VICTORIAN BAR NEWS

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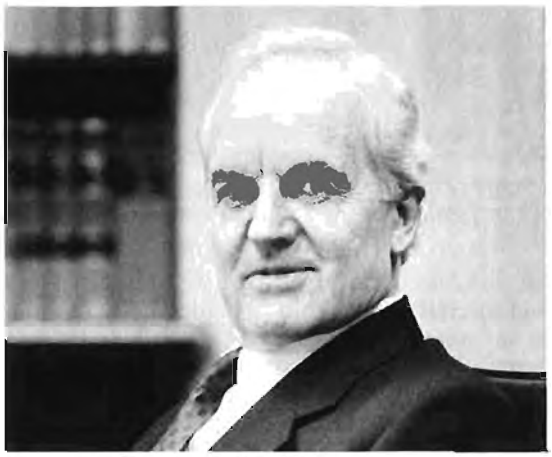

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THE EDITORS' BACKSHEET

LORD CHANCELLOR'S GREEN PAPERS (CONT)

"LAST WEDNESDAY FOUND ME lurching (sic) in Chancery Lane tete a tete with a distinguished and successful QC". Thus Auberon Waugh, writing in a recent issue of *The Spectator*. Further examination of the context makes it reasonably clear that he meant "lunching". Typos have long been a hallmark of the British quality press, ever since *The Times* meant to print a headline on the opening of Westminster Bridge "Her Majesty Passes Over Bridge", but printed something else.

Mr. Waugh was reporting on what seems to have been a reasonably effective public relations campaign by the English Bar against the Lord Chancellor's proposals. Top adpersons Saatchi & Saatchi were retained and the Bar's Chairman Desmond Fennell QC, came across on television as "a mild-mannered and plausible spokesman whose . . appearances invariably do his cause some good, or at any rate no harm" — to quote Paul Johnson writing elsewhere in the same issue.

But the intervention of the English judiciary seems to have been distinctly less than helpful. Lord Chief Justice Lord Lane and Lord Donaldson MR announced that court sittings were to be suspended for a judges' meeting to consider the Green Papers. This was immediately and predictably branded as a strike, especially as it coincided with the announcement by the Government of major changes to the waterside labour system. Pointed comparisons were made about restrictive practices of bench, bar and wharf. The proposed suspension was itself hastily suspended.

In the debate in the House of Lords things got worse. Lord Lane apparently complained about lack of consultation with the judges. The Lord Chancellor trumped him by producing a letter offering to consult the judges written last (northern) autumn, an offer which they turned down. Lord Lane was obliged to withdraw his complaint. Generally their Lordships' debating style was somewhat over the top, with references to "swastika armbands", "toothbrush moustaches" and the like. Lord Hailsham accused the Government of "thinking with its bottom".

All through this the Lord Chancellor has apparently emerged as that most deadly of opponents — one who is moderate in speech and rational in approach. Being a Scot, he is said to be outside the London legal Establishment and relatively, or perhaps entirely, immune to the unripeness of time argument against change.

At this distance, the whole debate is a little difficult to come to grips with. Each side espouses attractive principles but proceeds therefrom to positions which seem hard to justify. Looked at from the English Bar's side, its independence is of the highest importance, but why is a statutory monopoly on rights of audience necessary for the preservation of that independence? From the Government's side, one can sympathise with a push for a free market in legal services and the abolition of archaic restrictive practices, but why then impose a new and complicated form of bureaucratic control?

BLIND CAB DRIVERS

The BBC series *Blind Justice*, Sunday nights on Channel 2, was great viewing. Television with a message. At least some message was received by Philip Adams, writing in *The Weekend Australian* of 6th May:

"... Blind Justice, *by focusing on the horrors and hypocrisies that go on in courtrooms and behind the scenes, hopes to alert us to the slow-motion savagery of due process. Australia, established by the British legal system, has eagerly adopted the maternal model, which smacks of Gilbert and Sullivan rewritten by Kafka."*

If *Blind Justice* is therefore equally applicable to the Australian legal system, its criticisms are all the more worthy of attention.

The heroine is barrister Katherine Hughes, who in the first two episodes is in the process of moving from a fairly conventional Rumpole-style set of chambers to newly established Radical Chambers. Architecturally the latter are all New Brutalism; painted brickwork, exposed staircases, sliding factory doors, not a Daumier print in sight. Professionally, the members specialise in racism and police brutality (or, more accurately, cases in which their clients suffer from such matters). Politically they disapprove of what Philip Adams describes as "the thrall of Thatcherism".

One sub-plot involves Katherine's defence of a rape prosecution. She at first refuses the brief because the defence is consent. But the Counsel who then takes over the brief is sufficiently stressed to attempt suicide, and the head of her old chambers pressures her into "not letting down the side". Needless to say, she cross-examines the prosecutrix effectively and secures an acquittal.

The cab-rank rule thus becomes an issue. Katherine attacks it vehemently. While a vigorous and eloquent defence of it is put into the mouth of one of the members of Katherine's new chambers (some of who support him), the kybosh is put on this by the most sympathetic character in the whole episode, the elderly black mother of a woman doctor who had died after brutal assaults in police custody. "Those are just clever words", she says sorrowfully. End of argument. Although it's not explicitly mentioned in his review, one would assume that Philip Adams is quite satisfied that the cab-rank rule is yet another Kafa-esque twist in the savage system of British justice and its servile Australian imitator.

Perhaps all this is an argument for some of the Lord Chancellor's proposals. If the English Bar did not have an exclusive right of audience in the superior courts, then English advocates who wanted to pick and choose among their clients on the basis of the ideological correctness of defences the client wished to raise could practice as solicitors, to whom the cab-rank rule has never applied. And after a few decades nobody would ask lawyers at parties the inevitable "How do you defend someone you know to be guilty?"

ADMINISTRATIVE BUZZWORDS

A recent address by the Minister of a Federal Department which generates substantial administrative litigation was notable for the use of a couple of intriguing buzzwords. Although new to us, they must often be heard on the tees and greens of the Royal Canberra Golf Club.

The "*leakage*" rate is the percentage of administrative decisions which are taken on appeal. The lower the leakage, the better your Department. The implication is that an appeal is something distasteful, like an oil spill or a defective beach ball.

If you do have an appeal system in your Department, it may be sufficiently old-fashioned to be "*Anglo-Celtic*", that is to say there may be hearings at which Department and appellant are opposed in a confrontationist, unsharing and uncaring sort of way — even to the extent of having legal representation.

MEAGHER JA AND THE CULTURED INSULT

The recent appointment of leading Sydney Silk R.P. Meagher QC to the New South Wales Court of Appeal was marked in the recent NSW Bar News by suitable acknowledgement of his professional and academic achievements — notably of course his joint authorship of the celebrated *Equity, Doctrines and Remedies.*

What we particularly thought worthwhile passing on however were some examples of his Honour's talent for the cultured insult. A wellknown common law Silk was described as having a "sympathetic tolerance of an opposing point of view which was equalled by his passion for Chancery". Another Silk was said to have a knowledge of the law which was "intuitive and vocal rather than learned and subtle".

Probably the best was made shortly before his appointment when he proposed a toast to the retiring Chief Justice, Sir Laurence Street. In praising the

judgments of the guest of honour, Meagher noted that his "reasons for judgment did not resemble the 'position papers' now churned out by our Court of Appeal, lengthy ramblings on matters that their Honours deem to be of current social interest — which have no resemblance to the issues which are actually before the Court".

ATTORNEY-GENERAL'S BLUE PAPER

In recent years the Victorian Court System has been just about examined to death. The newly released Attorney-General's Discussion Paper on the Higher Court System in Victoria lists the following recent studies:

The Civil Justice Committee Report (1984), Parliamentary Legal & Constitutional Committee Report into Court Delays (1984), Cranston Report on Delays and Efficiency in Civil Litigation (AIJA 1985), Law Department Report (1985), Shorter Criminal Trials Committee Report (Victorian Bar/AIJA 1985), Professor Carl Baar's Report on Caseflow Management (1988), Law Institute Reports (1987 and 1988) and The Sorry State of the Judicial System in Victoria (Victorian Bar 1988).

Hopefully the Attorney-General's Discussion Paper will lead to substantial change, since if there is one common theme to all these studies and reports it is that the present system can stand considerable improvement.

As official reports go the Discussion Paper is a very readable document. It covers a wide range of important issues in a crisp and concise style. In some areas, for example the composition of a permanent Court of Appeal, a number of options are stated (the basic concept of such a court seems to have been accepted by the Government). In other areas, the Discussion Paper does not shrink from making a forceful point. A good example is the application of the user pays principle in the Commercial List, first raised in Bar News No. 63 Summer 1987, p.4. In supporting this case (albeit without acknowledgement of its source) the Discussion Paper says (p.33):

"It might also be argued that charging a daily fee in 'fast track' lists such as the Commercial List gives the appearance of 'one law for the rich' in that extra payment gives preferential treatment. The fact is that those in the Commercial List already get preferential treatment which is not enjoyed by other litigants and they do so now without having to pay extra for it."

Perhaps there's something to be said for "Plain English after all! The Attorney-General requests comments on the Discussion Paper by 31st July which should be (just) after you read this. Members of the Bar ought to get hold of a copy of the Discussion Paper and submit any comments that occur to them.

The Editors

LETTERS TO THE EDITOR

EXCLUSION OF LAWYERS FROM MAGISTRATES' COURTS

The Editors,
Victorian Bar News,

Dear Heerey and Elliott,

I take exception to your editorial in the Autumn 1989 issue of the Victorian Bar News about a report I wrote recommending that the Small Claims Tribunal model be established in Magistrates' courts for claims under $5,000.

I have been a member of this Bar for 14 years of which slightly less than half were spent in Parliament. I am now again practising full time at the Bar.

The report was prepared as counsel but since it dealt with, amongst other things, matters of policy I do not suggest that it should be immune from strong criticism. I have no complaint at all about the article written by the Chairman of the Bar, and published in the same issue, criticising the report for the reason that the criticism was fair and temperate.

My complaint is about what I, and other members of the Bar, consider to be intemperate and inappropriate personal remarks in your editorial.

I did not "seek to" inflict vicissitudes on the poor or on the legal profession and I was not motivated by considerations of what might possess "undeniable populist appeal".

The editors may disagree with my views but they should not use the Bar News to impugn the motives of another member of the Bar. As far as "populist appeal" is concerned, I would have thought that the boot was on the other foot.

The scheme I proposed was based upon successful models in Victoria, South Australia and Tasmania. Any unfairness attributed to the scheme has not, so far as my research extended, occurred in those jurisdictions and the spectre of the experienced insurance advocate carrying all before him is considered and dealt with in my report.

The Bar is a place where strongly differing opinions are held on many topics and the constructive criticisms of my proposal offered officially by the Victorian Bar and by the Law Institute were to be welcomed because they were a contribution to sensible debate.

It is unacceptable, however, that personal observations (even if dressed up as wit) should be made about other barristers in an official Bar publication, particularly by the editors of that publication.

Lou Hill

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

The Editors,
Victorian Bar News

Dear Sirs,

Your editorial in the Autumn 1989 edition of the Bar News concerning the statutory jurisdiction exercised by this Commission in discrimination cases is the type of light-headed frippery one expects to find in daily newspapers or radio and television commentaries. It is hardly an appropriate standard for the official journal of a respected professional organisation of which I have been a proud member for many years. Unlike your observations, the article by John Hall which appeared in the Melbourne Herald on 13 December 1988 was an attempt to explain and put in context for the public a recent decision of the Commission which had been absurdly misrepresented up to that time. Like most of the mass media, and of course the public and many of the legal profession, you also have obviously not read either the decision in question or the legislation which gave rise to it before affecting to make comment.

Among the many absurdities in your article, your statement that "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" is simply wrong. Indeed, it is the fact that decisions of the Commission have, for constitutional reasons, no enforceability and practical result that has formed one of the many reasons I have been arguing since coming to office as to why this jurisdiction should not be exercised by the Commission. Another is that no one should be or be required to be both advocate and Judge in the same cause. Of these two tasks, advocacy of human rights protection is, in my opinion, by far the more important for the Human Rights Commission. Nor should a Human Rights Commission have to be comprised of lawyers. There are plenty of Courts and

tribunals who could exercise this jurisdiction. The Victorian Equal Opportunity Tribunal for example, does so with complete competence quite frequently and I do not read anything from you about moving its virtually identical jurisdiction to the criminal courts, despite the fact that its decisions are enforceable. I hope that the Federal Government will soon be willing to change the law in this respect.

Your particular choice of the criminal courts is especially without merit. Primarily discrimination cases seek a finding of unlawful conduct (much closer to other federal analogies of unlawfulness or civil offences than to crime) and claim compensation, often of relatively small sums. Are you suggesting that these cases should go before a Judge and a 12 member jury? Or a magistrate? If so, you should be prepared to argue the matter with much more substance so that Government and the legal profession on the one hand, and the relevant constituencies of society affected by discrimination on the other can put their viewpoints. As it happens, most such cases elsewhere in the world are heard by special tribunals. Nowhere in the world are they heard in the criminal courts.

Your glib comment that the criminal courts "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" simply has no meaning at all. It would hardly be the view of those thousands of people in many common law countries who for hundreds of years were wrongly convicted or harshly treated by the common law. In particular for present purposes, discrimination on the grounds of sex, marital status, pregnancy, racial, ethnic or national origin and the other grounds provided by Australian legislation simply did not attract even a nodding acknowledgement from those "900 or so years" of accumulated wisdom and justice. It took international movements and conventions to activate an effective response and interest in the Parliaments of our own and other countries, and these concepts still struggle for community acceptance here and elsewhere.

Perhaps you might try to do a little better next time you feel like a sideswipe at a serious issue. It is a pity to spoil an otherwise normally stimulating publication with frivolities of this kind.

Yours faithfully,
The Hon. Justice Marcus Einfeld
President

EDITORS' COMMENT

1. **If Mr. John Hall, described as "a senior legal consultant" of the Commission, publishes an article in the Herald, the reader is entitled to assume that the article puts the best possible case for the Commission. His Honour does not suggest Mr. Hall's article was inaccurate in any way. Readers of the Herald were not invited to engage in legal research on the subject; nor did we.**
2. **By "practical consequences little different" we simply meant to point up the following comparison on the facts of this case. The proprietor of the Whyalla Fish Factory and Take Away is alleged to have assaulted two young women by touching them on the buttocks and breasts, throwing unwrapped condoms at them and forcing one to hold his exposed penis. He denies all this. Option A: He is charged with indecent assault before a court and found guilty. Probable consequences: (i) Publicity and ignominy, (ii) fine, (iii) no jail sentence. Option B: An official body called the Human Rights and Equal Opportunity Commission, presided over by a judge, finds the allegations are true. Probable consequences: (i) Publicity and ignominy, (ii) order for compensation, (iii) no jail sentence.**
3. **His Honour's letter does not deal with the main point of our comment on Mr. Hall's article, which was all to do with 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 it was fairer if some of the responsibility for providing the facts was shifted to the alleged discriminator."**

It may or may not be a good idea to have allegations of criminal conduct which happen to involve discrimination elements dealt with outside the ordinary criminal court system. If fiddling with the onus of proof — at least where the alleged discriminator is "emotionally and financially powerful" — is to be a feature of such cases, we suggest it is not a good idea at all.

SIR MURRAY McINERNEY AS LINGUIST

The Editors,
Victorian Bar News.

Gentlemen,

The tributes to Sir Murray McInerney (Autumn Edition 1989) brought to my mind an incident from his student days of which I am aware and in which your readers might be interested.

It was a requirement for history students to appear before a particular Professor for the purpose

of reading aloud a prepared paper on a particular subject. The Professor was renowned for interrupting (usually early in the recitation) with the most vitriolic and carping criticism. In the knowledge of this the young McInerney and his history tutor had prepared a flawless paper giving particular care to the opening paragraphs.

Barely had the young McInerney completed the title to the paper — the subject being an Explorer of Dutch extraction — when the Professor attacked with an allegation that the explorer's name had been appallingly mispronounced. The young McInerney looked the Professor directly in the eye and responded in a carefully measured reply:

I was born in South Africa. I lived there for 13 years of my life. I speak fluent Afrikaans and that is how the name is pronounced!

The Professor gave the young McInerney no further problems on the occasion in question or subsequently.

