VICTORIAN BAR NEWS

No. 68
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AUTUMN 1989

The Late Sir Murray McInerney

Sir Kevin Anderson

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Robert Redlich QC

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Stapled to the Wall

Ron Castan QC

Bar All Stars VIII

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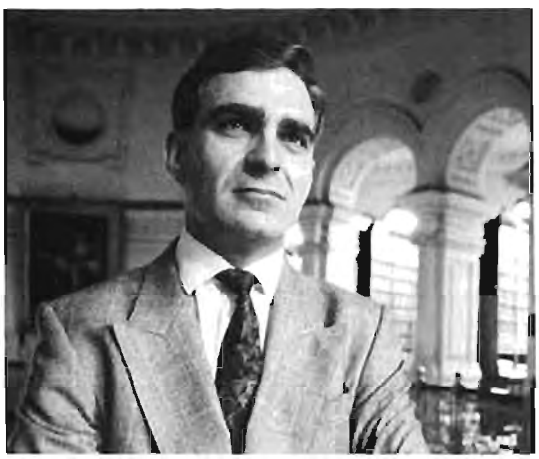

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THE EDITORS' BACKSHEET

HUMAN RIGHTS COMMISSION

On 13th December 1988 the Melbourne Herald featured an article by John Hall, described as "a senior legal consultant of the Human Rights and Equal Opportunity Commission", concerning the "dirty posters" decision of the Commission.

Previous media coverage had been confined to that element of the decision which apparently held that "girlie" calendars in the workplace could constitute sexual harassment.

The point of Mr. Hall's article however is that Justice Einfeld has "reinterpreted" several sections of the Sex Discrimination Act to such effect that "in some areas the decision extends protection against sex discrimination further than anywhere else in the world". Deep in the Australian psyche is a yearning for recognition on the world stage. Has the Human Rights and Equal Opportunity Commission become some kind of juristic Crocodile Dundee? With heightened interest we read on.

It seems the case concerned not only "girlie" calendars, but more serious allegations. Specifically, two young women aged 19 and 16 claimed that their employer at the Whyalla Fish Factory and Take Away had touched them on the buttocks and breasts, thrown unwrapped condoms at them and, in relation to one, attempted to force her to hold his exposed penis. We claim no expertise in the criminal law of South Australia, but we would be astonished if such conduct would not constitute indecent assault or some criminal offence of a like nature in that State.

It appears there was a contest of fact because Justice Einfeld, according to Mr. Hall, "decided that both complainants were truthful".

In so doing apparently some pretty bold advances were made in relation to onus of proof. After referring to previous discrimination cases in Australia and overseas where it has been generally decided that the person making the allegation bears the onus of proof, Mr. Hall summarised the decision as follows:

"Justice Einfeld decided that the Federal Parliament did not intend this when it enacted the Sex Discrimination Act. The aim of a Human Rights Commission hearing is to find out the facts, rather than to arbitrate between two opposing sides.

Because discriminators are usually emotionally

and financially more powerful than their victims, the judge felt that it was fairer if some of the responsibility for providing the facts was shifted to the alleged discriminator."

An adverse decision of the Human Rights Commission in a case of this sort might well have practical consequences little different from those which would follow a conviction in the criminal courts. If a defendant were to receive a non-custodial penalty, then he would be no worse off than if he had been dealt with by the Human Rights Commission, especially in terms of public ignominy.

Allegations of criminal conduct should be dealt with by the criminal courts, which have had 900 or so years of experience in determining guilt or innocence in a way consistent with respect for the rights of the individual. There are all sorts of fields in which Australia can seek world leadership without setting up a quasi-criminal justice system in which "emotionally and financially powerful" defendants have to prove their innocence.

THE LATE SIR MURRAY McINERNEY

Our Lady of Good Counsel Deepdene is a large and handsome church but, as the Parish Priest noted apologetically, it was not large enough to hold the many friends and admirers who came to pay a last tribute to the late Murray Vincent McInerney.

In the words of Chief Judge Waldron, Sir Murray possessed qualities of erudition and humanity which made him one of the great judges of the Victorian Supreme Court.

Murray McInerney Jnr. spoke movingly of his father's achievements as scholar and athlete, barrister and judge, of the many friends who admired him, and he them, of his passion for Shakespeare, Italian opera, cricket and the "hopeless cause" of the South Melbourne Football Club.

MOSHINSKY RHODES SCHOLARSHIP

The 1988 Rhodes Scholar for Victoria is *Mark Moshinsky*, son of Ada and nephew of Nathan Moshinsky QC.

Mark completed his law course at Melbourne University. He captured 13 exhibitions, the Supreme Court prize and the Sir Ninian Stephen Cup for the Australian Law Schools Mooting competition. He will read for a BCL at Magdalen College and then complete articles at Arthur Robinson & Hedderwicks.

If not (yet) a member of our Bar, Mark is at least "family" and all members will congratulate him on this great achievement. It's worth noting that our Bar includes in its ranks a number of Rhodes Scholars: Sek Hulme QC (like Mark a former student of Wesley, a matter of some satisfaction to Ada, who is a member of the Wesley Council), Mr. Justice Gobbo, Ken Hayne QC, Chris Maxwell and John Glover.

Ada tells us that Mark is a keen tennis player, a youth leader, good looking and a great help around the house. When pressed by Bar News for some indication of human failings, Ada did allow that he was "not in a hurry to get married".

Finally we should mention that academic achievement is nothing new in the Moshinsky family. Mark's uncle Nathan attended the Jesuit School in Shanghai shortly after the War and won the prize for Christian Doctrine.

THE PROPOSED COMPULSORY MAGISTRATES ARBITRATION SCHEME

The government has just released its latest scheme. All cases under $5,000 must go to arbitration; effectively all lawyers are barred from these proceedings. It is claimed this will lead to cheap and speedy justice.

The author of the report upon which this scheme is based is Lou Hill. Hill used to be a politician. Because of the vicissitudes of political life he is now a barrister again. He now seeks to inflict a few vicissitudes of his own on the poor and the legal profession.

Admittedly cheap, quick and lawyer-free justice has an undeniable populist appeal, and the more so when the sums are said to be "small" (although $5,000 would be about one-quarter of the annual after-tax income of someone on average weekly earnings). But what about the quality of justice which is delivered? Obviously there has to be a balance struck, and the cost to the litigant compared with the money value of the dispute involved is relevant and important. But that can't be the be-all and end-all, otherwise the logical answer would be decision making by the flip of a coin, the ultimate in cheapness and quickness.

More significantly, it appears that the type of magistrates court litigation targetted by these proposals is the motor car property damage claim, the "crash and bash". Very often one party will be insured and the other uninsured. Joe Average (uninsured) is sued for $5,000 for Freda Otherdriver. Freda is insured with Superglobal Insurance Co. who take over the case (along with several hundred others they will be conducting at any one time in Victoria). Superglobal have specialist in-house advocates who

conduct these cases, something like the employed advocates who represent unions and employer bodies in the industrial arena. Superglobal's advocate has had years of experience in these cases — he's smart, articulate and not a bad cross-examiner. There are eye witnesses on either side who give conflicting accounts. Joe Average would like to retain his local solicitor — a very competent advocate, just like Mr. Cain used to be — because he has a counterclaim for $5,000 for damage to his car, which he needs to travel to work. Sorry Joe. No lawyers allowed. The Superglobal operator wipes the floor with Joe. Joe is $10,000 worse off. But there are consolations for Joe. It only took half an hour and it hasn't cost him a cent in legal costs.

There was mention in the media release of "the alternative to a $1,000 a day lawyer — the white magnetic board" in these cases. We don't know if there are many who charge this fee for crashes and bashes under $5,000, however, it does seem a little over the set scale of fees. If the claim about $1,000 a day crash and bash barristers is any indication of the quality of research and analysis which went into this proposal, the whole thing should be treated with much scepticism.

All these schemes to remove lawyers from disputes are based on a view prevalent among certain sociologists and others in the "human sciences" — that lawyers create disputes to further their own ends. These are people who have never represented another person in a dispute. Many in the Law Department have not represented people in disputes.

Perhaps we can gain some guidance from a report of the Indian Law Commission. In December 1988 the Law Commission called for a ceiling on lawyers' fees. Evidently some Indian lawyers can earn between 5,000 to 15,000 rupees per day. There is difficulty to get barristers to go on circuit and represent the rural poor.

The Bombay Indian Express on 27th December 1988 reported as follows: "With regard to costs payable by the vanquished party to the successful party, the Commission says, the practice of awarding costs of successful litigants may continue but with some exceptions. If the successful litigant is from the affluent section of society, and the vanquished, from the impoverished section, the costs should not be awarded to the successful party. But if, on the other hand successful litigant is coming from a poor class, full costs should be awarded to him".

The report goes on to recommend "the setting up of a gram nyayalaya to be manned by a legally trained judge and two lay judges. And the gram nyayalaya will go to the people (or assemble at the site of justice) and not wait for the people to come in search of justice".

The legal profession should set up its own gram nyayalaya. It should go in search of Lou Hill and his colleagues in the Law Department. The costs of the vanquished in this scheme, namely the cost to the poor, the young barrister, and country solicitor should be awarded against Hill, the Attorney-General and the government in general, in other words the more affluent section of society.

MANIFEST DESTINY DEPARTMENT

A recent decision of the Victorian AAT (*Commonwealth of Australia v Road Traffic Authority*) revealed that the Officer-in-Charge of the Recoveries Section of the Regional Branch of the Applicant is a Mr Summons.

LORD CHANCELLOR'S GREEN PAPER

In January the Lord Chancellor released three green papers on "The Work and Organisation of the Legal Profession", "Conveyancing by Authorised Practitioners" and "Contingency Fees".

Much to the concern of the English Bar, one of the major recommendations would abolish the present monopoly which the Bar has for advocacy in the higher courts (a privilege which received strong recent judicial endorsement in *Abse v Smith* [1986] QB 536).

Of course no such right is enjoyed by the Bars in Australia, even in New South Wales and Queensland where separate Bars are established by law and not merely as voluntary associations of legal practitioners admitted to practice as barristers and solicitors. There may be a good case for saying that in the long run it is healthier for the survival and prosperity of a separate Bar if it has to compete in a free marketplace for legal professional services rather than be protected behind a statutory monopoly.

The green papers are seen by many as having a strong Thatcherite ideological base. The strong winds of competition and deregulation are to blow away restrictive practices. However, what is proposed to replace the existing structure seems likely to create its own problems in the form of rigidity and bureaucratic controls. Rights of audience for both barristers and solicitors in different courts will depend on different "levels of certification". This process will be controlled by an "Advisory Committee on Legal Education and Conduct" consisting of eight lay members, four practicing lawyers and two academics.

The Australian Financial Review (10th February 1989) reported that the Chairman of the English Bar, Desmond Fennell QC commented that "the establishment of this committee is more puzzling since there is no criticism of the Bar's conduct and procedures in the green papers". Another member of the Bar is reported as expressing alarm that a government controlled committee is empowered to determine what is an "appropriate code of conduct". He asks whether it would be deemed inappropriate for him to represent a member of the IRA.

The Editors

CHAIRMAN'S MESSAGE

THE JUNIOR BAR

My involvement on the Bar Council goes back to 1974. At regular intervals criticism is made that the Bar Council is "top heavy" and tends not to understand or appreciate the problems that face the junior members of this Bar. The Young Barristers' Committee was formed some 15 years ago with the express object of looking after and serving the interests of the junior Bar. More recently the Bar Council, last year, increased the representatives of the junior Bar from 3 to 4 on the Bar Council.

The Bar Council looks to both the Young Barristers' Committee and the representatives on the Council to inform it of the problems faced by young barristers and also for assistance with issues and problems that do arise which affect their practices.

Each year half of the 10 members of the Young Barristers' Committee have to face the electorate. This year there were only four nominations for the five vacant places. We have re-opened nominations for the fifth spot on the committee. The lack of response from the junior Bar is disheartening and reflects badly upon the junior members. There are 455 members of this Bar under six years' call out of the total 1,120 practising barristers. Surely the junior Bar can do better than four nominations?

ATTACKS ON JUDICIARY

Recently we have seen a spate of attacks upon members of the judiciary not only by sections of the media but also by members of Parliament.

No-one is suggesting that Judges are above criticism. However, the criticism must be informed, fair and constructive. If criticism does not meet these criteria then the judiciary is brought into disrepute. It is important in our democratic society that those who judge should be respected. Litigants must accept the result and the loser must go away from the Court feeling that he has had a fair and proper hearing. Nothing is gained by ill-informed, unfair and destructive criticism which lowers the standing of the Court in the eyes of the community. Both the media and members of Parliament have a responsibility to ensure that any criticism made is well founded and without lowering the esteem of the judicial system. Public confidence in the judiciary is of the utmost importance.

If continued uninformed intemperate attacks are made upon members of the judiciary they may act as a catalyst for the commission of acts of violence against members of the Bench as, unfortunately, has happened in the Family Court. Further, such attacks may lead to the possibility of the institution of private defamation proceedings by a member of the Bench against a Parliamentarian and/or the press. We may have the situation arising where the Chief Justice, the Chief Judge and individual Judges seek to defend Judges and themselves in the media from unwarranted attacks. These consequences would be most undesirable.

The Bar Council has recently written to the Premier detailing our concern about these attacks. We hope that the media has sufficient commonsense to see beyond merely attracting circulation by media bashing of Judges and Magistrates. Public confidence in the system is far more important than media sensationalism.

EXCLUSION OF LAYWERS

The move to exclude lawyers from representing litigants in the Magistrates' Courts in all claims up to $5,000 involves fundamental and important issues concerning the administration of justice in this State. The Bar Council is extremely concerned that the Attorney-General did not consult it or the Law Institute when considering and formulating the changes to the law. The Attorney-General did not consult with the Magistrates either. We suspect that the lack of consultation was due to the determination to push through the changes come what may.

The main reason given for the exclusion of lawyers is that the cost of litigation is getting beyond the average person and hence he is being denied access to the Courts. Nobody appears to have thought of the disadvantages of such a system. The disadvantages far outweigh any advantages.

Every person has a right to consult a lawyer and every right to have that lawyer representing him in court proceedings. These proposals do away with that right with a stroke of a pen.

The question of costs rivalling the claim can be met by placing a cap on the total costs that can be awarded in claims under $1,000. If interlocutory procedures such as interrogatories and discovery are excluded for claims under $1,000 save with leave of the Court for special reason, and if the junior Bar

is prepared to accept a fee of say $175 on brief, then there is no reason why a cap of say $400 should not be imposed. Of course the solicitors will have to be heard on this. When I first came to the Bar there was a scale of costs for default summonses which were concerned with small debt claims. There were two fees, namely an amount for an undefended case and an amount for a defended case. The fee was fixed at a small sum and did not concern itself with the constituent parts of the work involved. To ensure that barristers and solicitors are not unnecessarily financially disadvantaged, the introduction of some system in the Magistrates' Court whereby cases were listed for certain times during the day would enable practitioners to handle multiple cases during the day.

There are many reasons why it is essential that we have lawyers involved in litigation. The reasons have been spelt out in various articles and correspondence that have appeared in the media over the last few weeks. There are two very important points, in my view, that should be made. The first is the presence of lawyers ensures a fair hearing in accordance with natural justice. If lawyers are excluded there is no informed public scrutiny of the performance of judicial officers. It is an unfortunate but true fact that on occasions Magistrates and Judges fail to accord natural justice. The second important point is that the unintelligent, inarticulate, nervous and new Australian litigant are going to be at a distinct disadvantage in the conduct of their case. Some 40% of all the cases heard in the Magistrates' Court at Melbourne are brought by Government departments of one sort or another. No doubt the agent advocate who appears for the department will by training and experience become a formidable opponent in any proceeding. What chances Mr. Average? Finance companies and insurance companies will also gain a similar advantage. Is it right that the Magistrate-referee should become an inquisitor and also a legal adviser as well as an arbiter? Does the Magistrate want to do so?

I hope that commonsense will prevail. We have written to the Attorney-General and requested an opportunity to be heard. We sincerely hope that we will not be dismissed as being political or self interested. There are more things at stake than those who have formulated these proposals appreciate.

NEW SILKS

I attended the presentation of the new Silks to the High Court in Canberra in February and the A.B.A. Dinner held for them. Mr. Geoff Colman, Q.C. of this Bar made the speech responding to the toast to the new Silks. Geoff is to be congratulated on a witty and entertaining speech. I am very pleased to report this because the New South Wales Silk who responded last year created an all-time low on the speech scale!

E. W. Gillard

THE HONOURABLE SIR MURRAY McInerney, formerly a judge of the Victorian Supreme Court for eighteen years, died at his home, surrounded by his family, on 23 November 1988, in his 78th year. The magnitude of his obsequies at Our Lady of Victories Church at Deepdene a few days later has seldom been exceeded in modern times. The solemn Requiem Mass was celebrated before a congregation which filled the church and overflowed into the surrounding grounds. This tribute was paid by hundreds of people — friends and acquaintances — who had known and respected him over many years. I, who had known him well since our schooldays together in the middle 'twenties, was amongst those present, and I relived those more than sixty years, as the parade of mourners, many of whom I knew, recalled to my mind the multitude of happy occasions Murray and I had shared.

Murray — I shall call him by the name by which he was so affectionately addressed — was a remarkable man in so many ways: as a scholar, a

)URABLE SIR MURRAY McINERNEY

Personal Tribute

friend, an athlete, a barrister, a judge, a family man, a Christian, he was exemplary. Let me review some aspects of a remarkable life.

Murray's parents were Australian of Irish ancestry, but his father's employment took the family to South Africa from time to time, and it was in Johannesburg that Murray was born on 11 February 1911. His early education, which included learning Afrikaans and was by the Christian Brothers, was in the "Dark Continent" until 1924, when the family finally returned to Australia. Murray then went to Xavier College, Kew, where he was Dux of the School in 1927. In 1928 he began an association with the Melbourne University which lasted virtually the rest of his life. At the University he played a prominent part in a variety of activities besides his studies. He distinguished himself in debating and athletics in which he obtained an Australian Blue, and in other fields including the Newman Society of Victoria of which he was secretary, and he was a foundation, and very active, member of the Campion Society of Victoria, a group of Catholic intellectuals who actively engaged in the promotion, both at the University and elsewhere, of the concept of Catholic Action which advocated greater participation by the laity in Catholic affairs.

This was all during the Great Depression and money was short, but Murray found employment on Saturdays as a sports reporter for the Melbourne *Herald* and later as a sub-editor for the *Sporting Globe*.

In 1934 he graduated M.A., LL.M., collecting several exhibitions and prizes on the way, and thereafter for a number of years he was resident tutor at Newman College, lecturing and tutoring in various legal subjects. He was lecturer at the University in Procedure and Evidence for fourteen years until 1962, and he was a member of the Law Faculty at the University from 1949 to 1964.

He was admitted to practice in 1934 and signed the Bar Roll in 1935. Briefs were scarce at the time but he made progress, and in 1939 he was able to

marry Manda Franich, a sister of the now retired Judge Ivan Franich of the County Court. It was a happy and fruitful marriage, producing two sons and five daughters. In due time these children produced for Murray 23 grandchildren, who were his constant interest and pride. Sadly, Manda died in 1973. In 1975, Murray married Frances Branagan, the widow of Vincent Branagan (a Melbourne solicitor and a cousin of Murray), and herself the mother of seven children. The remaining years of his life were happily spent with Frances and their extended family of fourteen and their offspring.

World War Two interrupted Murray's legal career in 1942 for four years, during which he was a lieutenant in the Royal Australian Navy and served as an intelligence officer attached to General MacArthur's headquarters; he saw service in Melbourne, Brisbane and on the North Coast of New Guinea, where he suffered severe injury in a maritime collision.

After the War, he returned to the law and his practice really blossomed. The range of matters in which he was concerned was legion. His practice was mainly on the civil side — equity, commercial, constitutional and the like — though he had his share of crime. He appeared before courts and tribunals of every kind, including a number of Royal Commissions and other inquiries, and he did a mass of appellate work as well. His name as counsel is found frequently in the Law Reports up to 1965; from that time onwards, his name as a judge of the Victorian Supreme Court adorns a disproportionately large space in the Law Reports.

He took silk in 1957, and in due time he included the Privy Council in the list of courts he patronized. In 1964, while in London appearing before the Privy Council, he met Sir James Tait, still remembered with great affection by the Victorian Bar as the doyen of the Bar for many years. Tait, then almost seventy-four and a widower, coyly informed Murray that he was about to remarry in Westminster Abbey, and he asked Murray to be his best man. Murray agreed, but on one condition.

"What's that?" asked Tait.

"On condition," said Murray, with as much solemnity as he could muster, "that all the children of the marriage be brought up as Catholics."

"Done," said Tait. "It's a deal." As things turned out, he did not have to honor the undertaking.

Murray took a great interest in Bar affairs; he was a member of the Bar Council for twelve years, and was its chairman in 1962 and 1963. He was Vice-President of the Law Council of Australia in 1964-65; and he found time to be Deputy President of the Courts-Martial Appeals Tribunal from 1959 to 1965.

His appointment to the Supreme Court in 1965 was no surprise, nor were his eighteen years on the Bench during which he labored unremittingly and thoroughly to discharge his judicial functions. He seemed generally to be amiable and relaxed, and one felt comfortable in his court; tension, often present in courts, was rarely sensed in his court however serious the matter might be. His court never lost its dignity or authority; and he could be appropriately stern, as when he rebuked a medical witness in the witness box who presumed he could direct the judge's associate, without leave of the judge, to phone his surgery to report that he had been delayed in court.

He was always attentive to, and often ahead of, counsel in their submissions, supplementing their arguments with his own cogitations, and enjoying and developing every nuance which the nature of the case and the pleasantries of judge and counsel contrived to introduce. He devoted himself fully to every aspect of a case, no matter how minute, in order that full consideration be given to each party's case. If this happened to prolong a case, so be it; but his judgments left nothing in doubt or to be desired — except, perhaps, by the unsuccessful litigant. The Law Reports perpetuate his formidable labors. He was worthily knighted in 1978.

Though busily occupied with his judicial labors, he found time to participate in a number of other activities, and, amongst the appointments he held were chairmanship of the Council of State Colleges from 1973 to 1981 and presidency of the Victorian Amateur Athletics Association from 1978 to 1982; and, of course, for almost the whole of his time in Australia, he was an ardent, almost rabid, South Melbourne football supporter.

His retirement from the Bench in February 1983 did not lessen his labors, for he undertook various activities including the conduct of moot courts at Melbourne University, and more than a passing interest in the activities of the Leo Cussen Institute. He also embarked upon the writing of his Memoirs, a formidable task, regrettably not completed at the time of his death.

Within a few weeks of his retirement from the Bench, he was in hospital with a heart condition, long suspected but then becoming evident, which progressively weakened him physically, but was powerless to curb his will. Between bouts in hospital he pursued his accustomed activities with all the strength and determination he could muster until the very end. Less than two weeks before his death he was at an old school reunion dinner with me, and a few days afterwards I saw him at the Australian Club attending a luncheon. Though he was gravely ill, his interest in all things was as sustained as ever.

And so my friend of more than sixty years has passed on. I always regarded him as something of a prodigy. I valued his friendship highly, and my memory of him remains strong and affectionate. He was a great man in so many ways; he is one of the few of this generation whose memory deserves to be perpetuated.

Kevin Anderson

CRIMINAL BAR ASSOCIATION REPORT

The executive of the Association is Robert Richter QC *Chairman*, Colin Lovitt QC *Vice-Chairman*, Lex Lasry *Secretary*, Nick Papas *Treasurer.*

The Committee includes Graeme Morrish QC, Michael Rozenes QC, Aaron Shwartz, Bill Morgan-Payler, Roy Punshon, John Barnett, Ross Ray and Gavin Silbert, replacing Betty King who had been the Prosecutors' representative until her departure from the Crown in January 1989.

The Association has 243 financial members. Lex Lasry reports

TEN YEARS

On 29 November 1988, we celebrated our tenth anniversary with an exceptionally successful dinner at the Australian Club. Many of the honoured guests were former Chairmen or Committee members of the Association over the years. A nostalgic and entertaining speech proposing the toast to the Association was made by his Honour Judge Kelly, the first Chairman. The response on behalf of the guests was made by the Chief Justice, Sir John Young.

A look back at the last ten years suggests that the issues confronting the Criminal Bar Association change very little from year to year. Fees and listing delays are, and always have been, a constant topic of discussion and cause for concern by our members. However, there is now the increasingly public debate about the adequacy and extension of the powers of the police, the investigation of criminal and quasi-criminal matters by organisations with a sometimes crusading public image and an atmosphere in the community of a desire for law, order and heavier sentences. Often public attitudes are coloured by sensational press and emotive headlines.

In September 1988, the Police Association entered an election campaign with a circular on police powers and law and order which criticised the Government, the Coldrey Committee and some political parties and concluded with the emotive suggestion that there was some implicit design in the law to prevent criminals from being apprehended and convicted. The Association was very concerned about members of the police force campaigning in a political atmosphere on mattes which require impartiality and informed debate.

The Criminal Bar Association is not a civil liberties organisation but it is concerned to preserve and maintain a rational debate hinged on a system that guarantees certain basic rights to everyone, *particularly* to those who are suspected of or charged with serious criminal offences with the accompanying risk of forfeiting their liberty.

CUSTODY AND INVESTIGATION

The *Crimes (Custody and Investigation) Act* 1988 is now in operation. The Act implements the 1986 report of Consultative Committee on Police Powers (the Coldrey Committee) which recommended the repeal of the section 460 six hour rule and introduction of statutory safeguards and mandatory tape recording of interviews in indictable offences as a prerequisite for their admissibility. The police have published a set of procedural guidelines under the title "Tape Recording in Indictable Matters" (TRIM) to complement the legislation.

MELBOURNE REMAND CENTRE

The Association has been involved in discussions with the Senior Governor and Administrations Manager of the MRC through its representatives Roy Punshon and Graeme Thomas with a view to the facilities at the centre for remand prisoners and access by their lawyers. Negotiations have occurred on visiting times, teleconferencing and the adequacy of the visiting booths which have been established. Members will be advised when those matters are finalised.

ADULT PAROLE BOARD

In 1988, the Association raised the possibility of members of the Association attending proceedings of the Board as observers. Mr Justice Vincent was agreeable to the idea and some members have already

attended. Obviously there are limits on numbers and times but enquiries can be made through the Secretary by those interested.

