judgments have enriched our jurisprudence. I find it difficult to disagree with any of them. He was a staunch opponent of improper police and prosecution methods. His criticisms of the use of conspiracy charges when it is open to charge the commission of the substantive crime appear unanswerable. Murphy's judgments on special leave application in criminal cases are a fertile source of information about matters requiring reform. He was of the view that:

   'The history of human freedom is largely the relationship between the individual and the State (that is the Government or the Crown) in the administration of criminal justice': **The Queen v Darby** 148 CLR 668 at p. 686.

4. Murphy was the voice of our judicial independence from the United Kingdom. Of course he had some quite abberational views on the subject. But the fact is that what Murphy was telling us was correct. We had outlived the need for the British legal connection. We had to stand upon our own feet. It was for the High Court to finally determine the content of Australian law. I must say that I read **Viro** (141 CLR 88) and **Souther Centre of Theosophy** (145 CLR 246) with a degree of legitimate nationalistic pride that the results were right even though it is difficult to give intellectual assent to some of the reasoning.

5. Although Murphy made significant contributions in the law of torts he made little if any contribution to commercial or property law or equity. Indeed he does not appear to have had any great interest in these areas. Perhaps the reason was that these areas of the law involve largely consensual dealings with property or attach consequences to property. Murphy was concerned with people and how the wrongs - civil and public - done to them were to be righted. His fascination was with the judicial control of power and the creation of a legal environment which would produce fair results for inter-personal conflicts.

6. Murphy's deep concern for the aboriginal people of Australia is reflected in three of his most powerfully written judgments - **Neal** (149 CLR 305); **Onus** (149 CLR 127); and **Coe** (24 ALR 118). I think that these judgments had a very special place in his heart and in his mind and in our law. He detested racism. He believed that the aboriginal people had been gravely wronged. These judgments not only reveal a wealth of knowledge of their history and problems but also his view as to how the legal system can operate to protect their rights.

7. All of Murphy's judgments can be read and understood by an ordinary member of the community. He demystified the law. He wrote about it free of those turgid stylistic techniques beloved of lawyers. The law to him was a

system of principles which produced results that had to be capable of justification to ordinary people and in their own language.

Murphy was no Dixon; nor was he a Jordan or a Cussen. But he was a great judge nevertheless. I venture to think that many of his judgments will be read and will have influence at a time when the others are but faintly remembered names in the judicial hagiography. This is because he grappled with the fundamental points of principle which define the role of our Courts in defining the proper relationship between governments and the people they govern; and in the just resolution of inter-personal disputes. I do not know that we could ever live with an entire bench of Murphys any more than England could indulge itself with a House of Lords full of Dennings. What is clear however is that our jurisprudence is the richer for having had the benefit of their respective contributions. Judges who were not over-awed by precedent or traditional techniques; who have a profound respect for individual freedom and dignity; and, who are not averse to fashioning principle in order to achieve just results.

As Murphy became older and more senior in the hierarchy of the High Court his style altered. I will not say that it became at all conventional It certainly did not. But there was a marked difference between the junior member of the Barwick court and the second senior puisne of the Gibbs court. His influence on the other members of the Court appears to have grown. The dissents were not as exasperated. He was more frequently in the majority. His opinions commanded respect. It is a tragedy that the events of 1985-6 robbed us of the opportunity to see just how much influence he may have had on his brother judges. Perhaps he may have even been Chief Justice. Now there is a thought.

And what of his last two cases with a known death not far distant? His choice of cases, for that it was, is interesting. In **King** (60 A.L.J.R. 685) he stressed "the right of every accused person to know with particularity, the case which the prosecution wishes to prove at trial". He repeated yet again his view that it was the duty of the prosecution "to present the case against the accused fairly and honestly, not to use any tactical manoeuvre legally available in order to receive a conviction". **Miller v T.C.N.9** (60 A.L.J.R. 698) was an occasion for the restatement and summary of his theory of implied constitutional guarantees and his persistence in the view that the Courts interpretation of section 92 was incorrect. It is appropriate to end with his words:

"The Australian Constitution must be interpreted against a background of responsible government and democratic principles generally.
Implications should be made which would promote such principles rather than those of arbitrary government and tyranny . . . (These include) in my view a prohibition on slavery or serfdom . . . a prohibition on the infliction of cruel or unusual punishments . . . and a prohibition upon persons being tried and declared guilty of criminal offences by non-judicial bodies . . .

The Constitution also contains implied guaranties of freedom of speech and other communications and freedom of movement not only between the States and the States and the States and the Territories but in and between every part of the Commonwealth. Such freedoms are fundamental to a democratic society. They are necessary for the proper operation of the system or representative government at the federal level. They are also necessary for the proper operation of the Constitutions of the States which derive their authority from Chapter V of the Constitution.
They are a necessary corollary of the concept of the Commonwealth of Australia. The implication is not merely for the protection of individual freedom; it also serves a fundamental societal or public interest."

And that is how he ended his judicial career. Still at it. A re-statement of his credo. The ultimate and effective control over the exercise of social power in all of its forms is the existence of an independent and resourceful judiciary.

Thirty Years On

Sir Kevin Anderson, Sir Reginald Smithers, Charles Francis Q.C., Brian Thomson Q.C. *and* ***Hase Ball*** *talk to* ***Judy Loren*** *about post war years at the Bar - and some present issues.*

THE EARLY YEARS

It's easy to imagine today's barristers discussing their cases in 30 years time, so it should come as no surprise that barristers of the '40's and '50's have vivid memories of that era.

There was a romance about the business after World War II according to Sir Reginald Smithers. People didn't think about the future. He was young, actively involved in politics, and became President of the Young Nationals. From 1942 to 1945 he had been, like most of the young men of the day, caught up in the war effort. He'd almost ruined his career with politics before the war. 'Politics takes your eye off the ball and consumes a lot of time'. On his return to the Bar his Clerk, Arthur Nicholls, sat him down, and had a frank chat with him - Sir Reginald was 42 years old with three children and no money. He decided to give politics away. 'I was lonely without politics at first but it turned out to be the luckiest thing I ever did. Better being a judge than a minister, although I fancied myself a fine Prime Minister rather than a judge!' He went on to develop a general practice specialising in jury actions and including matrimonial causes. After the war, there were a good many separations and divorces. There was an element of consent in those cases but because of the then state of the law each case had to undergo a metamorphisis. You also had to find corroborating evidence. The parties were desperate. They would have gone away and lived in sin if they couldn't get a divorce.

Charles Francis Q.C. spent his war years as a rear gunner in Australia. He was a 2nd year law student aged 18, when he joined the army. The year he turned 20 was, for him, marked by two special events. He was appointed acting commanding officer of an explosives unit and he appeared in court as an advocate for the first time. A fellow serviceman was caught stealing. His superiors decided a law student would do, so he was sent down to the Magistrates Court. He didn't disappoint them and secured a verdict of not guilty. After his discharge he completed his law degree. Exemptions from coursework were available, depending on the length of service. He got one from Roman Law - the paper was set in Latin. 'Unless you were good, you wouldn' comprehend the paper let along the answers'. He decided to come to the Bar. 'People said it was hopelessly overcrowded. They predicted few would be accommodated'. Yet numbers at the Bar fell to 40 during the height of the war. Only 20 barristers had joined in 1939-1945. He came to the Bar in 1949 aged 24. The total membership of the Bar was less than some of the larger clerk's lists today. Ex-servicemen who came to the Bar could receive a living allowance from the Bar of 3 Pds. 5 s., roughly the equivalent of $150 today. 'The allowance was given for the first few months and was later reduced by the amount you'd earned. Everyone took the allowance, as fees were notoriously late.' Court work was plentiful and juniors were in court most days of the week. They were kept busy by the volume of regulations issued during the war and certain restrictions on eviction under the Landlord & Tenant Act 1948. But outgoings were a problem. 'You paid 50 guineas, approximately $2,500 at today's values, to read. The money went to your master.' Specialisation was rare. Most tried to cultivate a wide range of practice. 'There was a loose array of common law and equity lawyers. If you did crime, personal injuries and divorce, you were a common lawyer. Anything involving contract, commercial or constitutional law tended to be regarded as equity work'.

Sir Kevin Anderson was a jack of all trades. He began his legal career as a clerk of courts, and studied law part-time until he graduated in 1937. He then spent several years with the Crown Solicitor, and his war years with the navy. Sir Kevin joined the Bar in 1946. 'It was euphoric then. The work was there, much more than in the '20's and '30's. I once got nine briefs in one day'. His beginnings as a clerk of courts shaped his opinions on the structure of the legal profession. 'Most of the law lecturers in the '30's came from the practicing profession. It made sense because they were lecturing to students who expected to work in the real world'. Articles were longer. The centralisation in a few suburbs of the Magistrates' Courts in the Melbourne metropolitan area upsets him. He feels

the Government has removed the administration of justice from the hands of closely-knit communities. 'The administrators and reformers don't know what makes a law court tick. They often reform for reform's own sake, because it looks better'. He feels the courts of summary jurisdiction were given too much power. Something smaller was needed to deal with the lesser cases, so the Government created the tribunals. 'It was a mistake to take away the powers of Justices of the Peace.

Now they're as scarce as hen's teeth'. One of the Government's newly implemented ideas - the appointment of barristers to the Magistracy was previously considered in the '30's. 'It was said that anyone who failed at the Bar would take a job as a Magistrate. People who believe that Magistrates should be promoted to the benches of the higher courts are pipe dreamers. It would mean overlooking barristers with long and distinguished careers'.

Hase Ball came to the Bar in 1948. He'd been Sir Edmund Herring's associate, so he knew the 'ins and outs'. Many at his stage didn't, but those without that experience were pushed ahead because there was no one at the Bar of about five years standing. 'There were so few barristers, that I appeared against my master in the Practice Court while I was still a reader'. Most of the older judges were understanding. Some were a bit stricter. 'If you asked an improper question of a witness before Norman O'Bryan, he'd lean over and tell the witness - 'Don't answer that!"

In 1946 Brian Thomson Q.C. was told by his professor - the late Sir George Paton - that you couldn't make any money in law. Thomson had just spent 4 1/2 years in the army, and it wasn't the news he wanted to hear. So he ignored it and came to the Bar anyway in 1948. 'My only ambition then was to make a quid, and I had the reputation for elevating cases from the Petty Sessions to the Supreme Court, but I never got bitten. There were no rules in those days. We'd been appearing for a month before someone wandered over and told us to sign the book. It was a small community of barristers in those days, so people were more approachable. But the Bar was just as cut-throat and competitive as now.' At first he naively misunderstood the function barristers' clerks played. 'All my friends went to Nicholls and Foley - you got a better run in floating briefs there. No one wanted to work for the Public Solicitor who ran crime, because his fees were so moderate - seven guineas for a trial. But Maurice Ashkanasy Q.C. said he'd put aside some spare time each year to do work for him. He had no possibility of a judicial appointment because he was Jewish.'

Brian Thomson had faced that sort of prejudice himself when he began his legal career. He found articles at Rylah & Rylah, a Presbyterian firm. Somehow the firm's new Catholic clerk had slipped through the net. The members of the firm were shocked. The secretary took it upon herself to voice their collective concern to him. 'But Arthur Rylah stood firm. All that counted with him was that I was an ex-serviceman.'

ACCOMMODATION

Chambers have changed somewhat from the small dark rooms of Selbourne. Charles Francis's first room had no adequate ventilation at all, and would

have been illegal by today's standards. Nevertheless he was glad to have it because accommodation was so difficult to come by.