My source for the above was Sir Murray himself. He related it to me after I had been before him as counsel in chambers some years ago. He chose to tell it to me because the history tutor concerned was my uncle J F Mulvany KC who was later a Judge of the County Court. John Hockley my opponent was present when the story was told and John can attest to its accuracy.

Mark Mulvany

COUNSEL'S CONFLICT OF INTEREST; FINDING QUESTIONED

The Editors,
Victorian Bar News

Gentlemen,

An injustice may have been done to counsel in the case of *Nangus Pty. Ltd.* v *Charles Donovan Pty. Ltd.* [1989] VR 184, who was said to have appeared before the Full Court in circumstances involving a "clear conflict of interest".

The plaintiff lessor had obtained judgment jointly against two defendants. One was the lessee. The other was the guarantor of the lessee's liabilities. Both defendants appealed and were represented by the same counsel. The appeal involved two points. The first point sought to reduce the quantum of the judgment. By the second point, the defendant guarantor argued that the guarantee did not cover the particular liability.

Young CJ delivered a separate judgment agreeing with the other members of the court in dismissing the appeal, but devoted primarily to the question of conflict of interest of counsel (a matter not dealt with by the other members of the court). The Chief Justice, having stated that both appellants had the same interest on the quantum point, went on to say this (at p.185):

"Mr. Southall's second argument however was that the guarantor was not liable under the guarantee for any damages arising from the breach of the lessee's obligations under the lease. If this argument succeeded the whole of the burden of the damage payable would be thrown on the first appellant. A clear conflict of interest arose."

But the position would appear to be that the defendant lessee was ultimately liable to the plaintiff lessor for the whole amount. To the extent (if any) that the lessor recovered from the guarantor under the guarantee, the lessee simply owed the amount to the guarantor and not to the lessor.

Put another way, the *lessee* could have had no legitimate expectation that the guarantor would share any of the burden of his (the lessee's) liability to the lessor. To the extent that the guarantor escaped liability, that was a matter of concern only for the lessor.

An argument by a guarantor denying liability is an argument with the creditor; it does not affect the liability of the principal debtor. Clearly, issues may arise between the guarantor and principal debtor, and caution is needed on the question of conflict. There may be relevant facts undisclosed in the report. But, on the face of it, it is, with respect, difficult to see why the argument on behalf of both defendants as to quantum could not without conflict or embarrassment be coupled with the argument on behalf of the defendant guarantor denying liability.

The finding of "clear conflict" is one of some gravity and reflects adversely upon counsel's judgment. It is respectfully submitted that it is a finding not justified in the particular circumstances of this case.

Yours sincerely,
J.A. Strahan

DIVINE LIABILITY

The Editors
Victorian Bar News

Dear Editors,

I learn from the current issue of the Bar News that Mr. LCM Gordon is concerned at the failure of the legislature to exempt the Deity from the provisions of section 9 of the Rain-making Control Act 1967: "Any person who carries out rain-making operations in Victoria which are not authorised under this Act shall be guilty of an offence".

I can only assume that Mr. Gordon is unaware that the British Columbia Court of Appeal has held that God is not a person for statutory purposes: *R. v. Davie* (1980) 54 C.C.C. (2d) 216.

I also assume that with that awareness Mr. Gordon's concerns will be allayed.

Yours faithfully,
Leslie Katz

CHAIRMAN'S MESSAGE

PUBLICITY

Early this year articles appeared in "The Age" concerning two members of the Bar. An approach was made to each by the paper and each refused to be interviewed unless it was cleared by the Chairman. I was approached by the paper to give permission. I did so only on the basis that the article should be considered by the Chairman and the Ethics Committee prior to publication and publication would only take place if the article satisfied the requirements of both myself and the Ethics Committee. I did this for a number of reasons.

First, I think it is important to the Bar that the public get to know more about barristers. Secondly, by considering the article prior to publication, we could keep some control over the contents bearing in mind that there was no restriction on the paper printing the article without interviewing the subject and without his permission. Finally, a barrister may write an article or be the subject of an article, subject to the rules relating to advertising and touting and the prohibition on revealing the contents of a brief.

The articles were submitted for consideration by the Ethics Committee and myself. We did make a number of suggestions which were accepted.

I do believe the articles were well received. However, I have been informed that some members of the Bar have been critical, the suggestion being that the Ethics Committee has been guilty of applying double standards. I do not believe the criticism is well founded. If the same set of circumstances arise again, no doubt an application by a barrister to be the subject of an article will be favourably considered. Those who transgressed in the past did not seek permission.

EXCLUSION OF LAWYERS

The defeat of the Government's proposal to exclude lawyers in some claims in the Magistrates' Court was a triumph of reason and preservation of rights over a desire by a small section of the community to exclude lawyers. Those responsible for the proposal were motivated by a concern that the legal system was being denied to the man in the street because of expense. Their object was to ensure the legal system was more accessible and cheaper. This object is laudable and accords with the views of the Bar. But it should not be adopted to exclude the fundamental right to representation.

The campaign to head off the Government's proposal took some time. I thank those who gave time to assist the Executive and, in particular, the Young Barristers' Committee.

CHEAPER JUSTICE

There are a number of enquiries underway at present looking into the justice system in Australia.

REPORT RESORT

ETHICS COMMITTEE REPORT

SINCE NOVEMBER 1988 THE ETHICS Committee has received complaints against 28 members of counsel. Sixteen complaints have been dismissed, two have been upheld and ten are under investigation.

The complaints may geneally be categorised as follows:

- ☐ **Rudeness or tactless conduct by counsel to fellow members of the Bar and litigants;**
- ☐ **Breaches of agreement or undertakings, particularly involving police informants and prosecutors;**
- ☐ **Absence from Court when the case in which counsel is retained was called on;**
- ☐ **The quality of advice given by counsel and the manner in which it is explained giving rise to misunderstandings; and**
- ☐ **Failing to respond to a request from the Ethics Committee to respond to correspondence.**

There is an increase in complaints relating to conduct which may have been tactless or even rude. While in most cases the conduct is not found to constitute a disciplinary offence, counsel should endeavour to be polite, tactful and courteous to avoid undue stress and misunderstanding.

On the other hand, there was only one complaint relating to the failure of counsel to return a brief promptly and no complaint concerning fees charged by counsel.

Members of counsel are reminded of Rule 23 of the Restatement of Basic Rulings by which barristers are required to respond to requests of the Ethics Committee. Failure to do so may in itself constitute a disciplinary offence. Unfortunately, despite an express reminder, barristers are often tardy in responding to such requests.

There is a real concern, also shared by this Bar, that justice is becoming too expensive and beyond the reach of the average citizen. We must devise ways and means of speeding up the litigation process and making it less expensive. The Bar will do all it can to co-operate to achieve these goals. However, one should sound a note of caution. The most important person in any court is the losing litigant. Upon leaving the court he must be of the mind that he had a fair hearing and his case was well put and properly considered. Speedy and cheap justice should not come at the price of dissatisfaction and unfairness. A balance must be struck. Our trial procedures and the principles of evidence represent the collective wisdom of hundreds of years of practice and should not be swept to one side as an expediency to achieve speedy and cheap justice. The common law adversary system is the best system to ascertain the truth and the rules are designed to ensure that the system works fairly. The system is by no means perfect, but it is the best available. One has to be very careful of trial procedures based upon counsel prepared written statements, no oral evidence in chief and superficial cross examination because of the pressures brought by lack of preparation and reflective thought. The barrister's role is to prepare and present the case and assist the court. One must be wary of speeding up the process if it is to exact the price of careless work.

HIGHER COURT SYSTEM DISCUSSION PAPER

The Higher Court System Discussion Paper ranges over a number of issues. However, a discussion paper, like Law Reform papers of the same name and Law Reform reports, have a habit of creating a lot of paper but not much action. Pending consideration of this paper, there are two measures which must be implemented as soon as possible. The Supreme Court requires four more Judges and a Master. It does not need a discussion paper or a recommendation to establish that proposition. The court is undermanned and has been for many years. The establishment of a court of appeal division comprising eight Judges in August will take two Judges from the trial court. This will place a greater burden on the court and the Judges and increase the delays. The appointment of a new Master is long overdue. It appears there are difficulties being experienced by the Government in determining the terms and conditions of employment. These terms and conditions must be finalised as soon as possible. We do urge the Attorney-General to appoint four more Judges and a Master as soon as possible as a necessary measure pending implementation of the proposals which come out of the discussion paper.

TALENT

The Bar Revue, the recent Christmas pantomine, the Readers' skits and some performances in court, adequately demonstrate the enormous depth of theatrical talent at the Bar. I must say, I have always been particularly impressed by the Revues put on at each Readers' Dinner. The material is always witty, perspicacious and entertaining. The recent Bar Dinner saw talent of a different kind; the "Singing Judge" and the off-key "Judges' Chorus". The performance was superb and greatly enjoyed by those present. I would like to see a small revue staged at each Bar Dinner with the material and the talent coming from the new members of counsel.

E.W. Gillard
Chairman

The Committee has conducted six Summary Hearings. The Committee found that disciplinary offences had been committed by four of the six barristers concerned.

In the first case counsel was reprimanded for making an improper remark to an opposing lay client and another member of counsel in the presence of members of the public. In the second matter counsel was fined $500 and $600 for two offences of failing to be in Court when his case was called on. In the third matter a complaint by a police informant concerning an alleged breach of undertaking was dismissed. In the fourth and fifth matters counsel was fined $200 for each of two offences of failing to respond to correspondence from the Ethics Committee, a complaint against him for improper remarks was dismissed and another complaint for improper remarks did not proceed following an apology. In the last matter counsel was fined $400 for behaving in an aggressive manner to a litigant in the precincts of the Court.

In January 1989 a member of counsel was charged before the Barristers Disciplinary Tribunal with improper conduct in that he failed to disclose relevant matters to the defence in a criminal trial. It was determined that he had committed a disciplinary offence under Section 14B (b) of the Legal Profession Practice Act and it was ordered that he be reprimanded.

Apart from complaints, members of the Committee are called upon to advise members of counsel as to the appropriate course to adopt in certain circumstances. In particular, applications are made by counsel for permission to attend a solicitor's office to perform functions such as inspecting documents or conferring.

In some instances overwhelming necessity may make it unavoidable for counsel to attend a solicitor's office and in such cases permission may be granted. However such applications are not encouraged and will be refused except in cases of unavoidable necessity. The Committee's experience is that a number of unwarranted applications have been made.

Hartley Hansen
Chairman

CRIMINAL BAR ASSOCIATION REPORT

1. LISTING DELAYS

ON 7TH JUNE A MEETING WAS HELD on listing delays to which all members of the Criminal Bar Association were invited. The meeting was to discuss the recommendations of the Attorney-General Steering Committee on Delays in Criminal Proceedings. This, it was thought, was a matter of vital interest to members. Despite that thought the attendance was very disappointing. Listing delays are a regular source of complaint by members yet an opportunity to discuss the problem was ignored by most.

As at June 1989 it is believed there are 890 pending cases in the County Court Criminal List with 144 believed to have been received in the month of June.

The newsletter from the Steering Committee of May 1989 sets out a number of areas where delays are sought to be reduced. It discusses the reduction of the County Court backlog, County Court case flow management, early identification of pleas of guilty and committal proceedings in the City Court. The Committee's recommendations will begin to have effect in the latter part of this year and are still the subject of further discussion and modification.

As at June 1989 it is believed there are 890 pending cases in the County Court Criminal List with 144 believed to have been received in the month of June itself. At present there are an average of 14 criminal courts which, with the works being done in the building, may extend to 18 at some time in the future.

As recommendations are made and changes occur, the involvement of the Bar is vital. Please take an interest in these developments and provide assistance and input whenever possible.

2. POLICE POWERS

The recommendations of the Attorney-General's Consultative Committee on Police Powers of investigation on body samples and examinations has been recently made public. The outline of the recommendations proposes a scheme for taking samples from a person suspected of an indictable offence which is substantially similar to the scheme in the *Crimes (Fingerprinting) Act* 1988.

The procedure allows for consensual testing of adults with judicial supervision in the event of a refusal of consent and the tests and examinations include physical examinations to observe injuries such as bruises, cuts, scratches and distinguishing marks, the taking of gunshot residues from external skin surfaces, hair samples, fingernail scrapings, blood samples and, as an alternative to blood sampling, scrapings from inside the mouth. The scheme does not involve procedures for the removal of foreign objects from within the body by surgical or other means. The recommendations provide for procedures to be followed with the suspect's consent and provide two alternative models where the subject does not consent. In the case of both models, a refusal of consent will be followed by an application by police for an order by a Magistrate given certain threshold requirements. They then set out alternative consequences of a failure to co-operate subsequent to a Magistrate's order.

In one model the proposal is for the use of reasonable force in order to take the required sample. In the alternative, failure to comply with the Magistrate's order may result in an adverse inference being drawn against him or her at any subsequent trial of the offence.

A number of issues arise from this report which will be the subject of discussion by the Association and its members. In the meantime, the Consultative Committee is continuing to formulate the substantial report which will be the detailed basis of the recommendations which have already been published.

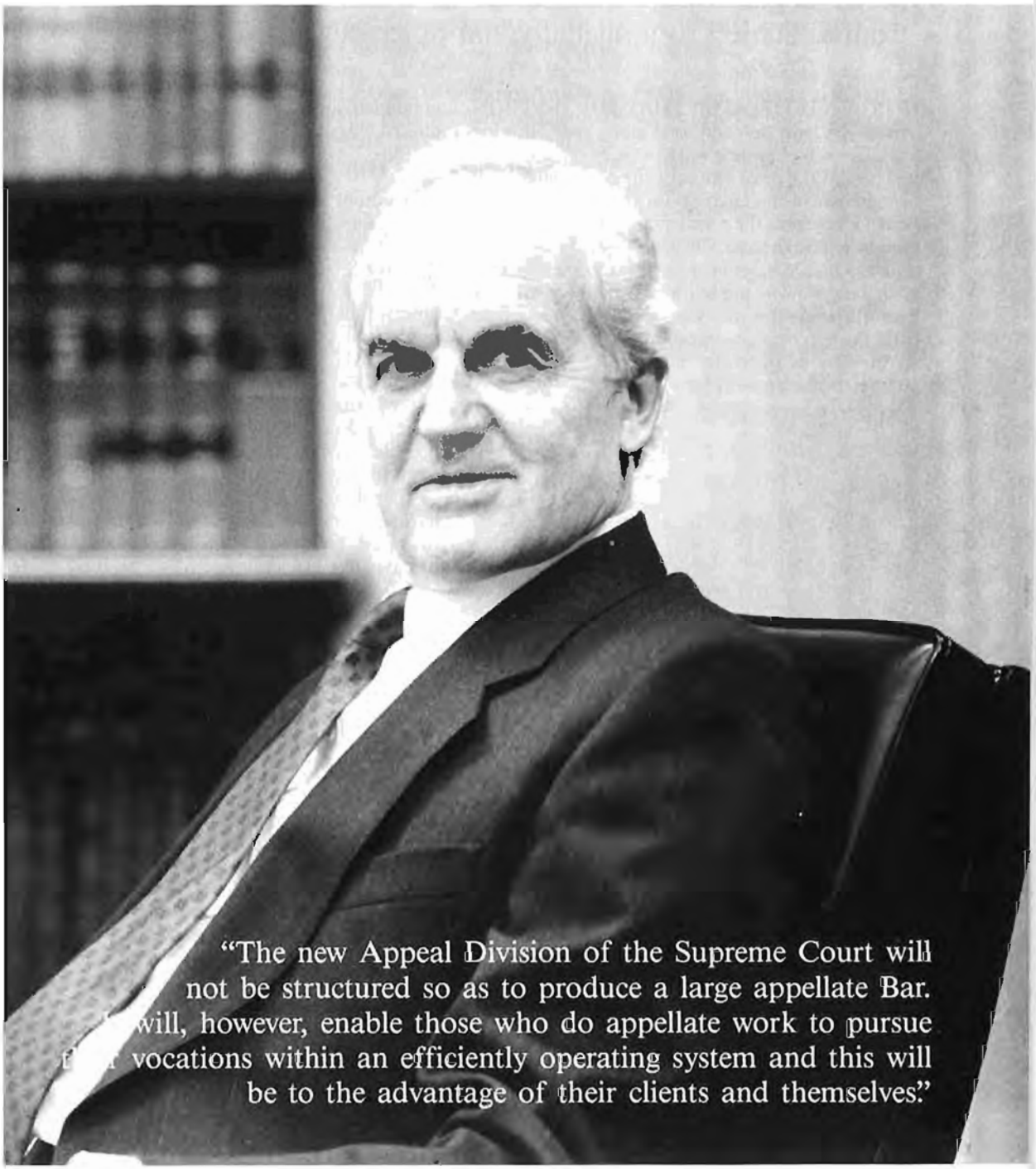
3. NATIONAL CRIME AUTHORITY

The Association notes with pleasure the appointment of Peter Faris QC as Chairman and Julian Leckie as the Victorian Member of the National Crime Authority. This Association has often been critical of the authority in the past. It looks forward to change and improvement under the new Members.