FEES

The negotiation and fixing of fees in any jurisdiction is difficult enough but in this jurisdiction, with the extra constraints of legal aid, it becomes complex. On 15 March the Bar issued a new scale of fees offered by the Legal Aid Commission in accordance with the recommendations of the Costs Co-ordination Committee

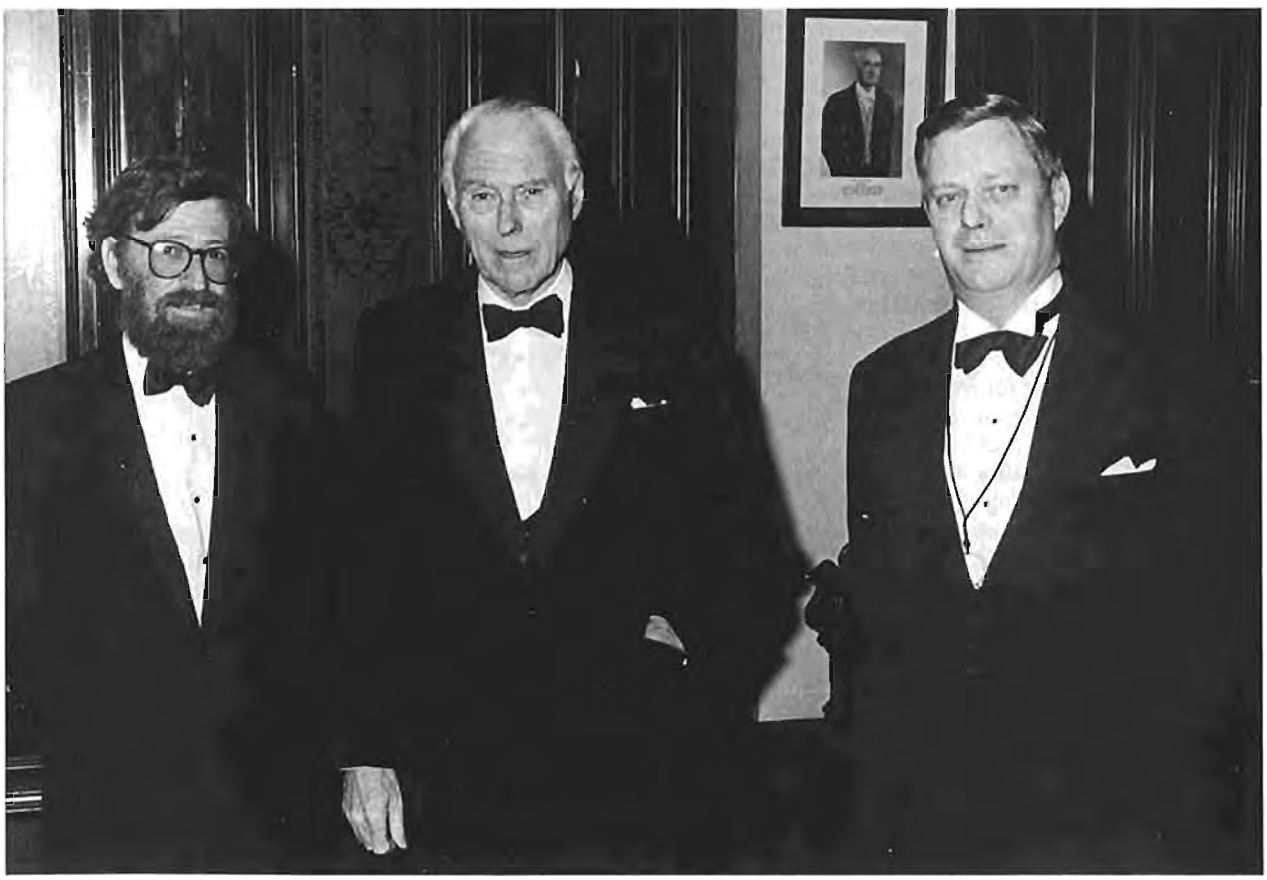
CRIMINAL BAR ASSOCIATION

10th Annual Dinner

On 29th November 1988 the Criminal Bar Association celebrated its 10th anniversary with a dinner at the Australian Club. The Chief Justice, Sir John Young, and the Attorney-General for Victoria, Mr. Andrew McCutcheon, were guests of the Association.

John Barnett, Gavin Silbert and Ross Ray

Ian Crisp, Liz Curtain and Wendy James



Robert Richter QC, President of the Criminal Bar Association, Sir John Young, Chief Justice and Judge Kelly, first President of the Association.

which trace the increases in fees in April and July 1988 and March 1989.

In the work done over the last 12 months this Association publicly acknowledges the efforts of Douglas Meagher QC during his Chairmanship of the Bar Fees Committee. In that period fees increased by approximately 15%. This Association, in particular, is grateful to him for his thorough research and preparation of material which enabled those increases to occur.

Lex Lasry
Secretary

John Coldrey QC, Director of Public Prosecutions with Sally Brown, Deputy Chief Magistrate

David Ross QC and Mr. Justice Phillips

Ray Lopez, Charles Francis QC and Brent Young

CRIMINAL LIABILITY OF PROFESSIONAL ADVISORS

Here is an edited version of a paper presented to a conference conducted by Business Resources and Services International Pty. Ltd. on 28th November 1988 by *Robert Redlich* QC who was from 1982 to 1984 Commonwealth Special Prosecutor in respect of offences disclosed by the Stewart and Costigan Royal Commissions. The paper takes issue with views expressed by *Justice McHugh* in recent extra-curial comments prior to his Honour's elevation to the High Court.

INTRODUCTION

In a paper on "Jeopardy of Lawyers and Accountants in Acting on Commercial Transactions" delivered to the Law Society of Western Australia in February of this year Justice Michael McHugh observed that there was a general public perception that accountants and lawyers have become indispensable to the success of many criminal enterprises. His Honour said that there had been an acceleration in the decline in the status of the accountant and the lawyer which in turn had given rise to a conducive atmosphere for the ready prosecution of professional advisers. His Honour concluded that the current rules of criminal complicity were such that professionals who give advice resulting in breaches of the law are in increasing danger of being charged as aiders and abetters or in extreme cases as co-conspirators.

"Professionals whose advice enable clients to overcome legal prohibitions usually receive considerable professional and financial rewards for their ingenuity and daring. It is difficult to see how they can legitimately complain if society insists that the professional who helps bring about a contravention of the law, as well as the client, should be punished."

THE ROLE OF ADVISOR IN A CHANGING ENVIRONMENT

In considering the criminal liability of an advisor it is important to bear in mind the observations of Street CJ. (with whom Gordon and Ferguson JJ agreed) in *Tighe* v. *Maher* (1926) 26 SR (NSW) 94 at 108-9 that

"it is expected of course of every solicitor that he shall act up to proper standards of conduct, that he shall give his clients sound advice to the best of his ability, and that he shall refrain from doing anything likely to mislead a court of justice; but in the course of his practice he may be called upon to advise and to act for all manner of clients, good, bad or indifferent, honest or dishonest, and he is not called upon to sit in judgment beforehand upon his client's conduct, nor because he does his best for him as a solicitor within proper limits, is he to be charged with being associated with him in any improper way. In acting for a client, a solicitor is necessarily associated with him, and is compelled to some extent to appear as if acting in combination with him. So he may be, but combination is one thing and improper combination, amounting to a conspiracy to commit a crime or a civil wrong is another thing. An uninstructed jury may easily fail to draw the necessary distinction between such combined action as may properly and necessarily be involved in the relation of solicitor and client, such acts on the part of a solicitor, over and above what is required of him by his duty as a solicitor, as may properly give rise to an inference of an improper combination. I think therefore that it may be useful to point out the importance, in the cases where a solicitor is charged with entering into an agreement with his client which amounts to a criminal conspiracy, of seeing that the jury are properly instructed as to a solicitor's duty to his client, and that it is made

plain to them that, before a solicitor can be convicted of conspiring with his client to commit a wrong, it must be proved that he did things in combination with him, over and above what his duty as a solicitor required of him, which lead irresistibly and conclusively to an inference of guilt".

It is frequently said that professional advisers are not entitled to set themselves up as the custodians

of the client's or society's moral standards. See "The Crimes (Taxation Offences) Act and the professional adviser" (1981) 10 ATR 63. Thus is it said that professional advisors are subject to a general duty to use their professional knowledge so as to enable their clients to obtain the most favourable tax position consistent with their clients desire and the requirements of the law. This duty of the advisor is a corollary of the right of the client to order his affairs so as to lawfully minimise his tax liability. See J.C. Walker Q.C. "Conspiracy to Defraud the Commissioner of Taxation" Faculty of Law, Monash University, October 1985. The concept of "fiscal nullity" has been introduced in the United Kingdom: *W.T. Ramsey Ltd.* v. *Inland Revenue Commissioners* (1981) 11 ATR 752; [1982] AC 300; *Furniss* v. *Dawson* (1984) 15 ATR 225. Thus a series of transactions which have no commercial purpose apart from the avoidance of income tax is struck down. This notion has not been accepted as any part of the law of Australia: *Oakey Abbatoir Pty. Ltd.* v. *Federal Commissioner of Taxation* (1984) ATR 1059. On the other hand s.260 of the *Income Tax Assessment Act* has been given a new and generous lease of life. There can be no doubting the trend by Boards of Review and the courts to strike down schemes of avoidance that are no more 'artificial than those which flourished and were upheld only a few years ago by the High Court. The disallowance of a deduction or the finding that a scheme is ineffective for the purpose of minimising tax did not in the past make those who were directly or indirectly concerned with such a claim or scheme guilty of criminal complicity. It is the object of this paper to identify the extent which the criminal law as presently interpreted does attach to the giving of taxation advice.

Despite the views expressed by Street CJ in *Tighe's* case, the professional advisor is now more vulnerable than ever before. R.V. Gyles QC in an article published in the NSW Bar News (Summer 1988) speaks of "a new and unwelcome hazard" in relation to the giving of professional advice. Industry and Commerce now have a greater dependency upon the advisor thereby exposing him or her to a greater risk of criminal complicity. The advisor's prosecution is presumably justified by the community on the grounds that:

"The accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crow bar". United States v. Benjamen *328F 2d 854 at 863 per Friendly J.*

The commercial advisor is well placed to identify and restrain commercial excesses which infringe the law. It is no doubt good politics for governments, at little cost to themselves, to place a heavier burden upon the commercial advisor to ensure that his client does not transgress the law.

"If the advice or assistance of the professional has played a part in the carrying out of an enterprise prohibited by law, an inference will usually be open that the professional was aware of the nature of enterprise. This is frequently enough to raise a prima facie case of criminal complicity and to justify charging the adviser either as a conspirator or as an aider and abettor. Questions concerning the guilt of professional advisors are increasingly seen as matters to be left to the courts for individual determination". McHugh JA in his paper to the W.A. Law Society.

AIDING, ABETTING, INCITING, URGING AND ENCOURAGING CRIMINAL ACTS

Section 5(1) of the Commonwealth *Crimes Act* 1914 provides

"any person who aides, abets, counsels or procures or by any act or omission is in any way directly or indirectly knowingly concerned in or party to the commission of any offence against any law of the Commonwealth or of a Territory shall be deemed to have committed that offence and shall be punishable accordingly".

Section 7A of that *Act* provides that any person who incites, urges, aids or encourages the commission of an offence shall be guilty of an offence and subject to a penalty of $200 or 12 months imprisonment or both.

In a review of the law of criminal complicity contained in his judgment in *Giorgianni* v. *R* (1985) 59 A.L.J.R. 461 at 463ff, Gibbs CJ suggests that these words are synonymous with help, encourage, advise, persuade, induce and bring about by effort.

An analysis of those authorities and text books which have attempted to define the words "aid, abet, counsel and procure" will demonstrate that, for practical purposes, they are little different to the words "assist, incite, urge and encourage." Smith and Hogan (Criminal Law 5th ed. (1983) p. 121) comment that the "natural meaning of "to aid" is to give help, support or assistance to," and of "to abet," "to incite, instigate or encourage". It is entirely clear that either type of activity is sufficient to found liability as a secondary party. "Abet", so defined, seems indistinguishable from "counsel"." In *Attorney-General's Reference* (No. 1 of 1975) (1975) 2 All ER 684, the English Court of Appeal said —

"Knowingly concerned in" — a practical connection between the defendant and the offence

"To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening". "To counsel" is defined as "to give or offer counsel or advice to, to recommend" (O.E.D.).

See J.W. Rapke "Aiding and Abetting and Encouraging Criminal Acts" Faculty of Law, Monash University 1985.

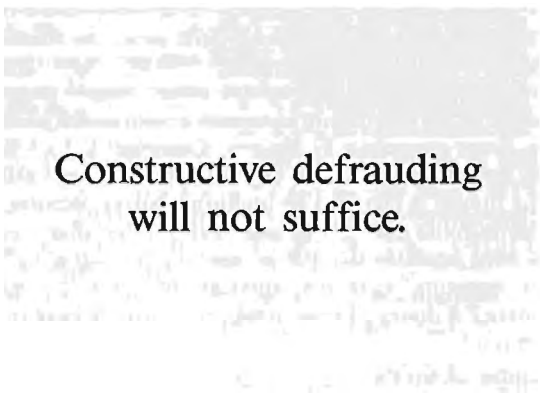
The term "knowingly concerned in" is obviously designed to cover a wide range of activities. A person does not have to be engaged in active participation in some scheme before he can be said to be knowingly concerned, although some act on his part would normally be required in order to prove his knowing concernment: see *R.* v. *Kelly* (1974) 24 FLR 441. In determining whether by act or omission one can be said to be knowingly concerned in a matter, a court should ask itself "whether on the facts it can reasonably be said that the act or omission shown to have been done or neglected to be done by the defendant does in truth implicate or involve him in the offence, whether it does show a practical connection between him and the offence" — *Ashbury* v. *Reid* (1961) WAR 49. See also *Mallan* v. *Lee* (1949) 80 CLR 198; *York* v. *Lucas* (1983) 49 ALR 672; *R.* v. *Tannous* (1988) 81 ALR 407.

The accessory's liability under s.5 of the *Crimes Act* (Commonwealth) is not dependent upon an earlier determination of the principal's liability. The section is an aiding and abetting provision and can apply only where the principal offence has been proved to have been committed. However, it does not follow from the requirement that a principal offence be proved that the principal offender must be convicted.

An advisor may be guilty of aiding and abetting if he knows that what he is doing is assisting the commission of an offence even though he is only carrying out his ordinary business or employment duties and does not desire the commission of the offence. *National Coal Board* v. *Gamble* [1959] 1 QB 11; Williams *Criminal Law* at 293. The advisor need not even know the precise criminal act which he is assisting or encouraging so long as he knows its general nature. *Thambiah* v. *R* [1966] AC 37; *R* v. *Bainbridge* [1960] 1 QB 129. The aider and abettor must know of the factual matters which constitute the breach of law by the principal. The law is presently unclear as to whether somebody can be guilty as an aider and abettor if that person "shuts his eyes" or is wilfully blind as to the existence of a relevant fact. In *Georgianni* v. *The Queen* (supra) the High Court was divided on this important question. The Chief Justice thought that the deliberate shutting of ones eyes was equivalent to knowledge (481) and Justice Mason, as he then was, expressed a similar view. (495) Justices Wilson, Dean and Dawson JJ. said that actual knowledge was required and not knowledge that was imputed or presumed although inferences could be drawn from the fact that a person had deliberately abstained from making any enquiry about some matter that he knew of. (Page 505). However in *R.* v. *Crabb* (1985) 156 CLR 464 the court appears to have adopted the view expressed by the majority in *Georgianni.*

A person is not guilty of aiding and abetting if it is his negligence which deprives him of the relevant knowledge. See *Callow* v. *Tilstone* (1900) 83 L.T. 411. In circumstances where a person owes a duty to another he may become an aider and abettor merely by omitting to take steps to prevent an offence. Thus an employee who owes a duty to his employer to prevent theft of his employers goods will become an aider and abettor where he fails to take steps to prevent another stealing those goods. *Ex parte Parker; re Brotherson* (1956) 57 SR (NSW) 326 at 332. Similarly where an advisor owes a fiduciary duty to people a failure to intervene may constitute aiding or abetting. Recently in the United States an attorney was held guilty of aiding and abetting where, inter alia, he failed to withdraw his opinion approving a merger and failed to inform shareholders of an adjustment to a financial statement. *Securities and Exchange Commission* v. *National Student Marketing Corporation & Ors* 457F Supp. 682 (1978). A failure to prevent an offence where a person has the power to control a situation may constitute aiding and

abetting. Thus the owner of a car who permits the driver to commit traffic offences has been held guilty of aiding and abetting *Cros* v. *Lamborne* [1907] 1 K.B. 40. Similarly a licencee was convicted as an accessory for permitting people to continue to drink after hours *Tuck* v. *Robson* (1971) WLR 741. This line of cases lead Mr Justice McHugh in his paper to the W.A. Law Society to conclude that an advisor may become liable where the client has placed himself under the advisor's control and makes clear that he is relying upon the advisor for advice and direction and the professional knowingly permits him to do acts which contravene the statute. This opinion derives some support from the approval which the High Court in *Georgianni* v. *R.* (supra) gave to the case of *Johnson* v. *Youden* [1951] KB 544 where a solicitor, knowing that his client was charging a purchase price in excess of that permitted by the regulations nevertheless took steps on his client's behalf requiring the purchaser to complete the sale in drawing up legal documents for the purpose of assisting the client to carry out the transaction in a prohibited manner.



It is not necessary that the principal committing the crime know that the aider and abettor is providing assistance or encouragement. There need be no agreement or consensus between them. See *Georgianni* v. *R* at 493, *R* v. *Ready* [1942] VLR 85. If the advisor knowing the facts draws up documents or does other work which facilitates the commission of the offence he will be liable although the principal is not aware of the particular assistance.

An honest belief that a scheme is effective and even a hope that certain expenditure is properly deductible from income does not prevent a possible finding of a criminal intent to defraud the Commissioner for Taxation. Thus in *O'Donovan* v. *Fereker* (1987-88) 76 ALR 97 it was held that if a person hopes that a tax scheme will successfully avoid the payment of tax but that to allow for the contingency that that hope be unfulfilled, the taxpayer arranges his affairs so that he has no assets or means of meeting his liability, the tax payer has the intent of defrauding the Commissioner. Consequently where an advisor considers that a scheme is likely to succeed but recognises that there is a more than fanciful possibility that the tax is payable the client's affairs cannot be so structured as to render the client unable to pay such tax should it become due. *O'Donovan* v. *Fereker* (supra), *Edwards* v. *Von Einam* (Full Court of the Federal Court of Australia October 1984 per Lockhart J).

It appears clear that there must be a conscious intention to dishonestly deprive before the requisite mens rea is made out and constructive defrauding will not suffice. See *Hardy* v. *Hanson* (1960) 105 CLR 451 at 456 per Dixon CJ. and at 463 per Kitto J.; *R* v. *Bonollo* [1981] VR 633; *R* v. *Salvo* [1980] VR 401; *O'Donovan* v. *Fereker* (1987) 76 ALR 99 at 127 per Pincus J.

One of the consequences of the decision of *O'Donovan* v. *Fereker* is that the state of mind of the advisor as to the risk of a tax liability must be considered. Consequently a promoter or advisor who is confident that a deduction will be allowed may not be guilty of conspiracy to defraud whilst a more cautious assessor of the situation may be.

Justice McHugh expressed the opinion to the W.A. Law Society that an advisor who knows the material facts is arguably aiding and abetting when he provides professional advice which is acted upon and which encourages or assists the breach of the law. His Honour states without qualification that if the conduct of the person charged as an aider and abettor is knowingly directed to the purpose which the principal has pursued and is likely to bring about or render more likely the attainment of that purpose, he is liable as an aider and abettor. This, His Honour says, is because the concept of encouragement is concerned with the effect of the accessory's conduct on the principal and not with a subjective state of mind of the accessory. His Honour summarises the mens rea of an accessory as follows:

"The guilty mind of the latter consists in the intentional provision of assistance which he knows may benefit the principal to carry out the particular purpose".

The dicta of Devlin J. in *National Coal Board* v. *Gamble* [1959] QB 11 at 20 is arguably to the same effect.

In my view the law requires that there be something more, namely "a purposive attitude towards it" per Gibbs C.J. — *Giorgianni* v. *R* (supra) at 480.

It is often said that a lawyer or accountant's advice gives approval to and assists in the carrying out of a scheme which was fraudulent. Advisors often have to express opinions on the legality or propriety of activities in which their clients propose to engage and to suggest means of avoiding illegality. If their opinions are erroneous, or thought by prosecuting authorities to be so, then, as the case of *O'Donovan* v. *Fereker* illustrates (supra)

"they may be in peril of being charged with offences along with their clients. That may occur, as is again illustrated here, even if there is no evidence that the opinions expressed were not truly held. Counsel for the Appellant informed us that the Respondent was "not necessarily dishonest in the ordinary sense". There is an underlying principle of the common law that a person should be entitled to seek and obtain advice in the conduct of his affairs without the apprehension of being thereby prejudiced" per Pincus J.

The High Court in *Baker* v. *Campbell* (1983) 153 CLR 52 makes clear the importance of a client being able to receive independent advice as to the client's rights or duties in any given situation. That principle must be weakened if the client's entitlement is to consult advisors who become threatened by prosecution if their advice turns out to be wrong, and the acts done in reliance upon the advice become criminal. In *Baker* v. *Campbell* (supra) concern was expressed that the proper functioning of the legal system might be inhibited by compulsory disclosure of legal advice. Dawson J. at pages 127-8. The prospect of imprisonment for giving advice held to be erroneous would no doubt be an even more potent inhibition. Pincus J. in *O'Donovan's* case found that where advisors are engaged in providing opinions as to the efficacy and legality of highly artificial means to escape the impact of substantial taxation their cause is hardly likely to attract universal sympathy, but nevertheless acknowledged an important right that must be considered namely that of "freedom of communication between citizens and (legal) advisors." His Honour candidly observed that he had been unable to think of any argument which enabled the reconciliation of the principle expressed by the High Court in *Baker* v. *Campbell* with the law as to the position of accessories and criminal conspirators. He likened the position to the analogous case of *Guillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] AC 112 where the conduct of doctors giving contraceptive advice to girls under the age of 16 years (the age of consent) was considered. Lord Scarman at p. 190 thought that

"the bona fide exercise by a doctor of his clinical judgment must be a complete negation of the guilty mind which is an essential ingredient of the criminal offence of aiding and abetting the commission of unlawful sexual intercourse".

It is not at all clear that a lawyer or accountant whose advice is said to have lead to the commission of offences may find exculpation in such a principle.

The high water mark can be found in the remarks of Justice McHugh in his Perth address when he said:

an inference of encouragement will usually be open even when the client simply asks whether a particular course of commercial conduct is lawful. It will be open to a jury to conclude that the client was relying on the lawyer's advice and was encouraged to carry out the prohibited conduct by reason of it . . . when the lawyer goes beyond advice and draws documents for the purpose of enabling a client to achieve an objective, it is I think almost impossible to contend that the advisor does not aid the commission of any offence which results . . . when knowledge of relevant facts is present, I regard the drawing up of documents as constituting aiding and abetting *any offence which is committed. (Pages 39-40 Emphasis added).*

A professional advisor should not in my respectful opinion be amenable to the criminal law for doing no more than expressing a genuine opinion on the propriety of a course proposed by the client. Thus it was held in *R* v. *Cox and Railton* (1884) 14 QBD 153 that a client's legal privilege is only lost where he conspires with his solicitor or deceives him.

If his Honour's views are allowed to stand uncorrected, they will seriously impede lay clients' ability to receive independent advice as to their rights or duties in any given situation. Whilst any opinion expressed by a Judge of his Honour's eminence must be afforded the highest respect I cannot believe that a majority of the High Court would regard those views as correct having to regard to statements such as those appearing in *Baker* v. *Campbell* 153 CLR 52 particularly at 66, 93, 114 and 128. However, until the matter is clarified by an authoritative decision, professional advisors should bear in mind that it is at least arguable that the expressions "encouraging" or "assisting" may have application even where the advisor is doing no more than expressing his genuine opinion.

CONCLUSION

Justice McHugh considers that the best means of a protection available to an accountant or lawyer is to give an opinion emphasising both the points for and a gainst a proposed course of conduct in making it plain that the professional is not recommending any particular course. Where the requirements of a client demand otherwise his Honour suggests other steps which the professional could take to prevent findings of conspiracy or aiding and abetting. It would be presumptuous of me in the extreme if I did not set out seriatim such steps as his Honour has recommended:

"1. A thorough investigation of the law applicable to the subject of the advice.
2. In doubtful cases, discouraging the client from proceeding or, at all events, making it plain that no part of the advice is intended to give any encouragement to proceed.
3. Assessing whether the objective or the means of achieving it, although not prohibited by law, may nevertheless be regarded as dishonest by the standards of the community.

4. Ascertaining the true facts in respect of matters which the advisor has grounds for suspecting that the client is concealing from him:
   e.g. (a) the conscious omission or inclusion in a return of something which should not have been omitted or included;
   (b) the deliberate failure to make an enquiry of a client on a relevant matter. If it is clear to the advisor from other material available to him that the client must have had some other income, or that he did not incur a particular expense which is being claimed, failure to make proper enquiries of the client would be likely to render the advisor guilty of aiding and abetting a taxation offence on the basis of his "wilful blindness;"

Expressing a genuine opinion is not enough for criminal liability

5. Insisting that the client not depart from any course proposed by the advisor and taking steps to check that the advice has been followed and, if necessary, disowning the client's improvisations.
6. The making of extensive contemporaneous records of advice given and instructions received.
7. So far as practicable, the avoidance of conduct, particularly of a participatory nature which gives rise to inferences that the professional has been taking steps to bring about "the common design".
   e.g. (a) The backdating of documents which have a legal effect and create rights between parties, where the incorrect dating would affect the incidence of taxation. Such documents would include management agreements, partnership and trust deeds, leases and contracts.
   (b) Assisting or encouraging a client to deny access to the Commission to any building, place, book, document or other paper (s.263 of the *Income Tax Assessment Act* 1936) or otherwise hindering or obstructing the Commissioner in the performance of his functions in relation to a taxation law (s.8 of the *Taxation Administration Act* 1953).
   (c) Assisting or encouraging a client to refuse to furnish the Commissioner with information, or to refuse to give evidence or to answer questions concerning that client's, or any other person's, income (s.264 of the I.T.A.A.).
   (d) Assisting or encouraging a client to keep records incorrectly or to fail to keep correct records (SS 8L, 8Q and 8T of the *Taxation Administration Act* and s.262A of the I.T.A.A.).