In 1940 the Landlord and Tenant Act had provisions designed to protect tenants in occupation. Ejectment was difficult to obtain and provided a great source of work for the Bar.

In 1952, with the growing number of roomless barristers known as the 'corridor bar', Counsel's Chambers Ltd. (CCL) took a concurrent lease of the 5th floor of the Eagle Star building. It then served notices to quit on the 20 or so businesses in occupation. 'You had to prove that the person seeking ejectment had a greater hardship than the companies already there', Sir Reginald said. Ashkanasy, then Chairman of the Bar Council, arranged for the cases to be heard together. He sorted the Bar into witnesses and counsel. Groups of barristers came and left in relays. 'I gave evidence that barristers were having conferences on the verandah. It was only in the box that I realised in a panic - I could only remember the one name!' Sir Reginald was overcome with relief when they didn't ask him for any names. All the tenants had capitulated by the end of the day, thanks to the Bar's united front. But serious divisions were already looming on the horizon.

In 1959, the Bar Council decided to build Owen Dixon Chambers. 'It was highly contentious at first', according to Charles Francis. 'The Bar was only persuaded to agree to the project because Selbourne Chambers no longer offered security of tenure'. Many of its shares had passed from barristers to their widows and children. Large holdings were in the hands of judges. If someone had offered sufficient money for the shares, the Bar could've lost the building. There were some strong objections to the Council's decision. The main ones were that a large number of the Bar were adequately accommodated in Selbourne Chambers at low rents. But barristers were assured that once they came to Owen Dixon, rent would be only minimally increased, the building would be run at cost and rents would fall below market rents as their building was controlled by the Bar. People also objected to the initial steep increase in rents. 'Mine jumped from 9 Pds p.m. in Selbourne to 36 Pds p.m. in the new building - 4 times as much'.

TAKING SILK

A career at the Bar is always risky, so Sir Reginald proceeded with caution when it came to taking silk. 'I didn't want to, but Oliver Gillard, who was junior to me did. So did Snowy Burbank who'd signed the roll about 2 minutes after me. So I decided I had to risk it.' His application in 1952 was granted. Not everyone was so readily accepted. 'Ted Laurie wanted to take silk. He'd been a good soldier, but he was also a communist. The Chief Justice, Sir Edmund Herring, wasn't sure whether he could be a Q.C.' Silk was traditionally given on the Chief Justice's recommendation. 'But if he'd refused, Ted might've gone to the politicians and the Labor Attorney-General might've given it to him. That would've set up a precedent for the Government to usurp the Chief Justice's role. Nevertheless, Sir Edmund decided not to grant him silk. Luckily Ted was patient. Later Sir Henry Winneke became Chief Justice and Ted was recommended without trouble'.

Silks have their ups and downs. Sir Kevin Anderson took silk in 1962 and was appointed a year later as Chairman of the Scientology Board of Inquiry. It sat 4 days a week. He spent each fifth day building his boat, because he couldn't work as a barrister. The inquiry was intended to last only a few months, but continued for 18 months or more. 'The inquiry almost glamorised me. I emerged still at the beginning of my career as a silk, with in effect, no practice immediately available'.

The profession thought I was too exalted for the run-of-the-mill case. Let that be a warning. Luckily, it wasn't long before he established himself, and in 1969 he was appointed to the Supreme Court Bench.

Sir Reginald was elevated to the Supreme Court Bench of Papua New Guinea in 1962, at the age of 59. 'I was a political appointment - Bob Menzies remembered me.' Sir Reginald was happy to accept. 'A barrister's life is a hard one, and there's always the prospect that your briefs will fall away. Barristers in good practice after 65 are very rare. I was tired and judicial appointments had pensions. The Government thinks of judges as public servants. Instead it should increase pensions and wages for judges to ensure that the best barristers sit on the bench. Of course, in times like these, it's hard to get anyone to agree that someone should have emoluments set at a luxurious level. But the sacrifice is well worth making because the administration of justice is so important. The difference between a judge's salary and worker's salary was much greater then than today.'

THE FAMILY COURT

Sir Reginald also had strong opinions on the status of the Family Court. 'The Family Court emerged partly because of the Supreme Court's attitude to divorce cases. It was beneath the judges' dignity to do undefended divorces. They couldn't comprehend the importance of competent people dealing with these issues. No one ever threw bombs at the Supreme Court, but then the Supreme Court didn't have to deal with the present Act'. Sir Reginald believes it was a mistake to eliminate fault. 'People no longer have an outlet for their grievances'. The Government's idea to integrate the Family Court into the Federal Court structure leaves him cold. 'Their first priority should be to improve the standard of the Family Court itself. That means setting attractive conditions of appointment, better salaries, and bringing about the return of wigs and gowns to its judges. Judicial work is different from any other work in the community. When the judge says 'I'm taking your children away from you', the fundamental and important quality of the act must be apparent to all.

Sir Kevin Anderson heard divorce cases while on the Supreme Court Bench. 'I took divorce work very seriously. It wasn't that we were disparaging of the work, rather that it was a troublesome jurisdiction. It was impossible to satisfy the parties. Often they didn't have enough money for maintenance, but you had to deal with it. The problems were insoluble, so the cases tended to clog up the lists. You had to get to the guts of the case if you wanted to finish your list in time. So you tried to get counsel to limit themselves to the relevant issues'. Sir Kevin approves of Sir Reginald's ideas on how the Family Court could be improved. Like Sir Reginald, Sir Kevin has no faith in consigning the Family Court jurisdiction to the Federal Court. 'It would only be a cosmetic change, in name only. However if Family Court judges were to undergo the spectrum of Federal Court cases, it could only improve their skills. The Family Court is little more than a rubber stamp jurisdiction for divorce and a glorified Magistrates' Court on decisions of maintenance and property. As for the Federal Court, we shouldn't have one. A larger Supreme Court would be better.'

Victorian Bar Withdrawal from Law Council

Michael Watt *argues against Bar withdrawal from the Bar Council*

By resolution passed by the Bar Council on 24th July 1986, the Victorian Bar withdrew from the Law Council of Australia, the withdrawal to take effect from 30th June 1987.

By circular dated 14th October 1986, members of the Victorian Bar were informed of this resolution for the first time.

In the period of nearly three months between passing the resolution and informing members, the Bar's Annual General Meeting was held. The agenda circulated before that meeting was silent on the withdrawal issue. In the same period of silence, Bar Council elections were also held. The newly elected Bar Council reaffirmed the withdrawal resolution on 9th October 1986.

Thus, without prior consultation or any notification to its membership, the Bar Council purported to bring to an end the Victorian Bar's foundation membership of the LCA, a membership which had continued uninterrupted since the formation of the LCA in 1933.

This article examines the reasons offered in the 16 page circular of 14th October 1986 for the Bar's withdrawal, certain underlying assumptions central to those reasons, and questions whether, in all the circumstances, the Bar Council has acted prudently or in the best interests of its members in resolving to withdraw from the LCA from June 1987.

The reasons for withdrawal can be summarised as follows:

> Changes to the constitution of the LCA which may be introduced in 1989 '... will result in the LCA being incapable of effectively representing the interests and views of the Bars'.
>
> These changes have already been introduced on a de facto basis.
>
> The three other independent Bars (Queensland, New South Wales and Australian Capital Territory) are similarly disposed to withdraw.
>
> The Bars will be better served by speaking on issues affecting them through the Australian Bar Association.

Assumptions which must be made for the above reasons to be a valid basis for withdrawal by the Bar **from June 1987** include:

> That the 'de facto' changes to the LCA threaten the independence and influence of the Bars in the period up to 1989.
>
> That the ABA is capable of ensuring that the Bars' interests and views are capable of being presented from June 1987 with an impact comparable to that which the LCA delivers.
>
> That following withdrawal by the independent Bars, the LCA will not be able to represent that it speaks for barristers, and will not be perceived as speaking on behalf of barristers.

These reasons and assumptions are grouped together under three headings in the following discussion.

The Constitutional Debate and the De Facto Changes

A full history of events over the last six years or so which have produced the present situation is beyond the scope of this article. The major influences in the current 'power struggle' are those of the large solicitors' bodies, principally the Law Institute of Victoria and the Law Society of New South Wales, which are seeking to broaden the base of input into LCA policy making by giving individual members a voice on the Law Council. The independent Bars, on the other hand, are striving to preserve the present constitutional balance of power whereby they have four out of twelve votes on the Law Council.

In an effort to ward off imminent disintegration of the Law Council over this issue, the Law Council adopted a Protocol in June 1986. This one page document is annexed to the Bar Circular of 14th October 1986. The Protocol has three main thrusts: firstly, to impose a moratorium on constitutional change to the LCA until its 1989 annual general meeting. It provides:

'During the period up to the 1989 A.G.M. no constituent body will propose any motion to amend the Constitution or dissolve the Law Council unless it has first obtained confirmation of support for its motion from all constituent bodies.'

Secondly, the Protocol establishes a policy advisory group consisting of '...representatives of each constituent body, the Executive Committee, the Chairmen of Sections (or their nominee) and three representatives of individual members nominated by the Executive Committee' which is to meet immediately prior to meetings of the Law Council, and its recommendations'...whilst not binding on the Executive Committee or the Council shall nevertheless be treated as both being persuasive and of importance'.

"Is it true that old Charlie had plastic surgery just to look like Leo McKern?"

Thirdly, the Protocol establishes a working party called the Constitutional Standing Committee to investigate and prepare reports for the Council on, inter alia, whether individual members and sections ought to be given voting rights on the Law Council and on how the Protocol has operated during the three year period from 1986 to 1989.

The Protocol was an attempt to give both sides to the dispute a substantial cooling off period while, at the same time, establishing, on a trial basis, a broader based policy advisory group whose recommendations, however, have no binding effect upon the Law Council.

The independent Bars' response to this move was to communicate their intention to withdraw and these withdrawals, as previously stated, will take effect in June 1987, unless some compromise is reached in the meantime. The Bars have chosen not to participate in the policy advisory group and have adopted the stance that change to the constitution of the Law Council will inevitably come about in 1989, in terms similar to those of the Protocol, and that therefore the appropriate course is to leave the Law Council now and work through the Australian Bar Association instead. As noted earlier, one of the reaons offered by the Bar Council for leaving the Law Council is that if the constitution of the Law Council is amended in 1989, the Law Council will be '...incapable of effectively representing the interests and views of the Bars.' The next matter for examination is whether the ABA is capable of performing this role, from June 1987.

The ABA as an Alternative Voice for the Independent Bars

The question whether the ABA is up to the task confronting it was addressed in an editorial comment in the Queensland Bar News of December 1986:

> 'The Australian Bar Association has failed, to the present time, to develop in the same way as has the Law Council. It has failed, by and large, to establish itself as the representative and the voice of the various Bar Associations. Obviously a body which can speak only for the Bars will have more relevance for them, provided it has the clout, the profile and the funds to make its voice heard above the voices of other interested groups and, particularly, above the Law Council where matters pertaining specifically to the Bars are concerned. So far the ABA has not achieved this position.'

What must the ABA achieve, by June 1987, if the independent Bars are not to be left without 'the clout, the profile and the funds to make its voice heard above the voice of other interested groups....?

The LCA has the following resources:

Permanent Headquarters in Canberra. The LCA maintains well appointed offices housing its permanent secretariat and administrative staff.

Permanent Staff. The full-time salaried professional officers of the LCA include a secretary general, a public affairs officer, a financial controller and a legal officer. These professional officers are supported by administrative and secretarial staff.