Lex Lasry

THE NEW APPEAL DIVISION OF THE SUPREME COURT[1]

Mr. Justice McGarvie



The new Appeal Division, which the Council of Judges decided in February to introduce, is to commence on 31 July at the same time as the Court moves to sitting in four terms instead of monthly periods.[2]

The Appeal Division is to consist of the Chief Justice and seven other judges. Members of the Division will constitute the Full Courts. Subject to availability and other exigencies.

IT IS CONTEMPLATED THAT THE DIVISION over a year will be composed along the following lines. The Chief Justice will always be a member of it. Three of the most senior of the other judges will be members of the Division for the full four terms. Four judges from the next segment of seniority will each be allocated to the Division for two of the four terms so that at any time two of them are members of it. The two who are not members in a particular term will sit in other lists. Each term two other judges from the remaining segment will join the Division. At the end of the term they will be replaced by another two judges and so on.[3]

"My purpose is to show that the Appeal Division is . . . better adapted than any alternative option to provide a system of intermediate appeal which will serve the community well in the years to come."

The Division has a desirable component of continuity. The Chief Justice will permanently head it. The three most senior of the other judges will, if agreeable, continue in it from year to year and do appellate work virtually full time. All other judges will serve in the Division from time to time with those more senior serving more often.

The judges to be allocated to the Appeal Division will be selected by the Chief Justice.

Full Courts, to be constituted by members of the Division, will continue to hear all civil and criminal appeals.

In my opinion this Appeal Division is capable of providing all the advantages of a permanently appointed court of appeal or division without the disadvantages.

ALL THE ADVANTAGES

I do not seek to answer recent criticisms made of the past operation of the Full Court in civil appeals by Stephen Charles Q.C. in his article in the Bar News, No. 61, Winter, 1987, p.16, A Court of Appeal for Victoria, or by the Law Institute.[4] My observation is that much has been done and a large proportion of the criticised deficiencies overcome since then but it is not my purpose to enter into that. My purpose is to show that the Appeal Division is not only capable of overcoming those problems but is better adapted than any alternative option, to provide a system of intermediate appeal which will serve the community well in the years to come.

The decision at the intermediate level of appeal is final unless the High Court grants special leave to appeal. This is granted in a very small percentage of cases. As David Jackson Q.C. recently wrote:

"Intermediate appellate courts are final courts for most purposes and there is a need for judges sitting in those courts to have time to 'think about' their decisions and their implications without working in a pressure cooker atmosphere."

He added:

"I think it likely, I may say in passing, that the tendency to permanent courts of appeal (de jure or de facto) will manifest itself further."[5]

The Full Court must, of course, perform all the functions in the clarification and development of the law as is appropriate for a court which is virtually a final court of appeal.[6]

In David Jackson's terms the creation by the Supreme Court of an Appeal Division is a move to adopt a substantial component of de facto permanency at the appellate level. The four senior members, the Chief Justice and the three other most senior judges, will for practical purposes be engaged permanently on the work of the Division. No doubt they would occasionally spend some time in a trial list to break the tedium of continuous appeal work and to keep contact with trial work. The next two in seniority at any time will be spending two of the four terms each year on the work of the Division.

It will be possible to plan ahead and develop uniform practices and policies of caseflow management. The downtime, which can occur if a Full Court declines to take an appeal towards the end of the month which may go beyond the month, will go. Even at the end of a term, because at least four members of the Division will be sitting the next term, it will be possible to arrange for an appeal to be taken although it may go into the following term.

Regardless of whether the Victorian Full Courts are already following the practices which those supporting[7] the model of the New South Wales Court of Appeal identify as meritorious features of its operation, it will certainly be open to the Appeal Division of the Supreme Court to adopt those features of operation, or features which are equal or better.

Having an Appeal Division will

- ☐ allow maximum flexibility in arranging hearing dates;
- ☐ permit the granting of fixed dates for appeals and enable the appeals to be heard on those dates;
- ☐ enable times to be allocated to cases on the basis that if an appeal exceeds the time, it will be adjourned to a later date and the next appeal in the list will not be kept waiting;
- ☐ enable judges to have time to be well prepared, having read the appeal book before the appeal commences;
- ☐ enable judges to have time out of court to prepare and deliver judgment soon after argument ends;
- ☐ allow the Court to find time to deal quickly with urgent appeals;
- ☐ facilitate the development and enforcement of practices by which the parties, well before the appeal commences, provide the judges with outlines of their arguments, chronologies and details of the legislative provisions and authorities which will be of importance in the appeal;
- ☐ allow the judges in the Division to meet regularly to discuss its management procedures, and what needs to be done;
- ☐ enable judges to meet frequently to discuss the appeals they are deciding.

NONE OF THE DISADVANTAGES

In considering whether the Victorian community will be better served by the Appeal Division which is about to commence than they would be by a permanently appointed court of appeal, it is wise to heed the words of Professor Harold Laski:

". . . men think differently who live differently . . . religious men always over-estimate the influence of faith upon morals; learned men attach undue importance to the relation of scholarship to wisdom. We are prisoners of our experience; and since the main item of our experience is gained in the effort to make our living, the way in which that living is earned is that which most profoundly shapes our notions of what is desirable."[8]

It is to be noted that most of the leading proponents of permanent appeal courts who are regularly quoted have earned their living as judges of permanent courts of appeal. It is equally important that the writer has for the last thirteen years enjoyed earning his living as a judge of the Supreme Court doing trials and appeals and would prefer to continue to do that rather than being confined to one or the other.

The leaders of the legal profession tend to be those who are most active and involved in the appeal side of litigation. Understandably they regard appeals as very important.

The views stated are all genuinely held opinions but regard should be had to the context of experience from which each opinion comes.

"Most of the leading proponents of permanent appeal courts who are regularly quoted have earned their living as judges of permanent courts of appeal."

Attorney-General's Discussion Paper

The Attorney-General's Discussion Paper on The Higher Court System in Victoria issued in May puts forward three options for the hearing of appeals in Victoria.[9] The first is a separate Court of Appeal on the New South Wales model with the important difference that it hear criminal as well as civil appeals. It appears that under this model, as in New South Wales, there would not be a separate court but part of the Supreme Court would by statute have appellate functions and be called the Court of Appeal of the Supreme Court of Victoria. The Court of Appeal would consist of a permanent President and seven permanent appellate judges. The second, based on a compromise proposal of Stephen Charles Q.C.,[10] is a Court of Appeal Division of the Supreme Court established by statute to hear all civil and criminal appeals and to consist of the Chief Justice, four permanently appointed appellate judges and three ordinary judges of the Court allocated to the Division by the Chief Justice for at least three months at a time. The third is the Appeal Division to commence on 31 July. Its members are existing

judges of the Court who will constitute Full Courts to hear all civil and criminal appeals as at present.

Importance of issue

The decision as to the nature of the Victorian appellate structure is in no sense upon a cosmetic issue. In my opinion the Victorian court system will work more efficiently, effectively and economically if the judges who hear appeals from trials are skilled by substantial judicial experience in conducting trials. I regard the nature of the appeal process as one of the most important determinants of the quality of the Victorian system. The desire that each Parliament should have a choice enabling it to select an intermediate appeal court composed of judges with current trial experience was a primary reason for my opposing, as a member of the Constitutional Commission's Advisory Committee on the Australian Judicial System, the creation of an Australian Court of Appeal.[1]

The decision should be based on a knowledge of what has happened and what is likely to happen in Australian conditions. There should be no automatic acceptance of what has been done in overseas systems.

Courts as hospitals

Usually citizens satisfy the primary objective of the law by themselves resolving any differences by reference to it. Of the exceptional disputes which go to lawyers only a minute proportion remain in dispute and have to go to court for resolution.

Similarly, few illnesses and injuries require admission to hospital for treatment. When one does, say a broken leg, the interest of the patient and the community is that the first setting of the fracture be efficient and successful. Sometimes the system fails and the setting is defective. In such a case a further opinion is commonly obtained which may lead to a decision that the fracture be recreated and reset properly.

The patient would desire a resetter, not only familiar with the latest advancements and techniques of setting bones, but currently very experienced in actually setting bones and very good at it.

It is not in the social interest that there be a great body of bone resetters, prospering because it is so often doubtful whether the initial setter got it right. The wellbeing of citizens is much better served by the initial setters of bones getting it right the first time.

It is the same with litigation. Litigants and the community are best served if the trial judge gets it right. If trial judges are generally making the right decisions the community will not mourn the absence of a large and prosperous appellate Bar and a very active appeal court. If it is thought that the primary judge went wrong in the trial and decision, there is much to be said for the appeal being conducted by judges who, besides being familiar with current legal trends, know a lot about trials through judicial experience of them and are very good at putting right those that went wrong.

The paramount consideration on an appeal is to do justice to the appellant and respondent according to law. The flowering of the law is not the first priority but is a by-product of doing justice to the parties.

"If trial judges are generally making the right decisions, the community will not mourn the absence of a large and prosperous appellate Bar and a very active appeal court."

Importance of trial judge

The justice which citizens receive and their impression of, and confidence in, the law, depend essentially on trial judges (or, more often, magistrates). In practice most of a trial judge's decisions in the running of the trial and the exercise of discretions are, in the typical case, virtually unappealable. In the ordinary case, despite *Warren v. Coombs* (1979) 142 C.L.R. 531, findings of fact on specific items are very difficult to upset, and most cases turn on findings of fact. There is more possibility of upsetting a judge's finding as to the overall effect of all the specific facts found. In the bulk of cases the quality of justice the community receives is that given by trial judges.

For them to maintain high standards it is important that competent trial judges do not feel that, however carefully the facts and the law are found and analysed and a decision reached, there is a relatively high prospect of being upset on appeal. If confidence slips so does morale, and standards follow.

High Court

I emphasise that I am writing only of intermediate appeal courts which hear the first appeal. Nothing I say refers to the High Court which obviously has to be a permanent appeal court. Australia has the great advantage of a final appeal court which can, by granting special leave to appeal, settle any question of law arising anywhere in the legal system. The Court deals with every kind of law from every part of Australia. It is often involved with important issues of policy within the law.

Qualities of trial and appeal judges

I query the view that appeal judges and trial judges need different qualities. That view is strongly advanced by Mr. Justice Kirby:

"Although the tasks are necessarily related, the functions of an appellate and a trial judge are significantly different in kind. Each must apply the law to facts. But the qualities that make a capable appellate judge may not necessarily be the same as those that equip the judge to perform, with skill and assurance the taxing obligations of presiding at a trial. Just as the skills of appellate advocacy are different, so are those of appellate judging. The appellate function involves a greater element of theory, principle and conceptualisation of the law. The trial function requires great skill in following the facts, and accuracy and deftness in rulings on evidence. That the two tasks are similar is undisputed. But so are some at least of the functions of a solicitor and a barrister. So too are the functions of a barrister and a judge. The points of difference are ones of degree but critical to the attainment of excellence and high efficiency.[12]

". . . there is the great attractiveness of appointment to an appellate court which can be offered to lawyers experienced in appellate work. For them, the prospect of years conducting trials may be so uncongenial to their skills and temperament as to dissuade them from accepting judicial appointment. It is well known that difficulties have been experienced, both by Federal and State Attorneys General, in securing the appointment as judges of leading Queen's Counsel, when the prospect before them may be years of trial work before they 'graduate' to regular appellate judicial duties. If their talents lie in conceptualising the law and if their bent is towards a scholarly interest in the law, they may well be deflected from accepting judicial appointment. In this way, some of the best minds and talent of the Bar, may be lost to high judicial office. A permanent appellate seat, on the other hand, might be more congenial and suitable.

"It should not be forgotten, as well, that a number of the leading judges in the common law world in recent years came from academic life. I realise that this is a heresy to propound in Australia. But I cite Laskin CJ, Le Dain J and Tarnapolsky J in Canada and Richardson J in New Zealand as notable instances. If the Bench is to be occasionally stimulated, elsewhere than on the High Court of Australia, by the appointment of lawyers of great talent who may have no particular inclination towards, skill in (or talent for) years of trial work, an alternative stream may be provided, to the great benefit of the law and of society. This is not a condescending remark, designed to disparage the taxing work of the trial judge. On the contrary, it is simply a reflection of the obvious fact that skills in trial and appellate advocacy differ, as do skills in trial and appellate judicial work. Our judicial institutions should reflect that obvious fact."[13]

I must say that my experience of trials and appeals has not led me to the conclusion that the functions of an appellate and a trial judge are significantly different in kind. They are functions exercised at different levels of the court structure but I regard them as essentially similar. I do not see trials as a species of process work and appeals as the preserve of legal architects.

I take the view that every appeal heard tends to improve a judge as a trial judge and every trial conducted tends to improve the ability to decide appeals.

"The strength of the common law has grown from its characteristic 'bottom up' operation."

Trial judges

The great majority of cases decided by trial judges never go on appeal. Commonly a good trial judge applies theory and principle and conceptualises the law to get to the result which, for similar reasons, a good appeal court would reach if there were an appeal. The growth of the common law depends on the creative work of trial judges as well as appeal judges. This is demonstrated by a comparison of the civil cases reported in the 1988 Reports which were decided by the Full Court or Court of Appeal, with those decided by a single Supreme Court judge. Of the 69 in [1988] Victorian Reports, 32 were decided by the Full Court and 37 by single judges. Of the 122 in (1988) Volumes 12, 13 and 14 (to p.459) of the New South Wales Law Reports, 71 were decided by the Court of Appeal and 51 by single judges.

At a time which Fifoot regarded as the golden age of the development of English law[14] Bramwell, Blackburn and Willes contributed as much in their decisions as trial judges as in their judgments in banc. Much the same could be said of Sir Leo Cussen in Victoria, Sir Frederick Jordan in New South Wales and many others in Australia.

The strength of the common law has grown from its characteristic "bottom up" operation. A mainspring of its evolutionary development has been

the adaptation of principle to changing community conditions by the trial judge's selection of a solution which resolves the dispute of the actual people in the actual situation before the court, in a way which is fair and consistent with what is implicit in existing principle. The life of the common law (including equity) has been nurtured more by the trial judge's lively appreciation of the conflicting needs of the people in the situation before the court than by the writings of those learned in the law, although both these inputs are important. As Holmes observed, the life of the law has not been logic it has been experience. The growth of our law is to be contrasted with that of systems which operate on a "top down" basis in which revealed wisdom, drawn mainly from learned writings, is adopted at the top and is received by the whole system below.

"When different solutions are adopted by trial judges, who is there better to choose between them than a bench of judges with ample current trial experience."

Appeal judges

When different solutions are adopted by trial judges, who is there better to choose between them than a bench of judges with ample current trial experience, considering an appeal in the light of the current trends of the law and the writings of learned authors?

	1981	1982	1983
N.S.W. C of A	195	226	192
VIC. F.C.	59	86	61

In that paper, on the figures then available to him, Wright commented that, while Victoria regularly had 16 to 17 Supreme Court and 40 County Court judges engaged in first instance work and New South Wales regularly had 30 Supreme Court and 43 District Court judges, New South Wales had about three times the civil appeals of Victoria.[19]

It would be unfair to lay entirely at the door of the Court of Appeal the fact that there are so many more appeals in New South Wales than in Victoria. My impression is that when there were appeals as of right from both Supreme Courts to the High Court, many more came from New South Wales than from Victoria. It used to be said, somewhat irreverently, that while the rebuttable presumption here was that the trial judge had got it right, the rebuttable presumption north of the Murray was that the trial judge got it wrong.

In 1986 the number of civil appeals heard and disposed of in the New South Wales Court of Appeal and the Full Courts of the other States were: N.S.W. 266, Vic. 80, Qld. 198, S.A. 148, W.A. 91 and Tas. 7.[20] Real caution needs to be exercised against drawing conclusions too readily from comparative figures of appeals heard and disposed of by intermediate appeal courts. The appellate jurisdiction of the courts is not identical. For example, some appeals which go to single judges in some States go to the intermediate appeal court in others.