See *Leary* v. *F.C.T.* (1980) 32 A.L.R. 221 at 239 per Brennan J. as to the problems facing a professional advisor who engages in entrepeneurial activity thereby risking a conflict of interest and a loss of his protection as advisor. The inherent dangers in counsel giving advice which would be used to "market" a tax scheme is revealed in *R* v. *Edwards and Collie* (Court of Criminal Appeal (Vic) 6.7.87).

8. Where practicable, obtaining a declaration from the courts as to the legality of the course of conduct. Unfortunately constraints of time, complexity, expense, the need for secrecy, and the rule that the courts do not give advisory opinions makes this option of little practical utility. Sometimes, however, it may be possible and desirable to obtain a declaration with the attorney general as defendant".

I do not share his Honour's view as to when criminal complicity by a professional advisor arises. Something over and above the relation of professional advisor and client must be established before the association becomes improper. The professional advisor must exceed his or her duty to advise the client. There must be conduct in addition to the giving of advice so that the conclusion can be drawn that the advisor encourages the clients' object. To provide bona fide advice on facts provided by the client does not without more permit an inference of criminal complicity.

While some of his Honour's suggested guidelines are, with respect, matters of obvious common sense (e.g. 1, 6 and 7), others go well beyond what has been regarded up until now as the province of the legal advisor. Still less should they be, in my view, relevant as criteria of possible criminal liability. How is something, ex hypothese legal, to be judged as "dishonest by the standards of the community"? Moral philosophy is a difficult enough field (and one not included in most law courses) without providing the sanction of criminal conviction for the professional advisor who fails to come up with the right answer. To guide one's conduct by what one things that others think could be even more hazardous — and perhaps contrary to some very respectable moral precepts as Edmund Burke reminds us when he speaks of "The coquetry of public opinion, which has her caprices, and must have her way".

JUDICIAL INDEPENDENCE AND JUSTICE STAPLES

The Honourable Mr. Justice M.D. Kirby, President of the Court of Appeal of New South Wales, reviews the recent controversy over Mr. Justice Staples. The views stated are personal. As his Honour notes, the Victorian Bar Council is among the many professional bodies which have expressed serious concern.

AN ALARMING "REMOVAL"

In February and March 1989 the Australian legal community was alarmed by steps which accompanied the abolition of the Australian Conciliation and Arbitration Commission and the consequential creation of the Australian Industrial Relations Commission.

The unusual feature of this legislative development, achieved by the *Industrial Relations Act* 1988 (Cth.), was the purported extinguishment of the commission of one of the Deputy Presidents of the old Commission (The Honourable Justice J.F. Staples). He alone of the Deputy Presidents and available Commissioners of the old Commission (numbering 43) was not appointed to the new Commission. He was originally commissioned in 1975. By 1989 he was one of the most senior of the Presidential members of the Commission. The purpose of this note is to record some of the main developments in what has become known as the "Staples Affair".

The Australian Conciliation and Arbitration Commission was set up in 1956 when the High Court of Australia held, in the *Boilermakers'* case, that the old Arbitration Court (which had preceded it and which had existed in various forms from 1904) was constituted in a way which was incompatible with the Australian Constitution. Because the "Court" was performing functions held not to be strictly "judicial" in character (such as devising compulsory awards for the settlement of industrial disputes), it was held that it could not be a "court" strictly so called. This required the urgent re-structuring of the Federal bodies dealing with industrial relations disputes. The result was the creation of the Conciliation and Arbitration Commission and the Commonwealth [later Australian] Industrial Court.

Nevertheless, many of the judges of the old Arbitration Court were appointed in 1956 to the new Conciliation and Arbitration Commission. By the Act of Parliament establishing that Commission, all Deputy Presidents of the new Commission continued to have the same rank, status, precedence, salary and immunities as judges of the old Court. Those who were legally qualified were also to enjoy the same designation as Federal Judges — i.e. the honorific "Mr Justice" or "Justice".

Following a national inquiry in 1987 by the Hancock Committee, the new legislation was passed by the Australian Federal Parliament in 1988, as mentioned above.

Apart from abolishing the Conciliation and Arbitration Commission, this legislation established the new Industrial Relations Commission. It clearly contemplated the appointment of members of the old Commission to the new, as in fact occurred. The President of the old Commission was appointed the President of the new. So were all of the other members except Justice Staples.

THE ISOLATION OF JUSTICE STAPLES

Following a speech which Justice Staples made in 1980 to an industrial relations conference and remarks he made in the course of giving decisions in the Conciliation and Arbitration Commission, the then President of the Commission (Sir John Moore) thereafter declined to assign the normal duties of a Deputy President to him within the Commission. Initially, he was excluded only from sitting at first instance. Later, when Justice B.J. Maddern was appointed President in 1985, Justice Staples was excluded totally from all duties as a Deputy President of the Commission including sitting on Full Benches. From 1985 he did not sit in a single case.

Although no public reason was ever given for this differential treatment, privately, this exclusion of a person with the rank of a Judge from the performance of his statutory duties was justified by various commentators as being based on Justice Staples' tendency to be a "maverick" and to express his opinions in colourful and unorthodox language. It was also pointed out that industrial relations, including the settlement of large national disputes, requires particular sensitivity and confidence in the decision maker on the part of both parties to the arbitration. It was suggested that neither the employers' nor the employees' national organisations supported the appointment of Justice Staples to the new Australian Industrial Relations Commission.

Following the abolition of the old Commission in 1989, a question has arisen concerning whether its abolition has the effect, in law, of abolishing Justice Staples's personal commission. Upon that question, which may come before a court, I express no opinion. Under the former Act, he could only be removed in the same way as Federal judges in Australia were removed, namely by an address to the Governor General by both Houses of Parliament asking for his removal on the ground of proved misbehaviour or incapacity. Although the Australian Constitution protects judges of Federal Courts from removal except in this manner, the constitutional provision may not, as such, apply to protect persons such as Justice Staples whose tribunal has been declared not to be a court strictly so called. The Federal authorities claim that the guarantee in his case was extinguished with the abolition of the Arbitration Commission and the repeal of the old Act.

THREE ASPECTS OF CONCERN

Nevertheless there are a number of aspects of the Staples Affair which have caused concern to the Australian Section of the International Commission of Jurists, the Law Council of Australia, the New South Wales Law Society, the Victorian Bar Council, the Victorian Law Institute, the Law Institute of Victoria, individual judges and other citizens in Australia. These include:

- ☐ The refusal or failure of the President of the Commission to assign duties to Justice Staples over more than three years although he was still a member of the Commission, had the rank and title of a judge and had not been removed by the Parliamentary procedure as the statute provided;
- ☐ The failure of the Government, the Minister or any other Federal official to state the reasons for the decision not to appoint Justice Staples, alone, to the new Industrial Relations Commission. Ordinary rules of natural justice would seem to require that he should know and be given an opportunity to respond to alleged criticisms of him before a decision was made, in effect, depriving him of his office; and
- ☐ The failure of the Government to initiate any steps for his removal on the grounds of misconduct or incapacity as was provided under the statute pursuant to which he had been appointed in 1975.

Mr Justice Michael Kirby

DEPARTURE FROM INTERNATIONAL PRINCIPLES

Although some lawyers in Australia, notably at first the New South Wales Bar Council, laid emphasis on the technical point concerning the suggested distinction between "real judges" and Deputy Presidents of the Arbitration Commission, this was not the view adopted by most lawyers. If an Act gives a person the title of a Federal judge; provides that he or she should have the same "rank, status and precedence" as a judge; provides for the same immunities, protections and mode of removal as a judge and the same salary and pension rights, most legal observers would conclude that that person is, for the purpose of independence and tenure, a judge. The U.N. *Basic Principles of the Independence of the Judiciary* were developed in a number of international meetings of jurists held in recent years. They have been adopted by the United Nations General Assembly, supported by Australia. They and associated international resolutions apply to set out the principles which civilised countries recognise to limit the removal of judges from office. It is submitted that at least those persons who are by local law given the status, title and privileges of judges are covered by the *Basic Principles*.

The *Basic Principles* are to be observed as much in the case of Justice Staples as in the case of other undoubted judges upon whose removal the Australian legal profession has lately been most vocal

(e.g. in Fiji, Bangladesh and Malaysia). They require that judges be guaranteed tenure and only suspended or removed for incapacity or misbehaviour that renders them unfit to discharge their duties.

On the eve of the abolition of Justice Staples' commission, an outcry occurred in many quarters throughout Australia concerning the treatment of Justice Staples and the breach of Australian conventions and international rules involved in the procedures adopted. On 29 February 1989 five senior judges of the Court of Appeal of New South Wales (including myself) took the "unusual course" of issuing a public statement expressing concern about the precedent set in the Staples case. The Prime Minister (Mr R.J. Hawke) dismissed the expressed concern by "members of the legal fraternity" as "contrived nonsense". The Australian Labor Party Government and the Liberal and National Parties Opposition in Federal Parliament defeated a proposal by the Australian Democrats in the Senate for an investigation of the treatment of Justice Staples. Nevertheless, a Joint Parliamentary Inquiry was set up by Parliament to investigate "the principles that should govern the tenure of office of quasi judicial and other appointees to Commonwealth tribunals". This was a compromise. But the terms of reference of the Joint Committee may permit exploration of related questions concerning Justice Staples.

"Contrived nonsense"?

STAPLED TO THE WALL

Ron Castan QC argues that the Victorian Police Complaints Authority got the same treatment as Justice Staples — but with nil reaction from Bench and Bar.

MUCH HAS BEEN WRITTEN ABOUT THE position of Mr. former Justice Staples. Much of it is also irrelevant. Most commentators in the press have focused on the interesting question (to lawyers) of whether he is really a "judge". It seems to be assumed that a decision one way or another on this issue decides the question whether the Government has acted correctly in not appointing him to the new Industrial Relations Commission.

It seems to me that all of this misses the point. Jim Staples' position is no different from that of Hugh Selby, who formerly was the Police Complaints Authority of Victoria. It is astonishing that John Cain got away with doing precisely what the Federal Government did to Jim Staples, without anything like the same furore.

Why is this? Is it because Jim Staples waged a better PR campaign to draw public attention to his plight? Do lawyers feel more strongly about somebody who is called a "judge", or has the words "Mr. Justice" in front of his name? Is it perhaps just legal snobbery that has caused members of various benches, organised legal bodies and learned media commentators to rush to the defence of one while remaining silent about the other. Selby is also a lawyer, and sought exactly the same defence. The comparisons are interesting.

Within a short time of being appointed Hugh Selby started to offend everybody concerned with the police "industry". He took a confrontationist line, and refused to go along with excuses given by police for inaction. He also refused to accept the situation in which police internal investigations were conducted along side, or prior to his investigations. So he was a "maverick" bucking the established system, unwilling to take part in the police investigations "Club".

What is the correct principle? It has nothing to do with being called "judge" or holding judicial office. It has everything to do with the independence of Parliament, and the relationship between Parliament, the Executive and the Judiciary. There is nothing unique about judicial independence. From time to time administrative and quasi judicial bodies are set up in a manner deliberately designed to give them independence from the government of the day. The classic way of doing this is to provide that the members of the body concerned are placed in the traditional position of judges. That is, the Act provides that they are not to be dismissed except on a finding of misbehaviour or incompetence. Of course such positions are created precisely so that such people are out of reach of political influence. They are meant to be immune from dismissal even if they do not behave in ways that please the groups on whom they pass judgment.

The Victorian government didn't like the way Hugh Selby went about his job. He irritated the Police Association, irritated the Commissioner and the Police Force, irritated the Minister for Police and

AN UNFORTUNATE PRECEDENT

The significant outcry over the Staples affair may itself inhibit similar procedures being adopted in Australia in the future to remove judicial and quasi judicial office-holders by the reconstitution of their courts or tribunals. But, perhaps ominously, within days of Justice Staples "removal" a proposal was made public to "restructure" the Industrial Commission of New South Wales. The relevant Minister has since given an assurance that all Presidential members of the old Commission will be appointed to the new.

Meanwhile, Justice Staples is contemplating other measures defensive of his position. He has declined to leave his office. He is reported to be considering legal proceedings in the High Court of Australia to require the recognition of his commission until he is removed from office following a Parliamentary inquiry such as he was promised on his appointment. Another avenue open to him may be a challenge to the failure of the Federal authorities to accord him natural justice and to confront him with the accusations which were thought sufficient to justify his "removal" from an office with the statutes and title of a Federal Judge. An analogous challenge succeeded in New South Wales when brought by magistrates not appointed to the restructured Local Court. See *Macrae* v. *Attorney General* (1987) 9 NSWLR 268.

The public controversy about the affair continues. It has already attracted attention overseas, notably in the Centre for the Independence of Judges and Lawyers in Geneva. It is a matter for close attention by all Australian lawyers concerned about the independence of judicial office and of offices declared by Parliament to be equivalent to judicial office.

Emergency Services and irritated most of the departmental, governmental and political people who had anything to do with him. He said that he thought that the reason they were irritated with him was because he was doing his job properly. They said that he was causing "friction". They had to get rid of him in order to keep the police happy. They were unable to show that he had misbehaved or that he was incapable as required by the Act. So they changed the Act. The Police Complaints Authority was abolished.

Ron Castan QC

The task of investigating police complaints was given to the Assistant Ombudsman. Mr. Selby was out of a job. He did what Jim Staples has done, complained to the press, the public and to organisations like the Victorian Bar. Nobody took much notice of him. The concept of independent officers constituted under parliamentary authority to oversee various functions of executive government was diminished. So was Parliament. The police, the public servants and the politicians all felt good about it. And somebody in Canberra had a good look at how easy it was to get rid of people who do their job in a way that upsets everybody, without bothering about the nasty business of trying to show that they have misbehaved, or are incompetent. Hence the Jim Staples affair.

What to do about this? The Judges should have been up in arms about Hugh Selby and should be screaming loud and long about Jim Staples. It is true that Judges are not meant to comment on political matters, or join in public debate. But there is one exception. If they don't stand up and complain in a loud and public way, if they don't play the PR game, if they don't "descend" into the murky world of politics in situations where their independence is at stake, then they will lose that independence.

The Victorian Bar said nothing about Hugh Selby. That was a mistake. It has supported Jim Staples, in a polite kind of way. But the judges in Victoria — High Court, Federal Court, Supreme Court, County Court, Family Court, Magistrates — all of them, have said nothing about Hugh Selby, and nothing about Jim Staples. Perhaps they think that Hugh Selby was just a public servant, and Jim Staples was not a "real" judge. They may or may not be right. The brutal fact is that they are not as independent now as they were two years ago.

We now know what can happen to people whose tenure is supposedly secured by provisions of the law which secure them from dismissal except on grounds of misbehaviour or incapacity.

Better behave, chaps!

BAR NEWS MEETS SUPREME COURT LIBRARIAN

Sturgess: James you are the Supreme Court Librarian but that's not in fact your title is it?

Butler: No I'm actually appointed as Secretary to the Library Committee and I just happen to be the librarian. I'm secretary to a number of other committees also.

The Library Committee meets about three or four times a year but it has delegated its role and a number of functions to various sub-committees. There is a finance sub-committee which looks after all economic matters, a book sub-committee which chooses books, a country library sub-committee which deals with the 19 country libraries that we run around the State and there is also an investment committee which looks after managing the investment portfolio of the library.

Sturgess: Who's on the Library Committee?

Butler: The Supreme Court Library Committee consists of all Judges of the Supreme Court but in fact six are nominated by the Chief Justice to attend meetings, three nominees from the Bar Council, three nominees from the Law Institute, the Solicitor-General and the Attorney-General.

The finance sub-committee is chaired by Mr. Justice Gray and consists of himself, Mr. Justice Teague, Geoff Nettle from the Bar and Geoff Gronow, solicitor. The books sub-committee is chaired by Mr. Justice Kaye with Mr. Justice Ormiston, John Phillips QC, Laurie Maher and Mark Linneman, the law librarian at Melbourne University. The country libraries sub-committee is chaired by Mr. Justice Ormiston with the Solicitor General, Maurice Phipps from the Bar, Jim Ryan, solicitor from Colac and Bob Constable, solicitor from Wangaratta. The investment committee is chaired by Mr. Justice Gray and has Mr. Justice Teague, S.E.K. Hulme QC from the Bar, Alan Lobban from Blake Dawson Waldron and Peter Trumble from Mallesons Stephen Jaques.

The sub-committees meet on a regular basis and the Library Committee meets maybe three or four times a year and receives reports from the various sub-committees and then questions the chairman of the sub-committees about anything that they wish to in their report.

Sturgess: How much of your time is taken up by being Secretary to these committees?

Butler: Obviously a lot more when the full committee is just about to meet, but I'd say probably a day a week.

FINANCE

Sturgess: Can we talk about the library finance. How much money comes from the State Government?

Butler: We receive $25,000 a year from the Government in the form of a Treasury Grant which we receive in quarterly instalments. We have to write and request that every three months.

Apart from that we have the money from admissions, present admission fees are $250 and have been since, I think, 1983. That's the maximum specified by the Act so to increase it now would need legislative action. That income obviously depends on the number of admissions and that can vary from $150,000 to possibly $200,000, the amount we are anticipating this year with, I think, 800 admissions

Desperately short of staff and funds, operating in lovely but cramped and unsuitable quarters, the Victorian Supreme Court library used to be the best in the nation. In this interview with *Garry Sturgess*, the recently appointed librarian *James Butler* talks about the challenges it faces.

expected. Other than that there is money from the investment portfolio, bringing in something between $100,000 and $120,000 a year and then there is maybe $20-25,000 a year from photocopying and some money from computer searches which we do for members of the Bar and solicitors.

Sturgess: What about gifts and bequests?

Butler: While I've been here, nothing. I haven't seen anything in the minutes about any gifts and bequests apart from the odd book, but nothing financial that I know of. It would be obviously valuable if we could get something.

Sturgess: How, for example, does the money compare with, say, what a big private library, say, in a commercial firm, would spend on their library a year.

Butler: Our entire budget is about $330,000-$340,000 a year out of which we pay books, salaries, general overheads. I am told that the larger firms would be spending something about $200,000 or possibly more just on books and computer searches, but that obviously is excluding salaries of the staff.

Sturgess: There is a staff here of five, isn't there? How does library money and the number of staff compare with law libraries around Australia?

Butler: Not very well. New South Wales has a combined Supreme Court and Federal Court Library and it has a staff of about 19 or 21 and a considerably larger budget than we do. Queensland has a Supreme Court Library staff of about eight or nine and they have a far smaller population and fewer Judges than we do. I think even the ACT Law

Courts Library which exists for the ACT Supreme Court and their Magistrates has a staff of five. So you can see in comparison with the other courts, we have a very small staff and a small budget.

PROBLEMS

Sturgess: You've been here for nine months. Upon arrival what did you isolate as the library's main problem area?

Butler: The main problem area is the finance which we are working on and that really governs everything else. But more specifically there is the matter of the book stock. There are a number of series of reports, subscriptions, specific texts that we should have that we just haven't been able to afford to buy. On the whole our collection of 19th century and early 20th century material is very good but because of funding our recent textbook collection is just not up to standard. The catalogue needs to be greatly improved. Our catalogue I find difficult to use. I'm told various members of the Bar also find it difficult to use and I think it needs to be altered. The books need to be classified so that all the books on one subject are in one particular area, so if you are searching for the most recent texts on contract or torts and don't happen to know who wrote them, you can still find them on the shelf. Along with that, obviously, we would need more staff to do the cataloguing and classification, to deal with the increased number of books and also to provide a better reference service to the members of the Bar, the solicitors and the judiciary who use the libary.

Sturgess: So how much money and staff do you need to make this into a fully functioning effective Supreme Court Library?

Butler: Well initially we'd need at least another two or maybe three staff. Ideally, we'd like to go up to 14 or 15 but we can't appoint 10 more people in one month and actually find something useful for them all to do on the spot. As far as money goes we would need at least another $300,000 to $400,000 a year to make up for past deficiencies and to pay the subscriptions for the things that we desperately need.

There was a report commissioned in 1987 by the Supreme Court Library Committee which was completed last year and that recommended that the Government provide funding in the area of $400,000 in the first year and then adequate financial funding each successive year. The Library Committee has accepted that finding and has written to the Attorney-General asking for $400,000. At present, as I understand it, we will know the result of that request nearer budget time.

The signs at the moment look more hopeful than they have done in the past but I wouldn't like to be any more definite.

Sturgess: What did the Chief Justice Sir Anthony Mason say about the library?

Butler: In his speech at the opening of Owen Dixon West he commented that the Supreme Court Library had formerly been the best law library in the country but that in the past it had been unable to keep up with current developments and collection building.

Sturgess: Just how far has the library slipped?

Butler: The number of books that we don't have that I would expect any worthwhile library to hold is amazing. Also we lack a number of computer services that we should be able to provide both the judiciary and the legal profession. For instance, we don't have a subscription to Lexis to provide computer searches of English and American legal materials.

Sturgess: I'm not asking you to be exhaustive about this, but what sort of books do we need but haven't got?

Butler: Well there are a number of American series of reports, the Federal Reporter, the Federal Supplement, the whole of the West's series of American Reports covering the American states, Canadian series like the Ontario Reports and the Western Weekly Reports which are becoming increasingly cited both in other Supreme Courts and also in the High Court. A number of journals and loose leaf services of which I can't actually produce titles at the moment. In fact one of the Judges has done a list providing all the services and books which we should have and haven't yet bought and it's quite exhaustive.

The cost for purchasing the items that were listed in the top priority including the initial purchase plus the annual subscriptions to them would be over $600,000.

Sturgess: That's in one year?

Butler: That's in the first year, yes.

Sturgess: Why is it that only $400,000 is being requested on an annual basis from the Government?

Butler: We can't expect the Government to make up the whole shortfall in one year. With $400,000 from the Government plus the $330,000 roughly that we have already has an annual budget, we would be able to fill a number of the gaps and with $400,000 in successive years, we would be able to properly complete the project.

THE BUILDING

Sturgess: What are the problems with the library building?

Butler: The building is not designed as a library, or not as a library would be designed today. It's a beautiful building, it's a lovely place to work in, but it's full of small rooms which make book stock difficult to organise in a logical way. The shelves are not moveable so we are restricted in how we can place books on the shelves. We are fast running out of space and it's difficult to work out where we are going to put new collections if we did get them. We recently received 24 years worth of Commonwealth

Hansard and they're presently in compactus in the old 15th Court. We've also been given by Parliament 20 years of Victorian Bills which we didn't have. We are going to have to find space for those. These are things that we desperately need but we are finding it hard to find the space to actually house them in the library.

Sturgess: There would be pressure to keep the library where it's traditionally been. How is it possible you could upgrade the library sufficiently?

Butler: There is a large area around the dome at the top of the library which presently houses Prothonotary's files. There has been a proposal for some time that this space be used for library storage and we could in fact put all the old text books from the first floor and a number of lesser used items in storage in that area and use the space that was made available for the current text books and other series of reports that we needed to buy. This would at least give us room for expansion for the next 10 years I would think.

Sturgess: Has there been any talk of getting consultants to have a look at the building to see what could be done in the way of making it more suitable for the library's needs?

Butler: I gather there was a consultant from the Public Works Department who did a report about five years ago on the possibility of converting the area around the dome for library usage. As far as I understand it the proposal faltered mainly on the fact that with the cost of putting a lift in, the price was astronomical. Whether we could still use the space without a lift is open to question.

A lift would mean people would have access to the area without having to walk up great flights of stairs outside the library. We would also have more control over what happened in there. Some of the books that need to be brought down may well be quite heavy and it would be difficult moving them up and down without a lift.

Sturgess: What about the problem of the small rooms. How can you do anything about that?

Butler: I think we have to work out what can be placed in the rooms in a better way. It is simply a matter of looking at our collection. Finding some more space upstairs by moving the old textbooks out somewhere else and then re-organising the library so that the collections fit in basically in a logical way or as logical as we can make it given the constraints. I'd like to do that as soon as possible but obviously I only want to do it once. It's going to be confusing enough for everybody to move things around without doing lots of moves which is why I've put it off. I think we have to wait until we've really made up our mind about where we are putting things and then make one move and explain it to everybody.

IMPROVED SERVICES

Sturgess: What can be done now to sort out some of the problems without having to wait for funding?

Butler: Well one of the things we've done is increase the opening hours of the library so that now we are open from 8.30 a.m. to 6.00 p.m. I hope that will make it more possible for members of the Bar to use it outside court hours. We're trying to provide a better reference service to users of the library and to make sure the reference desk is manned at all times and that if anyone has any problems they should be able to get an answer from there. We are attempting to re-catalogue part of the collection so that the books are more easily found in the catalogue, but that is a slow process and is going to take time. We are also trying to obtain more items on an exchange basis or to get on the free list from various Government committees and Government bodies so that we're trying to get committee reports that will be useful which we haven't made an attempt to collect in the past which should be held in the library.

Sturgess: Is it possible to work on an exchange basis with other States and other countries in terms of swapping sets of reports and that kind of thing?

Butler: It depends. There was previously in existence an exchange scheme between all the States where every State exchanged legislation but it's coming to an end now as most of the Government printers have to cover their costs and are not prepared to provide free sets so we're having to take out subscriptions to State legislation everywhere to keep up our sets. As far as overseas is concerned it's possible except that we would then have to pay for a subscription here to send overseas. We don't actually produce anything here that we can give away. We do have duplicate sets of Victorian Reports, Victorian Statutes going back to the beginning in most cases largely that have come from closed country libraries and it might be possible to either exchange those for something worthwhile or sell them to make some money but at the moment I haven't investigated that.

Sturgess: Has the library developed a coherent philosophy about what it wants to do as a library?

Butler: I want to see the library providing the best possible service to its users, both the judiciary and the legal profession. Now all the staff would like to do that, it's just that within the constraints that we have at the moment, it's not absolutely possible, but that's the aim.