A Monthly Publication: 'Australian Law News'. Through its pages, members are informed on a monthly basis of the Law Council's activities, and of the issues currently confronting the profession. This publication is self-funding, because significant numbers of advertisers support it.

Implicit in the existence of this well established permanent secretariat is the ability to co-ordinate responses to contentious issues as they arise and to achieve maximum publicity for the LCA's views. The Canberra location ensures that consultation with government and the many government bodies to which the LCA makes representations on behalf of the profession can be conducted in situ.

The principal source of funding for the LCA is the capitation fee paid by constituent bodies to the Law Council. To 30th June 1986, the capitation fee was $41. In other words, of your subscription to the Victorian Bar, $41 went to the Law Council of Australia. Membership of the independent Bars during 1986 totalled 2,372 (out of total LCA membership exceeding 22,000) representing a total contribution by the independent Bars to the Law Council's funding of $97,252, or approximately ten percent of total income. In order to maintain its activities at its present level following the withdrawal of the Bars, the capitation fee levied by the Law Council on remaining members would have to be increased by less than $10.

In order to fund a secretariat comparable to that of the LCA, the ABA would require contributions from each individual barrister to increase from $41 per head to $410 per head, a net increase of $369.00 for each of the 2,372 members of the independent Bars. For Victorian barristers the increase on the present subscription to the Bar (of which only $41 goes to the LCA) would be:

Seniority	Existing	Increase	New Rate
Queens Counsel	$520.00	$369.00	$889.00
10 years plus	$345.00	$369.00	$714.00
3 to 10 years	$230.00	$369.00	$599.00
1 to 3 years	$145.00	$369.00	$514.00
Less than 1 year	$ 85.00	$369.00	$454.00

Are barristers, as individuals, prepared or able to pay these increases? So far, they do not appear to have been asked.

It should be noted that the above 'budget' does not put the ABA in a position to circulate a monthly publication comparable to the Australian Law News which, as previously noted, is self-funding from advertising revenue. Whether advertisers would pay comparable amounts to reach the 1,372 members of the independent Bars is highly questionable.

The Identification of Barristers With the LCA After Withdrawal

One further aspect of the Bar Council's resolution of 24th July 1986 (set out in full at pages 1 and 2 of its circular dated 14th October 1986) must be noted. In its 'preamble' the resolution states '...and with the intention that upon the Bar's withdrawal members of the Bar shall not be **individual members** of the Law Council...'. (emphasis added). The justification for this foreshadowed restraint on freedom of professional association is offered at page 15 of the circular, where it is stated:

> 'If barristers were to remain members..., the Law Council will claim that it continues to speak on behalf of all 'Australian Lawyers' including barristers and the Bars.'

It should be noted that of the independent Bars, only the Victorian Bar has communicated to its members an intention to deter them from remaining or becoming individual members of the LCA after withdrawal. It may be that the Victorian Bar is alone in this intention.

The real question, however, is whether any attempt by the Bars to restrain their members from becoming or remaining **individual members** of the LCA will significantly affect how the LCA is perceived by the Government, Government bodies and the public, to whom it will continue to speak after withdrawal by the Bars.

In this context, it must be remembered that the LCA will continue to represent those States (WA, SA and Tas.) which have practitioners who may

properly style themselves as barristers, and who practice exclusively as such, but who have not elected to establish a Bar orgainsation separate from their local Law Institute/Society. The Law Council will therefore be able to continue to elect to its Executive the leaders of the Bar in those States. Recent examples include Ian Temby Q.C.(W.A.), Henry von Doussa Q.C. (S.A.) and the present president of the LCA, Daryl Williams Q.C. (W.A.). Clearly then, nothing that the independent Bars may do to deter their members from becoming or remaining individual members of the LCA will prevent the LCA from being able to represent that it has substantial barrister participation and, indeed, leadership.

But the problem does not end there. Even if the independent Bars withdraw, it must be assumed that the LCA, representing close to 20,000 remaining practitioners (including barristers in Western Australia, South Australia and Tasmania) will, in addition to issuing statements on behalf of its constituent bodies, continue:

to conduct the Australian Legal Convention (Perth 1987; Canberra 1988);
publish and distribute the Australian Law News to all its members; and
promote specialist committees on important subject matters.

In the past, members of the independent Bars have been heavily involved in all these activities: as speakers at the Australian Legal Conventions, as contributors of articles to the Australian Law News and as leading members of specialist committees. The important point here is that none of these activities require individual membership of the LCA as a pre-requisite to participation. It follows that even if the independent Bars found a way of restraining this members from becoming individual members of the LCA following their withdrawal, these high profile activities of the LCA, listed above, will still be able to include significant contributions from members of the independent Bars.

Conclusion

The thrust of this article is that the withdrawal of the independent Bars from June 1987 is prematurely divisive of the legal profession. Given the three year moratorium on constitutional change, there is time available to pursue the goal of ensuring that the Law Council continues to speak effectively on behalf of the independent Bars.

One thing is clear: the AEA is in no position to speak effectively on our behalf at the moment and withdrawal from June 1987 will leave the independent Bars a voiceless minority group, ripe for attack by any who may have been biding their time. In this context, a former president of the Law Council observed:

> 'To some extent the separate Bar is sheltered from public comments, criticism and intervention because it is perceived as an integral part of the Australian legal profession, and it may be that to withdraw from the Law Council could have the effect of reducing the level of that perception'.

In a speech given on the eve of his retirement, Sir Harry Gibbs addressed the current conflict within the Law Council. His remarks included the following:

> 'I am not in a position to say where the merits of this dispute lie, but if my long life in the law has taught me anything, it is that there are very few disputes which cannot be honourably compromised.
>
> I hope that all parties to the dispute within the Law Council will ask themselves whether they are not in some way at fault, and will in any case place the interests of the whole profession above those of a section of it.
>
> More than the interests of the profession are at stake, since the community generally will be the loser if the legal profession is unable to speak with a united voice on matters of public interest concerning the law.'

Barristers In The Pink At Last

Life in the new stately pleasure-dome in Lonsdale Street as seen by ***David Byrne*** *Q.C.*

'Go to the shabby brown building opposite the Supreme Court - past the lifts and straight ahead down a scungy corridor. Turn right and you see a paddock of deathless lilies - up the stairs and you are there...'
Note to articled clerk discovered late 1986.

When Editor Heerey put the finger on me last year to write a piece on life in ODCW my first reaction was to avoid the task by making a disclosure of interest. All to no avail. 'Tell them', he said, 'what it's like to practice in the new building'.

The difficulty of this task is twofold. First a very significant proportion of barristers in active practice are already there. The building is a little less than 95% occupied. It has 375 barrister tenants (38% of the Bar) each of whom has first-hand knowledge of the topic. What point is there in telling them of the elegance and spaciousness of the ground floor foyers, of the splendid views from the upper floors or of the post partem problems of the air-conditioning?

The second difficulty is that life within ODCW varies from floor to floor. It is very difficult to generalise.

Within the building life is largely determined by the physical layout of the floors. This was originally conceived as four suites one for each corner. These were to be independent; access from one quadrant to another was to be had only through the central lift lobby. This concept was abandoned early in the design stage with the deletion of the partitions separating the two north quadrants from those to the south. Each floor therefore comprises two suites only. On some floors the tenants are taking steps to abolish even this division, so that each floor members can see himself as a member of a unified floor, rather than of a suite in a floor.

This idea of promoting a sense of community among a manageable group in physical proximity has been a feature of the success at Seabrook, in the Latham suites and, to a lesser extent, in Aickin. It has been encouraged in ODCW by the oft-criticised provision of one only kitchen on each floor which was seen as a meeting place to encourage the secretaries to mingle - like women at the well. The idea has been given a physical symbol by the dedication of each floor to a patron Chief Justice. It has been fostered by the procedures adopted for the allocation of rooms, giving preference to, or at least encouraging, group applications. it remains to be seen to what extent this concept of floor community will develop. Perhaps it will depend largely upon the attitude and personality of the individual floor member.

One of the most successful aspects of the design has been the requirement that furniture, especially in the public areas should be standardised. The fears of those who saw this as a neo-fascist attempt to bully barristers have not been realised. Tenants have accepted the policy, and its implementation has meant that the design concept of the building has not been destroyed by the disease which disfigured Owen Dixon Chambers - the spectacle of corridors littered with superannuated, ill-assorted dining room and other domestic furniture. There is abundant possibility for groups of floor members to stamp their personalities on the floor by the provision, or the lack of it, of art works on the walls of their public areas. Likewise, the variety of furnishing and decoration within the individual chambers and the possibility of amalgamating chambers help barristers to express their own idiosyncratic taste, or megalomania.

Generally speaking, as you go up the building the extravagance of the interiors becomes more striking. First floor is modest as befits the humble folk that dwell there. Floors two, three and four have been let to County Court judged. These floors are to be redocorated by the Public Works Department in a style which doubtless will be appropriate. The rooms on floors five to ten have been described as medium. From then on the high flyers will feel at home. Fourteen is said to have been placed in the hands of Interior Decorators. And those at the very top, including the Chairman of Directors of Barristers Chambers Ltd. (bravely resisting the attacks of the group of Young Turks), the former Chairman of the Bar Council, and the Supreme Architect of ODCW (disguised as a leprechaun). Rumour is that the members of this

floor have designs to remake the whole of the internal areas on the floor, to be financed with short change from recent take-over battles. A less reliable, but nonetheless persistent, rumour has it that Marks J. and Brother Beach who made this possible, have filed a requisition (in quadruplicate) demanding at least equal treatment in the soon to be renovated Palazzo del Duce.

Yeeeeees . . . I'm really glad I moved to O.D.C.W.

A feature of the floor layouts has been the acceptance by Barristers Chambers Ltd. of the principle that a barrister may rent more than one room and remove the dividing wall. This has permitted Shaw Q.C. on sixteen to have enough space to play royal tennis and yet more for his table and chair. His extensive library spills onto the common area outside, for which his neighbours are grateful. Meagher Q.C.'s room is enormous as befits a man whose practice and interests are truly global. The panelling on the walls is doubtless intended to contain anti-bugging devices.

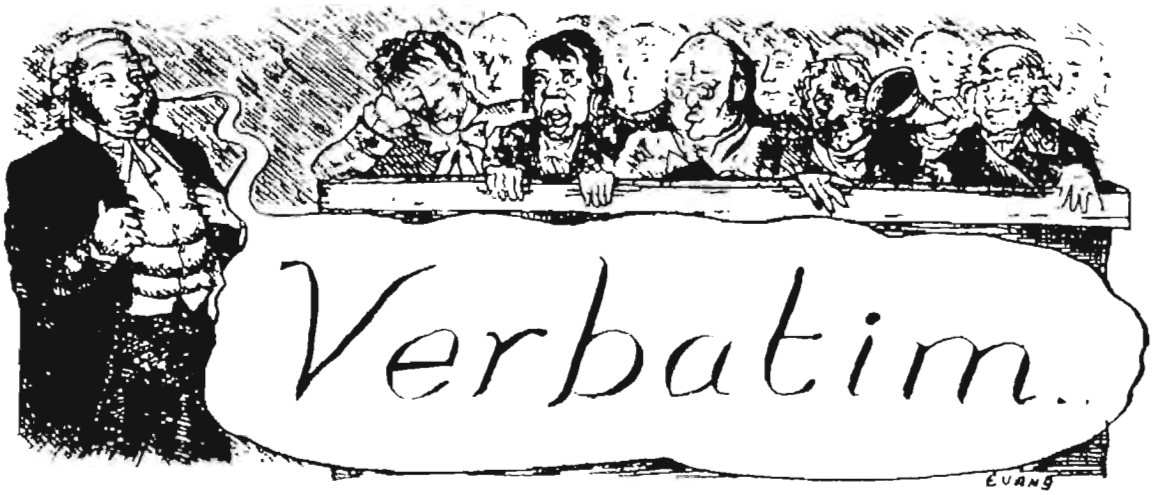
It is perhaps too early yet to describe the furnishing which have been adopted for the chambers. What can be said is that no style has yet been identified notwithstanding the uniformity of the fixed furniture. Most have left behind the teak desk and black vinyl covered chairs which were so fashionable when (old) Owen Dixon Chambers was first established in the 1960's. Some have retained an affection for the antique style; others have commissioned grand modern furniture. There are those who have contented themselves with the mean gesture of modifying their existing furniture to harmonise with the new style and fashionable colour of 1985. It is most unlikely that the National Gallery is keeping free a nook on the first floor for a genuine ODCW piece.