The indications are that the number of appeals being brought to the Court of Appeal in New South Wales is markedly increasing. The comparative figures relating to all processes initiated in that Court, show an increase of 120% from the last year of the Full Court system, 1965 (334), to 1987 (734).[21] The Annual Review of the Court of Appeal, 1987, contains the observation that the filings for 1987 were nearly 40% up on 1985.[22] Another table shows an increase of 53% in appeals listed before the Court of Appeal in 1987 (305) over those listed in 1978 (199).[23] This information is of limited significance without data as to the composition of the filings and the number of decisions in trial courts at the relevant times from which appeals could have been brought.

There is a view that the operation of the Court of Appeal in New South Wales has itself produced an increase in appeals. Mr. Justice Else-Mitchell, a judge of the Supreme Court of New South Wales from 1958 to 1974 and since the Chairman of the Commonwealth Grants Commission, has written expressing his belief

"that the establishment of the Court of Appeal was a costly mistake. It has, in a Parkinsonian fashion, produced an increase in appellate work far in excess of the load carried by other Supreme Courts in banc . . ."[24]

It has been suggested that there are inherently different tendencies in the Full Court system and the permanent Court of Appeal system which tend to reduce the proportion of appeals allowed by a Full Court and increase the proportion allowed by a permanent Appeal Court. Wright observes:

If intermediate appeal courts disagree the High Court is available to choose the most appropriate principle. At its level a great deal of development is inevitably involved.

I consider that appeal judges should have these priorities in mind in writing their judgments: first do justice according to law to the appellant and respondent; then, articulate a principle which will be fair and socially acceptable in its general operation, will be clear enough to allow citizens themselves and their lawyers to apply it in the resolution of their disputes and will be practical of application in the trial situation; only if the first two

priorities have been satisifed should the decision be driven by the desire to have it develop the law in a particular direction. I do not underrate the vital and increasing role that academic lawyers must play in the development of the law and the improvement of the operation of the court system. However, it is my emphatic view that the judgments of appellate courts are not to be written primarily to satisfy the law schools or the legal journals of this country or beyond.

Sometimes the importance of the resolution of issues of fact within the court system is overlooked. Litigants' satisfaction with the results of trials, and trial judges' reputations, depend more on correct findings of fact than on correct applications of law.

"In dealing with the large proportion of intermediate appeals which turn on the facts, trial judges with daily experience of fact finding would appear to have great advantage over permanently appointed judges of appeal."

Despite contradictions in evidence, in many cases the parties and witnesses are all well aware of what actually happened. Both ends of the bar table usually know whether the judge has found the facts correctly and with intellectual honesty. Cases which worry the community such as the Who's Baby Case and the Chamberlain Case are almost always cases where the concern is about the findings of fact at trial or appellate level.

Mr. Justice Moffitt who was President of the New South Wales Court of Appeal for the 11 years before Mr. Justice Kirby was appointed in 1984, concluded that a large proportion of intermediate appellate jurisdiction relates to appeals on questions of fact. He said that:

"Perhaps something in the order of two-thirds of all appeals come to depend on the appellate court's view of the facts."[15]

Mr. Justice McHugh's opinion is that in more than 80 per cent of the cases in the New South Wales Court of Appeal the facts rather than any real choice as to the formulation of the legal rule are dispositive of the appeal.[16]

I think it beyond argument that judicial experience in the finding of facts from evidence hones and improves the ability to do so. In dealing with the large proportion of intermediate appeals which turn on the facts, trial judges with daily experience of fact finding would appear to have great advantage over permanently appointed judges of appeal with a scholarly interest in the law but no trial experience.

Increasing number of appeals

Figures quoted by Mr. Justice Kirby[17] show that in 1986 the Victorian Full Court decided 80 appeals and 50 motions in civil cases while the New South Wales Court of Appeal decided 266 appeals and 459 motions.

Figures from a table in Edmund W. Wright's paper, Managing Overload in Appellate Courts: Australian National Report, show the following comparison of civil appeals heard:[18]

". . . there is in fact a prominent difference in the structure of the courts of appeal of the two states which suggests a number of institutional reasons why the New South Wales Court of Appeal may allow more appeals than the Victorian Full Court. The New South Wales Court is a separate court, staffed by full-time, specialist appellate judges. The judges of the Full Court are also the trial judges of the Supreme Court. Now — this is rather difficult to put in appropriately delicate and respectful terms — several things may follow from this. The Full Court may consciously respond to the thesis that a willingness to allow appeals leads to more appeals, particularly because the Victorian Supreme Court is a smaller court. If more resources have to be devoted to the Full Court workload, that means fewer resources can be devoted to the trial workload; and trying to relieve the pressure of Full Court work translates a multiple of the same pressure to the trial work where it would be felt by all. There is some reason to believe that an appellate judge who is not a specialist attaches more significance to the advantages a trial judge may have in deciding the facts. A Full Court judge may identify more closely with the trial judge; he may attach more importance to and have greater respect for the work the trial judge has done. And, perhaps, a Full Court judge feels a fuller measure of the restraint imposed by 'the lack of overweening certainty in one's own opinions'[25] — they are equals in a way their counterparts in New South Wales are not, and their places will frequently be reversed. The pressures on a specialist Court of Appeal judge are the other way — it is not wholly waggish to observe that appellate judges do not make their mark in the legal community by affirming."[26]

Judges constituting a Full Court who may have subconscious desires to make their mark in the legal community have ample opportunities of doing so in decisions made as primary judges and reported.

Wright investigated the outcomes of reported civil appeals in Victoria and New South Wales. He cautioned that using only reported decisions might

produce unknown biases in the samples. One would expect that in reported appeal decisions there would be an inherent bias towards decisions allowing appeals. Information set out below from the Annual Reviews of the Court of Appeal which relates to all appeals whether reported or not indicates that this bias exists. However, the significantly higher rate at which appeals are shown to be allowed in reported cases in New South Wales than that in Victoria, would be expected to have a tendency to increase appeals. The cases in the law reports would be likely to be regarded by the legal profession as indicating the operation of the appellate process. The impression that slightly more of those appeals are won than lost is unlikely to be lost on the profession. That impression would be expected to influence decisions to appeal. The figures below are derived from Wright's tables[27] with the addition of data for 1988.

Wright's tables include figures for appeals from civil jury trials. Including those appeals the percentages for 1976 to 1985 are shown as 41% allowed and 59% dismissed in Victoria and in New South Wales 52% allowed and 48% dismissed. The figures above do not include appeals from tribunals or courts other than the Supreme, County and

APPEALS ALLOWED AND DISMISSED IN REPORTED APPEALS IN CIVIL CASES TRIED BY JUDGE ALONE

Table 1

	FULL COURT, VICTORIA				COURT OF APPEAL, N.S.W.			
	SUPREME COURT		COUNTY COURT		SUPREME COURT		DISTRICT COURT	
	Allowed	Dismissed	Allowed	Dismissed	Allowed	Dismissed	Allowed	Dismissed
1976	2	5	3	0	9	18	5	1
1977	4	2	0	2	17	16	3	1
1978	2	3	0	0	10	14	1	3
1979	2	2	1	1	14	15	1	3
1980	4	5	1	0	11	8	0	1
1981	5	7	0	0	14	9	2	0
1982	3	11	1	2	11	13	0	3
1983	5	10	3	2	15	13	0	1
1984	11	10	0	1	26	15	2	1
1985	2	9	0	7	22	13	4	4
Totals	**40**	**64**	**9**	**15**	**149**	**134**	**18**	**18**
%	**38%**	**62%**	**38%**	**62%**	**53%**	**47%**	**50%**	**50%**
1988 No.	**6**	**11**	**0**	**2**	**23**	**25**	**4**	**2**
1988 %	**35%**	**65%**	**0%**	**100%**	**48%**	**52%**	**67%**	**33%**

Table 2

	FULL COURT, VICTORIA				COURT OF APPEAL, N.S.W.			
	SUPREME AND COUNTY COURTS Number of Appeals		SUPREME AND COUNTY COURTS Percentage of Appeals		SUPREME AND DISTRICT COURTS Number of Appeals		SUPREME AND DISTRICT COURTS Percentage of Appeals	
	Allowed	Dismissed	Allowed	Dismissed	Allowed	Dismissed	Allowed	Dismissed
1976	5	5	50	50	14	19	42	58
1977	4	4	50	50	20	17	54	46
1978	2	3	40	60	11	17	39	61
1979	3	3	50	50	15	18	45	55
1980	5	5	50	50	11	9	55	45
1981	5	7	42	58	16	9	64	36
1982	4	13	24	76	11	16	41	59
1983	8	12	40	60	15	14	52	48
1984	11	11	50	50	28	16	64	36
1985	2	16	11	89	26	17	60	40
Total	**49**	**79**	**38%**	**62%**	**167**	**152**	**52%**	**48%**
1988	**6**	**13**	**32%**	**68%**	**27**	**27**	**50%**	**50%**

District Courts. Those appeals are becoming a significant component of appeal work.

The Annual Reviews of the New South Wales Court of Appeal show the position of all appeals regardless of whether they are reported or not. Of the 266 listed appeals in 1986 about 34% (92) were allowed, 56% (148) dismissed and in 10% (26) there were variations or other orders.[28] Of the 294 matters proceeding to judgment during 1987 about 38% (112) were allowed, 53% (155) dismissed and in 9% (27) there were variations or other orders.[29] Considering only those allowed or dismissed, the percentages were:

	% ALLOWED	% DISMISSED
1986	38	62
1987	42	58

The comparable figures for the Victorian Full Court are not available. There is a statement by Mr. Justice McHugh that appellate courts, including intermediate courts, reverse about 30% of all judgments brought before them but the source of this information is not given.[30]

Clearly enough those who have written recently in support of a permanent Court of Appeal for Victoria expect that it would provide more appeals and stimulate the growth of an appellate Bar.[31] I agree with them. I see no reason to doubt that the creation of a permanent Court of Appeal in Victoria would produce a considerable and continuing increase in appeals. This increase would inevitably produce overload in the appeal court and consequent delay unless the number of judges, the facilities and the money devoted to it were correspondingly expanded.

Trial the Centrepiece

Judges of the High Court with extensive trial experience have emphasised that the trial should be regarded as of central importance in dispute resolution. In *Coulton v. Holcombe* (1986) 60 A.L.J.R. 470 at p.473 Gibbs, C.J. said:

"It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish."

In *Chamberlain v. The Queen* [No. 1] (1983) 153 C.L.R. 514 at pp.519-20 Brennan, J. said:

"The central feature in the administration of criminal justice is the jury, and it is a mistake to regard the effect of its verdict as contingent upon confirmation by an appellate court."

To the extent that the centre of greatest importance in the Victorian court system moved from the trial to the appeal level, unfortunate consequences would follow. Citizens would tend to regard the trial judge presiding at the "preliminary skirmish" as performing a relatively unimportant task and reserve their confidence for the judges of appeal. This would diminish confidence in the court system itself. Trial judges would tend to see themselves in the same light and question the value of applying themselves with the diligence and responsibility they now display. These tendencies would interact and each would aggravate the other.

The increase in appeals is inseparable from an increase in the cost of litigation. It might be said that the additional cost would mainly come from the Appeal Costs Fund but the resources of that fund have to be provided by the community. A Government ready to shoulder the responsibility for expanding that fund should spare a thought for the ordinary litigant. It is hard enough today for the citizen who is not wealthy and who does not have full legal aid, to marshal the resources necessary to go as far as judgment at the trial. If appeal becomes a common incident of litigation the ordinary citizen's financial difficulties are compounded. If the appeal process becomes a common component of a piece of litigation, that favours the party with access to more funds. It also increases the time that litigation takes.

Criminal Appeals

The proposal in Option 1 in respect of criminal appeals illuminates in the sharpest perspective the deficiencies inherent in the whole proposal for a permanent Court of Appeal. No one should overlook that that option involves accepting a structure that has been resisted in New South Wales. Under Option 1 it would be the permanent members of the Court of Appeal, who might have had no experience of conducting criminal trials, who would hear the criminal appeals.

That would be a step backwards of a very high order. In my opinion there is no experience which is as essential for a judge deciding criminal appeals than experience as a judge conducting criminal trials. After a practice at the Bar in which I frequently appeared in criminal trials and appeals I was surprised to find there was so much to learn about the anatomy of a trial from the judicial aspect and the realities of conducting one. It is because everyone commences with a lot to learn that judges who have never practised in criminal law may become superb trial judges in the criminal lists. I need only mention the late Sir Alistair Adam and Mr. Justice Newton. I consider that for the decision of criminal appeals a judge needs an appreciation of criminal trials, their atmosphere and the significance of what occurs in them. As this is largely learnt by a process of osmosis, judicial experience in conducting them is essential. It can not be learnt from books.

Option 1 involves a regression from recent advances. To the credit of the judiciary, the fiction has been abandoned that on appointment to the

bench knowledge of things not previously experienced or known descends upon a new judge in some mysterious way. Judges, appreciating their need to learn or improve particular skills of their vocation, now regularly attend courses, seminars and conferences designed to provide or enhance the necessary skills.

Option 1 would destroy an institution of great value to the Victorian community, the Full Court sitting as the Court of Criminal Appeal. Stephen Charles Q.C., a former Chairman of the Bar, in his article critical of civil appeals had this to say:

"No complaint can possibly be made of the system for hearing criminal appeals. They are, as one would expect, given priority, and the Victorian criminal appellate jurisdiction is the envy of many other parts of the world."[32]

I am sure that in 1974 I stated the view the Bar then held, when, as Chairman of the Bar, I said at the farewell to Sir Henry Winneke:

"Because it was your practice to preside over the Full Court whenever practicable, you have had a great influence on the Full Court in the last decade. This is a court in which the Bar takes great pride. It regards the Full Court of the Supreme Court of Victoria as a most satisfactory appeal court . . .

"The Full Court derives great strength from the fact that its members, when not sitting in the Full Court, are sitting as judges of first instance and remain familiar with the atmosphere of the trial situation. Judgments of the Full Court of this Court command respect throughout Australia and beyond . . .

"Many of us think that your Honour's greatest contribution has been to the criminal law of this country . . .

". . . Your Honour has always regarded the criminal law as important. You have ensured that the Full Court, sitting as a Court of Criminal Appeal, is a court in which appellants win cases that they ought to win and lose cases that they ought to lose. One can ask no more than that.

". . . Nor is it an accident that the decisions of the Full Court in criminal cases are so highly regarded throughout this country."[33]

That statement was made when I had practised for 11 years as a silk with a substantial practice in civil and criminal appeals before the Victorian Full Court and in the High Court on appeals from that and other Full Courts and appeals of first instance to the High Court from Supreme Courts of States and Territories.

In Victoria because all judges have experience of conducting criminal trials any member of the Court may be allocated to hear criminal appeals. An appeal court hearing criminal appeals may without change of composition move to civil work and back as the occasion warrants.

The community should hesitate long before jettisoning a criminal appeal system which has so carefully and successfully been constructed.

In 1983 I was involved in preparing the collection of views of its members which the Australian Institute of Judicial Administration provided to the Constitutional Convention on the then current proposals for an integrated court system for Australia. Many members were judges. I was struck by the strength of the judicial preference for a criminal appeal court consisting of judges with current experience in criminal trials.[34]

As Chief Justice, Sir Laurence Street applied to members of the Court of Appeal in New South Wales the pre-requisite which was part of the recommendations of the Donovan Committee in 1965 for a Criminal Division of the Court of Appeal in England. In a Policy Statement issued early in 1987 Sir Laurence indicated that, with the exception of the President whose statutory position was recognised, assignment of judges of appeal to the Court of Criminal Appeal would depend on their spending a few weeks each year trying criminal cases themselves.[35] In 1986 and 1987 the only judge of appeal who sat in the Court of Criminal Appeal was the President who sat on five days.[36] Mr. Justice Kirby has said that it was a source of concern that criminal appeals remained the province of the Court of Criminal Appeal.[37] At the end of 1987 legislation transferred from the Court of Appeal to the Court of Criminal Appeal appeals from decisions on applications to stay a criminal proceeding in the District Court on the ground that it involved an abuse of process or denial of a right to a speedy trial.[38]

Under the present Chief Justice, Mr. Justice Gleeson, a new arrangement for the Court of Criminal Appeal was recently adopted. From September two teams of three judges will usually sit for two weeks a month, rostered so that on each day of that two weeks one team is sitting while the other team is engaged in preparation or discussions or writing judgments. Ordinarily two of each team will be judges from the Common Law Division with current experience in criminal trials. Usually the third member of each team will be the presiding judge and this duty will be shared between the Chief Justice, a Judge of Appeal, the Chief Judge at Common Law and one of the most senior Common Law Judges. Thus on about three days in each month it might be expected that a member of the Court of Appeal will be sitting in the Court of Criminal Appeal, and that member will be sitting as the presiding judge unless it happens that the Chief Justice is also sitting.