Sturgess: In the various committees, for example, is there any kind of push and pull about which side of the profession or which elements of the profession should be serviced first?

Butler: Well the library is basically a court library but it is also a library for the profession and to the extent that those needs are competing it has to try and serve both needs. This occasionally leads to conflicts where books that are not of direct relevance in litigation may be thought less relevant in the library's collection but I think we have to buy things for the general legal profession to help them with day to day problems.

The day-to-day authority is largely vested in me except insofar as the selection of books is concerned and on the whole the book sub-committee is prepared to listen to reasons for purchasing a particular item if I think the item is needed by the library.

123 YEARS — 6 LIBRARIANS

Sturgess: Are you able to tell us something of the history of this library?

Butler: Well the first officially appointed was John Schutt who was appointed as sub-librarian in 1866 and died in office in 1919 aged in his early 80s, I think. In the same year, in fact, his son was appointed to the Supreme Court Bench. He was then succeeded by Dr. Robinson whom, I think, was librarian for 20 odd years who was succeeded by Eustace Coghill who was appointed a Master of the Court following his term as librarian. He was succeeded by Mrs. Goodwin who was appointed for a five year term and then was replaced by George Alcorn who was there for 26 years until his death in November 1987. I may say I'm not intending to compete with the record of the first librarian of 53 years.

Sturgess: What are your plans for the library?

Butler: I want to try and improve the service that we provide by improving the stock and increasing the reference that we provide for the users. It seems to me at present that a lot of people don't ask us questions because they don't think we'll either know or be able to find out the answers. I would be happier if people were prepared to try more often and see what we could do for them. I think they'd be surprised. Those two are basically it. Everything else, computerisation of the catalogue, access to more computer systems, are just part of providing a better service to those people using the library.

A PERSONAL VIEW

Sturgess: Well James, you've worked at Mallesons, The Law Institute, Melbourne University Law Library, how do you compare this job to the other stewardships of libraries that you've had?

Butler: I enjoy it for a number of reasons. The challenge is great in that the library has to be greatly improved and to do and plan that is one of the nice things about the job. I enjoy meeting various members of the profession. I enjoyed that when I was at the Law Institute and I find the same sort of thing here. I suppose what I miss is the availability of funding which was easier at some of the other institutions.

Sturgess: And what about the meeting that you do with the Judges and the Committee work that you do. How do you find that?

Butler: Apart from the fact that the preparation for it is sometimes time consuming, the actual meetings are very businesslike and don't seem to take up too much time. On the whole the finance committee meets monthly and approves invoices and looks out for our financial position and the library committee largely accepts or largely receives and discusses the reports of the sub-committees and deals with wider issues of policy when they come up.

Sturgess: What was it that attracted you toward being a librarian?

Butler: I did a degree in French, Latin and Ancient Greek, the employment prospects of which are not overly great, and I suppose in cliched terms I had always enjoyed books so I ended up doing a library course.

I had a general love of reading, I suppose, and a general enjoyment of the way libraries worked and of reference work in libraries. One of the most rewarding parts of being a librarian is actually helping people to find the answers to the problems they've got. That's one of the nicest parts of the job. I studied a few subjects of law before I finally gave it up and then when I qualified as a librarian I ended up working in a law library and found I enjoyed working there and working with the law and seem to have been in it ever since.

Sturgess: This is very much a sort of pop-type question, but if you had to name a list of the five books that particularly influenced you — could you do that? Or enjoyed very much?

Butler: Well I don't know about influenced me but the ones I have enjoyed the most I suppose at the moment I am trying to finish Proust's *A La Recherche du Temps Perdu* which I think I have been reading for 16 months and I am into the last volume. When I was studying at University I adored Virgil's *Aeneid* largely because of the professor who taught it and brought the whole thing to life. Unfortunately he died late last year. As far as novels and current material goes, there is a marvellous detective novel by Michael Innes called *Operation Pax* which is all set in the Bodleian Library and I think the most recent book I've read is *Oscar & Lucinda* by Peter Carey which I couldn't put down. I spent a week on the beach lying on a towel reading it.

Sturgess: What did you like about that book?

Butler: The characterisation of the main characters, the descriptions of life, the language that he uses, the way that he gives you the feel of the 19th century, the feel of Sydney in the early 19th century. It really does come to life as it hasn't in anything else. You can almost smell the back streets and the factories that he is talking about.

Sturgess: And have you got a favourite law book?

Butler: I suppose the only one I could think of would be Campbell, Glasson & Lahore (or at least they were the authors of the second edition) called *Legal Research: Materials and Methods* which is, I suppose, the law librarian's bible and talks about research, what's available and how to read statutes and abbreviations for law reports and everything else that we seem to need to do on a daily basis.

AN APPEARANCE

Continuing the Bar News obsession with the Privy Council — see A Last Hurrah — Privy Council Days, Spring 1986 — *Cliff Pannam* QC recounts what must surely be the last Australian appearance, and an encounter with the celebrated English silk, Lord Alexander QC.

I AM ALWAYS EDGY AND NERVOUS BEFORE an important case; especially when appearing before an unfamiliar tribunal or any appellate court. I have similar feelings when I am opposed by counsel whom I respect or admire.

Today I am both edgy and extremely nervous, almost to the point of being ill. The appeal to be heard tomorrow is before the Judicial Committee of the Privy Council here in London. The Committee comprises on this occasion five English Law Lords — Lords Keith, Templeman, Oliver, Goff and Lowry. My opponent is a recently enobled English silk, Lord Alexander QC. He is, by reputation, the finest advocate in England.

My presence here comes about in flukish circumstances. After all appeals to the Privy Council from Victoria have been abolished for several years. And, in any event, unlike the position in New South Wales relatively few appeals were ever carried to the Privy Council from Victoria. This case is an appeal from the Court of Appeal of New Zealand. I have no right of audience in the New Zealand courts. It is very much a closed shop for Australians. The rule here however is that in any appeal before the Privy Council counsel may appear if they have a right of audience either in the Court from which the appeal comes; or, in the English superior Courts. My junior and I have obtained temporary admission to the English Bar, based on reciprocal arrangements with the Victorian and New South Wales Bars, for the specific purpose of arguing this appeal. We are both

now members, albeit pro tem, of the Honourable Society of Grey's inn. Of course I am not a silk in England so I must appear as a junior "stuff gownsman"; hired from Ede and Ravenscroft for nine pounds. It is more than 10 years since I gave mine away. And, to my surprise, no Bar jacket is worn; just the gown over a normal suit with winged collar and bands. Certainly no jabots allowed!

We are for the respondent to the appeal which is a company associated with a client for whom I have acted throughout most of my time at the Bar. I had advised on the matter both before and during the New Zealand proceedings. So the client, bless him, thought that we should come to London to seek to uphold the New Zealand Court of Appeal judgment which was in his favour. The points at issue involve the interpretation of some clauses in a contract for the sale of a strategic parcel of shares in an Australian listed public company. They are short points. But difficult and interesting.

I have been here twice before. The first occasion was just after I had taken silk. It was an application for leave to appeal in a case where our Full Court had dismissed an appeal from the refusal of a single judge to grant interlocutory injunctions in a post employment restraint case. I was for the respondent who had succeeded below. The appeal, if allowed, was said to raise important questions involving the principles governing the grant and refusal of interlocutory injunctions. We didn't think so. The Committee was of the same view and refused leave. I was not called upon. I was so nervous however that I quite forgot to ask for costs! The members of the Committee had retired. There was quite a fuss. I pleaded, no begged, with the Registrar to ask their Lordships to hear my application. Finally the Committee sent out a curt message that I could have the costs and an order would be made. Phew!

The second occasion was only a few years ago. That was on any view an important case. It involved aspects of the right of contribution between co-sureties where one of them had been called upon to meet the whole burden of a default by the principal debtor. It is in the Law Reports: *Scholefield Goodman and Sons Ltd.* v. *Zyngier* [1986] AC 562 is the reference.I lost. Alex Chernov was on the other side. We both enjoyed the complex, and at times quite esoteric, arguments.

There could have been another time. It had been decided to attempt to appeal a curious and novel judgment of a single judge of our Court to the Privy Council. The decision involved a confiscation of shares consequent upon an alleged failure to comply with statutory notices requiring information as to their beneficial ownership. An application for leave to appeal was made the day before the date upon which Victorian appeals to the Privy Council were abolished. As the requirements of the Order in Council and the statute governing the conditions of leave had been met it was thought that the application was a mere formality. For one hundred and thirty years or more that seems to have been clear. But the times they were a'changing. In what I regard as the worst decision ever handed down by our Full Court it was held for the very first time in the history of Privy Council appeals that the Court had a discretion to refuse leave in a case where all of the prescribed conditions had been met. But justice is even handed. The Full Court heard the appeal and overruled the primary judge's alarming orders. See: *Broken Hill Holdings* [1987] VR 119.

So this is the third, and certainly the last time, that I shall ever appear here. I am glad that the points involved are so straightforward. I only wish that my unconscious mind would get the message and turn off the emotional pressure.

I have met our opponent before in somewhat curious circumstances. Stephen Charles and I had given an opinion on the meaning of various parts of a joint venture agreement between two oil companies. Alexander QC had expressed contrary views. In order to resolve the matter Alexander was flown out to Melbourne and the three of us were heard in formal debate before the Board and executive staff of the client. Just like the debates between philosophers or clerics before the Princes of old!

He certainly has a good public relations machine. Several copies of a now quite old (22nd May) Supplement published in the Observer have been left around the Privy Council library. We have been working there. The Supplement contains a lengthy article headed "Best Briefs in Britain". There are some seventeen senior barristers featured with photographs and lists (with photographs) of their famous clients and cases. At all events Robert is photographed in a garish diamond patterned jumper sitting in front of a case of Halsbury's Law of England and alongside his wig and silk gown. We are told: "A giant among men (at 6 ft. 6 in.) and, among lawyers, he is regarded as Britain's top civil QC. Of the modern 'conversational' school of barrister, Lord Denning once called him the best advocate of his generation." Then follows a listing of his famous cases, doings, positions which he has held, and his earnings. His clients are said to include Kerry Packer, Cecil Parkinson, Baron Thyssen, Ian Botham and Jeffrey Archer.

I thought that all of this was a little odd. What a fuss there would be in Victoria or in New South Wales. Nasty words like "touting" and "huggery" might come to critical tongues. But then again this is a very different England not the one we ape.

In this week's Weekend Magazine distributed with the Daily Telegraph there is an article headed "My Boy Malcolm" written by Malcolm Turnbull's mother, the novelist Coral Lansbury. It is all about the "Spycatcher Lawyer". Malcolm is photographed

as a babe in diapers with his feet on a typewriter chatting to his teddy bear opposite. Tales of his childhood and adolescent brilliance are trotted out in a mother's admiration for her intellectual and invincible lawyer son. Gough Whitlam is said to have written the following to Malcolm after his win in the High Court: "When Alexander the Great was 33 he conquered the world, when Jesus Christ was 33 he saved the world and at the same age Malcolm Turnbull has saved democracy for Australia." It is all very strange. But no man, I suppose, can be expected to control his mother; especially if she is a novelist.

"Huggery" by the way is a word that in pronunciation evokes its own meaning. Professor Murray defines it this way:

"The action or practice of hugging; esp. *the practice of courting an attorney, etc. with the view of obtaining professional employment."*

The appellate jurisdiction of the Privy Council is quickly drying up as the Commonwealth countries sever the last remaining legal links with London as an assertion of their national independence and sovereignty. New Zealand will go in 1990; Hong Kong for very different reasons in 1997. There soon will be a West Indian final court of appeal. For a time appeals from Brunei, Singapore, the Gambia, Mauritius, Gibraltar and some other dependant territories like the Isle of Man and the Channel Islands will remain as a matter of theory; although there are mumblings in Singapore. The case load will be minimal. There is a curious domestic jurisdiction which ultimately oversees the professional ethics of doctors, dentists, opticians and veterinary surgeons. Appeals can be entertained from the English High Court in prize matters — i.e. the seizure by the Crown of contraband or enemy ships and cargoes. The last such appeal was in 1945. There is also an obscure ecclesiastical jurisdiction involving the affairs of the Church of England.

In the past the Privy Council was the ultimate Court of Appeal for legal disputes generated by about one quarter of the world's population. At least that was the confident statement made by Mr. Bentwick in the last edition of his Privy Council Practice published in 1932. The jurisdiction involved appeals from Canada, India, Ceylon, South Africa, Ireland, Australia, New Zealand, most of east and west Africa, and a host of other territories.

The range of the legal problems posed by these appeals was incredible. There was Roman-Dutch law to be grappled with in South African appeals; Spanish law in appeals from Trinidad; pre-revolutionary French law in appeals from Quebec; the Napoleonic Code in appeals from Malta; the laws of the Venetian Republic in appeals from the Greek Ionian islands; the laws of mediaeval Normandy in Channel Island appeals; the Acts of the Oireachtas in appeals from the Irish Free State; Muslim, Hindu and Buddhist law of various schools in appeals from India; various systems of tribal law in African appeals; and, so on and on and on. The Privy Council also battled with fundamental constitutional questions; especially from Canada and Australia.

The Court does not sit in the Royal Courts of Justice in the Strand or in the House of Lords at Westminster. It is located at no. 9 Downing Street; just along from no. 10, curiously on the same side. This is in the middle of Whitehall, the home of the great departments of state and of the civil service. It is pure Sir Humphrey Appleby country. The street is barricaded with London "bobbies" on guard. There is a surge of a quite false sense of importance when you are ushered through on your way to the Privy Council offices.

It is of course called the Judicial Committee of the Privy Council. Until 1833 a committee of the Council, consisting of at least three of its ordinary members, none of whom need have had any judicial experience, was the body which reviewed all judgments of any of the Courts of the Royal Dominions outside the United Kingdom. In 1833 Lord Brougham secured the passage of the Judicial Committee Act which still provides the statutory basis of the Council's appellate jurisdiction. The members of the Judicial Committee were from then on to be lawyers. From about 1880 onwards the Law Lords became the effective permanent judges of the Court. But the mark of history is still there. Section 3 of the 1883 Act provides that all appeals are to be "referred" to the judicial committee by the monarch and a "report or recommendation" is to be made thereon and the "decision" is to be made by the monarch in Council. These matters are still recited in the Judicial Committee's advice. By convention the advice is always accepted. A gloss exists in relation to appeals from Malaysia and Singapore when the advice is tendered to the Head of State of those countries by reason of special legislation in those places.

The point on the present appeal arose in this way. The price of the shares was $2.40. There was an escalation provision in the acquisition agreement. If, within six months, the purchaser paid more than $2.40 for any future acquisitions then that additional

price had to be paid to the vendor. At the time of the agreement a dividend of six cents per share had been announced but was only payable to shareholders on the books as at a date a week later. The date for actual payment of the dividend was more than a month away.

It was common ground that the acquisition was to provide the purchaser with a platform from which it would launch a take-over offer. The offer was made within a few days. It was a cum dividend offer — i.e. that the acquirer was to be entitled to the six cent dividend. A few months later it had been increased to $2.44 ex dividend — i.e. the vendors were to keep the dividend.

"More than a little rich and fruity"

The point relied on by Alexander in the appeal is that the reference to $2.40 in the escalation provision had to be construed as a cum dividend price. This, it was contended, produced a 10 cent differential and not the four cents which had been conceded by the purchaser. Simple enough. However the point had not been dealt with in the New Zealand courts. Indeed it had been expressly abandoned by counsel for the vendor!

Alexander's performance was dazzling although his delivery was more than a little rich and fruity for Australian tastes. Although it was an appeal on a pure point of construction he could not resist the injection of more than a little factual prejudice and some distortions of what he asserted to be the facts; and, stock market practice and "take-over" law in Australia and New Zealand.

He was assisted by the fact that Lord Templeman made it absolutely clear from the outset that he could not even begin to understand how the rival view could be put. It was also obvious that Lord Goff and Alexander get on well together. There were knowing looks and nods between them for the whole of his address. Lord Oliver was taking the same line. The wind was blowing a gale behind the appellant! Only Lords Keith and Lowry gave him any difficulty. Their questions were dismissed in the indulgent manner of a teacher speaking to a student who really hasn't grasped the point of a simple lesson.

This was an advocate at the height of his career. I have only two comments. First he tended to speak down to the tribunal he was essaying to persuade. On the other hand it is obvious that he is held in very high regard. But however that may be he was sometimes quite condescending. Second, he was repetitive by Australian standards.

The less said about my performance the better. They all had me for breakfast. The propositions that a price of $2.40 meant just that and that the cum or ex features of the dividend in later transactions went only to the value of the share acquired were regarded as fanciful. I was given a very hard time; especially by Lord Templeman.

I was surprised that the members of the Committee had not read the papers. Still it was the first case of the new term after the summer vacation. I think the appeal would have lasted no more than a few hours in our High Court. As it was it took a day and a half. Much of the first morning was taken up with Alexander going through the facts and the judgments in the New Zealand courts.

I was also surprised that such firm views were expressed during the course of the argument; indeed even before hearing the rival argument. After all the point that was regarded as so obvious had been entirely missed by all four New Zealand judges who had heard the case and, as I have said, it had been abandoned by counsel who argued the case below. A client sitting in the Council chambers would not have been at all pleased.

The court sits in the Privy Council Chamber. It is situated on the first floor of a simple building which looks like a late-Georgian town house. There is an ante-room where counsel wait to be called. The entrance on the left for appellants and on the right for respondents. When the Committee is convened and seated around the semi-circular table counsel are called into the chamber by the usher who is splendid in formal tails and white bow tie. The members of the Committee are informally dressed in suits; large silver cigarette boxes in front of them which are never used. Counsel sit at a disconcerting right angle to the tribunal, not facing it. From the simple lectern to the judges is only about fifteen feet or so. It is quite intimate. No need to raise your voice very much, if at all.

The Chamber is carpeted in red and is surrounded by an oak wainscot. There are four large portraits on the walls; curiously, all Scottish Law Lords. Old pictures show John Soane's original design. He was the architect who in the 1820s transformed the brewery and pub which stood on the site of the present building. His room was full of sienna marble, murals, bookcases and elaborate plaster work, all under a vaulted canopy which soared between two long barrel lanterns. Almost all of the decoration went in the middle of the nineteenth century and the bookcases followed in the 1940s. It is now quite a simple court room.

But it is one in which few, if any, Australian advocates will ever again appear.

SERMON FOR THE COMMENCEMENT OF THE LEGAL YEAR, TEMPLE BETH ISRAEL 1989

By Rabbi John S. Levi D.D., A.M.

"WITH SAVAGES THE WEAK IN BODY OR mind are soon eliminated: and those that survive commonly exhibit a vigorous state of health. We civilized men, on the other hand, do our utmost to check the process of elimination: we build asylums for the imbecile, the maimed and the sick; we institute poor laws and our medical men exert their utmost skill to save the life of everyone to the last moment . . . no-one who has attempted the breeding of domestic animals will ever doubt that this must be highly injurious to the race of man."

So Charles Darwin wrote in "The Descent of Man". In his civilized, scientific manner he challenged the moral foundations of society. In essence Darwin's discoveries and conclusions questioned the source of the values of the society that we serve. For the entire Western World the enlightenment posed the dual question what is power, what is freedom? It was because of the perceived development of society that Lord Acton declared, "Absolute power tends to corrupt". We have learned that absolute power is oppressive whilst absolute freedom is supremely insensitive. Mr. Justice K. H. Marks in a recent article entitled "Commercial Law and Morality . . . A Judicial Perspective", observed "It is realistic to relate morality to community needs of peace, order and interpersonal harmony for these are the dictates of survival. There is a natural conflict however between what the individual wants for his or her self and the imperatives of community living. The purpose of law is or ought to be the regulation of both and the pitching of a balance."

As so often happens, this week of the formal opening of the Legal Year happens to occur between the Sabbath on which we read the Ten Commandments from the scrolls of the Law and the Sabbath on which we begin to discover the details of the Torah-Mishpatim — with the section that begins with the words "These are the statutes . . ." (Exodus 21). The needs of the individual and the imperative of the community stand in balance, even in the ancient biblical text.

Tradition gives us guidance. Two hundred years ago Reb Bunam, a Chassidic teacher in Poland, dealt with the majestic first words of biblical tradition by teaching: "The words in the beginning God created the Heavens and the Earth mean that God created the Universe in the state of its beginning leaving it to us, to human beings, to continue the work of creation." To which we can add in our day "or to destroy it". As partners in the process of creation, Jews are commanded to seek justice and truth within the boundaries of community.

We know that in ancient times the judges sat in the gates of the city wall, in the busiest part of the city, amongst the people. In the archeological excavations at Dan, on Israel's northern border, you can actually see the seat to which the judges came. We know the judges had to be above suspicion. Biblical law insists that there be one law for rich and poor. The Torah forbids its judges to favour the powerful and the powerless, the stranger and the home born. In ancient Jewish practice there must have been special laws for the king, but when the biblical text was edited into shape that we now know, those laws were deliberately left out.

At this time last year, I sat in a court room in Jerusalem and saw the man who brutally beat and pushed people into the Treblinka Gas Chamber on trial for his life. The Defence was summing up its case and had recalled an eyewitness to the stand who, immediately after the war, had written that he believed the "Butcher of Treblinka" had been killed. Why had he changed his testimony? asked the attorney. "Because I can see the accused sitting before me" was the reply. And then from the box that burley ex auto worker from Detroit suddenly said in Hebrew, "Mar Rosenberg, atta shakran" — Mr. Rosenberg you are a liar. And a gasp went through the hall. And then Demjamjuk took his fingers . . . extended them and with a smile indicated that he would like to blind the witness. There is no statute of limitations on justice because, unlike the mythical figure of justice who holds the scales in her hands, justice may never be blind.

Self preservation may be the basic law of life in the Darwinian jungle but in human society compassion and justice are the first requirements. By way of compassion the strong constrain their self interests. By way of justice the weak must be free to signal that change is needed.

To quote Justice Marks again, "If the law is not about conduct and about conduct which is seriously harmful to others or conduct which threatens others it is impossible for my part to identify valuable objectives . . . peace and good order trips lightly off the pen of the Constitutional and legislative draftsman but in truth it is the serious purpose of social living and vital to its stability without necessarily negating constructive change."

Society has given the challenge of reconciling freedom and power to the legal profession.

It is your task to "pitch the balance". It is our duty to help to mend the world. After all that has happened in Europe in the past two hundred years the Jewish commitment to the rule of law is particularly poignant. It is a commitment we trace to Sinai but a living experience that has been so fragile.

Having just celebrated the Bicentenary of the European settlement in Australia we have reached another bicentenary. In July 1789 the crowds filled the streets of Paris to bring to an end autocracy and the divine right of kings. And yet, once the Bastille fell, a new reign of terror began to ruthlessly send its victims to the guillotine. For we have learned no revolution in history dares sweep away all the inherited virtues and values of the past. It is true nevertheless that the universalism of the French Revolution shaped the way we think we act and vote. That Revolution held within it the promise of Jewish emancipation, which was a logical and inevitable consequence of the principle that a nation should have a uniform system of law for all its citizens. It is the anniversary of a revolution that abolished the special statutory rights and disabilities of time honoured feudal structures. Our presence in Western Europe, our commitment to community and to law meant that we were part of the first step toward universal human rights. We were the first test case.

It was a revolution that catapulted the Jews in most European countries from a marginal and peripheral status to their place on the cutting edge, the frontier of science, healing, philosophy and law. It was the most profound revolution in the position of the Jews since the days of the destruction of the Temple in the reign of the Roman Emperor, Vespasian.

This complex mix of destiny and choice, of freedom and universalism, in the face of power preoccupies us to this day. No ceremony, no religious service within the Jewish community, no occasion celebrates that emancipation more vividly, more clearly and certainly more colourfully than does this gathering. The very welcome presence of His Excellency the Governor and Mrs. MacCaughey and the Attorney-General of this State is a reminder of how momentous this process has been.

As the Legal Year begins it is also worthwhile recalling that it was a trial the trial of Captain Alfred Dreyfus in Paris in 1894, that first exposed the fragility of those basic rights.

For no-one could have been more chauvinistically French, more militaristic, more assimilated than Captain Alfred Dreyfus whose tragic fate exposed the dark forces that would have been seen again in the France of Marshall Petain and, even more vividly and tragically, in the fate of the Weimar Republic and its destruction by those who believed that the individual was nothing and that the State was supreme.

A Jewish religious service is a celebration of a commitment that there is a higher authority and a moral law. It is a living creative bridge of law that joins power to freedom that joins the individual to the community.

In Hebrew term "Tikkun Olam" is the Jewish task. It means to restore the Universe. To repair the World. To set it right. To be a partner in the eternal task of intelligent and purposeful creativity.

REDMOND BARRY'S FARM

This extract from "Cattlemen to Commuters", a history of the City of Waverley by Susan Priestley, is published by kind permission of the City.

NEXT TO MUIR'S DOWN THE EASTERN slope of German's hill was 'Syndal' the hundred and fourteen acre farm of Mulgrave's most renowned landowner, Judge Sir Redmond Barry. In classical mood, Barry referred to 'Syndal' as his 'Sabine farm', thinking of the tribes in the hills above Rome who supplied the burgeoning city with both food and wives. He bought it, possibly in 1866, as an occupation for his eldest son, nineteen year old Nicholas, who the year before had sailed to Hong Kong but had failed to gain an entry into its busy world of commerce. Certainly by 1867, both Nicholas and Barry rode regularly out to Mulgrave, where a small wooden cottage was built probably for the use of an overseer. They rarely stayed overnight. Indeed, while riding back from Mulgrave one November evening Nicholas' mare stumbled and broke both knees, testimony to either the rough roads or Nicholas' furious riding, or perhaps both.

For the first few years, 'Syndal' was mostly pasture and hay paddocks, but from July 1869 Barry began to make notes of new plantings at 'Syndal'.