They are a jolly brave band those who made the trek across the Guest Lane bridge. They are jolly or so it seems from the partying that can be heard through to extreme sound proofing of the walls. They are brave, young and old, shouldering the financial burden of higher rents and expenses confident in the future of the Bar. The new building is a monument to the vision and confidence of those who conceived it, setting their faces against the Jeremiahs who foretold doom and destruction some of whom have themselves taken chambers there.

SCENE: Owen Dixon Chambers West.
Two new barrister tenants in deep conversation.
Much pink and pastel.

New Tenant 1: Have you seen the cracks?
New Tenant 2: Everywhere!
N.T.1: And the paintwork.
N.T.2: Terrible!
N.T.1: What about the carpet.
N.T.2: Can't see it for stairs.
N.T.1: The air-conditioning.
N.T.2: What air-conditioning?
N.T.1: The pot plants!
N.T.2: The ones without any leaves?
N.T.1: And as for the chairs in the waiting area
N.T.2: So hard the clients get another whiplash sitting on them!
N.T.1: What about your secretary's work-station?
N.T.2: She's gone home with R.S.I and pneumonia.
N.T.1: Have you seen the kitchen?
N.T.2: So small that I missed it.
N.T.1: You have to walk miles to get a cup of coffee, there's no water.
N.T.2: Did you notice that they put the kitchen next to the ladies' loo.
N.T.1: Typical of the Bar Council - bloody racist.
N.T.2: At least I think it's the ladies' loos - I'm still working out the stick figures on the door ...
N.T.1: What about the lifts!
N.T.2: You mean these second hand ones they got from the old Owen Dixon -
N.T.1: There's always bells going off in them.
N.T.2: So narrow I couldn' fit my desk in them.
N.T.1: I'm still trying to work out the signs for open and shut.
N.T.2: Did you know they all contain exemption clauses?
N.T.1: What?
N.T.2: Well if you get on someone's shoulders you'll see in the top corner that no responsibility will be taken for children riding in the lifts without an adult.
N.T.1: That's earth shattering.
N.T.2: What about your rent.
N.T.1: Astronomical!
N.T.2: Still we've got a great view.
N.T.1: Going to be built out.
N.T.2: Still the cisterns in the toilets are great!
N.T.1: What do you mean!
N.T.2: Haven't you noticed the special feature that they added just for barristers?
N.T.1: No what?
N.T.2: The knob on the toilet, - the flushers.
N.T.1: What about the toilet flushers?
N.T.2: Haven't you noticed that the flushers are divided in two with the words HALF FULL on them?
N.T.1: Go on.....whatever for?
N.T.2: Well if you have been out to a particularly heavy lunch then you should go into the toilet and wave your hand over the flusher.
N.T.1: Yes, what'll happen?
N.T.2: Well if you've had too much of the liquid refreshments then the part marked 'FULL' will go down and you'll know that you are not fit for your 4.30 conference, but if the part marked 'HALF' goes down then you know you'll be in fine form for the clients.
N.T.1: At least we're getting something for our money.
N.T.2: Oh don't get me wrong I'm not knocking the new building, I think the building committee have done a wonderful job.
N.T.1: Oh too right, I wouldn't want to be anywhere else, it's going to be the new venue centre of the Bar, did you know there is 95% occupancy already?
N.T.2: You've got to expect a few teething problems with a new building.
N.T.1: Still have you put your head in the cupboards in your room recently - and closed the door.
N.T.2: No, why?
N.T.1: Well if you put your nose right into the corner you'll smell that they've used the wrong glue - in twenty years these cupboards will be .....

PAUL ELLIOTT



Commissioner of Corporate Affairs v Money Managers Pty. Ltd.
Coram Tobin S.M.
24TH November 1986

Mr. Goldberg: I was going to ask, if I may, just this; that the information should be dismissed today. Those orders should be made A.O. instanter, today and adjourn the question of costs.

Mr. Batt: Your Worship, A.O. instanter I think is but ..

Mr. Goldberg: I only have a Lewison Short Latin Dictionary.

* * *

R. v Lewis
Coram Judge Spence
September 1986

Mr. Chettle: Your Honour, there is yet another error in the transcript of the police tape. Where it reads '... is sitting back at the office', it should read 'I've said exactly the opposite'.

His Honour: Like when you ring home and say you're working back at the office and you mean exactly the opposite.

* * *

Proceedings in India arising out of the **Bhopal** disaster have been somewhat disrupted by the recent discovery that the presiding Judge, Mr. Justice G.S. Patel, was himself one of the 500,000 plaintiffs. His Honour had already made what the International Herald Tribune (26th February 1987) describes as 'several sensitive rulings' which had been objected to by the defendant Union Carbide Corporation.

* * *

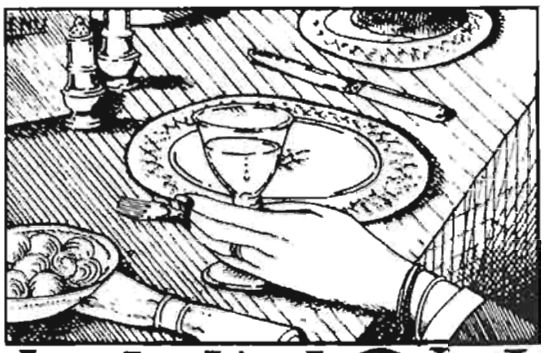
Shortly prior to Christmas members of the Bar received from Steeves Lumley Pty. Ltd. their professional indemnity premium demands, complete with **Giannarelli** loading. As if that wasn't enough, one member of the Bar received instead a demand for cover on a Clarke Bob Cat and a Ditch Witch Trencher. Somewhere presumably a bemused Bob Cat and Trencher operator is wondering why he needs cover against a barrister's professional liability.

* * *

The last **Privy Council** appeal from Victoria was heard in November 1986. Those appearing were Garth Buckner Q.C., Graeme Uren Q.C., Michael Wright (subsequently appointed Silk in the 1986 list) and Paul Lacava.

Lord Bridge was kind enough to invite Counsel to his London flat for drinks to mark the occasion. Michael Wright was the first to arrive, whereupon the following exchange took place -

M. Wright: 'Good evening, my Lord.'
Lord Bridge: 'Come in Wright. Don't stand on ceremony. Call me Lord Bridge.'



L·U·N·C·H

CAMPARI'S

'Whada ya havin today George' said the young Italian waiter whilst slapping Mr. Justice Hampel on the back. 'I think I'll have a salad, Aldo' responded the figure conscious judge.

The other 'regulars' at the table had no trouble going for the pasta. After all, barristers, by nature being a lean and hungry lot, are not as concerned about carbohydrates as those who sit day by day upon the bench. Beside, a little nervous energy expended in court that afternoon would soon burn off the extra calories. The table of junior barristers who had managed to drag themselves away from the 13th floor for a lunch out almost choked on their lasagne. (Nothing to do with the quality of the food, mind you.) Who is this upstart who addresses his Honour in this casual fashion? What about those senior Counsel at his table? Why doesn' one of them at the very least speak sternly to this fellow, if not encourage the Judge to deal with him summarily?

Lunch at Campari's is a most casual affair. If you can get a table that is. The 'regulars' have not difficulty. They have a table reserved five days a week. As to who constitutes the 'regulars' is not entirely certain, but their numbers vary from five to ten with perhaps another dozen or so 'semi-regulars' who claim that the reserved table is for them. Consequently on any given day there can be a significant crush at the table. The restaurant cleverly has oval shaped plates, thus permitting, when they are arranged in a spoke like design, to squeeze nine onto a table.

Campari's is always full both upstairs and down at lunch times and the maxim that '50,000 Frenchmen can't be wrong' must therefore have some application notwithstanding that Campari's is most clearly an Italian restaurant and it is highly unlikely that on any given day there would be more than, say, three Frenchmen present.

Apart from the standard spaghetti bolognaise, lasagne and ravioli there is the pasta special of the day consisting of such exotica as 'conchiglie alla tonno', 'mustaccioni saltati', 'tortellini alla panna' and 'risotto con funghi'.

The salad bar is without equal in Melbourne. A large selection of cold meats and fish, salads (Waldorf, Russian, French and others), fruits and a choice from at least five different cheeses. For the sweet tooth, Gelati of all flavours, Supa Inglese (wine trifle for the cognoscenti) and many others.

For an excellent meal, with real coffee for no more than $8... (cash, no credit cards, although one can open an account in order to impress the occasional solicitor) Campari's, in Hardware Lane (just before McDonalds) is hard to pass by.

MICHAEL ROZENES
CAMPARI'S
Open all day most days, 25 Hardware Street, 67 3813

Winner of Competition No. 2

The Editors have reluctantly concluded that the entries to Competition No. 2 did not achieve a sufficiently high standard.

The prize will therefore **jackpot** and be added to the prize donated for Competition No. 3.

Competition No. 3

An advertisement calling for tenders for the interior design and furnishing of a barrister's room in Owen Dixon Chambers West.

50 - 100 words

Prize: A bottle of reasonably good wine from the Essoign Club.

LAWYERS BOOKSHELF

SOCIAL SECURITY LAW AND POLICY
by John Kirkwood

Sydney 1986,
Law Book Company Pages i-xxvi, 1-263

This book is a useful addition to the resources available to the jurisdiction of social security law. The author is surely qualified; he has been a lecturer in this area at U.N.S.W. for some seven years and is a member of the Social Security Appeals Tribunal.

The book is not presented as a case book for the social security advocate. Rather, as the author states, it is a book on social security law and practice, designed to be of assistance to at least three groups of readers with quite different needs. That is, the lawyer and social worker working in the social welfare area; students of law or social work; and the 'general lawyer'. A broad design for a relatively slim book (263 pages of text).

All the same, on the legal side it does a pretty good job, particularly in the first two thirds of the book. Throughout there is an expected and appropriate emphasis on practical matters, critiques of practices and various provisions of the Social Security Act 1947, and prescriptions for reform of the social welfare system.

It is difficult to keep apace with the changes in both the law and practice in this jurisdiction. Any work dealing with social welfare legislation faces the prospect of too soon being out of date because of the changes which flow from governmental policy, D.S.S. guidelines or from responses to particular decisions of the A.A.T.

This 'state of flux' is probably best met by a looseleaf service rather than a general text or case book. This book is bound, as is **The Annotated Social Security Act** (ASSA), another publication in this area but one which is more clearly designed to meet the needs of the legal practitioner. The authors of the ASSA respond to the problem by publishing revised editions, two of which have been published since the first ASSA appeared in late 1984 with a third revision expected in early 1987.