The actual model in New South Wales of a permanent Court of Appeal and a Court of Criminal Appeal which is almost entirely separate, is not amongst the options in the Attorney-General's Discussion Paper.

Reluctance to Overrule Colleagues?

Recent writings have based on a remark by Sir Raymond Evershed[39] the comment that so long as trial judges review each other's work the risk exists that the public and the legal profession will believe that occasionally appellate review may have been influenced, even unconsciously by the pressures of comity and collegiality with other judges of the court.

That is not a suggestion that I have heard otherwise made. We are all overruled by our colleagues and we all join in overruling others. Perhaps some comfort comes from the figures in Table 1 above of the outcome of appeals in reported cases, which happens to show the same percentages for Supreme Court and County Court judges.

The existence of any belief in a reluctance to overrule colleagues seems inconsistent with the Victorian criminal appellate jurisdiction being regarded as the envy of many other parts of the world. Full Courts drawn from the same judges hear civil appeals from the same single judges of the Supreme and County Courts, as hear criminal appeals.

"Whatever be the reality, there is no doubt that the introduction of a permanent Court of Appeal would be seen as downgrading the other members of the Supreme Court."

A time when much of the professional community is moving to peer review as a desirable organisational safeguard, seems an inappropriate time to abandon our long established system of judicial peer review.

Recruitment

Whatever be the reality, there is no doubt that the introduction of a permanent Court of Appeal would be seen as downgrading the other members of the Supreme Court. A friend of mine, a senior judge of the Supreme Court of New South Wales who was not appointed to the Court of Appeal when the Askin Government, which introduced the legislation creating it, appointed its first members, told me:

"I was appointed a first class Supreme Court judge and now I have been made a second class judge."

Such perceptions are likely to continue. Mr. Justice-Else Mitchell writes:

"In later years the division of the Court's function has proved an obstacle to distinguished members of the New South Wales bar accepting appointment to the State Court and preferring instead appointment to the Federal Court of Australia."[40]

With a permanent Court of Appeal, the majority of positions on the Victorian Supreme Court to be offered to leaders of the Bar would be as trial judges only. Such an offer would be likely to be less attractive than the present offer involving trial and appeal functions. If some of the trial judges hankered for promotion to the Court of Appeal that would tend to detract from the strength of their independence from Government.

There is great community advantage if the Supreme Court provides the job satisfaction to attract as judges those vigorous leaders of the Bar who will enjoy their appellate time in surroundings of appeal books, counsel, statutes, reports and the law, but also relish their trial time when witnesses, juries and human experience join their environment. Whenever I hear it said that "So and So" would be no good at trials but would be a great appeal judge, I regard that as the description of one unsuitable to hear appeals in Victoria.

On the available information it is not possible to go beyond speculation as to the reason or reasons for the rate of appeal in Victoria being relatively so low. Mr. Justice Kirby having mentioned, as an explanation of the disparity between Victoria and his State, the commercial importance of Sydney, regarded it as unconvincing because of the greater number of appeals in Queensland, South Australia and Western Australia. He said:

"It may be simply a matter of differing traditions. It may even be, as one writer has suggested, greater satisfaction with the judgments at first instance of the Supreme Court of Victoria. It may be more likely to be related to the listing arrangements for appeals in Victoria . . ."

He observed that, whatever the explanation, the disparity was a source of concern to at least some members of the Victorian Bar and added:

"Any community which seeks to attract and hold commercial business must provide an efficient court system, including an efficient appellate system, to solve the disputes of business. That much is self-evident."[41]

I do not take the view that the available information leads to the inference that the most likely explanation for the low rate of appeals in Victoria is that it has had an inefficient system of appeals.

The possibility can not be excluded that the appointment as Supreme Court judges of persons assessed as having the aptitude and capacity to do both trial and appeal work has led Victorian citizens and practitioners to have a high degree of confidence in the decisions of primary judges. So long as this must be treated as being a possibility, it would be unwise to introduce a system which, by altering the pattern of recruitment and increasing the rate of

appeals, would risk the destruction of that level of confidence, if it exists.

Use of Judicial Resources

In Victoria at present any judge can be allocated to any part of the work of the Supreme Court. Option 1 contemplates that the permanent appellate judges would deal almost exclusively with appellate work. As in the Court of Appeal in New South Wales, they would be likely to operate with a very high degree of autonomy and in substance as a separate court.[42] A Victorian Court of Appeal would be more isolated from the rest of the Court because, unlike the arrangement in New South Wales, the Chief Justice would not be a member of it.

In New South Wales the Court of Appeal consists of eight members, the Chief Justice, the President and six judges of appeal and hears only civil appeals. In its Annual Review, 1987, the problem of delay was said to be:

". . . a source of special concern in a collegiate court of small numbers the overwhelming bulk of whose work cannot be deflected by procedures of leave or assignment elsewhere."

In that passage "leave" appears to refer to the procedure of not hearing appeals unless leave to appeal is granted. Difficulty was being encountered in having sufficient dates available to assign to appeals awaiting hearing. During 1987 it had not proved possible for judges to adhere to the policy of sitting no more than 3½ days a week except in urgent cases.[43]

At the time of that review the President had under consideration, although the Court of Appeal had not adopted, a number of innovations to tackle problems of delay, including

- ☐ an order of the Court in appropriate cases that the appeal be dealt with on written submissions only or with an oral hearing within a strictly limited time, along American lines,
- ☐ the assignment of a fixed maximum time to each party and the preparation of written submissions taking into account the time assigned and
- ☐ the introduction of elaborated requirements for written submissions or briefs.[44]

The Report on a Review of the New South Wales Court System, May 1989, by Coopers & Lybrand WD Scott noted that approximately 400 matters were pending in the Court of Appeal. Of those matters, 100 were ready for allocation of a hearing date, while the remaining 300 matters were pending awaiting settlement of index, printing and other associated registry work. It was observed that there was insufficient data collected to provide an overview of disposition times in the Court of Appeal.[45]

The Appeal Division which is about to be introduced in Victoria to do civil and criminal appeals would, as a matter of ordinary practice, be able to be kept at full strength, uninterrupted by the leave or other absences of judges. Allowance has been made for the leave entitlements of members of the Court in the system adopted by the Council of Judges last February. If at any time the full strength of the Division was not needed for appeal work, no inhibitions would be involved in allocating one or more members to other lists until again required in the Division.

A combination of human nature and an increasing number of appeals would make it unlikely that permanent appellate judges of a Victorian Court of Appeal would do any of the trial work of the Court. Judges regarding themselves as appointed to the higher level would be reluctant to acknowledge that they needed trial experience or to do what they regarded as lower level work carrying with it the inherent risk of loss of face by being upset on appeal.

Administrative Tensions

No imagination is needed to foresee the administrative and other tensions that would be produced where there would be a Chief Justice of the whole Court and a President of a virtually autonomous part of it to which the Chief Justice would not belong. Two summits of administrative authority within the one Court would inevitably produce difficulties.

"Judges regarding themselves as appointed to the higher level would be reluctant to acknowledge that they needed trial experience."

The Second Option

It would be a community misfortune if all attention were directed to the unacceptable features of Option 1, and Option 2, which shares most of those features, were to slip through unnoticed. As the features which make it undesirable have already been discussed in the context of Option 1, I will deal shortly with them.

Presumably any of the four permanent appeal judges to be appointed directly from the Bar or elsewhere would be scholastic, conceptualising types with no heart for trial work. I have stated my lack of enthusiasm for such appointments. It is difficult to see the advantage of being able to appoint an existing member of the Court to one of the four permanent appeal positions. The Chief Justice already has ample power under S.9 of the Supreme Court Act 1986 to allocate any judge or judges to the Full Court to hear appeals. Because of their function the permanent appeal positions would widely be regarded as superior, whatever the statute says. The problems of recruiting to a court regarded as divided into first and second class positions would exist in full. The risks to independence from Government of having a large number of judges at

the lower level, some of whom may be desiring appointment to the small number of top positions, would be obvious. The great majority of the judges of the Court would be likely to place work satisfaction above status and decline a permanent appeal appointment so as to continue in trial work while doing some appeal work. Having four permanent appeal judges would have a tendency to increase appeals though not to the same extent as Option 1. For reasons I have mentioned it would be most unlikely that the four permanent appeal judges would do any civil or criminal trial work. Those not appointed from the Court would be unlikely to get the trial experience which it is desirable for an intermediate appeal judge to have. Probably, some of the four would lack the experience appropriate for allocation to criminal appeals, as from appointment. Those with criminal trial experience would in the course of time lack current trial experience. New types of trials come on to the forensic stage and old types diminish or disappear.

Appellate Bar

The new Appeal Division of the Supreme Court will not be structured so as to produce a large appellate Bar. It will, however, enable those who do appellate work to pursue their vocations within an efficiently operating system and this will be to the advantage of their clients and themselves.

FOOTNOTES

1 In this article I set out my own opinions. I do not write as a spokesman for the other Judges. I do not imply that the other Judges would all agree with all I write.

2 To reduce delays the Council decided on a comprehensive and interrelated reorganisation including moving to terms and placing a judge in charge of each of the Criminal, Commercial and Causes Lists for one or two years. The Judges consider that their aim of implementing effective caseflow management in the Court would require as the absolute minimum two more judges with two more judges' chambers, two more courts and the necessary additional court staff. It would involve appointing a Registrar of Civil Appeals and placing the conditions and security of tenure of Masters on an acceptable basis. The memorandum from the Chief Justice of 2 March 1989 informing the Attorney-General of the proposed changes is set out in the First Annexure to the Attorney-General's Discussion Paper, The Higher Court System in Victoria, (May 1989).

3 These important improvements are not to be postponed pending provision being made for, and the appointment of, two more judges. In the meantime the Division will be operated by the Chief Justice and six other judges. In this article I discuss the Appeal Division as it will operate when it consists of eight judges.

4 See, for a recent criticism, Improving the Court System (1987) 61 Law Institute Journal 768.

5 The High Court with McHugh, J., N.S.W. Bar News, Autumn 1989, 5 at p.6.

6 Mr. Justice McHugh, Law Making in an Intermediate Appellate Court: The New South Wales Court of Appeal (1987) 11 Sydney Law Review 183.

7 The supporters of the model of the New South Wales Court of Appeal include its Judges in the Annual Review, 1986, pp.5-18, 29-36 and its President Mr. Justice Kirby in his article, Permanent Appellate Courts — The New South Wales Court of Appeal Twenty Years On ("Twenty Years On"), (1987) 61 A.L.J. 391 and his lecture to the Monash University Law Students Society on 9 October 1987, Permanent Appellate Courts — The Debate Continues ("The Debate Continues"), most of which is now published in (1988) 4 Australian Bar Review 51. In the former article (at p.405) he stated the belief that the conclusion is inescapable that the objectives of efficiency and of developing consistent and well thought out principles are better attained for the good government of the community by permanent appellate courts.

8 An Introduction to Politics, (London, Allen and Unwin), p.22.

9 at pp.17-25

10 op. cit. at p.20.

11 Report of the Advisory Committee (1987), pp.40-2.

12 op. cit., The Debate Continues (1988) 4 Aust. Bar Rev. 51 at pp.56-7.

13 ibid. at pp.59-60.

14 Judge and Jurist in the Reign of Queen Victoria (Stevens, 1959), p.15.

15 A Comment on the Proposal for Creating an Australian Court of Appeal (1983) 57 A.L.J. 167 at p.167.

16 op. cit. pp.185-6.

17 op. cit., Twenty Years On, p.394.

18 at p.8. The paper which is unpublished was presented at the Eighth World Congress on Procedural Law, Utrecht, Netherlands, 24-8, August 1987.

19 at pp.8-9 and 27-8.

20 Court of Appeal, Supreme Court of New South Wales, Annual Review, 1986, p.63.

21 Court of Appeal, Annual Review, 1987, p.55.

22 at p.17.

23 at p.43.

24 The New South Wales Court of Appeal (1987) 61 A.L.J. 752 at p.753.

25 cf. *Cashman v. Kinnear* [1973] 2 N.S.W.L.R. per Jacobs, J. at p.499.

26 op. cit. p.28.

27 ibid pp.28-30. Note that the figures are for the law reports of the various years which are not all confined to decisions made during the year of the report. The figures for the 1988 reports were taken out for me from [1988] Victorian Reports and [1988] New South Wales Law Reports, Volumes 12, 13 and 14 (to p.459, the remainder not having been published at the time of writing).

28 Annual Review, 1986, p.61.

29 Annual Review, 1987, p.47.

30 op. cit. p.186.

31 Stephen Charles Q.C., op. cit. pp.16-7; Mr. Justice Kirby, op. cit., The Debate Continues, at pp.62-4.

32 op. cit. at p.17.

33 [1984] V.R. at pp.xliv-xlv.

34 Representative summaries of views expressed, but not the individual expressions of view, appear in Collection of Views Expressed to the AIJA on the Proposals for an Integrated Australian Court System, 8 April 1983, p.7.

35 The memorandum containing the Policy Statement distributed by the Bar Association to its members was dated 12 March 1987.

36 Court of Appeal, Annual Review, 1987, p.53.

37 op. cit., Twenty Years On, pp.401-2. See also p.405.

38 Court of Appeal, Annual Report, 1987, p.25.

39 The History of the Court of Appeal (1951) 25 A.L.J. 386 at p.388.

40 op. cit. at p.763.

41 op. cit., The Debate Continues, p.63.

42 Mr. Justice Kirby, op. cit., Twenty Years On, p.392; Court of Appeal, Annual Review, 1986, p.2.

43 Annual Review, 1987, pp.23-4.

44 ibid pp.24-5.

45 p.157 and Appendix D, p.D21.

PUBLIC FINANCE AND THE COURTS

Michael Fleming looks at the recent A.I.J.A. study on the financing of the Australian court system.

ARE THE COURTS "RUNNING DOWN"? ARE they getting a fair share of available public expenditure outlays? Is the Victorian court system less favourably financed than, say, that in New South Wales? Has expenditure on the traditional courts, the Supreme, County and Magistrates Courts, suffered in competition with new specialised tribunals, or by other components of a notional "law and order budget" such as police and prisons?

Until recently, debate on such questions would have been hindered by a profound lack of publicly available statistical data. Now, with the recent publication by the Australian Institute of Judicial Administration of the research study "Financing the Australian Courts", a mass of statistical information has been for the first time assembled covering court system expenditure, from 1950 up to 1987. The information also covers expenditure over the same period on police and prisons.

The first point that stands out is the astonishingly poor source material that the study's authors, Professor Glen Withers and Dr Alan Barnard, had to work with. As between the jurisdictions, financial reporting is sharply inconsistent. Indeed, over the period under review, consistency in presentation of financial data has not been maintained even within jurisdictions. In some instances, the authors had recourse to estimates based on expenditure patterns in other States to produce series for States with especially inadequate information. This is particularly the case in regard to Victoria. The study says: "Publicly available information about the cost of the Victorian court system for the thirty years studied is poor. The Treasurer's *Statements* do not provide an adequate basis on which to determine expenditure by the different jurisdictions. The *Estimates*, normally a good source of supplementary information, do not detail salary payments within the various sections of a Department after 1974."

Indeed, the shortcomings in the data generally are such that they raise, say the authors, . . . "serious questions of public efficiency and accountability in the administration of the courts . . . It may also be that officials and other responsible persons within the legal and judicial system themselves also have inadequate information."

I turn now to an outline of some of the more interesting statistical findings.

Expenditure on the Victorian courts (comprising Supreme, County, Magistrates and Industrial Courts, relevant salaries and pensions, court administrative and working expenses, court reporting, witness and jurors expenses and court building and maintenance costs) totalled $45.731 million in 1985. In 1950 the figure was $713,000.

By comparison, expenditure on the New South Wales courts (comprising as above, but also the Land and Environment Court) came to $105.380 million in 1985, up from $1.312 million in 1950.