That month he took out one hundred and twenty almonds and some willow and poplar cuttings for

the creek. In August cucumber seed was sown and vines were grafted. More plants and seeds were taken out in October, probably from the vegetable plot attached to his Carlton Gardens house, where each Saturday, his gardener James Cutcheon sold herbs (thyme, sage, mint and parsley) flowers, vegetables, grapes and melons according to season. In the winter of 1870 Barry's attention turned to the orchard. In June, twenty different varieties of pears, making forty trees in all, were planted. In July another ten pear, ten apple, four plum, four cherry and two apricot trees were brought by a friend for 'Syndal'. This was the age of acclimatisation, when the colonists were planting as wide a variety of trees and plants as possible, to find the ones best suited to antipodean conditions. Of the pears planted at 'Syndal', Doyen du Comice, Nelis Winter and Williams bon Chretien are among the few which have a familiar ring to our modern ears.

In the meantime, Barry had acquired another Mulgrave property. In the winter of 1868 John Cunnington died and when 'St. John's Wood' came up for sale in October, Barry bought it for Mrs. Louisa Barrow, his devoted companion from 1846 until his death and the mother of his four children. By 1870 Louisa and the children were living for most of the year at Mulgrave, and Nicholas had full supervision of the farms, though not without a good deal of paternal advice from the judge. When his court round allowed, Barry enjoyed farm life as well. After lunch on a summer's day in January 1871, he with Louisa, Nicholas, Fred and Eliza picked eighty pounds of apples from the 'St. John's Wood' orchard and followed it wth a brisk ride.

By 1884, 'St. John's Wood' had twelve acres of orchard, but most of the property was devoted to dairying. One of the first improvements Barry made was to lay out a cowshed to accommodate twenty cows. The paddocks were sown to English pasture grasses and willow trees were planted to shade the creek 'at spots most acceptable to cattle with a few saplings round to protect them where necessary' while the trees were young. By 1884 the estate must have provided work for a good number of farm hands and household servants. There were two kitchens, presumably one for the main house and one for the farmhands. Among the out offices a groom's room, a servant's room and a men's room testify to a hierarchy of hired help. As well, there were the cowshed, the piggeries, a dairy, a barn, a chaff house, a coach house, a six-stall stable with looseboxes and a fruit house. This last was for the storage of orchard and garden produce, on shelves covered with straw to promote a steady cool temperature, so that only regular orderly supplies reached the market.

At the end of 1875 Barry sold his large city house and in January 1876 much of its furniture, books and wines were auctioned. He had been appointed commissioner for the Victorian exhibit at international exhibitions in the United States and Europe, and travelled overseas during 1877 and the early part of 1878. On his return he took lodgings in town, but visited 'St. John's Wood' when he could, and (from his letters to Nicholas) seemed intent on developing 'Syndal' more assiduously. Firstly walnut trees were planted. From Guilfoyle, the new curator of the Botanic Gardens, he received a generous contribution of plants for the creek. Half a consignment of wild plants and ferns from Fernshaw in the Dandenongs went to the botanical and university gardens, and half to the creeks at 'Syndal' and 'St. John's Wood'. Nicholas was instructed to get some broom, aloes and elder slips 'from our neighbours on the top of German's hill' (probably the Muirs), and Barry himself was to add some types of English trees which were still required.

In November 1878, Nicholas received a long list of instructions. He was to get a horse up to 'Syndal' to 'scuffle' the strawberry bed, then to hoe around the fruit trees and spread a grass mulch; to drag off stumps and logs lying about and pile them near the stock yard, to cut and stack grass hay from one of the paddocks, to try a new system of robbing the bee hives, to plough the headland on the twenty acre field before the new fence posts went up, to put in new wicket gates in the quick hedge near the bridge over Back Creek, to have a spare bedstead sent up from 'St. John's Wood', and to see about buying a secondhand set of six cane-bottomed chairs and a cane-bottomed sofa 'real plain, . . . scroll end'.

In the following year, Barry was preparing another paddock for sown pastures, with loads of black soil brought from the bed of the creek to be well-mixed with lime, then spread and seeded. Two strong mares were bought for the 'Syndal' ploughing, and Barry himself obviously spent a good deal of time on his Sabine farm. All his plans, however, were cut short by his unexpected death after a short illness on 23 November 1880. His estate passed to Louisa, but when she too died just over three years later, both 'St. John's Wood' and 'Syndal' were put up for sale in May 1884. Nicholas Barry, who had served his time on the Shire Council, and was its president in 1882-3 inherited some land at Scoresby, where he seems to have lived after his parents' death.

The name 'Syndal' was one of the legacies Redmond Barry left to Waverley. It seems to have been derived from viking sources, meaning 'sunny dale'. Barry may have associated his farm with the Syndale valley in Kent, near which he spent some years at boarding school. But his most enduring legacy to the district was the extensive variety of fruit trees which he planted. These bearers of apples, pears, plums, apricots and cherries were a living promise of the orcharding future towards which High Street Road and the north Riding of the Shire were headed.

CRIME AND PUNISHMENT — AND CERTAINTY

Cliff Pannam's reflections at Mytilini provoked this comment from the well known forensic psychiatrist *Allen Bartholomew.*

IT IS OF INTEREST TO NOTE THE formulation of Diodotus who commented in 427 B.C. that "Severe penalties by themselves never prevented crime and it was foolish to think that they did" (Pannam, 1988). The statement of Pannam and the following quotation from Diodotus puts one in mind of the approach to this matter by Beccaria in his *Dei delitti e delle pene* (6th Edn., 1776). It is stated by Monachesi (1960) that

To be effective as a deterrent to crime, punishment should be both prompt and inevitable, applied to all alike for similar crimes. It is not cruelty nor severity, Beccaria believes, that renders punishment an effective deterrent, but rather its certainty. To this end Beccaria suggests that the accused should be tried as speedily as possible in order to reduce to a minimum the time that elapses between the commission of the crime and its punishment. This, Beccaria declares, will produce a more lasting effect and tend to strengthen the association between crime and punishment. He further believes that the sought-for connection between crime and punishment can be made more impressive where it is possible to make the punishment analagous to the crime. It is for this reason that Beccaria questions the utility of punishing lesser crimes in the obscurity of prisons.

It is the strength of the association of crime and punishment that Beccaria believes to be the most effective deterrent. It is not the severity of punishment but rather its certainty that leaves a lasting impression on the minds of men. He contends, therefore, that punishments that are severe cruel and inhuman do not prevent crime. As a matter of fact he argues that extremely severe penalties actually encourage persons to commit crimes. Thus, he states: "The certainty of punishment, even though it (punishment) be moderate, will always make a stronger impression than the fear of one more severe if it is accompanied by the hope that one may escape that punishment, because men are more frightened by an evil which is inevitable even though minor in nature. Further, if the punishment be too severe for a crime men will be led to commit further crimes in order to escape punishment for the crime".

A very similar sentiment is expressed in our contemporary society. John McVicar was interviewed by Ludovic Kennedy (1979).
Kennedy asked:

For the next ten years or so, you spent far more of your time in prison than outside it, but, in fact, you weren't a very successful crook, were you?

The answer given reads:

Being a thief is a terrific life, but the trouble is they do put you in the nick for it, and I tended to get caught more often than I got away with it, but it doesn't really change your attitudes . . . In a way, a fairly calculating criminal doesn't tend to look at sentences; he looks at detection and thinks he can get away with it. Then he goes ahead, and the amount of punishment that follows from being detected and conviction doesn't come into his calculation.

(At one point McVicar was serving sentences totalling 26 years and he had been classified to the maximum security wing of Durham Prison. In 1979, when the above took place McVicar was "out" and was a post-graduate student researching for his M.A. in sociology at Leicester University).

Having taken note of Diodotus, Beccaria (and McVicar), a time span of some 2,406 years, one may end this very brief survey by quoting from Sir Thomas More's "Utopia" (Penguin Classics, 1967) which translation reads:

Well, in Tallstoria a convicted thief has to return what he's stolen to its owner, not, as in most other countries, to the King — who according to the Tallstorians has just about as much right to it as the thief himself. If the stolen goods are no longer in his possession, their value is deducted from his own property, the rest of which is handed over intact to his wife and children. He himself is sentenced to hard labour. Except in cases of robbery with violence, he's not put in prison or made to wear fetters, but left quite free and employed on public works. If he downs tools or goes slow, they don't slow him down still more by loading him with chains — they accelerate his movements with a whip. If he works hard, he's not treated at all badly. He has to answer a roll-call every evening, and he's locked up for the night — but otherwise, apart

from having to work very long hours, he has a perfectly comfortable life.

Today we are concerned with a rising crime rate and, in certain cases, we attempt to deal with the matter by increasing the sentence. Whitaker (1969) commented "Just 5,000 more Marines, Mr President, and we'll have the Viet Cong licked". "Add another ten years on to the penalties, and we'll have this dope menace licked". It may well be that when the various behavioural sciences meet together in yet another "Committee" they should be concerned with history quite as much as with the out-pourings of departments and institutes of criminology. There is so much to be said for contemplating Mytilini and its history as also the triremes, with the aid of Sec Epom or a little ouzo.

BAR COUNCIL ELECTIONS

The Editors Bar News

Gentlemen,

I refer to the Chairman's Message in Bar News, Summer 1988 Edition. There are a number of points with which I wish to take issue.

Firstly, the Chairman states that he would like to see tickets outlawed in Bar Council elections because there is, in his words, "no room for factions or playing of politics". There are two points that I wish to make here. The Chairman indulges in a degree of inconsistency in making this statement for during the 1988 Bar Council elections the first ticket to be circulated was one in which the Chairman's name appeared. The Chairman did not issue a statement, as John Winneke QC did, disassociating himself from the ticket. If he feels so strongly about the issue why did he not adopt that course during the election? Secondly, the 1988 Annual General Meeting of the Bar overwhelmingly rejected a proposal to ban the use of tickets at elections.

More importantly however is the general issue of whether or not it is desirable that voters at Bar Council elections should know something about the issues and policies which concern each candidate and whether or not promises should be held out. Whilst agreeing with the Chairman that it is appropriate that a list of candidates be published with an expression of some view as to what he or she thinks the Bar Council should be doing, I take issue with the argument that promises should not be held out to the Bar. Why shouldn't a barrister or group of barristers who feel particularly strongly about a particular issue or issues which affect the Bar as a whole or any particular group at the Bar promise that if elected he or she or they would implement or attempt to implement their proposal or proposals whatever it or they may be. It is one thing to say, as the Chairman does, that the Council must work as a team but it is an altogether different concept to suggest that the creation of tickets which hold out promises to members of the Bar prevents the Council working as a team. What is wrong with the Chairman's analysis is it that he treats the Bar in the same way as one might treat a small "club" in which the interests of all members are basically one and the same. The analysis does not accord with reality. The Bar is now a large institution and comprises many different groups who have different needs. In other words, it is a pluralistic organisation. Accordingly, tickets or individual platforms are a natural consequence of this pluralism which exists. To outlaw tickets would be an anti-democratic step on the part of the Bar and for that reason alone highly undesirable.

I also wish to take issue with the Chairman's comment that the Bar Council should not be political and that it is not "in the business of playing politics". The administration of justice is, after all, of paramount importance to all persons and not just lawyers. It is the duty of the Bar Council to comment both publicly and privately on matters affecting this issue. In fact if the Council does not do this then it is abdicating its duty and responsibility which it owes to its members and the public as a whole. If relations between the Bar and the Government have become strained as a result of the Bar Council performing its duty then so be it.

Sincerely yours,
Greg Barns

JUDGES OF THE ACCIDENT COMPENSATION TRIBUNAL

	Date of Birth	Date of App'mt	Year of Retirement
M. Higgins	28 4 44	21 9 85	2016
R. Betts	13 12 51	12 10 87	2023
J. Bowman	4 5 45	2 12 87	2015*
J. Bingeman	28 11 36	1 2 88	2006*
L. Boyes	4 5 42	1 2 88	2012*
M. Croyle	13 2 45	1 2 88	2015*
C. Macleod	18 7 34	1 2 88	2004*
B. McCarthy	19 8 29	1 2 88	1999*
K. Travers	9 1 38	1 2 88	2008*
P. Mulvany	30 1 48	8 2 88	2018*
P. Hardham	30 1 40	1 4 88	2010*

Listed in order of appointment.
No maximum number of judges.
* Judges of the tribunal appointed after 1 December 1987 are required to retire at 70 years of age otherwise they are required to retire at 72 years.

CROSS-VESTING AND CHOICE OF LAW

The Law Reform Commission
Australia

On 16 December 1988 the Attorney-General, the Honourable Lionel Bowen, referred to the Commission questions relating to Federal and Territory Choice of Law Rules. The full Terms of Reference are enclosed.

There are many important issues which arise under the Terms of Reference including

- ☐ Whether the States and Territories should continue to be treated as foreign countries for the purpose of choice of law rules or whether some different choice of law rules is more appropriate within a federation.
- ☐ The impact of the newly enacted cross-vesting legislation on choice of laws issues.
- ☐ Whether the rules on the recognition of inter-state judgments should be altered.

In accordance with the Commission's usual practice, a discussion paper will be issued in due course and submissions will be invited. As there are difficult constitutional and policy issues about which many of your members who practice in this area of the law would no doubt be able to make a useful contribution, I would be grateful if you would draw it to their attention by publication in your journal or by some other means so that the Commission can obtain the benefit of their comments at this early stage.

Stephen Mason
Secretary and Director of Research

FEDERAL AND TERRITORY
CHOICE OF LAW RULES

Commonwealth of Australia
Law Reform Commission Act 1973

I, LIONEL FROST BOWEN, Attorney-General of Australia, HAVING REGARD TO:

(a) paragraph 51(xxv) and sections 118 and 122 of the Constitution and sections 79 and 80 of the *Judiciary Act 1903;*

(b) the scheme for cross-vesting of jurisdiction embodied in the *Jurisdiction of Courts (Cross-vesting) Act* 1987 and its State counterparts; and

(c) the costs of, and other disadvantages associated with, uncertainty in connection with matters relating to the choice of law and of procedure to be applied in proceedings in federal courts, other courts exercising federal jurisdiction, Territory courts and other courts exercising jurisdiction under laws for the government of a Territory;

in pursuance of section 6 of the *Law Reform Commission Act 1973* HEREBY REFER to the Law Reform Commission for review and report the following matters:

(1) whether the laws to which the *Law Reform Commission Act 1983* applies relating to the choice of law and of procedure to be applied in proceedings in federal courts, other courts exercising federal jurisdiction, Territory courts and other courts exercising jurisdiction under laws for the government of a Territory are adequate and appropriate to modern conditions;

(2) the appropriate legislative means of effecting any desirable changes to existing laws in relation thereto, having regard to any constitutional limitations on Commonwealth power; and

(3) any related matter.

2. THE COMMISSION shall particularly report on:

(a) the resolution of the question which law applies in a case where the subject-matter of the proceeding is, or arises out of circumstances, connected with two or more of the States and Territories;

(b) the law and procedure that should apply where a proceeding is remitted or transferred from one court to another; and

(c) statutes of limitations as they affect proceedings in the courts referred to above.

3. IN PERFORMING its functions in relation to this Reference, the Commission shall:

(a) consider the desirability of uniformity between laws to which the *Law Reform Commission Act 1973* applies and other Australian laws; and

(b) have regard to relevant law and experience of other countries.

4. The Commission is to draft any appropriate legislation and explanatory memorandum necessary to give effect to the recommendations in its reports under this Reference.

5. The Commission is to report not later than 30 June 1991.

DATED: 16th day of December 1988.

Lionel Bowen
Attorney-General

26th AUSTRALIAN LEGAL CONVENTION

SYDNEY CONVENTION SET TO BE
"A week that'll knock your socks off!"

THE 26TH AUSTRALIAN LEGAL convention in August this year will be one of the most exciting ever held in this country.

To be held at Darling Harbour, Sydney's newest and most exciting convention and recreation centre, this convention will be the largest ever held in the Southern Hemisphere.

The Darling Harbour setting will be magnificent. It sits close to the water on one of the worlds best harbours and has facilities, shops and activities second to none.

A large contingent of overseas lawyers are expected to attend due to pre-conference publicity in the USA, Europe, New Zealand, Pacific & Asia, and advance bookings from the United States are already very strong.

The programme of speakers and social functions are all virtually in place. The papers are designed to touch most areas of legal practise and many of the emerging issues such as multi-disciplinary partnerships, contingency fees and class-actions to name a few.

A wide variety of social activity has been planned. As well as evening entertainment after each convention day, an extensive "accompanying partner" programme has been organised.

The theme for the convention is "Building Bridges". This not only relates to the venue of Sydney — using a stylised Sydney Harbour Bridge as the logo, but it also relates to bridging the many gaps that exist involving the Law.

The convention will attempt to build bridges between the Australian legal systems in each state, between Australia and legal systems throughout the world — particularly with our closer neighbours. It will attempt to build bridges between the legal profession and other professions such as doctors, architects, accountants and journalists. Finally it will build bridges between the legal fraternity and "man (person) in the street".

Keynote speakers from throughout Australia and throughout the world have been invited — notable amongst the early acceptances are Lord Mackay of Clashfern, the Lord Chancellor of the United Kingdom; Sir Gordon Slynn, Judge of the Court of European Communities and Justice Anthony M. Kennedy — the newest appointee to the Supreme Court of the United States of America.

These keynote speakers will relate their experiences to Australia. For example Sir Gordon Slynn will discuss how the different countries of Europe are working towards a uniform legal system by 1992. He was recently involved in a case involving West German Breweries who where, he alleged, stopping free trade of beer throughout Europe via an ancient "anti-preservative law".

Lord Mackay will discuss his "deregulation" of the English system of Law. A great reformer of the Law in England, the Lord Chancellor will add interesting arguments for many of the emerging issues in Australia.

Justice Kennedy will discuss law in the USA. A fascinating figure, he was appointed to the Supreme Court after two earlier nominations by the Reagan Administration had been rejected.

Each month the Law Society of NSW, hosts of the 26th Australian Legal Convention with the Bar Association of New South Wales, will bring you updates on the Convention. Please remember that if you register before May 1, 1989 you receive a $100.00 discount. Any enquiries should be directed to Robyn Johnson, Law Society of NSW, (02) 220 0333. Next issue — The Papers/Forum programme.

For further details contact
Stephen Woodwill.
Media Officer, Law Society of New South Wales.
Ph — (02) 220 0288 (W), (02) 560 4355 (H).

SUPREME COURT JUDICIAL STATISTICS

SUPREME COURT JUDGES

Judge	Age at 31 12 88	Date of Birth	Date of App'mt	Year of Retire. 72/70*
W. Kaye	69	8 2 19	1 13 72	1991
A. King	69	13 2 19	19 7 77	1991
J. Young	69	17 12 19	30 4 74	1991
P. Murphy	65	5 5 23	12 4 73	1995
W. Crockett	64	16 4 24	2 12 69	1996
K. Marks	64	10 9 24	15 6 77	1996
I. Gray	62	6 3 26	12 7 77	1998
R. Fullagar	62	14 7 26	29 1 75	1998
R. McGarvie	62	21 5 26	1 6 76	1998
A. Southwell	62	1 11 26	3 4 79	1998
R. Brooking	58	7 3 30	22 2 77	2002
N. O'Bryan	58	5 10 30	3 2 77	2002
B. Beach	57	16 2 31	18 7 78	2003
J. Gobbo	57	22 3 31	18 7 78	2003
G. Hampel	55	4 10 33	16 3 83	2005
J. Phillips	55	18 10 33	1 2 83	2005
R. Tadgell	54	15 3 34	4 3 80	2006
W. Ormiston	53	6 10 35	22 11 83	2007
A. McDonald	51	3 3 37	19 5 88	2007*
B. Teague	50	16 2 38	13 10 87	2008*
F. Vincent	51	3 10 37	30 4 85	2009
P. Cummins	49	9 11 39	16 2 88	2009*

* Justices of the Supreme Court appointed after 1.7.1986 are required to retire at 70 years of age (Courts Amendment Act s. 4 1986).

MASTERS OF THE SUPREME COURT

Master	Age at 31 12 88	Date of Birth	Date of App'mt	Year of Retire. 72/70*
V. Gawne	62	19 6 26	21 3 77	1998
P. Barker	62	15 11 26	13 4 77	1998
J. Gaffney	59	21 8 29	19 7 82	2001
T. Bruce	54	7 3 34	16 7 73	2006
K. Mahony (Senior Master)	47	29 8 41	15 4 83	2013
E. Evans	45	20 2 43	2 8 83	2015

* Masters of the Supreme Court appointed after 1.7.1986 are required to retire at 70 years of age.

DISCOUNT HOTEL RATES

THE RYDGES GROUP OF HOTELS HAS extended corporate rates to members of the Victorian Bar.

The rates provide for substantial reductions.

Hotels in the group are: The Bryson, 186 Exhibition Street, Melbourne. Northside Gardens, 54 McLaren Street, North Sydney NSW. The Lakeside, London Circuit, Canberra ACT. The Pavilion, Cnr. Canberra Avenue & National Circuit, Forrest ACT. Greaterway Inn, 579 Olive Street, Albury NSW. Noahs Hotel, Worester Terrace, Christchurch NZ. Lakeside Regency, 14-18 Lake Esplanade, Queenstown NZ.

The Victorian Bar corporate rate should be requested when bookings are made.

For further details contact Anna Whitney.

OUT AND ABOUT ODCW

THE LIFTS OF ODCW ARE MARVELLOUS things. You learn a lot about life from the lifts of ODCW.

They teach one patience. They have been ergonomically designed so as to not function at optimum levels. This allows barristers, solicitors, clients and interpreters alike to contemplate their lives. That marvellous moment in the day when you think

(a) are any lifts working at all?

(b) if one is working, then it is sure to be the furthest from where you are standing (thereby ensuring healthy exercise)

(c) having reached the lift, do I have the statutory two seconds to get inside before the doors close?

(d) having had the door close in my face, will there be another along in less than ten minutes?

(e) will the next lift be full of tinkering uniformed lift mechanics and therefore unavailable?

(f) why are lift mechanics not the most handsome of folk?

(g) I am late for court/conference.

They inform one of what is happening at the Bar. It was very informative to read a notice in the lift recently that Ken Hayne QC had been appointed to be a Registar of the Family Court. Many whisperers attended the welcome at the Family Court in full robes and full of curiosity as why a man of Equity would choose such a sociological path. Alas they were disappointed to discover that one Kenneth Haines had accepted the appointment and not the Silk of similar name.

Those coloured notices stuck to the lift walls, however, regularly fill many with disappointment of a Monday morning. The disappointment of not being appointed to the Small Claims Tribunal — yet again. The disappointment of not being chosen for Gillard's cricket team — yet again. Of course such disappointments give us inner strength to soldier on in the face of adversity.

They teach one about computers. The notices within proclaim that the current failure of lift, air-conditioning, cleaning, and lack of apprehension of in-house thieves is caused by computer fault. Often the word is computer blow out, failure, black out or that marvellous phrase — "the computer is down". This conjures up visions of a manic depressive computer. That the lift is not working because some neurotic computer in the ceiling is having a "down" day. Do the lifts travel at a faster speed when the computer is "up"? I asked this question of the Bar's doyen of computery — Burnside. Through the services of a qualified computer interpreter, I understood the answer to be "perhaps depending on its softwear". Thus I learnt that the clothing of computers is indeed relevant to whether the lifts and the air-conditioning are ever to function. I have also abandoned my night time courses of "French for Lawyers" and have now undertaken the Council of Adult Education's series on "Computer language for the Backward and its Application to Macrame."

The lifts are marvellous places to over-hear what is going on. Often there are important people inside like Queen's Counsel, and members of the Bar Council. They often talk to each other in such a way so as others may hear. Thus began the rumour that Recorders are to be appointed to the courts. These will be different to the present recorders in that they will not push buttons on a tape deck. It seems that a new system is being introduced to alleviate the intolerable backlog in the courts. It seems that there are not enough barristers to argue cases. Therefore the government has decided to appoint part-time barristers from the community to assist in the hearing of cases. Qualified lay persons such as social workers, psychologists and primary teachers will be rostered for a month's service. Being unencumbered by legal training it is believed that they will resolve disputes in a quick and fair manner applying common sense and making all parties happy in a meaningful scenario. They will be paid what the newspapers have deemed to be the normal fee for a junior barrister — Cliff Pannam's costs of the day.

The lifts teach us the wonders of architecture. Why did the lifts not go to the Lonsdale Street level. Was it a question of cost? The desire to give barristers much needed exercise by walking up and down those delightfully designed pink granite stairs? Or the thought that the personal injuries jurisdiction needed a shot in the arm by the creation of our very own slipping cases? What creative brain thought up the invalid lift? That solitary shaft going to the

ground floor. Reserved for the disabled and therefore full of barristers clutching malted milks and pies and sauce. What is to become of those lift doors on the ground floor? Will they ever function or are they just an ornamental facade?

There are many more questions concerning O.D.C.W. will be the subject of a regular column. So if there is anything you have of interest just drop a line to the Editors and they will forward it to me.

Comoedus

L.A. LAW — JUDGES & JURIES IN CALIFORNIA

LOS ANGELES LAWYERS ARE VERY serious, sober and conservative. It is not just the lawyers in California. Without exception, every taxi driver I met, who found out I was Australian, expressed his disappointment that Paul (Crocodile Dundee) Hogan had left his wife. They were upset; Californian taxi drivers! I did not try to explain to these folk that I did not care. I was surprised that their legal system and Courts worked so well. I soon realised that their lawyers found my surprise offensive. This serious attitude to life and civil institutions is reflected by their attitude to jury service. Their tour of duty used to be until recently a month. It is now two weeks. If they are chosen within the fortnight, they serve for the length of time the case takes. Exceptions are of course taken if it is inconvenient to serve on a long case. Our Judges and persons responsible for the system are apologetic about keeping our civil juries for three days whilst they are put up for selection. It is felt that our juries are resentful about being herded around for three days whilst being looked at and perhaps serving for a short time. There is no such resentment in the system as I saw it in California. Their juries are of course subjected to cross examination as to their suitability.

Why not ask a potential juror on oath whether he is fitted to serve in a particular case? What I saw of the examination of jurors was efficient and done with the minimum of time. Take a simple case; a Plaintiff suing for a back injury. A juror was asked whether he had ever had a back condition; yes, it had recovered within some months. He was then asked whether he believed that some back conditions did not resolve as quickly, whether he felt he could fairly judge a case involving a back condition that had not resolved for years; whether such long lasting conditions were due to lack of motivation or desire by a Plaintiff to receive compensation. These questions evoked a response on oath from the juror that he felt he could be fair. Another example was a case that was estimated to take about six weeks, after about three weeks the question of liability would be determined. A juror was asked whether he felt that after three weeks he would be able to make a fair decision knowing, that if he found against the Defendant, in favour of the Plaintiff, he would be committing himself to another three week's work as a juror. It was put to him that at that point of the trial, he would be tempted to find against the Plaintiff and put an end to his service. The questioning of a juror in a civil case by both sides is usually completed in two or three minutes. It may have been longer in a criminal case but it was all very short and sharp and to the point. There is a great emphasis on time not being wasted.