This work, **Social Security Law and Policy**, has already fallen foul of such changes. For instance the fairly recent amendments (Act No. 127 of 1985) to the provisions for recovery of overpayments and the new provision dealing with the decision maker's discretion in this regard are not included. Nor are the more recent amendments (Act No. 33 of 1986) which have the purpose of drawing a more clear boundary between what have been termed 'employment related benefits' and 'eduction related benefits'. Both are significant amendments of which the legal practitioner should be aware.

It is perhaps unfair to criticise this book for these shortcomings. It is a problem faced by those who publish any work in this area.

With that said, the book is a good starting point for the practitioner wishing to find the law. It does not purport to be and should not be the end of that enquiry if preparation of advice or for appearances is the purpose. The work is well structured with an emphasis in the first two sections on the legal consideration of entitlements. Integrated in these sections are interesting critiques and prescriptions for reform.

For the reader with more than a concern about a specific issue the third section may be of some interest. Therein the author draws upon his expertise in outlining the process of review available to an aggrieved person. It is also in this section that prescriptions for reform to the system in general are advanced.

The index is useful and sensibly referenced and, read with the straightforward and well structured Table of Contents, should enable ready access to specific issues of concern to the practitioner.

GREG WICKS

CONTEMPT OF ROYAL COMMISSIONS

by Enid Campbell
Contemporary Legal Issues No. 3, Faculty of Law, Monash University)

The title of this monograph suggests that the text will deal with the topic of contempt. The text does do so, but for any person interested in the law relating to Royal Commissions it also covers a wider range of other related matters.

After a short introductory chapter pointing out it is now clear that in the absence of statutory provision to the contrary the law of contempt applies only to courts of justice (properly so called), Professor Campbell includes two relatively lengthy chapters dealing first with the powers of Royal Commissions and secondly, with the procedural and other safeguards witnesses and persons whose activities are being investigated might have.

Issues dealt with in chapter 2 include the legal constraints on the matters which can be inquired into and inquiries which might present a risk of prejudice to the disposition of cases pending in courts of law. Reference is made to the fact that there is no right of access to testimonial or documentary evidence given to Royal Commissions (or that such evidence be taken in public), and the problems arising from the overlap of powers being conferred on commissioners when concurrent commissions are issued by the Commonwealth and States. There are a very informative few pages dealing with the powers of commissioners to summons and give various orders and directions. In this context reference is made to the statute law of the various States and of the Commonwealth. The chapter concludes with a reference to some of the judicial remedies by which the actions of royal commissioners may be reviewed and the protection given them against civil and criminal liabilities.

In chapter 3, dealing with procedural and other safeguards, the question whether, when conducting an inquiry, a Royal Commission is bound to follow the rules of natural justice is raised. Professor Campbell expresses the view that it is by no means a foregone conclusion that the Australian Courts will respond in the same way as the courts did in **Mahon** v **Air New Zealand** ((1983) 50 A.L.R. 193, the Mount Erebus Royal Commission case). In that case the New Zealand Court and the Privy Council held that the rules of natural justice did apply, but were able to do so because of certain provisions in the New Zealand **Commissions of Inquiry Act** 1908. The chapter is full of other useful information including references to legal representation, the privilege against self-incrimination and legal professional privilege.

Chapters 4, 5 and 6 are the core chapters so far as the topic of contempt is concerned. There are sections on offences by and against witnesses, offences by disrupting proceedings, offences by publication and miscellaneous offences. The ways in which persons who are alleged to have committed offences under the various statutes are prosecuted and tried are discussed. There are comments on the question whether a Royal Commission should have the power to punish for contempts, or whether such proceedings should be brought in a court of law. Chapter 6 is devoted to the relationship between the privilege of freedom of speech of members of parliament and Royal Commissions, particularly when it is made a punishable offence to scandalize or publish statements calculated to prejudice proceedings before a Royal Commission. Reference is made to the relationship between the powers of the Commonwealth Parliament and State Parliaments and to joint advice given by the Commonwealth Attorney-General and Solicitor-General on 23 August 1983 to the Royal Commission on Security and Intelligence Agencies that the **Commonwealth Royal Commissions Act** 1902 does not, as a matter of statutory interpretation, impinge on the privileges of parliament (either State or Federal).

In the final chapter it is stated that there are many aspects of the law governing Royal Commissions, both State and Federal law, which merit careful examination. There follows some suggestions for that part of the law relating to contempt.

The matters to which reference has been made merely give an indication of the information contained in this monograph. Moreover, a most important contribution is that throughout there is reference to the statute law of the Commonwealth and the States, and to the important judicial decisions dealing with Royal Commissions which have been handed down within the past five to six years. It is a tribute to the author that so much has been included in 65 pages.

L.A. HALLETT

MEDICINE AND SURGERY FOR LAWYERS

Publisher: Law Book Company (1986)
Editors: A.J. Buzzard, Sir Edward Hughes, G.L. Hughes, J.D.B. Wells
Price: $89.00

Barristers are frequently required to demonstrate an understanding of the cause and effect of a wide range of medical conditions. Finding suitable literature which explains the nature of the medical problem in lay terms can be difficult. Trying to prove or disprove the relationship of such a condition to a given cause can be even more difficult.

This book, which is expected to have world-wide circulation and has already been favourably reviewed in Canada, helps practitioners overcome these problems. In 48 chapters, Melbourne's leading medical specialists discuss probably every injury or disease which is likely to arise in litigation. The text is accompanied by helpful illustrations and photographs.

The editors are each well known in medico-legal circles and have used their experience to tailor the book to the needs of the profession.

In particular anybody involved in a case involving 'psychiatric conditions' will find Dr. Kornan's section on functional overlay of great interest. Psychiatrists' use of the terms 'functional overlay', 'post-traumatic syndrome' and 'compensation neurosis' vary greatly. In Chapter 7 the author has attempted to describe these 'conditions' and compare them to malingering. Whether all psychiatrists will agree with his analysis is uncertain - whether all psychiatrists would agree on anything is uncertain. However the chapter provides a useful guide to the myriad of expressions used to describe these 'psychiatric reactions to trauma'.

Overall this book will be a useful tool for those involved in personal injuries litigation. Undoubtedly passages of the book will be quoted to medical witnesses in the box for years to come. But its use would not be limited to these practitioners. Rumour has it that many members of the Equity Bar have purchased it to evaluate their own trauma related conditions. In particular the section on repetition strain injury will be of great use to those suffering from the 'dictaphone-over-use-syndrome'.

Copyright Law in the United Kingdom

by J.A.L. Sterling and M.C.L. Carpenter (Legal Books Pty. Ltd.) 749 pp. + cxi.

Copyright law remains a field in which U.K. is of direct relevance and assistance to the Australian practitioner. The assistance is because much of the U.K. caselaw is upon statutory provisions and concepts which are not dissimilar to those found in Australian legislation. The relevance is because Australian owners of copyright may seek protection of their work or other subject matter in the United Kingdom.

For these reasons the recent publication by Legal Books Pty. Ltd. of **Copyright Law in the United Kingdom** by J.A.L. Sterling and M.C.L. Carpenter is a valuable addition to the books on copyright. The book provides a thorough treatment of U.K. domestic copyright and designs law as well as an introduction to the international conventions.

Of particular interest is the inclusion of a comprehensive discussion of EEC law affecting copyright law in particular and intellectual property in general. The Treaty of Rome contains provisions which have had significant impact upon the intellectual property laws of each member of the EEC. Chapter 12 of the book considers the EEC provisions designed to achieve the free movement of goods within the EEC, to prevent anti-competitive behaviour, and to restrict the abuse of a dominant market position. Quite apart from the interest of these issues to the copyright law practitioner seeking knowledge of the law in the U.K., this chapter is of interest for domestic purposes on, for instance, the effect on copyright law of the **Trade Practices Act** 1974. In 1976 the High Court hinted at some problems in the **Time-Life** case, but there is much still to be confronted by our courts.

The book also contains many primary source materials conveniently collected in the one place. Its fourteen appendices include extracts of relevant conventions and legislation. There are also numerous preliminary tables and introductions. The inclusion of these tables at the beginning of the book (and especially the 'Addendum to Introduction and Additional Material' (p.xcviv)) make the whole rather cumbersome and awkward. Nonetheless, once the user becomes familiar with the layout and contents of the materials in the table, it is found to be useful.

All in all the book is well produced and recommended for the general reference library.

G.T. PAGONE

Socialist Chambers

EDITORS NOTE: We received the following letter which we suspect may have been intended for our sister publication, The Law Institute Journal.

CONFIDENTIAL

Dear Comrades,

RE: BARRISTERS CLERK FOR SOCIALIST CHAMBERS

I wish to apply for the position of Barristers' Clerk as advertised in the Law Institute Journal of January/February 1987. As a Barrister of some two years and three months and five lists I believe I have the required previous experience. I also have had considerable experience in the application of computer technology to Clerking particularly in the field of fault finding. Three of the lists that I have been on were computerised and in each case I was involved in trying to determine why the Computer kept printing out zero sum pay slips and why it had me recorded as not briefed so often. I am sure the computer somehow failed to record the briefs I am sure my respective clerks had been offered for me. As a consequence I developed considerable expertise in dealing directly with solicitors in a moderately successful attempt to obtain briefs. It was astounding what one could achieve by dealing directly and eliminating the middle man. Unfortunately, that left me with some difficult fees collection exercises.

Whilst not actually a member of any political party or grouping I believe my credential to be impeccable: I went to Monash in the mid-60;s (albeit that I did not graduate until the late 70's) and I marched with Albert Langer. I also have never refused a legal aid brief. My manifesto for the Socialist Chambers would be:

* From each according to his skills, ability and training and to each according to his needs. As we all have similar needs for food, inner suburban accommodation and op-shop clothing, all barristers, clerks and other employees would draw equal salaries.

* Only Legal Aid funded briefs would be accepted. Those who did not qualify because of means for Legal Aid would not share our ideals and those who were rejected for other reasons would not be deserving of our services.

* Hours of work would be 35 per week for all barristers and other employees, with 6 weeks annual leave, 25% annual leave loading, unlimited sick leave, maternity leave, paternity leave, fraternity leave, study leave, and bereavement leave.

* Briefs would not be accepted from employers, landlords and similar exploiters of the proleteriat but would be encouraged from the unemployed, tenants, ethnic minorities and referrals from the Credit Legal Services.

* Barristers would be encouraged to refuse to wear robes in higher courts and suits in the lower courts. The latter prohibition would not apply to our female barristers.

* All barristers and all members of staff would have full equality in all aspects. There will be no silks and seniority/juniority would be abolished. All decisions - particularly as to seating within the open plan single room Chambers - would be by ballot.

* All barristers would have business cards printed and would be required to spend one half day each weekend distributing their cards and the cards of their colleagues in inner suburban hotels, billiard parlours, pizzerias, coffee shops, fast food outlets, police stations, etc.

* All barristers would do their own typing and take their place on the telephonists, coffee making, cleaning, mailroom and accounts rosters.

I trust that this manifesto meets with your approval,

FRATERNALLY YOURS

PENNI REDD (MS)

Sporting News by 'Four Eyes'

In the closest match for many years, the Bar and Bench were narrowly defeated by the Solicitors in the annual Tennis Match held at the Albert Ground Tennis Courts on the 22nd December 1986. The result was in the balance until the very end but the Solicitors won two of the last three matches which went to tie breakers. Without taking anything away from the winners, some members of our side were in constant fear of being struck by cricket balls which were regularly coming onto the Courts from our batsmen who were giving the Law Institute bowlers 'the handle' at the adjacent cricket oval. Once again, to the amazement of all, Collis moved around the Courts with the same alacrity and skill as Pat Cash.