A fairer comparison is achieved by comparing State expenditure on a per capita of population basis and, insofar as longitudinal comparisons are attempted, "constant" dollars i.e. adjusted by a cost of living index. Such an approach shows Victoria in 1985 at $4.40 (in 1975 dollars) per capita expenditure on the court system, up from $2.12 in 1950. The

comparable NSW figures for 1985 are $7.65, and $2.29 for 1950.

Per capita spending on the court system in 1985 was lower in Victoria than in every other State and very substantially so, being almost 50% less than the Australian per capita average. There are only rare occasions since 1950 when Victoria has not had the lowest per capita expenditure on the courts of any of the States. Accordingly, it is unsurprising that one of the study's principal findings is —

"Victoria has been distinctive among the State court systems for its low recorded expenditure per capita on courts . . ."

Although Victoria may have done more poorly in per capita terms than other States, the growth in expenditure on the courts in the post-war period is still very significant, representing substantial growth in real terms throughout the period.

This is matched by the aggregate Australian figures which show expenditure on the courts throughout Australia (including Federal) as 0.08% of national gross domestic product in 1950 rising reasonably steadily to a peak in 1985 of 0.157%.

The study also records spending on police and prisons. For Victoria, the 1985 expenditure on police was $338.752 million and $60.839 million on prisons. The corresponding N.S.W. figures were $429.149 million and $113.203 million respectively. It is one of the intriguing features of the research to see the stability in the respective shares of "law and order" expenditure over time. Thus, in 1950, court spending was 12.27% of total Victorian spending on law and order, with police and prisons consuming 76.24% and 11.49% respectively. By 1985, the respective shares were courts 10.27%, police 76.07% and prisons 13.66%. The NSW and other State figures show a similar stability over time although the proportionate shares differ as between the States to some extent. As the above figures show, NSW courts took up 16.27% of NSW law and order expenditure (compared with 12.27% in Victoria).

It is to be noted, again, that *the aggregate* of court, police and prison expenditure in per capita terms has been reasonably consistently lower in Victoria than in all the other States throughout the post-war period.

Although the focus of the study is on expenditure, figures have also been gathered for "revenues" associated with the court system such as court fees, court fines, jurors fees, sales of transcripts and the like. The data suggests that "revenues" of this type make a very substantial contribution to the total cost of the courts themselves. Thus, in 1985 such court revenues totalled 58.74% of court expenditure. The average of States together with the Commonwealth was 50.41%. Notable outlyers were the Commonwealth itself whose revenues comprised only 12.10% of expenditure, down from 66.50% in 1970, and Western Australia, whose revenues *exceeded* its court expenditure by 9.95%.

Michael Fleming: *notes the low per capita spending on Victorian courts (and Victorian law and order).*

Of course, just because a court system's outlays have increased in real terms, one is less reassured if the demands placed upon it have also risen disproportionately.

Obviously, this type of inquiry is rather resistant to simple statistical analysis but the authors have proferred for consideration a set of "selected law and order indices" as follows:

SELECTED LAW AND ORDER INDICES

1950-1980 (1950 = 100)

	1950	1960	1970	1980
Court expenditure ($ 1975)	100	144	247	458
Law and order expenditure ($ 1975)	100	144	230	451
Gross Domestic Product ($ 1975)	100	151	248	350
Motor vehicles registered	100	190	317	468
Offences charged	100	190	247	360
Higher court committals	100	254	322	425
Average prisoner numbers	100	172	235	225

The authors report ". . . the impression, and emphatically that is all that is fair at this point, . . . that resources provided have grown more than the broad range of indicators of requirements. What remains unanswered here, and hence is the recommended object of further research, is whether such indicators are too broad an expression of a changing set of demands upon the judicial system."

One cannot but agree with these cautious comments. It can readily be imagined that a different

set of indices may suggest other conclusions. At the most basic level, this writer would be interested to see a series based on the annual total of initiating process issued in the courts. In the commercial field, some indicator of commercial activity, such as the annual volume of cheques negotiated, perhaps. And what about more comprehensive social indicators such as, for example, the number of applications filed for marriage dissolution?

Having described briefly some of the more interesting features of the study may I hazard some observations.

First, it does seem clear that the quality of reporting of court related public expenditure has been very poor in Victoria and throughout Australia over a long period and is still deficient.

What is particularly disappointing is the inconsistency in presentation over time and between jurisdictions. Is it inappropriate to expect that the Government co-ordinating agencies and the respective Auditors-General will develop standards for public expenditure reporting that are, to the extent that it is possible, more meaningful, but at minimum, be applied uniformly and consistently?

"Even with that rise (in court expenditure 1985 to 1987 of 25.9%), Victoria was still the lowest spending State on the courts with its per capita expenditure 13.21% lower than . . . the other States."

Second, and contrary to, I think, received wisdom, it is apparent that expenditure on the courts has increased substantially in real terms over the last

JUDICIAL SALARIES

A review by *Chris Jessup* QC of recent developments affecting Federal State Judicial Salaries.

A FAMILIAR THEME

In the light of the contemporary debate concerning the relevance of earnings at the Bar to the fixation of judicial salaries, and of the undoubted fact that, many years ago, judicial salaries stood much higher relative to other incomes in society than they do today, the following observations by Mr. George Turner introducing the Supreme Court Judges' Salaries Reduction Bill in consequence of his austerity budget in 1894, will be of interest:

Honorable members must not forget the fact that the gentlemen who now occupy the positions of Judges were prior to their appointments earning far larger incomes than they at present receive, and that they accepted the lower rates on the distinct understanding that a contract was then being made with them practically for life, that certain sums should be given to them by way of remuneration.

Mr. Longmore had a ready response to this

decades in Victoria and throughout Australia and is currently about as high as it has been over the post-war period. Whether that increase has been sufficient taking into account increasing community demands on the system is, of course, another matter.

Third, the low per capita spending on Victorian courts (and Victorian law and order generally) as compared with the other States apparent throughout the study period is very distinctive. The basic data have so many difficulties that the result may be little more than a statistical artefact. The authors say though, that ". . . one possible explanation for the observed Victorian outcome could be that not only might there be some economies to greater population size (the Grants Commission suggests otherwise) but also instead some economies to *area*." I confess to finding this unpersuasive. If it were so, one would expect to see a consistent pattern of lower per capita cost to the Victorian Government in delivering other but comparable programs outside the law and order area. That pattern is not evident. The phenomenon requires a better explanation.

Finally, I should note that the study contains a postscript updating a very small part of the information for the years 1986 and 1987. The most notable aspect is a stagnation or decline in real expenditure on courts, police and prisons throughout Australia, particularly in 1987. The court share of law and order expenditure has declined Australia wide. Standing out sharply against this trend is a very significant rise in per capita spending on courts and on law and order generally in Victoria. In real terms, the rise in court expenditure 1985 to 1987 was 25.9%. Even with that rise Victoria was still, though, the lowest spending State on the courts with its per capita expenditure 13.21% lower than the per capita average of the other States.

As will readily be seen, the information presented in this study raises more questions than it answers. The Australian Institute of Judicial Administration and the authors of the study are nonetheless to be congratulated for their illuminating work which will be a spur, no doubt, to further research as well as debate and discussion.

proposition:

A great deal has been said about gentlemen giving up lucrative practices to go upon the bench, but honorable members who made those statements omitted to mention the fact that barristers in practice were subject to the possibility of their brains going astray from overwork, when they would have nothing to retire upon.

A less florid way of putting much the same proposition is to be found in paragraph 92 of the Attorney General's recent discussion paper "The Higher Court System in Victoria".

Chris Jessup: *appointment to the judiciary should be regarded by barristers as a "promotion".*

The Judges' Salaries Act 1895 made no reduction in the salaries of existing members of the Court, but reduced the salary payable to a future Chief Justice from 3,500 pounds to 3,000 pounds per annum and reduced that payable to a future puisine Judge from 3,000 pounds to 2,500 pounds per annum. Supreme Court salaries remained at these levels until 1947, when they were increased to 4,000 pounds and 3,500 pounds per annum respectively. Further increases were made over the years, until the Judges' Salaries and Pensions Act 1980, passed in consequence of the Grimwade Report, fixed the salary of the Chief Justice at $72,000 and that of a puisne judge at $64,000, with annual allowances of $3,750 and $3,000 respectively.

The problem in recent years, of course, has been the risk that the independence of the judiciary may be eroded not by legislative intervention to reduce the salaries of serving judges, but rather because, since inflation so effectively erodes the real value of all incomes in society, the judiciary is dependent upon the legislature to make the necessary upward adjustments in the level of money salaries. The nature of this dependence is complex. The question is not simply whether or not there should be an increase; neither is it simply one of timing, although that too is important. The burning question as to the adjustment of judicial salaries concerns the philosophical justification for increases. Put shortly, should the adjustment of judicial salaries be related to adjustments made to wages and salaries in the community generally, and if so how, or should judicial salaries be regarded, in some sense, as a "special case"?

A LITTLE BIT OF INDEXATION

The problem of inflation was dealt with by the legislature in the Act of 1980 by way of the following provision:

Where the Attorney-General is satisfied that the Australian Conciliation and Arbitration Commission has made a determination that increases or authorises the increase of wages that are subject to the jurisdiction of the Commission that is generally or substantially applicable to all such wages he shall issue a certificate that the increase is to be applied to the salary of the Chief Justice and the puisne Judges.

This provision was enacted in the heady days of wage indexation, when the federal industrial Commission sat regularly to decide what increase should be awarded to wages and salaries generally to reflect increases in the cost of living. The provision served the Supreme Court Judges well, but only for the first six months of its operation. Increases were certified in January and April 1981 but, less than 8 months after the ink was dry on the Governor's assent to the 1980 legislation, the federal industrial Commission abandoned wage indexation.

This did not mean that wage and salary earners generally stopped getting increases and indeed, the important Metal Industry Award was varied to provide for increases for a tradesman of $25 per week from late 1981 and a further $14 per week from mid-1982. The judiciary did not feel the benefit of these developments, as the Commission made no such determination as would have activated the Attorney-General's obligation to issue a certificate. The legislature finally rectified the position in the Judges' Salaries Act 1982 which awarded an 11.2% increase with effect from 14th November 1982, and, in effect, tied future increases for Supreme Court Judges to increases received by permanent heads of Government Departments. Unfortunately the judiciary missed out again, as the permanent heads had, by two increases in November 1981 and January 1982, already received the 11.2% increase which the judiciary received in November 1982. Indeed, with effect from the same day upon which the judiciary were awarded their 11.2%, the permanent heads received a further increase of 7%. This 7% increase, however, being contemporaneous with the enactment of the Judges' Salaries Act 1982, did not form the basis of any subsequent increase for the judiciary.

"The independence of the judiciary may be eroded not by legislative intervention . . . but rather because the judiciary is dependent upon the legislature to make the necessary upward adjustments in the level of money salaries."

It is hard to avoid the conclusion that, at one and the same time in November 1982, the legislature both established a policy for the adjustment of judicial salaries and departed from that policy.

THE ROBINSON INQUIRY

In 1986 the State Government established an inquiry, constituted by Mr. James Robinson, a recently retired presidential member of the federal industrial Commission, into the total remuneration packages of Supreme Court Judges and Masters, County Court Judges and the County Court Master, and Magistrates. In his report made on 20th June 1986 Mr. Robinson recommended that the salaries of Supreme and County Court Judges be increased by 7%. This would do no more than grant to the Judges the balance of the "community movement" in salaries which had arisen from the two-stage metal industry increases of late 1981 and mid 1982. He

made a number of other recommendations concerning the procedure to be adopted for future reviews of judicial remuneration, and these were, in the main, embodied in the Judicial Salaries Act 1987. In his second reading speech on 25th March 1987, the Attorney-General said that the 7% increase would be deferred "in the present climate of wage restraint". That increase, of course, had its genesis in industrial developments of 1981/82 which could on no view be described as occurring within a climate of wage restraint. The 7% increase was eventually awarded to Supreme Court and County Court Judges with effect from 11th September 1988.

In introducing the 1987 legislation, the Attorney-General said that the Government believed that it was appropriate for the remuneration of Victorian judges to be assessed in the same way and on the same basis as the remuneration of other judges. The way in which this policy was translated into legislation may be seen from sub-sections (3), (4) and (5) of s.82 of the Constitution Act 1975. Salary increases occur on the certificate of the Attorney-General. The Attorney is obliged to have regard to salary increases payable to federal judges, to decisions of the federal industrial Commission, to the latest report of the federal Remuneration Tribunal, and to any other relevant report. When there has been an increase granted to federal judges, the Attorney must determine whether, taking the above matters into account, there should be a corresponding increase to state judges. In addition, the Attorney may at any time determine increases for Victorian judges and, at least once every 5 years, he must establish a review of judicial salaries.

THE FEDERAL REMUNERATION TRIBUNAL

These considerations take one to the federal scene. The Remuneration Tribunal's role, in relation to judicial offices, is to enquire into, and report to the Minister on, the question whether alterations in remuneration are desirable. The implementation of any recommendation of the Tribunal is a matter for the Parliament. In its 1988 review, the Tribunal recommended that the remuneration of High Court Justices be increased from their then (and still) existing level of $115,582 p.a. to $210,000 p.a. and that Federal Court salaries be increased from $98,161 p.a. to $180,000. An increase of a more modest order was also recommended in the allowance payable in each case. These recommendations were rejected by the Commonwealth Government.

The Rumeneration Tribunal gathered information from a wide range of sources, and concluded that judges' remuneration was too low. It pointed to the recent experience of judges resigning from office because of inadequate remuneration. As to the recruitment of judges, the Tribunal said:

The Tribunal has consulted widely with those concerned with the recruitment of lawyers to the Bench. It has spoken to Chief Justices, judges, Attorneys General and senior officers in government service. It has been surprised by the information given to it as to the difficulty in obtaining appropriate lawyers for judicial office.

"Barristers remuneration was found to be in the order of 4 to 5 times that of existing judicial salaries, even excluding the very highest earners from the comparison."

While recognising that appointments of quality to the judiciary had been made, the Tribunal expressed its view that unless there was a change, the damage to the judiciary would be both substantial and immediate. The Tribunal had been given, in confidence, detailed figures of the remuneration received by lawyers from whom it was to be expected that judges would be recruited. Such remuneration was found to be in the order of 4 to 5 times that of existing judicial salaries, even excluding the very highest earners from the comparison. The Tribunal referred also to increases which had occurred in the level of judicial remuneration in various States, and to the expected increase in remuneration for high office holders in Government bodies consequent upon certain measures by way of business deregulation which were proposed.

The Remuneration Tribunal has now been asked to provide further advice on appropriate remuneration for the federal judiciary. According to a Press Release from the Minister for Industrial Relations dated 1st May 1989, the Tribunal has been requested "for broader wages policy and equity reasons, to report on judicial remuneration in the current wage fixing context." It is understood that this request was addressed to the 3 members of the Tribunal as individuals, rather than as the Tribunal. The Law Council has described this procedure as highly improper, alleging that it strikes at the independence and utility of the Tribunal.

It is believed that the federal Government takes the view that Federal Court Judges (whose allowance is currently $5,419 p.a.) should be paid at least as much as the highest paid State Supreme Court Judges (in Queensland, where the total of salary and allowance is $120,150 p.a.). In the Government's view,

the present position amounts to an "inequity" which can be rectified under current principles of salary determination as applied in industrial tribunals. Whether this is so must be subject to some doubt, as, under the principles, a higher rate cannot be used for comparison if it is "vitiated by any reason such as an increase obtained for reasons inconsistent with the principles . . . applicable at the relevant time." If Federal Court Judges are awarded an increase to no less than the Queensland salary level, the Victorian Judges (presently on $104,595 p.a. plus an allowance of $5,320 p.a.) can be expected to benefit from an increase under the Act of 1987, but will the Attorney-General take the view that they should be paid as much as Federal Court Judges, or perhaps a little less?

"One cannot but see force in the Remuneration Tribunal's observations . . . that the gap between the earnings of those senior at the Bar and judicial salaries has become intolerably large."

The whole subject has become intensely political, which is the last thing it should be. At the federal level, increases in judicial remuneration require an Act of Parliament, that is to say (significantly in present times) legislation passed by both Houses. Unless the report of the Remuneration Tribunal is acted upon, what point is there in having such a Tribunal at all? The point at which (perhaps successively less objective) reports are no longer rejected becomes entirely a matter of politics. Quite apart from inadequacy in remuneration, this state of affairs must make any practitioner concerned about his or her future independence as a member of the judiciary think twice before accepting an appointment.