Almost all civil actions in California are heard by juries of twelve with two reserves. They hear the most complicated factual disputes, for example, fraudulent misrepresentation of the sale of a business involving millions of dollars. They are provided with huge blow-ups of the documents involved and have copies and photographic aids of all kinds. There is no preconception that juries will not be able to handle something complicated. They are given written and diagrammatic assistance which reduces, or attempts to reduce, the complex to the simple. It is quite normal for Counsel to use a blackboard or large sheets of paper upon which to summarise arguments. We are used to a Judge at the end of a case instructing the jury. This is also done at the beginning of a case and during its running. The opening addresses by Counsel are much the same as ours but they hear both sides before they embark upon hearing the evidence.

Appointment to senior judicial office is by the governing party. Their system differs from ours, in that in California, proposed judicial appointments to their Superior Courts are put before an extensive bipartisan panel. It is similar to the panel used by our Chief Justice when appointing Silk. Once the panel of referees approves the appointment, it has to be then approved by the relevant Bar Associations. They have to be, and in practice are, totally beyond reproach. I had a number of conferences with Judges before they started work, usually 7.00 or 7.30 a.m. Most started pre-trial conferences at 8.00, starting formal Court work 9.00'ish and finishing in the afternoon. In the Superior State and Federal Courts the Judge is given a list of cases which he has to deal with. The cases are distributed by a balloting system which seeks to eliminate any choice being exercised by the parties. It is the Judge's responsibility to get through his own list. If he strikes a number of difficult cases then that is his bad luck. Once a Judge has a case allocated to him he is involved in all the interlocutory steps, listing for trial, pre-trial conferences etc. He will normally hear the case so as to fit in with the practitioners. If the demands of his list and practitioners mean that a suitable arrangement cannot be made, he will go ahead and

hear it despite inconvenience. This is totally different from a system that lists cases only to fit in with witnesses.

Criminal and civil trials in California are conducted much the same as they are in Victoria. A personal injuries action is almost identical. The difference is in accent and what seemed to me everyone's great respect for the system. Jurors wear a tag identifying them as jurors. This simple identification sets them apart from the members of the public who are at Court. In the State District Court where L.A. Law is filmed (or perhaps more accurately is represented on film) is next door to their theatre/concert hall complex known as The Pavilion. After a civil jury has retired to consider its verdict, if it is taken to lunch, it is taken to The Pavilion Restaurant which is set on top of The Pavilion complex. It is a magnificent restaurant catering for 400-500 people. It is elegant and extremely sophisticated. There are the jurors having lunch. Ours used to be trundled down Bourke Street to a sleazy pub. They are now handed a packet of sandwiches. In this same Court complex I heard a potential juror being examined about his suitability to serve in a civil action. The panel were present when this was taking place, it was the end of a long day. Counsel asked "Well, I suppose you've learnt one thing on your tour of duty, that the law as it is practised in this State has nothing to do with L.A. Law or Perry Mason". The question was answered by a roar of laughter from the jury panel. The practising lawyers of Los Angeles cringe when L.A. Law is mentioned. They find the representation of their legal system on film and television extremely embarrassing. There are attorneys in California who practise in Hollywood, but to describe someone as a Hollywood lawyer is very seriously abusive.

Amongst all this seriousness and hard headedness the City proper, or Downtown Los Angeles, is littered with people who obviously have not a home and have prams and other things they push and pull which contain all their possessions. You cannot walk a city block without being set upon by beggars. It seems that everyone who is not a beggar drives into the downtown area using the freeway system which enables them to drive straight into the basement of the building where they are going to work.

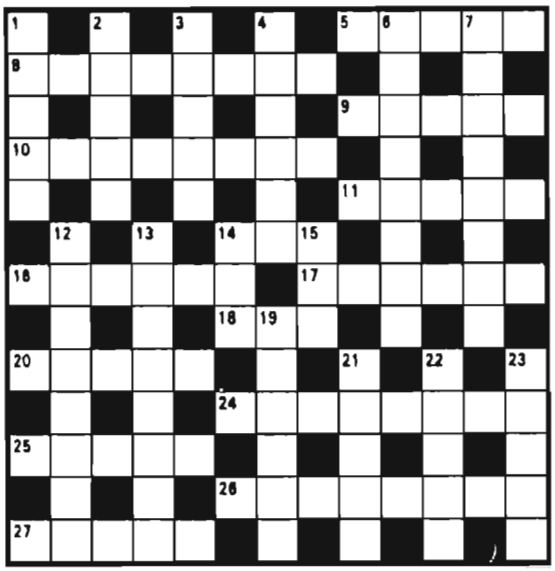
Arthur W. Adams

ABA CONFERENCE

Darwin 1990
7th-13th July

Overseas visitors including Judges from Asia. Tours of Central Australia and Kakadu can be arranged.

CAPTAIN'S CRYPTIC No. 65



Across

5 Disposses a tenant (5)
8 As a Latin favour (2, 6)
9 Holus (5)
10 Barrister's den (8)
11 Russian country villa (5)
14 Form of Buddhism (3)
16 On behalf of another with shortened Latin (3, 3)
17 Official requisition for stores (6)
18 Not in (3)
20 Horizontal (5)
24 A gentleman's agreement (8)
25 Slip of French paper, often minute (5)
26 Poverty-stricken (8)
27 Sumptuous eating and drinking (5)

Down

1 Freedom from disorder (5)
2 Ancient British and Irish alphabet (5)
3 Like to the slaughter (5)
4 Raging (6)
6 Single is bad, double a bar (8)
7 An heraldic lying-down (8)
12 Ecclesiastical living (8)
13 Final addresses (8)
14 When species meet (3)
15 Cockatoo as for two up (3)
19 Between habits and customs (6)
21 Maxim (5)
22 Scottish lord (5)
23 Sorts of flares (4)

SPORTING

CRICKET — BAR v. LAW INSTITUTE

IT WAS WITH A DEGREE OF FOREBODING that the skipper travelled to the Albert Ground in December, 1988 for the Annual Match against the Law Institute.

The bowling to say the least was looking very thin. David Harper after many years of good service had broken down (is it the end?) and big Dean Ross, a ferocious fast bowler on his day, thought that a "crash and bash" at Heidelberg was more important than playing for the Bar Cricket Team (it is clearly the end for Dean Ross!).

Despite the thinness of the attack, we did well to contain the Law Institute. At the end of 40 overs the opposition was 4 for 177. The opening bowlers, Jeremy Gobbo and Chris Connor performed very well. Peter Watkins who made 100 last year was well contained in the opening overs. Gobbo's first 6 overs produced 11 runs and Chris Connor bowled 8 tidy overs for 25 runs. Gobbo finished with 2 for 21 off 8 overs and the only other wicket-taker Geoff Chancellor got 1 for 42. Peter Watkins was run out for 65. Ross Middleton fielded the ball at square leg and threw the wicket down at the bowler's end to dismiss Watkins in what was a very good piece of fielding, especially bearing in mind the antiquity and weakness of Middleton's throwing arm. Craig Henderson, always a thorn in our side, contributed an unconquered 51. The Bar's bowlers did perform well and are to be congratulated. 177 in 40 overs was not beyond us.

Unfortunately, yet again, the batting was found wanting. Jeremy Gobbo looked good until he was bowled for 19. One of the stars of former games, Ian Dallas, was bowled for 1. Newcomers Peter Lithgow and Michael Cosgrave managed 26 and 20 a-piece and Bill Gillard and another newcomer Peter Walton made 19 and 26 respectively. Unfortunately the batsmen could not go on with the task and at the end of 40 overs we were 9 for 152.

The pleasing feature of the day was the performance of three newcomers, Lithgow, Cosgrave and Walton and we do hope that with the influx of young blood we can improve next year to a success.

The bowling is looking a little bit thin as the bowlers get older and I do hope that there are young men at the Bar to provide a bit of fire power next year, otherwise things are going to be bleak.

The team was: E.W. Gillard Q.C. (Captain), Chris Connor, Bruce McTaggart, Ross Middleton, Rob Dyer, Jeremy Gobbo, Michael Cosgrave, Geoff Chancellor, Peter Lithgow, Peter Walton and Ian Dallas.

E. W. Gillard

O'DRISCOLL CUP 1988

ON THE 19th DECEMBER, 1988 THE ANNUAL tennis match for the O'Driscoll Cup took place at the Albert Ground. It was pleasantly cool and the grass courts were in perfect condition. Unfortunately at the last moment some of the stalwarts of the Bar who play in the top division sold their souls to mammon, thus considerably weakening the team which although not short of numbers was considerably light in top quality. A diplomatic problem arose when Teague J. sought permission to play with his old time companion, Tony Smith, for the solicitors. Permission was reluctantly granted because the Bar was only too well aware of the savaging it had received over the years from this formidable combination. Their fears were justly realised when the pair won most of their matches although not, as so often previously, every one. The overall result was the most severe defeat the Bar has received for a good number of years. Even the big guns of the Bar such as Collis and Hammet were gunned down by bigger guns of the solicitors. Collis maintained he had been playing pennant this year but further inquiries elicited the fact that the pennant season finished in August and he was unable to give a satisfactory explanation as to training he had pursued in the intervening months. The greatest incongruity was reserved for the presentation when Hampel J., on behalf of the Bar, presented the cup to Teague J., on behalf of the solicitors.

B. K. C. Thomson

ANNUAL LEGAL FUN RUN

ON A QUIET SUNDAY MORNING IN December the Annual Legal Fun Run was held. The ability to run two laps of the Tan together and an entry fee of $12 were the prerequisites.

Your intrepid reporter believing he could meet both requirements and fortified (in due course) with the knowledge that "a gala" (should that be "galah"?) cocktail party was included in the price, ventured the suggestion that perhaps "The Berkeley Boot" should be put on the line.

For the uninitiated and the uninformed "The Berkeley Boot" is that magnificent trophy donated by no less personage than Berkeley himself. It symbolises all that is good, free, worth fighting for, that pillar on which democracy was founded, for which Superman was prepared to fight ("truth liberty and the American way") and also what solicitors and barristers could "gladiate" over.

When the challenge was made our intelligence was that only a few solicitors had entered, so if we could muster the numbers we just might succeed.

No less than 13 of our good members fought the good fight. One suspects that we may have been hustled — just a wee bit — as 61 solicitors arrived at the starting line.

No official result was forthcoming, neither was the cocktail party, although the sheer weight of numbers makes the conclusion fairly inevitable.

I can advise that we do have a number of good grounds of appeal from the result, if there was one. We also have some fantastic excuses; two of our members maintained they had just returned from their honeymoons (not with each other) and had dissipated their energies elsewhere (that could have been more crudely and accurately put but the editors wouldn't allow it). Two others said their spouses had just had babies — same sort of excuse as the first two, you might say.

The other excuses were even better, but to maintain the element of surprise when we issue our appeal to the High Court I will not divulge them publicly. However, if you really want to know, a discrete phone call and all will be revealed.

Tom F. Danos

W.A.G.S.

Second place getter "Iona" shortly to be renamed "HMAS Bucolic".

"LET US NOW PRAY FOR THOSE WHO GO down to the sea in ships at Williamstown."

Thus intoned the incumbent of the Tabernacle of the Mystic Redeemer at the conclusion of the service for the well being of the doughty members of the Wigs & Gowns Squadron, who were to embark on, their now traditional cruise in company, on that Monday in December 1988.

Rear: Bill White, Judge Duggan, Jon Klestadt, Judge Crossley, Peter Rattray. Front: Mr Justice Rowlands, Jane Ackman.

Would these prayers be answered?

Whilst upon matters nautical/liturgical/ecclesiastic, it is a little known fact, that the services and prayers proffered in sundry Churches about Melbourne at the beginning of the legal year, are really for the safe return of those intrepid mariners. The reasoning is simple. Under the rules of the Cruise in Company — fluid though they are, any ship and/or its complement, which has not completed the course and the celebrations by February of the following year, is deemed lost. Thus would Lutine bells ring, clerks fulminate, and bank managers resign — the potential for disaster is immense.

Happily in that Bicentennial year, and cosseted between those prayerful entreaties to higher deities, the wanderers, some with little time to spare admittedly, completed their charter.

This year's cruise saw an increased fleet of some 12 assorted craft face the starter's pop gun. Like last year, there was a wealth of diversity in craft and crew — and some notable absences, upon which to ponder.

For example: Charlie Wheeler's "Boomaroo" failed to appear — again.

Michelle Williams has apparently been banned from matters nautical after burning up only one engine last year.

The honour of the Tall Girls Club was saved by an act of extraordinary heroism. After last year's dismal performance by "Once Is Enough" Keenan, it seemed that there would be no representative of this once proud but now depleted body. But no — at the last moment Arthur "Horatio" Adams took the forrard hands job on the Rat's Etchel. To say that Horatio enjoyed himself on the day, has been criticised as being a serious understatement.

Michael Kildea purchased a new boat in an attempt to win a coveted prize.

Tim Wood sailed his Endeavour 24 from Blairgowrie to match race Alwynne Rowlands' similar craft from Brighton.

The Freedom 33 borrowed by Campbell appeared to have as its order of priority — champagne, girls, beer, sailing.

Other starters included, Hard Fox in "Panache", Paul O'Dwyer and the (well nearly) All Girl Crew in the "Top Hat", Kommodore Klestadt in "Crossbow", Philip Misso in the modified Etchel, Martin Bartfeld in his "Boomerang".

trying a Dennis Connor feint, and giving his crew a close up view of the Williamstown Football Club Grandstand. Subsequently, with Seldom Seen McPhee at the helm, an attempt was made to close in on the "All Girls" team by the hitherto unprecedented manoeuvre of cutting a corner. Rattray and Titshall were so intent upon indoctrinating Horatio into the mystique of sail, that they forgot about the course proper.

The finish provided an interesting spectacle, particularly to spectators enjoying the use of the former trading ketch "Flinders" as a close up viewing platform. Most skippers, having apparently studied the tactic whereby John Bertrand successfully forced Dennis Connor into the spectator fleet in the last race of that lesser known other regatta, elected to beat to the finishing line through the several hundred boats moored off Williamstown. Whether such tactics were designed to fool other boats and/or the Judge at the finishing line is not clear. It certainly fooled the spectators.

A gratifying large complement then resorted to the lawns of the R.Y.C.V. for barbeque, refreshment and the presentation of trophies.

The latter event was accompanied by the usual cries of "rigged" — "recount" — "appeal" but these imprecations were overshadowed by an unseemly wrangle upon presentation of the second prize. Rowlands' Endeavour 24 had been crewed by, inter alia, a bunch of judicial "heavies", most of whom wished to claim the prize, each asserting that they had been the principal helmsperson around the course. With an air of authority that has caused Premiers to tremble, A.R.O. using the Bond precedent of "I own it", finally wrested his prize from — yes that short portly County Court Judge who so distinguished himself in the inaugural event.

Again a successful cruise, and it is hoped that there will be an even greater participation by members of the Bar and friends in the next event.

OVERHEARD

— Dyson Hore Lacey — "This beats the Henley on Todd, or is the other way around?"

— Tony Lupton — "Lord, if I ever get out of this I will never do it again."

— The Kommodore — "I promise faithfully never to win again and to donate a perpetual trophy from the remains of the 'Thorsen'."

— Horatio — "Why has this sport eluded me? It is the only one I've played where one can drink before, during and after the game."

— An unnamed female crew upon being told that the ship had to be sailed back to its home mooring somewhere up the Bay — "Do I have to do this all over again?"

Our thanks to the Royal Yacht Club of Victoria for the use of their excellent facilities, and to all who attended.

"Neptune"

RESULTS

1. "Crossbow" — Borenson
Skipper — J. Klestadt; Crew — K. Liversidge, Bill White, A. McIntosh.
2. "Iona" — Endeavour 24
Skipper — A. Rowlands; Crew — A. Nicholson, G. Crossley, J. Duggan, J. Goldsmith.
3. "Gareloch" — Top Hat
Skipper — P. O'Dwyer; Crew — D. Byrne, G. Uren, D. Hore-Lacy, J. McArdle.

THE BAR ALL STARS VIII

Stroke **Ian Douglas** QC, Commonwealth Games Gold Medallist, Victorian Kings Cup (won)
7 **Paul Guest** QC, Olympic Games Silver Medallist (Mexico City), Australian representative other Olympics, Victorian Kings Cup (won)
6 **Brian Keon-Cohen**, Scotch Head of the River (won), Trinity Inter-Collegiate (won), Melbourne University Inter-Varsity (won), Full Blue Melbourne University
5 **Arthur Adams**, Xavier Head of the River, Newman Inter-Collegiate (won), Melbourne University Inter-Varsity (won), Melbourne University Veterans VIII
4 **Chris Dane**, Monash Inter-Varsity, Mercantile Rowing Club, Banks Rowing Club. Coached Australian Olympic crews
3 **Stephen O'Bryan**, Xavier Head of the River, Melbourne University Inter-Varsity
2 **Julian Zahara**, Xavier Head of the River, Newman Inter-Collegiate (won), Melbourne University Inter-Varsity, Melbourne University Veterans VIII
Bow **Stephen Shirrefs**, Victorian Kings Cup (won), Australian World Cup Championships (won), Moscow Olympics
Cox **Peter Galbally**
Boatboy Clive Penman

SELECTOR'S NOTE

I have construed my instructions as limiting the field to practising members of the Bar. Were this not so, the Bench could scrape together a formidable crew, starting with:

Gobbo J	Xavier Head of the River (won), Oxford University (won)
O'Bryan J	Xavier Head of the River (won)
Frederico J	Victorian Kings Cup (won)
Judge Howden	Olympic Games Bronze Medallist

VERBATIM

Heard in the Common Room

Mr. Justice Vincent: "I'm going to a Judges' Meeting in Perth. Mr. Justice Ormiston is speaking on 'Six Month's Experience of Cross Vesting'."

Coldrey Q.C.: "They ought to get a local to speak on 'Six Month's Experience of Crass Investing'."

Sandringham Magistrates Court

(The building had just been refurbished, repainted, recarpetted, some curtains installed, a conference room created. Sounds of breaking glass and crashing chairs emanating from the Second Division where Mr. Gilman M has just completed an arbitration. Following which a Melway was propelled through the recently curtained window.)

In the adjoining court, Mr. Gibbs M, after requesting that all Melways be removed from the bar table, noted:

"It appears as if the air conditioning problems in the other Court have been finally attended to." (So much for arbitration!)

Melbourne Magistrates Court

One of the Bar's recent appointments to the magistracy, Harley Harber, had occasion after his appointment to ring the Melbourne Magistrates Court.

"Who's calling?" asked the receptionist.

'It's Harley Harber here," was the response.

"Yes, and I'm the Indian Ocean!!?!"

Coram Master Barker,

2nd February 1989

G. Thomas: "I don't know how I've been painted into this corner."

Master Barker: "You brought the paint, and it's your paint brush."

Re HCC

Coram Credit Licensing Authority 23rd May 1988

Johannes Franciscus Adrianus.
Maria Van Boxtel, sworn and examined.

Mr. Bingham: "Could you tell us your full name, please?"

Mr. Van Boxtel: "Johannes Franciscus Adrianus Maria Van Boxtel."

Mr. Bingham: "Perhaps we could go through that again?"

Mr. Van Boxtel: "Johannes Franciscus Adrianus . . .

Mr. Bingham: "Could you spell that for us?"

Mr. Van Boxtel: "No, I can't."

R v Peter John Allen

Coram McGarvie J
Accused in person
1.12.88
(Transcript)

His Honour: Nothing more before the jury are brought in?

Mr Maguire: No, Your Honour.

His Honour: Bring in the jury.

(At 10.30 amphetamine (sic) the jury entered the court.)

[The following day — after transcript had been released.]

His Honour: Very well. Yes, bring in the jury.

Accused: Just one short matter.

His Honour: Yes, Mr Allen.

Accused: It will only take about 30 seconds. I did see at 10.30, at page 7152 that apparently the jury entered the court and the amphetamine was with them.

His Honour: Amphetamine was with them according to the transcript?

Accused: I ask a ruling from Your Honour to keep the amphetamine away from the jury.

His Honour: I will certainly bear that in mind, Mr. Allen.

His Honour: Bring in the jury.

(At 10.41 a.m. the jury entered the court.)

Bodno v Traviato, Adler & Cotte (3rd Parties); Traviato v Bodno; Adler v Bodno & Traviato

Prahran Magistrates Court
5th December 1988
Coram: Mr. G.A. Golden, M

Ron Clark: (cross-examining complainant's passenger):

"I put it to you that your evidence is identically the same as the previous witness."

Will rain bring prosecutions?

from L.C.M. Gordon, solicitor

AT TIMES ONE WONDERS WHETHER SOME governments have an over inflated idea of their own importance and abilities.

An interesing Act of Parliament recently came to my attention; namely the Rain-making Control Act 1967.

The Parliament of the time obviously considered that the responsible minister had not only the means of producing rain but also the exclusive right so to do. Section four of the act states that: "Where the minister authorises rain-making operations under . . . this act he shall issue his authority to some . . . body under his control to make arrangements for carrying out those operations."

The minister's omnipotent powers are brought into play in section nine of the act which states that: "Any person who carries out rain-making operations in Victoria which are not authorised under this act shall be guilty of an offence . . . penalty $1000 or imprisonment for 12 months."

No doubt some of the more religious members of our community may be somewhat concerned about the use of this power by the responsible minister. I can find nowhere in any acts or regulations whether there is any exemption for any holy entity.

I await with interest to see whether the Director of Public Prosecutions Institutes any proceedings in relation to the past few days of rain.

L. C. M. Gordon,
Warragul.

Rain-Maker may be above the Law

From J. Coldrey, QC Director of Public Prosecution, Victoria

WHETHER OR NOT A BREACH OF THE Rain-making Control Act 1967 has been committed in the quarter suggested by L. C. M. Gordon (28/11) the problem of extradition would seem to be insuperable.

John Coldrey,
Melbourne.

Donna Maree Lamb v. Shaun Smythe

Coram: Judge Spence and Civil Jury Ballarat, 10th November 1988
Jordan for Plaintiff, Titshall for Defendant

Prior to empanelling the Judge asked the panel the customary questions on circuit about whether they knew the parties to the action or anything of the motor vehicle accident in question. About six young men indicated they knew Donna Lamb. Upon the Plaintiff being asked to stand forward by the Judge and pointed out to the panel they each indicated it was a different Donna Lamb they knew. After empanelling appearances were taken.

Jordan: I appear for *this* Donna Lamb, the Plaintiff, although I rather wish I appeared for the other one.

Sunshine District Centre Panel Hearing

Coram: Mrs. H. Gibson, Chairman, Mrs. P. Semmens, Member, Mr. P. Davies, Member.
25 November, 1988

H. McM. Wright Q.C. (Cross-examining Dr. Wolinski on town planning matters).

Dr. Wolinski: Madam Chair, I do not know what the . . .

Wright: You are trying to anticipate the questions again, Dr. Wolinski?

Dr. Wolinski: Yes, all right.

Wright: Watch the way the ball turns in the air. Do not anticipate before he bowls. What is the size of those . . .

Davis v David Syme & Co. Ltd.

Coram O'Bryan J and A Jury of Six, 24.11.88-28.11.88. The Plaintiff appeared in person, Jeremy Ruskin for the Defendant.

Mr. Ruskin: Did you think it is a little odd to call yourself 'Elsa Pharlap Davis'?

Miss Davis: What did you say?

Mr. Ruskin: Is it a little odd to call yourself 'Elsa Pharlap Davis'?

Miss Davis: It's not hard, it's a wonderful horse.

Mr. Ruskin: No. I do not think you heard my question. Do you think it is a little odd or a little unusual to register a name 'Elsa Pharlap Davis'?

Miss Davis: No I don't, because a lot of people said 'You are a racehorse, you're not a draft horse'.

Mr Ruskin: Yes?

Miss Davis: So I look at it that way.

[One of the matters of which the Plaintiff complained was that the Age newspaper had referred to her as "ageless".]

His Honour: Would you be prepared to reveal how old you are Miss Davis?

Miss Davis: No, ageless.

Mr. Ruskin: Well there you are Miss Davis. Now you have said it, you have said the word 'ageless'.

Miss Davis: Ageless, because you said it. You've had four years of saying it . . .

Mr. Ruskin: Now here you are upset by the words 'leading Melbourne eccentric'.

Miss Davis: Yes.

Mr. Ruskin: Now, do you not regard yourself as an eccentric?

Miss Davis: No. Would you regard Lady Fairfax as an eccentric?

His Honour: Well Mr. Ruskin does not have to answer questions.

Mr. Ruskin: And what about Dame Edna Everidge? Do you think she is a bit eccentric?

Miss Davis: No, I think she is very brave and very clever.

Mr. Ruskin: Why do you think the word 'indestructible' would remind people of Rasputin?

Miss Davis: Well it was in the paper, it was in the Age when they wrote up about Sinclair.

Mr Ruskin: Do not worry about Sinclair. Why is it that the word 'indestructible' reminds you of Rasputin?

Miss Davis: Well, because it's in the book. I bought a book on him to read it. On Rasputin.

Mr. Ruskin: They use that word about him?

Miss Davis: Indestructible, yes, a very bad monk.

Mr. Ruskin: Yes, a very bad fellow. The fact is that there is a big difference between you and Rasputin is there not?

Miss Davis: A number of differences. I think so. I don't think I'm like Rasputin at all.

Mr. Ruskin: One big difference is that he is very dead and you are very much alive are you not?

Miss Davis: M'mm.

Mr. Ruskin: So?

Miss Davis: Well don't let that worry you.

Mr. Ruskin: Miss Davis, just listen to my question please. To accuse a journalist from the Age of being malicious is a serious accusation.

Miss Davis: Well, are they all sacred there that work at the Age? I should say they've got some very good journalists at the Age.