* * *

In golfing news, the New South Wales Bar and Bench fielded a side to play against the Victorian Bar and Bench at Victoria Golf Club in January. The match was duly won by the home side. The opposition was so impressed by our golfing prowess that they have invited us to join forces with them in their annual match against the N.S.W. Combined Services at Elanora Golf Club in Sydney on the 17th July 1987. Entry forms will be available in due course. Unfortunately, admission ceremonies to join the N.S.W. Bar are only set down for the 3rd July and 7th August 1987.

* * *

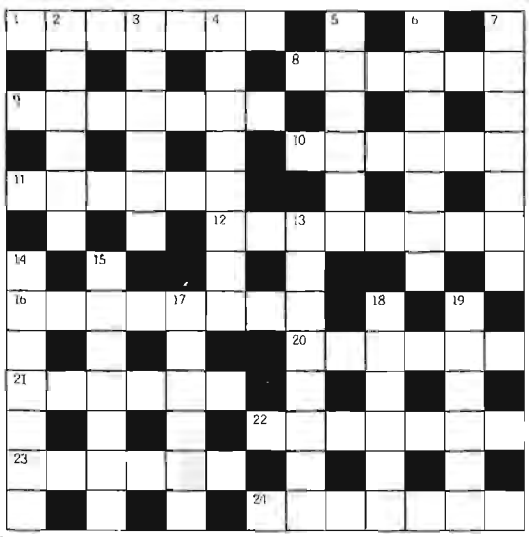
Whilst on golfing topics, Mr. Justice Gray combined with Peter Couzens to win the individual trophy in the annual Golf Match against the Solicitors held at Victoria Golf Club in January 1987. Unfortunately, the Sir Edmund Herring Trophy was relinquished to the opposition - hopefully for only 12 months.

* * *

Jack Forrest celebrated his first wedding anniversary by training a city winner at Sandown on the 27th December 1986. The mare, Eastern Show, which firmed in the market from 10/1 to 8/1 led for the last 400 metres or so to beat the promising horse Imperial Regina by a comfortable margin.

* * *

CAPTAIN'S CRYPTIC NO. 58



Across

1. This Mary has hit the high spot (7).
8. Judge rooted in dishonour (6).
9. Legislative Act (7).
10. Uplifted (6).
11. A seat especially for judges, juries or, anciently, for legislators (6).
12. The relationship between a traitor and the Queen's enemies: **R v Casement** [1917] 1 KB at 136 (8).
16. Once more upon the breaking of the obligations dear friends (8).
20. Small beer J. in Gar's Mahal (6).
21. Deduces (6).
22. This ancient custom duty levied on imported wine was abolished in 1809 (7).
23. Mistaken things (6).
24. Behind that face lurks a solipsistic rower (7).

Down

2. Witness a critical examination (6).
3. Arrest politely (6).
4. Surpass (8).
5. Free tenure of land (6).
6. The morsel of execration formerly used by Saxons to determine guilt (7).
7. Plusses on a balance sheet (7).
13. Memorable, at least for an historian (8).
14. He is obliged to you (7).
15. The jingoist judge prefers this place of Latin law (7).
17. The good egg looks after the vicar as well (6).
18. Magistrate with supreme power (6).
19. Breakbone fever makes the modern dandy (6).

(Solution page 50)

Victorian Bar Cricket - WE DID IT!

Not only did we do it - we did it twice. Both Victorian Bar cricket teams were victorious in the matches against the Law Institute in December 1986. History was made. We have fielded two teams for the past five years. This is the first time the Second XI has won, and we won the double.

First XI Report

Having won the toss in overcast conditions, Bill Gillard invited the Solicitors to bat on a wicket which was showing some moisture and promising some life. A rare occurrence at the Albert!

The early assessment proved correct, but the openers weathered the storm. The Solicitors managed 73 runs for the first wicket, aided somewhat by the 'benefit of the doubt' going their way on three occasions. Of the opening bowlers, Dean Ross stood out - 8 overs for 13 runs. It should have been 2/13.

The first 14 overs cost only 39, but change bowler David Harper's second and third overs were plundered by 17 runs. The skipper was heard to mutter something about it being difficult to place a field. However, Harper's fourth over was a 'bottler'. Carpenter caught Gillard, bowled Harper for 33, and two balls later, the other opener was clean bowled. All of a sudden Harper was a world beater and the Solicitors had slumped to 2/73. Nevertheless, they climbed back and managed to make 4/183 off 40 overs. The Bar's bowlers stuck to their task admirably and are to be congratulated upon their endeavour. Harper finished with 2/32 off 8 overs, Chancellor 1/26 off 8 overs and Connor 1/52.

The skipper, who has played a lot of cricket, gave specific instructions to the young openers, Jeremy Gobbo and Ian Dallas - 'Play straight, nothing silly, I want you still there after 10 overs and don't worry about the runs - they will come'. Young Gobbo's response was - 'Like hell, we have to hit out from the beginning'. He was suitably chastised by the skipper, but as the skipper has experienced over the years, nobody ever pays any attention to him anymore (indeed if they ever did). The two openers blazed from the first ball and we witnessed some of the best batting and running between wickets from two Barristers seen for a long time. At the end of 24 overs we were 0/128. Gobbo was first to go when he was caught behind for a brilliant 75. Bruce McTaggart chipped in with 21 before going to make the score 3/177.

It was unfortunate that Ian Dallas who had batted so well, was to fall in the second-last over for 72 when the score was tied. Nevertheless, the skipper is pleased to announce that it enabled him to steal some of the glory as he hit the winning run. The Bar, at the end of 40 overs, was 4/185.

Both Jeremy Gobbo and Ian Dallas are to be commended on their match winning efforts. All round the team performed exceptionally well. It is amazing what a bit of very successful youth can do, to an ageing team!

The Bar team was -

Bill Gillard Q.C. (Capt), David Harper Q.C., Chris Connor, Bruce McTaggart, Ross Middleton, Tony Cavanough, Tony Neal, Dean Ross, Geoff Chancellor, Jeremy Gobbo and Ian Dallas.

E.W.G.

2nd XI Report

On the 21st December 1986 history was made in sporting relations between the Law Institute and the Bar when, for the first time since the commencement of cricket matches between 2nd XI's representing both bodies, the Bar 2nd XI was victorious.

Sent into bat by Ramsey deputizing for Couzens who, at the relevant time, was en route to the ground from Flemington (Racecourse not Court), the Law Institute struggled to total 148 from their 40 overs. This rather modest total by comparison with their past efforts was due to a combination of tight bowling and excellent fielding by the Bar's representatives.

Successful bowlers for the Bar were Batten 2/20, Chettle 1/14, Couzens 2/27 Mathews 1/37 and Myers 1/9.

At 0/28 the Bar seemed well set to reach the Law Institute's total in quick time when disaster struck.

From 0/28 the Bar were soon 5/37 and looking most likely to emulate the less than glorious past achievements of its predecessors.

When all seemed lost, however, Rex Wild strode to the crease. With all the grit and determination expected of one of Costigan's crime busters, Wild set about the Law Institute's bowlers as if they were a band of P & D's. Assisted first by Myers (15) and then by Cosgrave (53), Wild powered his way to a magnificant 57 to set up victory for the Bar.

Although Wild was clearly 'man of the match', special mention should also be made to two newcomers to Bar cricket, Lithgow and Cosgrave.

Lithgow opened the batting and although out for 23 showed enough of his batting talent to give cause for great optimism about his future role in Bar cricket.

Cosgrove not only made 53 (retired) but also kept wicket with great skill on a difficult wicket and in the course of doing so earned the undying admiration of his captain by effecting an excellent stumping off the latter's bowling.

Hopefully the result of December's match will be the forerunner of many more successes for the Bar 2nd XI's.

The 2nd XI was:

Peter Couzens (Capt.), Andrew Ramsey, John Batten, Geoff Chettle, David Myers, Steven Matthers, Peter Lithgow, Greg Burns, Peter Searle, Nathan Crafti, Rex Wild, Michael Cosgrave.

P.C.

Victorian Bar Cricket v N.S.W. Bar

The Victorian Bar cricket team continues its victorious march. The 'substandard trophy' bears another shield engraved 'March 1987, Won by Vict. Bar, Sydney'.

The team travelled to Sydney for the Labour Day weekend. The match was played at Queen's Park, Waverley. Fortunately, the Sydney weather came good for the weekend enabling us to play on turf. Sydney had experienced a week's wet weather before we arrived. But what can you expect in the rainy capital of Australia?

Having lost the toss, we were invited to bat on a slow, uneven wicket. Chettle, a little unsettled by being struck on the hip, shouldered arms to the next ball and was bowled for 2. Andrew Ramsay followed shortly thereafter, and we were 2/11. Richard Gillard (a ring-in) was unfortunately run-out for 16, followed shortly by Chris Connor going for 9. Bill Gillard and Bruce McTaggart put on 47 runs for the fifth wicket before Gillard was caught for 22. McTaggart went on to make a dashing hard hitting 42. The tail, ably lead by Geoff Chancellor, wagged and we closed after 40 overs with the score at 8/164. Chancellor was unconquered on 36.

Our bowlers performed brilliantly, and the opposition were never in the hunt. At one stage they were 5/30, and eventually managed to make 138. Geoff Chancellor finished with 2/15 off 8 overs, Chris Connor 3/22 off 8 overs, Richard Gillard 1/7 off 8 overs, Steven Mathews 1/42 off 8 overs, Peter Elliott 1/28 off 4 overs and Bruce McTaggart 2/8 off 3 overs. The N.S.W. skipper, Bruce Collins topped scored with 45 runs.

The N.S.W. Bar is to be congratulated on their organization for the weekend. We thank them most sincerely for a very enjoyable three days in Sydney. We look forward to their team coming to Melbourne next year, but suggest they might like to start training now to ensure some competition!

The team was

Bill Gillard Q.C., Bruce McTaggart, Chris Connor, Andrew Ramsay, Geoff Chettle, Geoff Chancellor, Ross Middleton, Peter Elliott, Steven Mathews, Richard Gillard and 'Tosca' Hodgson (on loan from our hosts).

E.W.G.

Cricket - Legal World Cup

The Section on Business Law of the International Bar Association is proposing, in conjunction with its annual conference in London from 14th to 18th October 1987, to stage a 'Legal World Cup' involving a series of 20-over cricket matches between teams from Australia, England and, it is hoped, India and the Rest of the World. The matches will include a contest between Australia and England for the 'Legal Ashes'. The games will take place on Sunday, 13th September 1987 at Vincent Square, the Westminster School Grounds not far from Westminster Abbey. The implementation of this proposal is dependant upon support from Australian practitioners who have a high profile in the Section on Business Law and at International conferences generally.

The Australian Branch of the Section on Business Law of the I.B.A. would like an early indication of intention to visit England for the conference to be given to the Law Council of Australia before 31st March 1987 and whether attendance is possible, probable or certain and the willingness to play cricket.

If so, please advise your age, the date you last played regularly and the level at which you played. Only members of the I.B.A. attending the conference will be qualified to play. The average age of the players is expected to be the wrong side of 40, if not 50, so please do not be inhibited by fears of physical, mental or competitive inadequacy in putting your name forward for selection.