In Victoria, the matter is in the hands of the Attorney-General. Until there is an increase for the federal judiciary, the State Attorney-General is under no obligation to take any action at all. When the circumstances arise in which he is obliged to take action, his obligation is to have regard to the factors specified in the legislation. May he still hold the salaries of Victorian judges below those of their federal counterparts if there is, at the time when he comes to make his decision, a "climate of wage restraint"?

POLITICS PHILOSOPHY AND ECONOMICS

As indicated at the outset, the judicial salaries debate inevitably becomes one of philosophy. It is easy enough to assert that the adjustment of judicial salaries should be something which occurs completely outside the political process. It is much harder to define what this means in practice. Does it mean that judicial salaries should be automatically and permanently protected against inflation? Does it mean that judicial salaries should be kept in a constant relationship to average earnings in the community? Each of these propositions sounds fine as it stands, but from where does one start? What is the correct figure whose real value should be maintained; what is the ideal relationship to be maintained? Although consistent standards of measurement are not easily applied over a very long period, the relationship between the salary of a Supreme Court Judge and average earnings in the community is not much different now from the way it was in 1947.

As to the suggestion that judicial salaries should be increased only be reference to standards which are the same in every respect as those applied in the determination of wages and salaries generally, this seems reasonable enough as a general proposition, but it tends to break down in practice, as the working circumstances of judges are different from those of any other wage or salary earners in the community. Further, it might now be thought to be somewhat late in the day to introduce such a concept as the sole criterion for the adjustment of judicial salaries.

There are those who will assert that, philosophy aside, as a matter of harsh reality, judicial salaries must bear some relation to earnings at the Bar, so that judges of the best quality will be forthcoming. Understandably, this kind of argument is more attractive to barristers and to the judiciary than it is to the community at large. But there is a sense in which this proposition should be attractive to members of the general community. It ought to make sense to anyone that appointment to the judiciary should be regarded by barristers from whose ranks the appointment is to be made as a "promotion". The analogy is, of course, imperfect, because it ignores the profound change in status (both economic and institutional) which is involved in moving from the Bar to the Bench. However, making due allowance for these differences, one cannot but see force in the Remuneration Tribunal's observations, in effect, that the gap between the earnings of those senior at the Bar and judicial salaries has become intolerably large. As the Tribunal pointed out, "it is not to be expected that a judge, on appointment, will continue to receive remuneration at the level he attained at the Bar. This has long been understood and accepted, but the difference should not be so great that a judge is apt to lose respect and authority in the yes of those who appear before him."

PERMANENT PROSECUTORS

Prosecutor for the Queen *Don Just* discusses some of the unique features of that important office.

There are presently 13 members of the Bar practising exclusively as Victorian Permanent Prosecutors. Legally, the title of each is Prosecutor for the Queen. It is a form of practice at the Bar which has existed for very many years. All the Prosecutors for the Queen are located at 271 William Street. Following long tradition, they are remunerated by public salary.

The views which follow are personal views expressed as one of the members of the Bar practising as a Victorian Permanent Prosecutor.

SOME KEY FUNCTIONS — OFTEN WRONGLY though performed by the Magistracy, police or "the D.P.P." — are in fact amongst functions performed by the Prosecutors for the Queen. (In accordance with a usage which has gained currency, I use the abbreviated expression "the D.P.P." to refer to the sizeable bureaucracy existing under the Director of Public Prosecutions.) Committal proceedings serve important purposes, but the legal foundation for Victorian criminal proceedings in the County or the Supreme Court is the filing of a signed presentment ("the making of presentment"). Ordinarily it is a Prosecutor for the Queen whose presentment is made: *R v. Parker* [1977] V.R. 22. In constitutional theory the making of presentment is probably to be regarded as in part an exercise of Crown prerogative, both devolved by intervention of statute.

The Director of Public Prosecutions also has power to make presentment but, like the Attorney-General in former times, by convention does so only in exceptional circumstances. Justification for the convention is fundamental. Presentment signed by a Prosecutor for the Queen is subject to independent review by the Director of Public Prosecutions which may result in its public negation (Nolle Prosequi). Presentments signed by the Director of Public Prosecutions would not be subject to independent review of this kind before reaching court. The power to make presentment is too important a power to be exercised without exposure to independent review possibly resulting in its public negation (Nolle Prosequi) before reaching court. Exposure ultimately to judicial scrutiny is not enough. Great damage to an individual (and waste of public resources) can occur before there is opportunity for judicial remedy.

In the function of making presentment, Prosecutors for the Queen can require presentments to differ from offences charged at committal. Prosecutors for the Queen can in appropriate circumstances decline to sign presentment, regardless of committal outcome. They can also join together proceedings which they consider have been unnecessarily separated. Subject to considerations of fairness, Prosecutors for the Queen possess power to sign presentment notwithstanding discharge at committal or absence of committal proceedings: *Barton v. R* (1980) 147 C.L.R. 75. Prosecutors for the Queen also have an opportunity to provide written advice concerning evidence, witnesses, time requirements, possible grounds for adjournment, possible settlements and many other matters of law, procedure and pleading. Further functions arise if there is plea negotiation, which is an important area requiring special care and sensitivity.

Don Just: *notes continued neglect of the numbers and morale of the Prosecutors for the Queen.*

The performance of the above functions is obviously of major significance to the efficient flow and the quality of Victorian criminal proceedings.

The bulk of Victorian prosecution appearances in the criminal jurisdictions of the Full Court of Victoria is made by Prosecutors for the Queen. Appearances are also made in the High Court and often in major criminal trials. In these functions there are special obligations imposed by legal ethics and common law to which all prosecutors in the higher courts are subject.

Unfortunately, there is a need for the ringing of some alarm bells. Continued neglect of the numbers and morale of the Prosecutors for the Queen has adversely affected the extent to which existing functions can be properly performed. The number of Prosecutors for the Queen has been allowed to run down in almost inverse proportion to the increasing volume and complexity of criminal litigation. Only a minority of present Prosecutors for the Queen has been appointed within the last decade. The false view that Prosecutors for the Queen are simply subordinate officers within "the D.P.P." has become disturbingly spread.

Future policy and reform should have an informed understanding of the existing structures of prosecuting authority and of the reasons of principle for them.

Prosecutors for the Queen are not part of "the D.P.P." or responsible to the Director of Public Prosecutions. They are permanently appointed and responsible to the Governor-in-Council. The office of Prosecutor for the Queen has existed in Victoria and New South Wales for more than a century. The English and Welsh prosecution system has recently been "reformed" by the introduction of an office approximately equivalent to our Prosecutor for the Queen: see Lidstone (1987) 11 Crim.L.J. 296. Some accounts of the office of Prosecutor for the Queen and its practice are contained in Fox, *Victorian Criminal Procedure* (6th ed.) 26, 33; Read (ed.) *Preparation of Criminal Trials in Victoria* (1984); Langton, *Victorian Bar News*, Autumn 1985; Kidston (1958) 32 A.L.J. 148; *Law Calendar 1988* (Attorney-General's Dept., Vic.); *R v. Parker* [1977] V.R. 22; *R v. Judge Dyett; Ex parte Allen* [1987] V.R. 1049 at 1053.

The office of Prosecutor for the Queen confounds drawers of neat bureaucratic pyramids. The practising membership of the Victorian Bar retained by each Prosecutor for the Queen and the permanence of appointment brings with it an independence from politicians, bureaucracy and police. It is an independence which can assert objectivity and a concern for civil liberties and fairness. It is an independence which can lead to diversity of outlook and of speciality between Prosecutors for the Queen, not unlike that to be seen within the judiciary.

There is no inconsistency between the roles of Prosecutors for the Queen and those of the Director of Public Prosecutions. Prosecutors for the Queen act only upon being briefed as counsel by the Solicitor to the Director of Public Prosecutions. The briefs delivered often provide valuable assistance. The Director of Public Prosecutions possesses specific statutory powers capable of being used in a public manner to overrule exercises of presentment discretion by Prosecutors for the Queen. It demonstrates the objectivity of Prosecutors for the Queen that the Director of Public Prosecutions, through his solicitor, often requests their written advice upon many matters, including possible exercise of Nolle Prosequi power. Some of the research and writing of Prosecutors for the Queen in recent years has in fact been published by Directors of Public Prosecutions. The most recent example is Heath, *Indictable Offences in Victoria* (2nd ed. 1988). Another work, Phillips and Bowen, *Forensic Science and the Expert Witness* (Law Book Co., 1985) was co-authored by a Director of Public Prosecutions and a Prosecutor for the Queen. The Director of Public Prosecutions possesses power to issue in a public manner general guidelines applicable to the presentment discretion. The Director of Public Prosecutions also possesses other important powers not shared by Prosecutors for the Queen.

MR JUNIOR SILK

Mr. Chairman, distinguished guests, fellow members of the Bar.

Mr Peter Hayes QC
Mr Junior Silk

WHEN GILLARD ASKED ME TO SPEAK tonight he was his usual subtle self. "You will turn up won't you?" he said. "Of course," I said. I put these thoughts in writing and gave a copy to Robson just in case.

This year's honoured guest list are the upstairs and downstairs of the Victorian judicial system and reflect the changing face of the law in this state. Upstairs, we honour Sir John Young, fifteen years our Chief Justice, on his award in the Order of Australia, without which the Supreme Court would be as irrelevant to this speech as it has seemed to be to the Government. With his film star looks he is our Lord Bellamy. We also honour Sir Ninian Stephen who keeps on finding better things to do, having passed from member of this Bar, to Supreme Court Judge, High Court Judge, Governor General, roving sporting Ambassador and now toastmaster. He is the souffle that never stopped rising. We honour Sir Daryl Dawson our only reminder of when Victorians were appointed to the High Court, or indeed regularly appeared there, on his award in the Order of Australia. The Bar's undoubted desire to have Sir Daryl's company tonight is illustrated by the fact that his award was in the year of the previous Bar Dinner. Perhaps Jessup had enough guests to speak about already.

Downstairs is the County Court which under our much respected Chief Judge Waldron works hard to serve the people and feed the egos of the upstairs household. The importance of the County Court is highlighted by the six new appointees who are guests tonight, and by the master plan for the Victorian judicial system, which I obtained on an exclusive basis in preparing for this speech. Apart from making the Supreme Court largely ceremonial, the plan is to make the County Court fully integrated and socially well adjusted. The scaffolding masking that architectural masterpiece conceals from public view radical changes to the layout of the Court currently underway. Having regard to the wide range of sporting, cultural and other interests of recent appointments to the Court, the new building will have a golf driving range, tennis courts, TAB, surf shop, theatre, several restaurants and bars and a chemist shop. An unfortunate oversight in the planning was the absence of a library.

An idea given consideration, but rejected, was to extend the scaffolding so as to completely block off access to the Court, thus substantially relieving the back log of cases and allowing golf, tennis and other sporting events scheduled mid-week to proceed uninterrupted. The Judges took a poll as to the name for the new Court complex. In keeping with the Bar's trend towards originality there were suggestions of calling it "Owen Dixon North-East County Court", but this was thought to be too elitist and so the Court will be known as "County Court Club Med". Our six County Court guests have the interests to be well at home in this new Court complex.

Not that the Supreme Court has stood still these last fifteen years. Under our first architect-trained Attorney-General, the Supreme Court has become one of the better restored Victorian buildings in Melbourne. The endlessly cleaned sandstone exterior and National Trust internal colour scheme have enabled the Court building to reflect the Victorian standards of its inhabitants.

Efficiency is the buzz word in the Court. So well is the Court functioning this year it has not been necessary to make any new judicial appointments.

With Court space at a premium the corridors of the Court have been utilized. Part of the corridors are occupied by the Listing Court, where many a startled cleaner or member of the public has been threatened with arrest when unwittingly venturing into the territory of the Listing Master.

"Sir John Young is no John Cleese. We leave that to our beloved Chairman."

While the Supreme Court has been said to operate with the erratic efficiency of Fawlty Towers, Sir John Young is no John Cleese. We leave that to our beloved chairman. But with the moving on of Mr. Darling we now have our own Manuel — the Listing Master's Secretary, who will cheerily tell any practitioner or party anxious to know their prospects of being heard: "I know nothing".

We have seen radical changes to the jurisdiction of the Court. With matrimonial causes, cases up to $100,000, most tax cases, landlord and tenant cases, many administrative law matters, common law cases and so on leaving the jurisdiction, the Judges have plenty of spare time, and accordingly are now paid as part-timers.

A totally unreliable source told me that the Judges have been utilizing their spare time writing a best seller. No, not Riordan's modest work of legal precedents, but a practical book for Judges entitled "1001 Ways To Avoid Hearing A Case". Chapter 1 centres on the use of blue forms; Chapter 2 on the new rules; Chapter 3 on wrong time estimates; Chapter 4 on — if a company director is involved send him to Mr. Justice Brooking's list; Chapter 5 on finding that your neighbour knows someone who once knew a cousin of a witness who might be called, and so on. Mr. Justice Fullagar is consulting editor.

A further work being undertaken by the Court Masters at the moment is entitled "The A-D of How

to Avoid Granting an Order". A minor sensation was caused the other day when one of the Masters actually made a winding up order.

SIR JOHN YOUNG

The Supreme Court has just re-organised itself so that it will now have an appellate division. This avoids the need for a separate Court of Appeal which may have attracted Michael Kirby to move south. The other great reform is to avoid any hearings in July.

Perhaps Sir John's desire for reform comes from his radical past. If there was such a thing as a blue ribbon seat at the Bar, Sir John has had it. His Honour makes the colt from Kooyong look like a draught horse by comparison. Everything about Sir John has always been impeccable, including his timing. After a Geelong Grammar/Oxford education, he happened to be in Britain during the second World War and served gallantly in the Scots Guards, taking up a position as a Commissioned Officer; returned to Australia to complete his law qualifications and then served articles at Blake & Riggall; became Associate to Chief Justice Dixon with whom he was so impressed that he now belongs to that select group of lawyers with sufficient appreciation of Sir Owen's judgments to believe that all legal buildings should be named after him. His Honour read with Sir Henry Winneke who gave him some timely advice — always follow your nose, which was all very well for Sir Henry to say. He sub-let Sir Robert Menzies' chambers. Then he built up a largely shop-front legal practice. Making the most of his considerable talents his Honour was appointed Chief Justice of our Supreme Court.

We are fortunate that Sir John returned to Australia rather than spending time in a bleak Scottish jail. When serving as an officer in the Scots Guards during the war he had responsibility guarding the Deputy Fuhrer Hess who called to see him. As Sir John, flanked by two soldiers opened Hess's cell door he rushed at them, jumped the balustrade of the adjacent staircase and tried to escape. Sir John had visions of court martial. The course of the war may have changed. Fortunately Hess broke his leg and was recaptured, never to leave jail again.

Sir John has always placed great store on impeccable, if not conservative, dressing. When first at the Bar Sir John cut such a fine figure with his morning suit, striped trousers and homburg hat that a member of the Supreme Court watching his Honour approaching the Court was heard to say "Why don't they just make him a judge now and get it over and done with".

On one occasion, Sir John and Sir Ninian Stephen were Junior Counsel together, to a New South Wales Common Law Silk, regarded by Sir John and Sir Ninian as being big on self confidence and rhetoric but low on ability, attributes which later took him to the District Court Bench of New South

He was well known at the Bar for many things, including his absent mindedness, his obliging personality, the fact that Brian Shaw read with him, his glasses and his pipe.

One day all these features came into play when a demanding solicitor of the sort we all know well — it won't take long, just a little free advice — came across Sir Ninian and his glasses amongst the pebbles and fernery outside Owen Dixon Chambers opposite the bank. Apparently shortly before leaving for overseas, and during a fire alarm, Sir Ninian had leant out the window and his glasses had dropped Wales. They saw their leader slump to his seat shortly after rising, following a question from Sir Owen about the effect of the Act of Settlement on the issue before the Court, which was the power of Parliament to jail somebody for contempt. The New South Wales Silk was unable to answer. This prompted Sir John to say to Sir Ninian as they left Court together "There you are Ninian, never trust a man who wears black suede shoes". So don't think Sir John is looking down his nose at you. He is probably looking at your shoes.

Sir John, according to family, associate and friends is incredibly fastidious, organised and intolerant of disorganisation in others. He is the Bar's accidental tourist. On one occasion, having moved to a new home in Malvern, his daughter Trish was keen to have a spare key placed outside in case of need and repeatedly raised the issue with Sir John. He was dismissive of the idea, saying that "One should carry one's key on one". Early one morning Trish was woken by the sound of a tapping on her window. This was not every woman's dream come true, but Sir John in full formal gear returning late from a function having forgotten his key. Thereafter it has been Sir John's invariable routine for a key to be placed in precisely the right spot each day in case of need.