Mr. Ruskin: Do you believe that it is a serious accusation to make of a journalist to call him malicious?

Miss Davis: Well, some companies don't let them in they're so malicious.

[Miss Davis cross-examining the journalist who wrote the alleged defamatory article on the issue of why he wrote about a singing dog in relation to the Plaintiff's act.]

Miss Davis: That is right. Well then I have got the date of the Queen's letter here that I got last night and — what sort of dog was it? Was it male or female?

Mr. Weiniger: I don't know. I didn't check it that closely actually.

Miss Davis: No. But was it a singing dog, was it? Was it a high voice or a low voice, mezzo or contralto?

Mr. Weiniger: It was hardly contralto.

Miss Davis: Do you know I have appeared in the picture 'Cactus'?

Mr. Weiniger: I wouldn't be surprised. I wouldn't be surprised at all. I'm sure Mr. Cox, like myself, is an admirer of your talents.

Miss Davis: He took the singing, the director, and went to France and to Cannes and . . .

His Honour: Well again Miss Davis that really has nothing to do with the case.

Miss Davis: Well he's seen a lot of singing dogs he said.

(To witness) You have haven't you?

Mr. Weiniger: I said I'd seen singing dogs from time to time.

Miss Davis: You have?

Mr. Weiniger: Indeed.

Miss Davis: Where?

Mr. Weiniger: In cabaret acts and circus acts.

Miss Davis: What do they sing? Is it a high pitch?

Mr. Weiniger: Sometimes it's a high pitch, sometimes lower.

Miss Davis: Some are low?

Mr. Weiniger: M'mm.

Miss Davis: You are a judge of singing?

Mr. Weiniger: I'm a judge of entertainers.

Miss Davis: You're a critic to singing.

Mr. Weiniger: No. I'm a critic for — an entertainment critic.

Miss Davis: You are not as good as Don Dunlop though are you, of the Herald?

Mr. Weiniger: No, certainly not.

Miss Davis: He said my top notes were splendid.

Mr. Weiniger: Indeed. Well, there you are. Loathe am I to argue with a colleague.

His Honour: Thank you Mr. Ruskin. And now Miss Davis you may address the jury and sum up your case.

Miss Davis: Ladies and gentlemen of the jury you can certainly hear I have been defamed by Counsel because what I heard, what I could hear Counsel say, it was very hard to hear him mumble.

Well Master Brett said — he listened and I think that Mr. Smith was acting as Solicitor then, and Master Brett said 'They want another Statement of Claim but we will not strike out your case. It will take' — 31 days he gave me for a Statement of Claim . . . Now I said — I got up and I said 'Master Brett'. Now this is exactly what I said. I said 'All I want here is nothing else from these people but I want to know where I was with a singing dog and where, that's all I'm asking'. . . . Well anyway I was knocked out. I could not continue as Mr. Gawne, dear Master Gawne, he set the case down for September . . .

His Honour: Yes, how much longer do you think your final address will be? Are you nearly finished?

Miss Davis: Mine, a long time sir.

His Honour: How much longer?

Miss Davis: I should say about an hour sir.

His Honour: Well, that would be a long time. You do not want to bore the jury do you?

Miss Davis: Beg your pardon sir?

His Honour: You do not want to bore the jury. You do not want to go for too long.

Miss Davis: No, but I think they should — I've got to say something haven't I?

His Honour: Well you have said a lot. Do you think you have got much more to say?

Miss Davis: Yes.

His Honour: Miss Davis you told me you had not quite completed your address on Friday morning.

Miss Davis: No, I hadn't started.

His Honour: Pardon.

Miss Davis: I hadn't started the address yet.

His Honour: Yes, you may start (again).

Miss Davis: Yes and I think Counsel I must say has put up a very good fight for his clients. He has, extra good fight. Because his clients are very wealthy. Now when I did start, in the very beginning, I did not mention that I had claimed $1 million damages from the Defendants at all, because I thought it would, it might upset the Defendants here. I didn't mention that at all. . . .

A libel is a false statement gentleman, ladies and gentlemen of the jury, about a man say to his discredit. That is all that is necessary for the libel. That was a decision of Mr. Justice Kaye.

His Honour: Miss Davis you are not entitled to tell the jury what the law is. That is my function when you finish.

Miss Davis: [Talking about the press]. But unless they're checked and unless they're prevented from that well then that's what's going to happen. Anybody. Look at the way they're talking about our good Australian men. They'd say they were homosexuals in Australia. It's in America we're ugly Australians.

His Honour: Miss Davis, you are now straying from the topic.

Miss Davis: I know, I'm sorry, I'm sorry. I only want to protect the people here because we've got good

His Honour: Well you are only here to protect yourself.

Miss Davis: I'm that's exactly. We've got good people in Australia and it's a very good place and very good men even in it.

His Honour: Perhaps that is a high note on which to finish Miss Davis.

Miss Davis: Beg your pardon?

His Honour: Perhaps that is a high note on which to finish.

Miss Davis: To finish?

His Honour: Yes.

Miss Davis: Well, it's taken me a long time to come here sir and

His Honour: I know. I have to sum up to the jury.

His Honour: And if you sit down I will commence my charge and tell the jury what the issues are.

Miss Davis: All right sir. Just one little thing about Lord Goddard what he said.

His Honour: No. The jury are not interested in Lord Goddard.

CLIVE PENMAN — DEFENDER OF FREEDOM

Many of our readers will remember that The Age published a two part series profiling two of the Victorian Bar's better known silks, Sher and McPhee, who amongst other things were described as being in "friendly rivalry". Once again The Age's sub-editors unfortunately did not have room to print the following on their other "friendly rival" — Clive Penman (Non QC).

Clive Penman had a tough start to life. For reasons of family impoverishment he left Spotswood High School at age 15 and joined the Commonwealth Public Service as a Clerical Assistant. "It was a dog-eat-dog existence. To secure overtime and promotion one had to drink with the boys from Personnel. Three quarters of my fortnightly take home pay went in the first shout each pay day lunchtime. It was cold and brutal," he says, a bit like the old English Borstal tradition.

He served 16 years in the Commonwealth Public Service completing his Leaving and Matriculation part time at Taylor's in a record five years and then going on to complete a Law Degree part time at Monash University. "I would have completed my studies a couple of years earlier but I missed my exams one year when they coincided with the Commonwealth Public Service's Third Division entry tests."

The harsh years in the Service of Her Majesty appear to have done Clive Penman little harm. Described by Wayne Sloth, Clerk Class 4 and Clive's Supervisor for 14 of those years as "A pimply sort of fellow, quiet, unambitious, always at the photocopier with his library books. He had a career in the Public Service, that lad did. It was a shame to see it cut off in its prime. He was destined to become a senior counter officer at the CES, or even better. He threw away years of accumulating sick leave credits, long service leave entitlements and most importantly a nice little superannuation package." Clive is now one of the lesser lights of the Victorian Bar, a Magistrates and County Court Chambers specialist, with active twin boys and another child on the way, and little time to develop a hobby other than memorising peak services on the Belgrave line.

The decision to be a lawyer, says Penman, "just sort of grew on me. When I completed Matriculation it seemed logical to go on to University. I had no language and no science subjects so I gravitated to law. I saw it as just another job. I don't know why I left the security of the Public Service. I suppose I just thought I had grown up."

The legal game has lived up to his expectations: just another job. "I haven't seemed to get much exciting work. Once I defended a young lad charged with assaulting a pub bouncer. The bouncer couldn't remember much about the assault and couldn't identify my client. It was satisfying saving him from a heavy fine. Like me he came from Spotswood High and like most of the kids from there he was out of work."

Penman denied that his estimate of the client affected the quality of his advocacy. "I try as hard for everyone. I do my best all the time. It doesn't seem to matter much."

A faded blue pinstripe suit; a white shirt with slightly frayed cuffs and collar; watery grey eyes; a rather large nose; he looked like any other public servant as he entered 471 Little Bourke Street in order to do battle in the Melbourne Magistrates Court Civil Division. Appearing for a Defendant seeking to have a judgment set aside because he failed to lodge a Notice of Intention to Defend, Penman's voice drones on, the Clerk's head drops and the Magistrate's eyes begin to glaze. "Yes Mr Penman, I think you have made your point. Yes I accept that it is feasible that the Defendant didn't think the Summons was important enough to read all the printed material on it. I will grant the application."

As Penman was to say in the lift on the way back to his Chambers, "It is satisfying to do the job, to get the result, to have a happy client." And later when asked to rate his highest achievement Penman ruminates, "I suppose it would have to be the week I was in Court every day *and* won two crash and bash in the same week!"

And a little later he observes, "No, I am sure that none of my cases have made it into the newspapers. It does not really worry me that my name hasn't got into print or my face onto television. Look, you might get me into trouble with the Ethics Committee if you quote me. I think that I'd better clear this with them. We are not allowed to advertise ourselves. They really come down hard, especially on the Juniors.

I do not think it is safe for me to talk to you."

There are no humourous anecdotes to tell of Penman. Life at his end of the Bar is too serious for cut and thrust. Pride is his hallmark; pride at going about the job without flourish or fanfare; pride at helping the little person with the problem too little for anyone else to concern themselves with; pride at getting the odd good result; pride at being a Spotswood Boy made good; pride at being enthusiastically greeted by the twins and a frazzled wife pleased to see him home at 8.30pm after yet another train hold up. "It is essential to have an understanding wife and an uncomplaining, unquestioning supporter. I've been fortunate that she hasn't seen the need to prove herself in academia or the work place, that she is happy enough to play a supporting role."

LUNCH IS A CRIME

IT'S OFFICIAL — LUNCH IS A CRIME. IT'S obvious that within our society it has become a norm of customary law that — "Thou shall not commit the sin of luncheon."

Let us look at the evidence. We can trace the beginnings of this norm to the great Keating. He began the rot by decreeing that those who indulged in this grotesque excess should not claimeth it upon ye olde taxation. He bade us follow his example and lead an austere life free of claims for expenses.

Other more subtle influences were at work within our society. The State Bank smote mightily at this citadel of corruption with its recent television advertising campaign. Picture that vision of the smug bank manager on your T.V. screen, cross-examining the poor couple who have come, cap in hand, to beg for money to build a swimming pool. "And do you go out to restaurants a lot?!?"

They tremble, perspire and confess. "Yes, yes, we do, but we shall repent, oh please please, we'll never do it again, we want the pool to spend more time with the kids, give us the money." His pock-marked face breaks into a smile — obviously his mother was a bad cook.

Citizen Cain has created new heroes in our society. To them lunch is anathema. These are the school teachers and nurses of Northcote. The folk whom the Herald loves to blazen across its pages. These are the models of society bravely attempting to pay off their mortgages in the wake of galloping interest rates. They are lionised because of their budgets. They forego all worldly pleasures, such as lunch, holidays, food, clothing and medicine in order to BUY THEIR OWN *HOME*. It is not a house but a HOME. Yes these people actually plan to own their own home in twenty years time. They are paying extra on their mortgage payments in order to achieve this end. A concept beyond the wildest dreams of any barrister — subsisting on over-draft, credit cards and the payment whims of solicitors. To them lunch is Kraft cheddar and vegemite sandies (without the crusts) in glad wrap. Their main concern at lunch time is to preserve the glad wrap for the morrow. They dream of twenty years time when the Northcote bungalow is paid off — and — and, they can afford to buy their sandwiches in a sandwich shop.

The State Bank advertisement featuring Ralph and his spouse/de facto — encapsulates these heroic pioneers of the Cain society. The deep and meaningful conversation concerning which bank account will pay the electricity bill — captures in a truly gripping fashion the levels our society has reached.

Premier Cain would be proud of the bank manager and Ralph. He cannot fathom these folk who lunch. Why? What a waste. To him food is coal — the high point — over grilled chops, mashed spud and pumpkin and a few frozen peas. Alcohol is toxin. Lunch is nothing but a breeding ground of useless wit and self indulgence.

The trend is even permeating New York. In the film "Wall Street" Michael Douglas, as the hot-shot broker, after advising his young protege that you can't trust WASPS "because they don't like human beings — they love animals instead" goes on with the grand statement that "lunch is for wimps". Of course he ends up behind bars for fraud, corruption and insider trading among other things.

Investigators from the Transport Accident Commission have developed the theory that lunch is responsible for many modern day injuries. Evidently Monteith was vigorously cross-examined, by Sydney Silk, to the effect that his disc prolapse did not emanate from a motor vehicle accident but was as a result of repetitive-lunch-overuse. Monteith's Counsel, Meldrum QC (and with him Campbell), took great umbrage at this line of attack — and indeed went red in the face. However the Accident Compensation Commission does have strong statistical data to indicate that workers who attend the Flower Drum during lunch breaks are more prone to attacks of functional overlay and hearing loss. Indeed, Burns has been declared industrially deaf for the purposes of after-lunch hearings with a touch of mild settlement neurosis invading the picture.

Has the impromptu long lunch of junior barristerial days been struck a death blow? Ah, remember, those joyous occasions when fresh from a quick plea in the Magistrates' Courts many and varied would assemble for a "bit of lunch". The joys of Cafe Popolare when the lady who explained the menu in such long and glowing terms possessed such a graciously proportioned bosom to be admired by all. The forays to Lygon Street when it was not just a row of clothes shops frequented by the denizens of Doncaster thinking they are Bohemian by actually

walking the streets of Carlton. To many and varied hostelleries, Chinese cafes, and odd assorted BYO's, some of which have come and gone. But those that remain somehow lack the atmosphere of years gone by.

Some will say that this loss is merely old age, the process of settling down, growing up, being senior, mature and responsible. Today's major topic of conversation appears to be your cholesterol count. Everybody is denying themselves something in the name of health. Pritikin, Scarsdale, and even the Simon K. Wilson all ice-cream diet are the buzz words of today. Lunch today is epitomised by the plastic salad pack available from Domino's ODCW Cafe. Four salads for $3.20, but avoid the potato salad, the three bean mix and the fetta cheese — all bad for you.

More and more the remaining criminals are being driven to the safety of their Clubs. The Essoign Club is booming. But although an enjoyable haven to ponder on lunches of the past, you can hardly say it is a *real* lunch in the true sense of the word. There are simply too many colleagues present who may over-hear *that* conversation.

Perhaps I am wrong. Perhaps there are barristers out there continuing the tradition of the long lunch. If you are out there please write to me. The Editors will gladly publish any worthy story of a lunch well enjoyed — especially from those in the junior bar.

Rumour has it that Mr. Spoiker, ("Who's Who in the Cabinet" lists his favourite food as egg sandwiches), is, at this very moment, preparing an Act for the coming session of Parliament. It will be entitled "The Lunch Act" — being "an Act to eradicate the discussion of culture, gossip, romance, humour and self and other socially undesirous topics during the period to be allocated for the necessary digestion of regulated nutritional substances."

Paul Elliott

MOUTHPIECE

Circular to all Members of the Victorian Bar

LAST TUESDAY EVENING A SPECIAL General Meeting was called to consider the State Government's ultimatum that the Bar introduce complete equality or face the prospect of its existence being legislated against. 103 Counsel attended and voted overwhelmingly for the reorganisation of the Bar along the following lines, to take effect at midnight on the 31st of December this year.

1. The Commissions to all Queen's Counsel are to be withdrawn and the distinction between Senior and Junior Counsel is to be extinguished.

2. All Lists are to be abolished and all Clerks offered positions in the to-be-created "Central Briefing Pool".

3. No member of Counsel is to accept a brief otherwise than through the "Central Briefing Pool".

4. Every brief is to be allocated by the "Central Briefing Pool" by a random ballot.

5. Once a member of Counsel has been allocated a brief that person is not to be allocated a further brief until every other member of Counsel has been briefed.

6. Each brief shall be only for the particular stage of the matter and shall be returned immediately after the conclusion of that stage whether it be paperwork, interlocutory proceedings or an adjourned hearing.

7. It shall be a serious ethical breach for Counsel to mark more than the appropriate scale figure.

8. It shall be a serious ethical breach for Counsel to mark less than the appropriate scale figure.

9. Where no scale figure is published the figure set down by the "Central Briefing Pool" shall be deemed to be the scale figure.

10. No member of Counsel shall amend, or seek to amend, any marked brief fee unless it is other than Scale or deemed scale.

11. No member of Counsel shall refuse any brief for any reason other than that member has appeared for the other party in earlier stages of the same proceedings.

12. No member of Counsel shall be employed, or receive remuneration from any other source whatsoever, whilst a member of Counsel.

13. Members of the academia shall not be allowed to become members of Counsel.

14. The Bar Council is abolished from the 31st day of December this year.

15. The position of Convenor of the Bar shall rotate daily when each member of Counsel taking their turn in alphabetic order with the first convenor to be Ms Aabaster.

16. The position of Treasurer shall likewise rotate daily with the first Treasurer being Mr Mablstone.

17. There shall be two other members of the Bar Executive who shall also rotate daily starting with Ms Fabb and Mrs Sam.

18. The "Central Briefing Pool" shall consist of those present Clerks who accept appointment as a member of the Pool. The Pool shall be financed by a levy of 7.5% of fees received by Counsel. Each member of the Pool and each employee of the Pool shall be paid a sum each month equal to 92.5% of the average fees received by all members of Counsel for that month. The Pool shall be required to meet all other expenses from such sums as remain after payment of salaries.

19. All Bar Council levies will be abolished from the 31st day of December 1989.
20. Barristers Chambers Ltd is to be abolished and replaced by the "Central Briefing Pool".
21. All Chambers are to be declared vacant on the 30th day of November 1988, although Counsel will be allowed to stay on until their new Chambers become available as follows.
22. Every floor of every building occupied by Barristers Chambers Ltd as at the 30th day of November this year is to be progressively remodelled so that every Chambers shall be as nearly uniform as possible. To that end all windows will be boarded over. All Chambers will be rented at the same figure and allocated by random ballot.
23. Every member of Counsel will be required to have a standardised library of Victorian Reports from 1957 and certain services.
24. Apart from textbooks acquired during their University Courses no member of Counsel is to have any books, reports, services or the like outside of the Standardised library.
25. All current libraries in excess of the Standardised Library are to be acquired by Barristers Chambers Ltd at a figure nominated by Mr Wade (less his usual Commission) and are to be housed on the 17th and 18th floors of Owen Dixon Chambers West which such floors shall become the Library of the Victorian Bar.

The above listed rules, which were drawn by a prominent ex-parliamentarian, have been approved by the Victorian Government as meeting its equality requirements. For its part the Government has undertaken to make all appointments to the Bench, quasi-judicial positions, various tribunals and other like offices from members of the Bar. The Government has further undertaken to legislate to fill each position as it becomes vacant alternately from the most senior female, and most senior male, member of Counsel practicing on the day that the position becomes vacant. All members of Counsel thus appointed are to be remunerated monthly at the same figure as members of the "Central Briefing Pool" plus 8.108% "expenses of office allowance". It is understood that the Federal Government is considering similar rules for its appointments.

E.W. Gilbert
Chairperson ProTem.

Commonwealth Law Conference

Auckland, N.Z. — April 16-20 1990

The Commonwealth Law Conference is to take place in Auckland, New Zealand between the 16th-20th April 1990. Included amongst the distinguished guests are the Lord Chancellor of England, Justice Bertha Wilson of the Supreme Court of Canada, the Chief Justice of Zimbabwe, Dr. Reynolds, Editor of the Law Quarterly Review, Sir William Wade of Cambridge University, Sir Patrick Neill Q.C., Warden of All Souls, Oxford, the Chief Justice of the Supreme Court of Nigeria, and Justice Manohar of the High Court of Bombay.

ADS IN BAR NEWS!

From next issue, *Victorian Bar News* will be available for advertising, including Personal Classifieds (Villa in Tuscany for rent — sleeps 18, etc).

Please contact the Editors for details about rates, etc, before the next deadline, 27 June.

CLANCY OF THE READERS' COURSE

There was movement at the Vic Bar, for the word had passed around,
That another Readers' course was under way,
Three months' forensic learning only twice four hundred bucks,
So all the cracks had gathered to the fray.
All the tried and noted Sollies from the firms both near and far,
Had mustered at the Four Courts overnight,
To see what pearls of wisdom the Committee threw their way,
And whether they could make it through the night.

Their teachers were most clever, they'd done it all before,
With Judges, Silks and seniors erudite,
And few could argue with them when their blood was fairly up,
They knew it all, and how to do it right.
And Georgie of the snow fields came down to lend a hand,
No better scholar ever put a view,
And never Reader could trick him with an "Oh yes but",
'Twas always "case concept" and bugger you.

And one there was, a top Silk, widely known as Stephen Charles,
He was something of a prefect, I surmised,
With a tiny little stutter — quite deliberate I suspect,
But such as are by Counsel rarely prized.
Another Judge was Frank, and he told us everything,
As to famous criminal openings he'd devised,
And how to sway a jury, how to look them in the eye,
Build a bridge, and get acquittal, unsurprised.

And Perry tried to teach them, in the County Court Appeals,
His Court adorned with Readers wigged and gowned,
And he put them through their paces, with quite uncommon zeal,
Judge Shelailagh ran the queerest Court yet found.
Then they halted for a moment, to do their video,
Wood and Chop consumed their thoughts 'most every night,
But Lovitt, Bob and Felicity and Judges in the know,
Were kindly, and most times things turned out alright.

BARRISTERS IN THE THEATRE

SOCIETY HAS A LOVE-HATE RELATIONSHIP with barristers. The love side is a desire to have their offspring become barristers and a seemingly unrequited love of seeing the lives of barristers being depicted on stage and screen. The latest offerings are *Boswell For the Defence* starring Leo (Rumpole) McKern, and *Beyond Reasonable Doubt* starring Frank Finlay and Nyree Dawn Porter. Soon to come will be David Williamson's new play *Top Silk*.

Boswell is a one man show. It concerns James Boswell the biographer of Samuel Johnson and his efforts in defending an escaped convict from Australia, one Mary Broad. Her story is a truly amazing one. She, her husband, children and a group of other convicts escaped from Botany Bay in a tiny open craft and managed to complete an incredible voyage to Dutch Timor. Here they convinced the Dutch authorities that they had been shipwrecked and a passage back to England was arranged. They were free. However the demon drink stepped in. Mary's husband had too much and in his cups told someone the true story. They were arrested and sent back to England in cages on the open deck. Mary watched her husband, children and all the others in the party perish before her eyes, and saw their bodies thrown overboard.

Amazingly she survived the voyage only to face certain execution back home. Enter Boswell for the defence.

The author of the play, Patrick Edgeworth, had originally planned the story to be a grand television mini-series as part of the Bi-centenary. However the money dried up, so he turned it into a one-man show,

And when they reached the Family Court, e'en Kingsley had a go,
His heavies made the strongest Readers squirm,
Those Pre-Trials, Order Twenty-Fours — so very much to know,
Some sighs were breathed when that week came to term.
But still the lectures followed, now with Magistrates and Co,
With moots and more moots in the Common Room,
So wearying of coffee they sought a place below,
Where they could think about impending doom.

But the Readers took their medicine and settled on the pace,
They purchased Cross and Statutes by the score,
Found the Essoign Club, the Metro and other pubs as well,
And learned of Grant and Downes and much, much more.
While Brent amused the eager crowd with clever little quips,
Not so courteous were Cassin, Sean and Co,
And Howard did a dance or two which had them all in fits,
While know all Godfrey kept them in the know.

Many others lent their talents, what a generous spread was this,
Judge Kelly woke them all one day in fright,
They travelled out to Coburg — could have given that a miss,
But by then they saw the far off end in sight.
And always there was Barbara, just to keep it on the road,
With Readers late or drunk she was discreet,
Then some ratbag pinched the video which imposed a heavy load,
But she's got another, so she's right, she's sweet.

And so arrives the famous day, when Readers finally sign,
The day they are upon the stage at last,
Their masters pray their efforts have been of good design,
And hope this lot is equal to the task.
And whether we succeed or not, is purely up to us,
But to those who volunteered their time and skill,
We Readers thank you, and without further fuss,
We trust your hopes and plans we can fulfil.

John Pilkington

and sent the script to Leo McKern who accepted the role without hesitation.

One should never listen to others' opinions about plays — or restaurants for that matter. Many who had seen the show before me said it was boring, dull and disappointing. This conjured up a vision of a very serious night in the theatre. Of deep pleas for mercy, of soliloquies on life, existence and morality.

. . . a wonderful vehicle for Leo McKern to display his great talents.

Such was not the case. Boswell was a brilliant man, a marvellous drunk and relentlessly energetic lecher. His gifts for lechery and drunkenness were widely recognised, his brilliance was not. He was a failure at the Bar and in politics. His only claim to fame being his biography of Johnson which did not give him the personal satisfaction and glory for which he so strongly craved. Then the hopeless brief for Mary came his way.

All these elements could have produced a great play. Boswell for the Defence is not a great play. It is in general a lighthearted romp. Certainly not a serious or dull play at all. Much is made of Boswell's drunkenness and lechery. Not much of his brilliance. There are too many jokes concerning his prostate gland. A man urinating into a potty is not particularly clever theatre. The second act is better because it concentrates on his pleas to save Mary's life. These do not happen in court but through the Secretary of State, Lord Dundas, a one-time drinking companion of Boswell, who had succeeded where Boswell had failed.

Apart from these criticisms, Boswell provides a wonderful vehicle for Leo McKern to display his great talents. He is truly a man of the theatre. It was an uplifting experience to witness such a great actor totally in command of himself and his audience. The play is to go to the West End where it undoubtedly will be a smash hit.

Beyond Reasonable Doubt comes to Melbourne from the West End. It was written by Jeffrey Archer. Jeffrey Archer is a hack author. He was a failed politician. He is now a hack playwright.

This play is a terrible pot-boiler. It concerns the trial of the chairman of the Bar Council for the murder of his wife. (Obviously a very different type of chap from our own beloved Chairman Gillard.) It is a thriller with a thin plot.

The first act is the courtroom trial; the second act the flash back of what really happened. Archer is no lawyer. Perhaps things are different in England, but it did appear odd to have a policeman reciting the statement of the key witness to the court, just before she hit the box. The prosecutor indulged in the most amazingly scathing cross-examination of his own witnesses, and a doctor was prevented from giving an opinion on the cause of death "because it was only a personal opinion and it contradicted the coroner's report". The accused QC conducted one of the most pathetic cross-examinations to be seen on stage and the whole trial was over in less than a day. In short the trial miscarried.