Practitioners contemplating a visit overseas or to the U.K. next Autumn and who may not have considered attending the I.B.A. Section on Business Law conference will find this most stimulating, irrespective of the area of law in which they practice. If you would also like to seize what may be your last chance to play cricket for Australia, please indicate your interest.

The instigator of this proposal is **Francis Neate** of Slaughter and May, 35 Basinghall Street, London EC2V 5DB who will be organising the England team. If you wish to play for Australia (or merely to come and support us), please contact Peter Perry, Freehills, Sydney DX 361 or **Huan Walker** of **Madden Butler Elder & Graham**, Solicitors, Melbourne DX 102. Alternatively send your application direct to I.B.A. Headquarters, 2 Harewood Place, London W1R 9HB, for the attention of the Executive Director.

The Grafters Goblet

Members of the Bar should be informed that the Victorian Bar is the present title holder of the 'Grafters Goblet' trophy to witness the annual jousts between the Law Institute and Bar 2nd XI's.

The idea for a cup arose from discussions between Bob Burdeu (Wisewoulds) and Radford who lost the first three contests and were sick of a mythical teapot. 1985 was washed out. Radford temporarily 'retired' after the 1984 defeat. Couzens then took up the mantle and his team won handsomely in December, 1986.

The cup was purchased from a leading Melbourne jeweller, the design of the titles and results and the interesting scales of justice (wig in one scale, bat and ball in another overlaying a cricket pitch) were sketched by Radford, whilst the critical engraving is by Jimmy Lowden, well known to the Bar's racing fraternity as engraver of the Melbourne Cup.

The Law Institute and the Victorian Bar have agreed to fund the cost of the cup and its initial engraving, thus refunding Radford a modest outlay of just under $100.

It is noted that the 2nd XI's winning ratio is now .25, the Gillard XI - 1966-86 alone .015 - the latter take note.

Magistrates' Court Listing

As requested by the Police Lawyers Liaison Committee, we publish a letter from the Co-ordinating Magistrate (Mr. M.W. Gerkens S.M.) and a subsequent memorandum from the Victoria Police Association.

LETTER 25th AUGUST 1986 TO LAW INSTITUTE FROM M.W. GERKENS S.M.

Introductory

As a result of recent discussions between the Chief Magistrate, Deputy Chief Magistrate, Region 1 Co-ordinating Magistrate and representatives of the Police/Lawyers Liaison Committee, it is considered appropriate that persons and organizations regularly using the services of the Melbourne Magistrates' Court be aware of the general arrangements for listing business.

The court sits daily and has a capacity to sit in thirteen divisions (eleven in the City Court building, one at Hawthorn and one at Marland House in Bourke Street). The Hawthorn and Marland House divisions are reserved for lengthy matters such as 'Bottom of the Harbour' tax prosecutions.

Some seventeen magistrates are stationed at the City Court but, at any given time, a number are performing relieving duties at courts throughout the State.

The Chief and two Deputy Chief Magistrates have chambers in the City Court building and are responsible for the administration of the magistracy on the state-wide basis. Additional to their administrative role, they sit regularly in court.

The Region No. 1 Co-ordinating Magistrate is charged with the routine magisterial administration of the City Court. His responsibilities include listing policy and arrangements and the allocation of available magistrates to the various divisions of the court. In practice, the listing arrangements are delegated to the Co-ordinating Clerk whose office might be described as the 'nerve centre' of the City Court building.

All enquiries in relation to listing arrangements should be made of the Co-ordinating Clerk whose telephone numbers are 667 6136, 667 6168, 667 6166.

Listing of Cases

It is City Court listing policy to fix contested matters for hearing within thirteen weeks and to ensure that listed cases proceed on the allotted day. Unfortunately, for a number of reasons, policy and practice do not always coincide.

Because the City Court is the source of magisterial relief for sudden and unexpected illness or emergency throughout Victoria, the complement often drops below eleven magistrates. When booking three months in advance, it is not possible to foresee these contingencies. The result can be as few as five or six magistrates available for a list designed for eleven. The alternative is to regularly book for seven or eight magistrates in which case considerable magisterial capacity will often be wasted and hearing delays will 'blow out' to even more unacceptable limits.

Other variable factors bedevilling the listing process are the imprecisions inherent in estimating case hearing times and the unreliability of plea indications.

For a variety of reasons, estimates can be grossly inaccurate. It is common place, for example, for cases estimated at one day to proceed for two or three weeks and just as often for lengthy estimates to prove exaggerated. Again, matters booked on the basis of being lengthy contests frequently become twenty minute pleas.

It will be seen therefore that the Co-ordinating Clerk has an almost impossible task in reconciling all of the variables so as to make the best use of available magisterial resources, ensure that all listed cases are reached and keep the backlog within acceptable limits.

Practitioner Support

The object of the exercise is to provide the best service possible and there are many ways the profession can assist in this regard.

1. Realistic estimates are all important when arranging a hearing date.

2. The Co-ordinator should be kept aware of developments. If there is a change of plea or if the allotted date proves inconvenient, he should be notified as soon as possible so that alternative arrangements can be made.

3. The practice of delaying delivery of a brief to counsel until the last minute is to be deprecated. It is unfair to clients; it is unfair to counsel and it is unfair to the court. It can only bring the system into disrepute.

4. When calling for witnesses in 'hand-up Brief' committals, realistic decisions should be made in relation to the advantages to be gained. Some consideration should be given to the disruption and inconvenience occasioned to witnesses forced to take time off from their employment and to the cost to the public purse.

5. When witnesses are to be called, it is imperative that notice be given both to the clerk and to the informant no later than five days before the hearing (e.g. if the hearing is fixed for the 6th September, notice must be served no later than the 1st September). Where notices are served out of time, adjournments are not freely available.

6. It is common for practitioners who are seeking adjournments to sit in court until a case is called and then ask for it to be stood down while they get a suitable adjournment date from the Co-ordinator. The result is wasted court time. Dates for adjournment should be settled before cases are called.

7. In all cases, practitioners are required to lodge an appearance as early as possible but no later than 9.30 a.m. both with the Co-ordinator and with the bench clerk in the appropriate division of the court.

Yours sincerely,

M.W. GERKENS
CO-ORDINATING MAGISTRATE
REGION NO. 1.

MEMO TO POLICE/LAWYERS LIAISON COMMITTEE FROM VICTORIA POLICE ASSOCIATION DATED 9TH SEPTEMBER 1986.

SUBJECT: **Magistrates' Courts - City Court Work Load**

Recently, concern was expressed to the Police/Lawyers Liaison Committee at the manner in which cases are listed for hearing at the Melbourne Magistrates' Court. On occasions delays in bringing cases on have been considerable. Members have also felt frustration for, although they are prepared to proceed, it is discovered on the listed day that the case cannot be dealt with. There are also difficulties in communicating with the court in respect to the listing of cases.

As a result of discussions with the Chief Magistrate, it is believed that by bringing the policy and practices of the case listing procedure to the attention of members, with understanding and co-operation, the system would operate more effectively for the benefit of all parties.

Apart from mention court cases, the Co-ordinating Clerk at Melbourne Magistrates' Court is responsible for listing cases. Committal proceedings and summary hearings cannot proceed unless appropriate arrangements have been made with this Clerk.

The Court's policy is to fix contested cases for hearing within thirteen weeks and to ensure that listed cases proceed on the allotted day. However, for a number of reasons that is not always possible.

First, although seventeen Magistrates are stationed at Melbourne, with the capacity to sit in thirteen divisions, because this Court must provide magisterial relief throughout the State, there can be as few as six Magistrates' available. When listing cases, it is not possible to foresee the number of Magistrates that will be available to sit on any given day, and the policy is to list sufficient cases to be dealt with by eleven Magistrates. It is argued that to list on the basis of six or seven Magistrates would cause the hearing delays to extend to unacceptable limits.

Secondly, the listing system is dependent on an estimate of the length of time a case will occupy. Accurate estimation is very difficult and the Clerk is often given unrealistic times.

Thirdly, the length of time a case will take is largely influenced by the plea that the defendant proposes to make. This may not be known until immediately before the case is to proceed.

Fourthly, it is more often the case that the Clerk is not advised of intended adjournments until the listed date or just prior to that date. The result is that the case is then listed for a further thirteen weeks. Communication with the Clerk as soon as an adjournment is proposed reduces the ultimate listing date.

From a Police point of view, informants can assist in improving the listing procedure, which will reduce the level of frustration and inconvenience suffered by members and witnesses, by:-

(a) where required to do so, making a realistic assessment of the length of time a case will take.
(b) contacting the Co-ordinating Clerk (telephone 667 6136, 667 6168, 667 6166) at the earliest opportunity when any matter becomes known that may affect the listed date. Obtain another date as soon as possible.
(c) contacting the Melbourne Prosecutor's Office (telephone 663 5188) at the earliest opportunity if it becomes known that a case will not proceed on the listed date or there is concern as to whether an adjournment should be sought or objected to.
(d) maintaining communication with the Prosecutor's Office in all matters of concern with a case, particularly in committal proceedings where a request has been made for the attendance of witnesses who are not available.

Informants should always consult their prosecutor prior to the case or bail proceedings.

The key work is "**Communication**".

MAL HYDE
KEN SERONG

Rape in Marriage

His Honour Chief Judge Waldron has drawn our attention to a passage in the article **'Legislative Over-reaction'** at page 25 of Summer 86 Bar News.

That passage, under the sub-heading 'Altering the Concept of Marriage', was as follows:

> 'In September 1985, at the trial of a man charged with rape of his wife, the trial judge ruled that a husband could not rape his wife because by the fact of marriage she was presumed to consent to sexual intercourse. From this he drew the conclusion that the charges of rape (which were based on acts of anal and oral intercourse against the wife's consent) must fail.
>
> Whatever the merits of his Honour's decision, and whatever the possible views which an appellate court in that case or in some such case might have expressed, the legislature reacted with vigour.'

His Honour, who was good enough to supply us with a copy of the trial judge's ruling, makes the comment that the first sentence is an over-simplification of what was then the existing law because the effect of s 62(2) of the **Crimes Act** (in its then form as introduced by the **Crimes (Sexual Offences) Act** 1980), was that where a married person was 'living separately and apart from his spouse', the marriage did not constitute or raise any presumption of consent to an act of sexual penetration.

His Honour points out that the second sentence wrongly stated the effect of the trial judge's ruling, which was concerned with the statutory definition of anal and oral rape (Crimes Act s 2A(1)). In substance, the trial judge held that the statutory offences of anal and oral rape were governed by s 62(2) (in its then form) in the same way as was common law rape, that is to say marriage constituted consent unless the parties were living 'separately and apart'. The trial judge's ruling reviewed the evidence in the depositions and held that it was not sufficient to enable a jury to find that the requisite separation existed at the time of the alleged offence.

THE EDITORS.

Preparation and Daily Fees

Introduction

In an important recent decision in the Family Court of Australia upon a taxation of costs as between solicitor and client, Barblett J. allowed, as proper disbursements, fees to senior and junior counsel charged upon an hourly basis for preparation and conferences and upon a daily basis for appearances in court.

Facts

The decision arose from contested custody proceedings in the Family Court (**In the Marriage of G.**) which resulted in custody of the two children being awarded to the husband. The wife's appeal to the Full Court was dismissed. She was represented throughout by very experienced senior and junior counsel who both specialised in matrimonial causes and custody cases. It was a heavy case involving lengthy preparation, long and difficult conferences, several pre-trial hearings, a seven day trial and an appeal hearing. Counsel throughout charged for preparation and conferences at an hourly rate and for appearances in Court at a daily rate. The fees of junior counsel in all cases were charged at the rate of two-thirds of those of senior counsel.