The second act improved greatly. It was full of old vaudeville jokes about the North of England and great chunks of Dylan Thomas, which Frank Finlay quoted very well. The ending was tired and melodramatic.

However the evening was saved because of the leads. Frank Finlay is a true professional. Nyree Dawn still retains the charm she displayed so well in *The Forsythe Saga*. Finlay dominated proceedings with his force and talent. The night was memorable for their performances alone.

Frank Wilson was cast as the judge. At first sight I thought he had got the role on the strength of his performances in "New Faces". However his was a competent performance, as was that of Brian Blain who played the jealous prosecutor. Such could not be said for the rest of the cast, which fell away badly. The most notably feeble performance was that of Sean Myers as the chairman's permanent junior. Sean's face would be familiar from many T.V. ads, the most recent being the business man who has a shower in the Australian Airlines lounge. He cannot act.

May this love affair in the theatre continue. The new Rumpole series is as good as ever. Williamson's *Top Silk* is looked forward to. Even *Rafferty's Rules* brings a smile. Now if only we could convince society that we are worth what we are paid and we cannot be replaced by social workers, then the love affair would be complete.

Paul Elliott

LAWYER'S BOOKSHELF

INTRODUCTION TO TRUSTS

by Don Chalmers Pages vii to xxiv, 1 to 282, Index 283-303, The Law Book Company 1988

THE AUTHOR OF *INTRODUCTION TO Trusts* notes in the Preface that "there are a number of substantial and notable Australian works in the area of equity and trusts". This book is not meant as a rival to those "substantial and notable works", rather it is meant as an introductory text to the ". . . general principles of the modern Australian law of trusts."

Chapters 1 and 2 deal with the nature of trusts and trusts and other legal relationships. Chapters 3 to 6 essentially deal with establishing a trust relationship. In addition chapters 12 and 13 deal with the appointment, retirement, duties, powers and rights of trustees and the termination of a trust. The consequences of a breach of trust is also discussed in chapter 13.

Chapter 7 deals with charitable trusts and includes a discussion of the cy-pres doctrine including statutory modification to this doctrine such as the *Charities Act* 1978 (Vic) and equivalent Queensland, Western Australian and South Australian provisions.

Chapters 8, 9 and 10 deal with resulting, constructive and discretionary trusts respectively. Family law practitioners will be assisted by discussion of constructive trusts in relation to de facto relationships as well as the brief overview of the *Family Law Act* 1975 provisions, particularly s.79 that deals with property distribution upon dissolutions of marriage where a trust is involved.

Trusts have peripherated in the commercial context. Chapter 11 deals with this modern day phenomena, including discussion of unit trusts and of trading trusts.

An extension of the author's concern with trusts in a commercial context is found in chapter 14, written by Justin Dabner dealing with the taxation of trust estates. This chapter provides a concise excursion into the *Income Tax Assessment Act* Pt. III-Div. 6 dealing with trust income and Pt. IIIA capital gains and capital losses insofar as those sections are relevant to trusts.

This work is concise and readable. It admirably fulfils its aim of providing an introduction to the law of trusts. It is a work that is sure to be of relevance to students and practitioners seeking a concise text that examines the law relating to trusts in Australia.

P. W. Lithgow

THE LAW OF TORTS

by Professor J.G. Fleming, 7th edition, pages i-lxix, 1-680, index 681-706. 1987, Sydney, The Law Book Company Ltd.

SINCE ITS FIRST APPEARANCE IN 1957, this work has become a standard reference text and its structure is doubtless familiar. Indeed, the Table of Contents discloses a lay-out substantially the same as that established in the sixth edition.

A useful formal change is the inclusion of a Table of Statutes, geographically far-ranging and yet fairly detailed in its references to specific provisions of pertinent legislation such as the Trade Practices Act. Further, as the preface indicates, the section on powers of arrest has been deleted to make room for an expanded account of products liability. Professor Fleming develops as an underlying theme the flux and reflux of tort liability for negligent economic harm, high tide being marked by *Anns v. Merton L.B.C.* [1978] A.C. 728 and *Junior Books v. Veitchi Co.* [1983] 1 A.C. 520. This edition analyses an overall retreat towards more conservative notions of foreseeability and recoverable loss.

What certainly remains constant is the clarity of the text and its seemingly unfailing utility as a provider of punctual information within a

framework of theoretical discussion. The footnotes have been enriched with new references and are frequently themselves expository, so that assiduous use of the index is almost invariably productive of authorities germane to the matter in hand. In view of the laconic style of the table of contents and the consequently greater functional importance of the index, it is a pity that the latter does not differentiate between the main text and the notes.

An advantage inherent in a work whose successive editions now span some thirty years is that a considerable stock of journal citations has been built up.

Given the book's wide coverage of Common Law jurisdictions it is inevitable that an occasional gap should be found: Victorian practitioners, for instance, will notice that the extension from three years to six of the limitation period for an action for wrongful death under Part III of the *Wrongs Act* has been lost sight of. Moreover, it is surprising that the *Mudginberri* case[1] is not cited, despite references to s. 45D of the *Trade Practices Act* and an examination of the issues raised by secondary boycotts. In relation to professional negligence, barristers may feel that the implications of the *Giannarelli* litigation should have been canvassed. As matters stand, of course, that omission might be regarded as proof of the author's prescience.

Any lacunae, however, are of small import when measured against the ensemble, in which serried information is so organized as to give the work an "intelligence" of its own.

P. D. Freckleton

FLEMING v TRINDADE & CANE

The Law of Torts in Australia

IN COMPARING THESE WORKS, IT IS THE difference of layout that first commands attention. Fleming's format is traditional: the Table of Contents provides a laconic guide to the chapter headings and the major topical sub-divisions within each chapter. The text itself is written as a series of dissertations interspersed with internal sub-headings which do not appear in the Contents pages. Hence if a reader is seeking information on a specific point of law rather than leafing through the book at leisure, in practice he goes straight to the index. On the other hand, Trindade & Cane have adopted an exploded format in which the chapters are split up into labelled subdivisions, hierarchically numbered and listed in the Table of Contents. In the latter case the Contents pages are of some use in guiding one to the desired point of law.

In consequence, Professor Fleming's text enjoys an advantage in elegance and economy of space, information being packed densely into solid blocs. However, the format preferred by Trindade & Cane appears better suited to the analytical setting out of the elements of a tort. That is particularly noticeable in the respective treatments of the relatively complex tort of passing-off, which indubitably lends itself to the method of Trindade & Cane: it is far easier to understand a seriatim enumeration of the elements, with a discrete gloss upon each in turn. In Fleming the treatment suffers from a potentially confusing interference between authorial opinion (passing off is subsumed under the description "unfair trading or competition") and an objective account of what constitutes a cause of action. As a result, a practitioner seeking answers to a specific query might well be left unsatisfied. It must be said that Fleming's discussion of passing off has not altered greatly over the years, and the topic seems not to be one of his favourites. In contrast, Trindade & Cane furnish a "check-list" and their account is, if only for that reason, much clearer.

Similar considerations apply to the treatment of detinue. Here the complexity lies less in the cause of action than in the choice of remedies, whose relative desirability depends on a sometimes difficult weighing of consequences. Accordingly the analytical approach of Trindade & Cane is superior, as each remedy is described and evaluated separately.

In a few instances it appears that Trindade & Cane better reflect Australian concerns, as one would expect. The recent debate on the right to refuse medical treatment, for example, finds an echo in their work whereas Fleming concentrates (pp. 74 and 100) on professional liability for treatment whose consequences have not been properly conveyed to the patient. Furthermore, Fleming's attitude towards the Australian High Court is implicitly disapproving, it seems; in his preface he adverts to the "(especially Australian) tradition of multiple appellate opinions couched in the style of discursive academic exercises". He mentions *Beaudesert v. Smith* (1966) 120 CLR 145 as an aberrant decision on consequential injury while Trindade & Cane accord it a place in a sub-heading. In the upshot, little turns perhaps on the difference of emphasis, as both texts treat the authority as something of a dead end.

Somewhat surprisingly, it is usually the case that an apparent difference of opinion is neutralized in the conclusion each comes to.

The considerations outlined above do not alter the fact that the density of Fleming's text, and the refining effect of thirty years' revision, makes for a succinct yet exhaustive coverage of a great many of the situations confronting practitioners from day to day.

The two works in question have virtues at times overlapping and at times complementary. In reality, while each is a desirable acquisition, it is better still to own both.

P.D. Freckleton

ANNOTATED TRADE PRACTICES ACT

Edited by Russell V. Miller, 10th Ed. 1989, Pages v to xlvi, 1 to 436, Index 437-447, The Law Book Company.

THE 10th EDITION OF THIS EXCELLENT work maintains the high standard and comprehensive coverage that users of this work have come to expect from preceding editions.

This edition incorporates all amendments to the *Trade Practices Act* up to the 31 December 1988 including the *Trade Practices Amendment Act* 1988 (No. 20 of 1988) together with relevant cases up to the 30 November 1988.

In particular, approximately 20 new cases dealing with s.52 are noted as well as: *Ardmona, Letona & SPC* (s.90), *Re Delhi Petroleum Pty. Ltd. and Santos Ltd.* (s.90), *Direct Holdings Ltd. v Feltex Furnishings of New Zealand Ltd.* (s.48), *Finucane v N.S.W. Egg Corporation* (s.4, 47, 52), *Haydon v Jackson* (s.6, 52, 75B, 87), *Independent Cement and Lime Pty. Ltd. v Australian Cement Ltd.* (s.45D), *Re International Commodities Clearing House Ltd.* (s.90), *Keen Mar Corporation Pty. Ltd. v Labrador Park Shopping Centre Pty. Ltd.* (On Appeal) (s.52, 53A, 82), *Kinna v National Australia Bank Ltd.* (s.86A), *McCarthy v Australian Rough Riders Association Inc.* (s.4, 45), *McIntosh v National Australia Bank Ltd.* (s.86A), *Midland Milk Pty. Ltd. v Victorian Dairy Industry Authority* (s.46), *Phillip & Anton Homes Pty. Ltd. v Commonwealth* (s.2A, 52, 53A), *Plumbers & Gasfitters Employees Union of Australia v John Holland Constructions Pty. Ltd.* (s.45D), *Re Real Estate Institute of South Australia* (s.2.90), *Shoshana Pty. Ltd. v 10th Cantanae Pty. Ltd.* (s.4E), *TPC v Australian Autoglass Pty. Ltd.* (s.45), *TPC v Australian Meat Holdings Pty. Ltd.* (s.4E, 50, 81). *TPC v British Building Society* (s.47), *United States Tobacco Co. v Minister for Consumer Affairs* (s.65J), *Wright v TNT Australia Pty. Ltd.* (s.4, 47, 52).

It is unfortunate that the 1989 High Court decision in *Queensland Wire Industries Pty. Ltd.* v *BHP Ltd.* dealing with the definition of "market" in s.4E and s.47 could not be noted in this edition, however the High Court's decision is sure to be included in the next edition of the *Annotated Trade Practices Act.*

The author is to be commended for updating the table of cases with the full reference to authorized reports of cases together with alternative citations where appropriate. Similarly, the text provides comprehensive cross-referencing to both the New South Wales and Victorian *Fair Trading Acts* and the New Zealand *Commerce Act.*

Once again the editor of this work is to be commended for providing lawyers, businessmen and students with a comprehensive work that explains and illustrates the operation of the *Trade Practices Act.* This edition is sure to find a niche on the shelves of students, businessmen and lawyers.

P. W. Lithgow

INJUNCTIONS

A Practical Handbook by N.R. Burns pp. 108 + xviii, The Law Book Company, Hardcover, $27.50.

THIS EASILY-DIGESTED VOLUME IS short and to the point, and would be of great use to any practitioner who is not thoroughly at home in the area. It includes a small Appendix containing suggested minutes of orders, and many practical suggestions throughout; care should be taken, however, as, although there is much material of general application, the author is a N.S.W. barrister, and has referred only to the procedures in his own State.

The much-discussed Mareva Injunction and the Anton Piller Order, so appealing to plaintiffs' solicitors, are allocated a chapter each. Solicitors acting in the execution of an Anton Piller Order are given due warning of the onerous responsibilities imposed upon them, and the chapter sets out the justification for the making of an order, and the undertakings required.

Quia Timet Injunctions to avert impending disaster are given a short chapter, and the Trade Practices Act and the Family Law Act, both of relevance to Victorian practitioners, are also discussed, although not at any great length.

The greater part of the book is taken up with general principles and practical matters such as drafting the originating process, instructions and advice, the procedure in ex parte applications, discharge, variation and appeals. There is much of practical value included here. The chapter on enforcement relies heavily upon discussions of the N.S.W. Supreme Court Rules, and will be of less direct use to Victorian practitioners.

Detailed reference is made to the tests to be applied by a court when hearing an application for an interlocutory injunction: because of the extraordinary and often damaging effects that the granting of an injunction can have, the courts are invariably wary about them, particularly before all the issues have been determined, unless the strict tests evolved over the years have been satisfied. Controversy and great publicity may accompany the

granting of an injunction, as witnessed by the Marriner/Smorgon litigation over trees, and the even more recent public furore over the granting of an injunction to Silvers Circus againt the Animal Liberation group.

Mr. Burns' book is a most useful introduction to the law of Injunctions, and will no doubt sell quite well. I venture to suggest, however, that if the author were to consider covering the law and procedures in other States and Territories, the effort involved would be well justified.

Kim Baker

ESSAYS ON CONTRACT

P.D. Finn (ed.) The Law Book Company Ltd., pp. 261 + xxx, Cloth, $49.50

THIS IS NOT A PARTICULARLY PRACTICAL book, and although it will no doubt be found in most law libraries, I suspect that it will end up on a few barristers' shelves — save for those of practitioners in the commercial area who find it recreational to ponder the wider considerations of contract law.

The Editor, an academic at the Australian National University, says in his Preface to this slim volume that the Essays are "the product of a small seminar held at the Australian National University in October of 1986". The essayists include three judges, five academics and a Principal Adviser to the Commonwealth Attorney-General's Department, and the nine topics covered range from Promises and Consideration to The Government and Contract. Seminar participants included several judges, barristers and solicitors, but their comments on the essays have not been included in the book. Although there may have been sound reasons for omitting, or failing to gather, any comments, their inclusion would have added depth and interest.

The principal difficulty of contract law as evolved by the courts and the legislatures is that it is often totally divorced from the aspirations and needs of the group most affected — the business community. Businessmen are constantly amazed by contract law and the gymnastics of their legal advisers when they or their companies suffer the misfortune of being involved in litigation. Most of the essays contain some discussion of reforms to contract law, but it has not occurred to any of the learned essayists to consider reform in the light of the needs of the class of persons most affected. Although a contract is supposedly constituted by a meeting of the minds of the parties, the current maze of contract law is so contrived and artificial that the interests of the parties has seemingly become almost irrelevant.

Professor Sutton, in an involved essay on consideration, states that "Reform must be undertaken by the various legislatures who must be persuaded, preferably by law reform agencies, of the rightness of the cause." Business people have no doubt whatever of the rightness of the cause, and perhaps, if they were to be consulted, their resentment could be harnessed and channelled towards a major rationalisation of the area.

J.L.R. Davis deals in his essay with the question of damages and its growing importance as an academic topic with the decline in the use of juries in actions for breach of contract.

One interesting essay is that by Dennis Rose on Commonwealth Government Contracts. The Editor also contributes, with an essay on Equity and Contract in which he deals at some length with the question of "Good Faith", a topic also dealt with by H.K. Lucke in his essay, "Good Faith and Contractual Performance".

The high price asked for what is only a small book will no doubt restrict its sale, even within the ranks of those who might normally be interested in its subject-matter.

Kim Baker

CITIZEN COHN

Nicholas Von Hoffman, pp. 1-483, Harrap, RRP $34.95

THE WORD "McCARTHYITE" HAS PASSED into the English language as a consequence of the activities of what the author terms the "gratuitous malevolent lunacy" of the US Senate Un-American Affairs Committee chaired by Senator Joseph McCarthy in the early 1950s.

Second only to the junior senator from Wisconsin in achieving international prominence in those hearings was the subject of this excellent biography, Roy Marcus Cohn, chief counsel of the Committee at the age of 26.

The history of the Committee, culminating in the debacle of the Army-McCarthy hearings, is described in an entertaining and racy fashion, full of anecdote and pungent comment. We are reminded of some piquant aspects. Bobby Kennedy, now firmly enshrined in the liberal Pantheon, was an unsuccessful contender for Cohn's job as chief counsel and his disappointment fueled a life-long enmity between the two. The author points out that the connection between the Kennedys and Joe McCarthy "has been a painful subject for the family's liberal biographers". It is widely thought that it was Senator McCarthy, a Republican, who saved John Kennedy's 1952 Senate campaign in the face of that year's Eisenhower landslide by refusing to come to Massachusetts to speak on behalf of Kennedy's Protestant Republican opponent.

Another irony lies in the fact that homosexuals were a target of the McCarthy Committee's zeal second only to Communists, yet Cohn was an enthusiastic life-long homosexual (albeit of the closet variety) and died of AIDS in 1986.

But what the legal reader might find of even more interest is Cohn's post-McCarthy career as a practising lawyer in New York City up until the time of his disbarment shortly before his death. His approach to the practice of law is epitomised by an anecdote about his application to join the Connecticut bar as a precautionary step against his possible disbarment in New York. He told one of the young men in his firm "When I take the ethics exam, I'll read the question and whatever I would do, I'll put down the opposite answer".

Bribery and perjury were routine. "We can't afford your Harvard Law School ethics" he told an employee protesting at being asked to swear a false affidavit. The book's excellent index lists

Cohn, Roy M

. . .
as lawyer,
betrayal of clients
. . .
defending self in suits
disbarment proceedings
. . .
lack of preparation
legal ethics
. . .
strategy of never going to trial
. . .
unpunctuality in court

There is a fascinating awfulness in the conduct that the stories under these index entries expose. How could Cohn have survived, let alone prospered? He acted for many notables such as the New York real estate megastar Donald Trump. In his office was displayed a picture of Cohn "playing go-between with Rupert Murdoch . . . and President Reagan". Murdoch owned the New York Post and Cohn apparently played a major part in securing the Post's endorsement of Reagan in the 1980 Presidential campaign.

The milieu in which Cohn operated is brought to life in this cameo of New York City's Supreme Court ". . . housed in a legal mausoleum, too ornate, too grand to be kept up. Occasionally one of the raised letters on the wall behind the judge's high backed chair will fall off so the motto reads IN GOD WE RUST. Dirt in the corners, a house of the grotesque, a place of distortion. A judge stops a trial to take a telephone call in open court; after she hangs up, she looks at the three people in the visitors' section, then at the jury, and then at the counsel before she says, 'My stockbroker just shot himself'."

This is a compelling book about a man well described on the dust jacket as "Lawyer, fixer, destroyer". It is also, at a deeper level, about a legal system which we would like to think couldn't happen here.

Peter Heerey

BAR NEWS PERSONALITY OF THE QUARTER

As *Ron Clark* shows, *Chairman Gillard* is renowned for playing a straight bat but doesn't always keep his eye on the ball.

SOLUTION TO CAPTAIN'S CRYPTIC No. 65

COURT IN

WRITTEN BY
Mark Ridgeway & Simon Plant

WITH FAMILY COURT SCENES BY
Paul Elliott

DRAMATIS PERSONNAE

JACK GELLIBRAND.....Colin Lovitt
JILL ST CLAIR.....Meryl Sexton
HENRY VIII.....Simon Wilson
THADDEUS DRYSDALE...Patrick Montgomery
ANN HATHAWAY.....Clare Franklin
CATHERINE PARR.....Trevor McLean

MRS JUSTICE
BERYL SCHIPSINK.....Douglas Salek
THOMAS CROMWELL.....Mark Ridgeway
JANITOR/
SIR PAUL KEATS.....Michael Pickering
SIR KEVIN HEDGE.....Sebastian Greene
SIR DARYL LEA.....Adrian Dickens
PRESSMAN.....Thracy Vinga
ANNE BOLEYN/
ANNE OF CLEVES.....Kate Seekings

"What do you think I should wear to court?"

"Such a gracious audience . . ."

IN THE LAST WEEK BEFORE CHRISTMAS the Bar in association with the Tin Alley Players staged "Court in the Act" at St. Martin's Theatre. The show dealt with the divorce case of Henry VIII and Catherine Parr in the modern day Australian Family Court. The show was a Christmas pantomine with legal overtones.

The absurdity of this scenario continued throughout the show. There was a juxtaposition and intermingling of both Tudor Court and Family Court scenes. Henry VIII attended his modern day female barrister wearing full Tudor garb. His wife, Catherine Parr, was humorously played by Trevor McLean. Simon Wilson shed several stone to play Henry VIII, a part which the writer is told he has played before, which is not surprising as dressed in a magnificent Tudor costume he presented as the Holbein Henry come to life. Simon gave an athletic over-performance in a pair of silver tights and even played

THE ACT

DIRECTED & DESIGNED BY Mark Williams

PRODUCED BY Simon Wilson

MINSTRELS.....Andrew Johns
Tami Artemi
Thracy Vinga
Tom Cantwell

LEAPING LORDS/
PEASANTS.....Steve Rosanove
Belinda Kelly
Andrew Plant
Tom Cantwell

IVAN, THE PEASANT.....Andrew Plant
THE LAWYERS.....Adrian Dickens
Thracy Vinga
Sebastian Greene
FRENCH AMBASSADOR.....Adrian Dickens
CLERKS OF COURT.....Michael Pickering
Thracy Vinga
FAMILY COURT
COUNSELLOR.....Paul Elliott
MAD BOMBER.....Paul Elliott

"A typical conference in Lovelt's chambers."

"A spot of Family Court Counselling"

a set of royal tennis on stage.

Douglas Salek played the part of Dame Beryl Shipsink — the Family Court Judge. He and Trevor Maclean as Catherine Parr were the archetypical panto "dames". Their performances were a highlight of the cast.

The opposing lawyers were played by Colin Lovitt and Meryl Sexton, a star and starlet from the criminal Bar. Colin was . . . well Colin — laid back and very vocal. Meryl was refreshingly vital in a part which has since left several County Court Judges who saw the show, falling back in their chairs in Court when they realise where they have "seen her before". Paul Elliott amused greatly in a twin cameo performance of the Family Court Counsellor and the Family Court bomber.

The show unearthed at least one new talent in Thracy Vinga who showed his versatility as a performer and musician.

In this critic's eyes the show was to some extent disjointed and was quite obviously a show of two halves. The first act which was set mainly in the Tudor court was pleasantly amusing. However the second act which was set in the Family court contained scenes of biting satire which most found hilarious. This was the bit which seemed to appeal to the lawyers in the audience.

It is not surprising these observations should be made as the first half of the show was written by Mark Ridgeway, a Melbourne solicitor, and Simon Plant, a Melbourne journalist, whereas the second half of the show was written by Paul Elliott who many will remember for his scripting of the 1984 Centenary Bar Revue.

The director, solicitor Mark Williams must be commended for his efforts in controlling a large, and in some cases inexpert, cast.

Perhaps the most important lessons to be learned from the show are that there is room for the Bar to put on a play, revue or pantomime once a year or once every two years; that in the main this should be able to be done at little or no cost to the Bar; that such events bring about and increase the level of camaraderie at the Bar, and further productions should be encouraged by forming a Bar Drama Society although it might be wise to look at staging production earlier in the year.

The show was very well attended despite being staged in the week before Christmas. Although not in the same league as the Centenary Bar Review, it proved that the Bar can continue a theatrical tradition. All that is needed in the future is more participation from the junior bar.

MONASH LAW SCHOOL 25 YEARS YOUNG

Dear Mr Heerey,

You may, or may not, be aware that the David Derham School of Law is enjoying its Silver Jubilee in 1989.

Enclosed is a detailed list of events planned to help celebrate this land mark year.

We are looking forward to entertaining as many of our graduates as possible and your assistance in promoting these events will be invaluable.

Please contact Ms Helen Milovanovic on (03) 565 3373 should further information be required.

Thank you.

Professor C. R. Williams
Dean, Faculty of Law

MONASH LAW SCHOOL 25 YEARS YOUNG

In its comparatively short life, the David Derham School of Law at Monash University has won an international reputation for the quality of its legal teaching and research.

Founded on 1 March 1964, the School is named for its first Dean, the late Professor Sir David Derham, later Vice-Chancellor of the University of Melbourne.

The School has grown from a handful of staff and 150 first-year students in cramped premises shared with the Faculty of Engineering to a modern building opened in 1968 which now accommodates over 1600 students (including a first-year intake of 350) and 65 staff. Its outstanding law library houses over 100,000 volumes.

In addition to its contribution to legal education and practice, including the Centre for Commercial Law and Applied Legal Research, the School has helped to serve the wider community through the Springvale Legal Service, which conducted over 7000 client interviews in 1988.

One former Dean, Professor Louis Waller, A.O., has made a distinguished contribution to the national debate on bio-ethics and reproductive technology; and another, Professor Bob Baxt, is currently on leave from the Faculty as Chairman of the Trade Practices Commission.

SILVER JUBILEE CELEBRATIONS

Gala Dinner, Tuesday 30 May 1989

To be held at the Hyatt on Collins, the Dinner is expected to attract hundreds of former students and many past and present faculty members and friends. The Toast of the Law School will be proposed by the Premier, the Hon. Mr John Cain, and a special highlight will be the appearance of Monash graduate and renowned speechmaker Mr Campbell McComas as Master of Ceremonies, in the guise of perpetual 60's student Willy Waller-Baxter.

Silver Jubilee Oration

The oration entitled 'Law at Monash' will be delivered by Monash's first Vice-Chancellor, Sir Louis Matheson on Friday, 28 July 1989, at 12 noon at the Alexander Theatre.

1989 Wilfred Fullagar Lecture

Former Australian Prime Minister Mr Gough Whitlam will give this year's Fullagar Lecture on Wednesday, 16 August 1989 at the Alexander Theatre, Monash University.

A Special Anniversary Issue of the Monash University Law Review

Subscription Inquiries: 565 3374

The Dean, Professor Bob Williams, and Faculty staff look forward to being joined by graduates and guests in celebrating a quarter-century of growth, achievement and service.

For further information contact: Ms Helen Milovanovic on (03) 565 3373