Proceedings were brought by the wife's solicitors in the Supreme Court against the wife to recover fees and disbursements, and it was agreed that the bill should be taxed by the Family Court. The total amount of the bill constituted by disbursements for Counsels' fees was $50,100 of which the Registrar disallowed items totalling $33,100. In reaching this result the Registrar had proceeded as follows:

(a) He disallowed the level of all of senior counsel's fees and allowed senior counsel's fees on the basis of amounts not exceeding what he considered to be a normal junior counsel's fee plus 50 percent.
(b) Accordingly he disallowed the level of all junior counsel's fees, based as they had been upon two-thirds of senior counsel's fees as charged.
(c) He disallowed almost all of the fees which had been charged for preparation and conferences.
(d) He disallowed all daily fees for appearances in Court and allowed instead a series of reconstructed fees using a brief-plus-refresher basis, the initial brief fee for senior counsel being the daily fee which had been charged.

The wife's former solicitors appealed against the Registrar's decision.

Procedure

In the Supreme Court, appeals from the Taxing Master to the Judge in respect of party-party and solicitor-client taxations are not by way of hearing de novo but are confined to a review of the Master's decision on the basis that it is a discretionary judgment reviewable on the same limited basis as any other discretionary judgment: **Australian Coal & Shale Employees' Federation v. Commonwealth** (1953) 94 CLR 621, 627. Although Barblett J. held that the rules of Court generally applicable to appeals from the Registrar to a Judge did not apply, nonetheless he decided that he sould treat the matter before him as a hearing de novo.

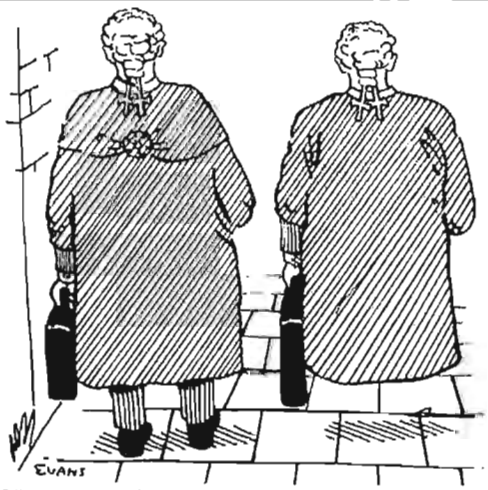
Evidence

The wife's former solicitors and the wife were represented before Barblett J. by counsel. Evidence was given by senior and junior counsel whose fees had been disallowed, by the solicitor who had had the conduct of the wife's case, by senior counsel who had appeared for her husband, by two of the Victorian barristers' clerks and by the wife and her father.

Decision

The learned Judge upheld the appeal, reversed the Registrar's decision and allowed all of the fees to counsel claimed as disbursements (subject only to a few items immaterial to this Note), including the fees charged by junior counsel at the rate of two-thirds of senior counsel's fees. The decision turned to some extent upon his rejection of the wife's evidence as to her understanding of the basis and level of charging fees. However the decision proceeded primarily upon the bases that the principles enunciated in cases concerning the allowance of counsel's fees upon a party-party taxation were not applicable to a solicitor-client taxation. The cases which had been relied upon by the wife's counsel and by the Registrar were the decisions of Fullagar J. in **Magna Alloys Pty. Ltd. v Coffey** (No. 2) [1982] VR 97 and of the

Principal Registrar of the High Court in **Commissioner of Taxation v Gulland, Watson v Commissioner of Taxation** (1986, unreported). In both those cases, fees charged by counsel on an hourly basis for preparation and conferences and on a daily basis for appearances had been disallowed on party-party taxations. However, as Barblett J. pointed out, the reasons for judgment in both those cases are clearly confined, by their own express terms, to party-party taxations. Barblett J. said, 'In my view the Registrar erred in applying to a taxation between solicitor and client the well established principles for the assessment of counsel's fees on a party and party basis'.,



How to justify getting two thirds of the Silk's fee.

A further important principle which was applied by Barblett J. is that established, inter alia, by the decision of Townley J. in **Re Trout, Bernays & Co.** [1955] St. Rep. Qld. 398. The principle requires that the taxing officer, having given consideration to all relevant matters, should not seek to arrive at the fee to counsel which he considers to be a reasonable one in all the circumstances, but instead must determine whether the fee actually paid was a reasonable one for the solicitors to disburse. The fact that the taxing officer regards the fee paid to counsel as being slightly high does not mean that he should therefore treat it as unreasonable. Hence in the present case Barblett J. considered that the Registrar should have looked at the fee charged by senior counsel and determined whether it was reasonable or unreasonable, rather than calculating a "proper fee" himself.

The most important aspect of the case concerns the learned Judge's conclusion that fees to counsel should be allowed on an hourly basis for preparation and conferences and at a daily basis for appearances. In reaching this conclusion the Judge acknowledged that fees to counsel charged on these bases constituted 'unusual expenses', so that, in conformity with the principle laid down in **Re Blyth and Fanshawe** (1882) 10 QBD 207, the solicitor was under a duty to warn the wife as to the recoverability of the fees on a party-party taxation, and unless he had done so they were not recoverable by him. However he held, in substance, that the duty had been discharged and that the wife was aware of how she was being charged. His Honour concluded his judgment with the following important observation:

> 'I also find that had counsel charged on a traditional basis the client would not have understood what it all meant. How can the law believe that a lay client will understand the very technical rules of brief fees, conferences and refreshers? Time costing is a product of the 20th Century and provided the amounts are fair and reasonable and the work charged for proper, it provides a readily understandable and efficient method of costing for counsel and ultimately, through the solicitor, for client.'

Commentary

Several comments need to be made:

(1) The case serves as a reminder of the distinction between party-party and solicitor-party taxations. In the case of the former the basic consideration is whether items of costs and disbursements incurred or paid by the successful party should be borne in whole or in part by the losing party. That consideration is, of course, absent in the case of a solicitor-client taxation.

(2) The case does not depart from settled principles governing solicitor-client taxations, but, in applying those principles, recognises the realities of practice in the 20th Century.

(3) The decision will serve as a timely reminder of the correct legal principles in this branch of the law which, of late, have been the subject of misunderstanding in some circles.

(4) The continued recognition by the Judge that fees to counsel charged on an hourly basis for preparation and conferences and on a daily basis for appearances are 'unusual expenses' for the purposes of the principle referred to earlier indicates that counsel proposing to charge fees on those bases should ensure that the fees are the subject of a fees agreement for the purposes of s.67 of the **Supreme Court Act** 1986, whilst the solicitor instructing such counsel should ensure that he gives the client the requisite warning.

(5) The principle established by such cases as **Re Trout, Bernays & Co. supra** and and followed by Barblett J. is one that appears to be applicable in the case of a taxation of fees as between barrister and solicitor pursuant to s.67.

DOUGLAS GRAHAM Q.C.
Chairman
Bar Fees Committee

Barrister's Immunity — Historical Footnote

Being the first English barrister in a hundred years to be sued for negligence would seem an unpromising omen at the outset of a career.

This setback faced Mr. Michael Worsley in the mid to late sixties; see **Rondel v Worsley** [1969] 1 AC 191, currently of course a very topical matter for the Victorian Bar as **Giannarelli's Case** wends its way through the appellate process.

The total lack of merit in the plaintiff's case in **Rondel v Worsley**, coupled with understandable sympathy for this undeserved and unwarranted publicity, doubtless persuaded the editors of the All England Law Reports to report the case at first instance and in the Court of Appeal as **Rondel v W.** see [1966] 1 All E.R. 467, [1966] 3 All E.R. 657.

But you can't keep a good man down. The same Michael Worsley, now a Silk, led for the Crown in the recent House of Lords appeal **R v Andrews** [1987] 2 WLR 413, an important decision on the res gestae doctrine. Not only was he successful, but he persuaded their Lordships to hold that the old law school favourite of **R v Bedingfield** (1879) 14 Cox C.C. 341 (about to expire murder victim says 'Look what Harry has done' held inadmissable) was wrongly decided.

P.C.H.

International Conference on Lawyers in Public Service

Jerusalem 25th - 29th May 1987

The Conference theme will be 'The Role of the Attorney General and Other Law Officers in Times of Crisis'.

The Conference is held under the auspices of the Faculty of Law of The Hebrew University of Jerusalem and The Israel Bar.

For further details contact

Proferror Shimon Shetreet
P.O. Box 3378
Tel Aviv 61033
Israel Telex 33624, 361406

24th Australian Legal Convention

The Convention will be held in Perth from 20th to 25th September, 1987.

A lively programme includes speakers such as House of Lords members Lord Ackner and Lord Mackay, English Bar Chairman Robert Alexander Q.C., Mr. Justice Scalia of the U.S. Supreme Court and 'palimony' lawyer Marvin M. Mitchelson.

As well as the usual golf, tennis, etc. sporting activity includes ballooning and boomerang throwing.

Further information may be obtained from P.O. Box 40, West Perth 6005, telephone (toll free) (008) 999 151.

Australian Mining and Petroleum Law Association Limited

ELEVENTH ANNUAL CONFERENCE
July 15th to 18th, 1987
Brisbane, Queensland

TOPICS:

Policy Objectives of Mining Legislation and the Queensland Review.

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-Capital Gains Tax
-Divident Imputation and Foreign Tax Credits.

Debt and Equity Financing - Recent Developments.

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Boundary Disputes involving Mineral Titles.

Arbitration and Other Dispute Resolution Procedures in the Mining and Petroleum Industries.

Recent Cases - Their Practical Significance.

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New Directions in Mining and Environment Legislation - The New Zealand Experience.

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8th Floor,
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Melbourne 3000.
Telephone (03) 67 2544, Telex AA35307,
FAX (03) 602 3495

CROC'S CORNER

Solution to Captain's Cryptic No. 58

1 G	2 A	U	3 D	R	4 O	N	■	5 S	■	6 C	■	7 C
■	T	■	E	■	U	■	8 H	O	N	O	U	R
9 S	T	A	T	U	T	E	■	C	■	R	■	E
■	E	■	A	■	R	■	10 R	A	I	S	E	D
11 A	S	S	I	Z	E	■	■	G	■	N	■	I
■	T	■	N	■	12 A	D	13 H	E	R	E	N	T
14 O	■	15 L	■	■	C	■	I	■	■	D	■	S
16 B	R	E	A	17 C	H	E	S	■	18 C	■	19 D	■
L	■	X	■	U	■	■	20 T	O	O	H	E	Y
21 I	N	F	E	R	S	■	O	■	N	■	N	■
G	■	O	■	A	■	22 P	R	I	S	A	G	E
23 E	R	R	A	T	A	■	I	■	U	■	U	■
E	■	I	■	E	■	24 S	C	U	L	L	E	R

Movement at The Bar

NAMES REMOVED

A. Shaw
J.R.V. Williams
M. Rush
G. Borchers
K. O'Connor
Julie Davis
Jennifer Davies
P.M. Thomasz
J.W. Galbally Q.C.
M. Monester
E.J. Trahair

LEAVE OF ABSENCE

I. Gray
P.H. Clark
A.J. McDonald
A. Alston
Frances Millane
D.M. Wilson
J.A. O'Bryan

TRANSFERRED TO THE RETIRED LIST OF COUNSEL

P.E. McGavin

RETURNED TO ACTIVE PRACTICE

D.W. McLeon
S. Morris

TRANSFERRED TO CROWN COUNSEL AND PARLIAMENTARY

D.G. Saw