The legal system is centred on the rule of law and the continued existence of a free and democratic society depends on that rule of law and the lawyers who practise it. All of the Courts, and particularly the Supreme Court under Sir John, also represent the pursuit of excellence. There are elements who see the rule of law being replaced by the rules of tennis, golf and racing; the pursuit of excellence as meaning trying to get your golf handicap under 11, and Dixon as someone who used to play on the wing for Melbourne. The eminence and dignity of his Honour have been and are important public reminders of the rule of law and the pursuit of excellence and what his Honour has done as Chief Justice has been greatly appreciated by the Bar.

SIR NINIAN STEPHEN

Sir Ninian Stephen through the ownership of one law book, and not Spry's Equitable Remedies at that, and an out-of-date copy of the rules, rose beyond the top of the legal system.

The View From the Top: *Judge Meager, Judge Strong, Peter Heerey QC, Paul Elliott, David Habersberger QC, Judge Smith, Andrew Kirkham QC, Sir John Young CJ, Bill Gillard QC, Sir Ninian Stephen, David Harper QC, Sir Daryl Dawson, Judge Ross, Judge Keon-Cohen.*

into the fernery below. Sir Ninian pipe in mouth with his respectful reader Shaw at his side were on hands and knees looking for the glasses when along came the solicitor. "There is just something I want to ask you," the solicitor said to Sir Ninian. Not put off by no reply the solicitor got down on his hands and knees and sought his bit of free advice from Sir Ninian as he continued to look for his glasses. Some junior Silks I know might have told the solicitor to get lost, but not Sir Ninian who managed to be charming to the solicitor and find his glasses in the one movement. Now there is a lesson for the Junior Bar.

When visiting the High Court in Brisbane, working late at night and smoking his pipe, Sir Ninian was surprised to hear a build up of fire engines around the Court which culminated in several burly firemen in full uniform, axes in hand raiding his office to extinguish a perceived fire, which was no more than the effect of his incessant pipe smoking on the smoke sensitive fire alarm system in the Court. The firemen should have realized that in the High Court where there is smoke there is not always fire.

Christmas was always a happy family time in the Stephen household. One Christmas things were bleak when Sir Ninian with some of his mates had a few uncharacteristic drinks at the Club on Christmas Eve. When Sir Ninian returned home having picked up Lady Stephen's expensive present, which he had been not too subtly directed towards in the form of eight Georgian glasses, they were smashed, as was Sir Ninian. Feeling guilt or perhaps conscious of the need to retrieve himself he set upon carrying out that morning's instructions from Lady Stephen to cut the feet off the ducks, which he recalled was to cut up the ducks, something taken literally by Sir Ninian. When Lady Stephen arrived home she found a drunken husband, eight broken Georgian glasses and some carefully diced ducks. It was a cold and lonely Christmas Day for Sir Ninian.

On one occasion when Sir Ninian and Lady Stephen were hosting a dinner party in Canberra for a hundred or so of their most intimate friends in honour of Prince Charles and Princess Diana, our then recently appointed Prime Minister, now almost God Emperor, was a guest. It was a dinner worth breaking out of the car park to get to. The Prime Minister, with more medals and finery than you would expect at Malcolm Fraser's lodge meeting, was concerned to know why Prince Charles and Princess Diana, who had retired upstairs relatively early in the evening, asked to see him. "What does this mean?" the Prime Minister asked Sir Ninian. "I think they want to offer you a Knighthood, Bob," was Sir Ninian's reply. An ashen faced Prime Minister ascended the stairs but shortly thereafter returned, colour restored, with an autographed photograph of Prince Charles and Princess Diana to add to his collection.

Sir Ninian has finished with the law and if he can find them his one book and old set of rules will be for sale. We wish him a happy and rewarding life, without butler, maids and AIDES.

SIR DARYL DAWSON

Sir Daryl Dawson has lived a rich and varied life. He is now a superman of the Victorian legal system

as our only representative on the High Court. It is said that as a barrister, before becoming Solicitor-General and beyond, his Honour was a mild mannered Clark Kent, but with the cloak of office has become a man of steel.

Sir Daryl keeps his long thin frame in good shape, something he has found that pays. In one mining case, which was outside his normal range of cases, Sir Daryl was required to go down the mine shaft as part of the view. After the case was over, curious as to why he had been briefed, he enquired of his clerk who said "Daryl, they needed a tall thin person for the job".

In his days at the Bar Sir Daryl used to sit as Judge Advocate in Naval and Military matters. On one occasion Winneke was acting for the unfortunately named Rod Fayle, a naval lieutenant commander who in simulated war exercises ordered his submarine to 90 fathoms depth in the face of approaching aircraft. The trouble was the submarine was in 40 fathoms of water at the time. When Winneke succeeded in persuading Sir Daryl, the Judge Advocate, to discharge his client at the close of the prosecution case because taking the submarine down in the face of oncoming aircraft was a necessary risk of warfare, the furious Admiral was heard to say "Who is this Dawson? He obviously knows no law".

Sir Daryl's judgment on Lieutenant Commander Fayle was soon tested when in further exercises, his commission restored, a disoriented Fayle raised his submarine telescope into the path of an oncoming destroyer.

His Honour had an interesting experience appearing in Malaysia. When cross-examining an elderly Chinese witness about the affairs of a Malaysian club of which he was secretary he was met with resistance from the witness who was constantly stating that he was too old and tired to remember. After tolerating evasive answers based on this excuse for a long time his Honour eventually in a testy fashion put to the witness "Well, do you say you're too old to be the secretary of the club?" at which point the Judge hearing the case intervened to say "Don't pester witness Mr. Dawson, witness father of Judge".

His Honour moved from trendy North Melbourne to Canberra to attract a better class of neighbours. He had trouble with neighbours in North Melbourne where amongst other complaints it was said by his neighbours that he and Lady Dawson had backed their dog against their neighbours' keyhole and persuaded it to an unfriendly act. Of course Sir Daryl would not be responsible for such a foul deed.

This is not the only time Sir Daryl was in trouble. At the hearing of one of Mrs. Gallo's recent Full High Court Appeals concerning a small unpaid bankcard bill, his Honour made the mistake of querying the accuracy of one of her customarily conservative submissions. She later lost the appeal. She retaliated by issuing a High Court Writ seeking damages against Sir Daryl for bias. So concerned was the Australian Government Solicitor by this charge that the application to have the action struck out as frivolous and vexatious was represented against Mrs. Gallo before the High Court by none other than our own "Top Silk" Michael Black QC. Needless to say Black disposed of the complaint with

a flourish. Mrs. Gallo is no doubt disappointed that lawyers will not be barred from cases up to $5,000. Maybe she will now sue Gillard for writing his letters.

We hope that Sir Daryl's example will persuade the Government that Victorians make good High Court Judges. His Honour is congratulated for his award.

JUDGE SMITH

In keeping with the genus of County Court Judges, Judge Smith is also a sportsman of sorts. His Honour can be regularly seen hanging ten on his eight foot 1950s style wooden surf board off the coast at Anglesea reading the latest edition of his law reform paper on the laws of evidence.

I confidently expect his Honour when he exercises his right of reply a little later to tell us all a little about his good friend Gillard, who tripped him up on his wedding eve. Gillard invited Smith to a sculling contest alongside the Anglesea River. It was scull or be thrown in the river. Smith obligingly sculled, but this was not good enough for Gillard, who went to throw him in the river anyway. Those of us who have been opposed to Gillard would expect this sort of conduct from him. Smith's attempt to evade being thrown into the river led to bad damage to his leg. The sight of his Honour hobbling down the aisle with crutches took a lot of explaining by Gillard to both parents and parents-in-law. Gillard did not lose his stride and danced the bridal waltz with Angela. Tim's father was later heard to say that that wasn't the first barrister that Gillard has tripped up.

His Honour had a good Calvinistic upbringing which produced a certain canniness with money. Apparently when his Honour shared chambers with Gillard there was rarely enough money between them to buy the postage stamps.

His Honour is making the most of the extensive range of perks offered to members of the Court. He has taken to frequent train travelling using his gold pass and can be seen going around and around the loop making up his mind on judgments.

His Honour is justly proud of his father, the Honourable Tom Smith, former Justice of the Supreme Court who is here tonight; I think to make sure that nothing too beastly is said about his son. His Honour is a legal force in his own right and probably tires of reference to his impressive legal genes. But on at least one occasion he was pleased to know his father. One Christmas morning his Honour, ever alert for something for nothing, crept into a Malvern garden to help himself to some peaches, zucchini and carrots. His pleasure at a free feed was cut short when the garden was raided by the full force of the Malvern and Hawthorn Police Squads, guns drawn, who had been tipped off by an ever alert neighbour. With some difficulty his Honour persuaded the police bent on Christmas cheer that the garden belonged to his father.

His Honour although not having much of a common law practice before ascending the bench has already made a name for himself in that area. He is known as "Tattslotto Tim". This is not because he is running a numbers racket with Judge Ross, but because of a large, you might say generous, award to a bad back sufferer at the beginning of a recent Bendigo circuit. The verdict had the result of quickly clearing a long list following that case and may provide a model for future case flow management.

His Honour may well find himself in charge of Court security. He had a personal experience with security during the worst of the Irish London bombings when together with Angela he visited the National Gallery in London with a carefully packed antique clock which he had acquired. The news bulletins in London that day were to look for a black haired man with a blonde woman who were the suspects in the recent spate of bombings. The clock was ticking. His Honour, his blonde haired wife Angela and the ticking clock came under very close scrutiny by the authorities in the Gallery and his Honour was required to unpack the clock piece by piece to prove that he was not a terrorist.

We wish his Honour well as a Judge.

"His Honour . . . has taken to frequent train travelling using his gold pass and can be seen going around and around the loop making up his mind on judgments."

JUDGE LEWIS

Judge Lewis's swash-buckling life before ascending to the County Court Bench, as told at his welcome, really makes his Honour the County Court's Indiana Jones. He is probably off on some adventure this evening, so he cannot be here. After two years living on a rat infested barge near the River Thames, his Honour drove back to Australia through Greece, Turkey, Iran down to Cochin in Southern India. This took some six months and at an entire cost of fifty pounds for the trip he did his brother Smith proud. His Honour lived out of tin trunks and under canvas and had five shillings left at the conclusion of the trip.

Whilst outside Tehran a group of tough and

aggressive would-be robbers attempted to remove some of his Honour's meagre possessions little knowing how meagre they were. However in true Indiana Jones tradition his Honour pulled a Luger pistol from a place of concealment and dispersed the group with a fusillade of shots over their heads. Such crowd control may come in handy in the over crowded surrounds of the County Court.

Later whilst in India a cyclist riding his bicycle erratically collided with his Honour's car. Apparently the cyclist drove backwards and upsdie down into his Honour's stationary car. Given the circumstances it took some oratory on his Honour's part to persuade the crowd to take his side. The Chief Judge will no doubt allocate all Indian bicycle accident cases to his Honour.

His Honour's daring was put to a test when the Law Institute burned down in 1978 and his Honour was apparently the last one to leave the building, having first made sure that everyone was safe. His Honour probably did not realize then that his heroics had spared the lives of many future judicial officers. In fact they all may have died and with his brothers Jones and Teague he might now be in the solicitors' after-life.

The excitement of his Honour's overseas ventures are nothing compared with the excitement of being on the Rules Committees which led to his Honour becoming the first County Court Master. Putting up with those positions by itself entitled his Honour to promotion.

His Honour has an impressive range of interests including a collection of Lionel Murphy caricatures, Latin, art, fine glass, property restoration, trivial pursuit, old things and Michael Adams. Any reported decision after the fourteenth century is unlikely to be appreciated by his Honour.

We wish him well, in absentia.

JUDGE KEON-COHEN

Judge Keon-Cohen has many sporting interests, all involving ferocious determination.

His Honour did Scotch College's standard course on "How to become a Judge" and graduated with Sir Ninian Stephen and Judge Smith from this year's list and countless others from the past.

A principal interest of his Honour is his regular game of golf. It is said that because of his Honour's earlier extensive rowing exploits he has a strong right arm and as a result has a natural tendency to hit the ball to the right, something which helps distinguish him from his brother Brian who has a natural tendency to the left. Indeed his Honour's reaction when approached about becoming a Judge was to ask somewhat modestly if the caller wasn't after his more politically in tune brother.

His Honour is a keen outback adventurer, scuba diver and was a willing footballer. Although his Honour's playing days are behind him he still has an interest in the game and is a very keen Melbourne supporter. It has been said that if his Honour urges on the juries in the same way as he does the Melbourne Football Club, there will be very few convictions not recorded.

His Honour sees being a spectator at the football as a blood sport. His form of barracking is to so provoke those around him as to necessitate some form of physical reaction. He won't let any little matter like being a Judge of the County Court temper his enthusiasm for his beloved Demons. Wright took him to Essendon to watch the home side play Melbourne shortly after his Honour became a Judge, where he was wined and dined in the Essendon members. A certain circumspection in barracking was expected given his recent appointment and his hosts. For two and a half quarters his Honour was a model of decorum. But it could not last. At a critical moment in the third quarter his Honour rose to his feet and enthusiastically declared "You're an animal Watson", which for non football followers is as provocative as reading an uncovered version of Rushdi's Satanic Verses on an Iranian Airlines flight.

His Honour tends to treat prisoners up for sentence like Collingwood supporters and his enthusiasm for harsh punishment has not endeared him to the Italian drug peddling community.

We hope his Honour's enthusiasm lasts and that he doesn't pull a legal hamstring. We wish him well.

JUDGE STRONG

His Honour is unlikely to have a case involving as fine points of the laws of contract and biology as he had as the singing hanging Judge in the Bar Review. In that case the issue was whether the insertion of the accused's moccasin in the mouth of the prosecutrix was an oral variation of the contract so as to bring about a mutual discharge. As the Judge in that review, his Honour showed how much he had learned from his Master Meagher on the reversal of the presumption of innocence.

Startled Court officials have noticed a tendency of his Honour to break into song or prance around the bench at unexpected moments. Rumour has it that his ambition is to sit on a Full Court with Mr. Justice Nathan, so they can do a duet.

His Honour at last has the real power he has aspired to having practised all his life being the policeman in the Pirates of Penzance — at his school play, the "Hanging Judge" in the Bar Review, and Crown Prosecutor.

His Honour illustrated the County Court's power to make Anton Pillar Orders and showed the skills learned from years of criminal investigation on behalf of the Government by contacting my secretary whilst I was overseas and having her read to him the portion of the draft speech that related to him. The fact that he didn't then throw himself out of the

Paul Elliott, Michelle Quigley, Richard Stanley Q.C.

Michelle Williams, Tim Ryan, Anthea MacTiernan and Liz Harbour.

County Court shows how misplaced his suspicions were. As if I would say anything beastly about anyone. In future all inquiries about his Honour can be handled through his media unit. I can assure his Honour that I have never flown Continental.

His Honour brings a wide range of interests with him to the Court including carpentry, cooking, house husbandry, tennis, he was an off-air member of Michael Schilberger's team and can look to life after the bench giving singing lessons. His Honour has started judicial life on a high note. We wish him well.

JUDGE MEAGHER

The Bar has many tortoises and many hares. Judge Meagher is one of the tortoises who won the race. He is described by his friends as having a fierce determination, great attention to detail, unfailing good humour and complete organisation.

As with everything in his life his Honour took his time getting married and was known as Melbourne's oldest teenager. His Honour occupied the same room on the 9th floor of Owen Dixon Chambers for 25 years and the layout of the room never changed. The photograph of his family never changed, his solicitors never changed and his practice never changed.

When on holidays at Noosa Heads, his Honour was known to be up very early in the morning rapping on doors, getting everybody up for tennis, organising the restaurant at night and doing a tour of the surf beaches by day. On one of those occasions his Honour's industry was rewarded by a sight only given to a few of us, that of Master Peter Barker naked.

His Honour is hardly a Renaissance man. Some years ago when he went overseas for the first time with his wife and travelled through France into Italy to Rome he was heard to comment as to Rome that it was old and dirty and not been looked after properly and should be pulled down.

His Honour used his initiative on one occasion when travelling to the Preston Magistrates' Court when he realised he had a large split in the crutch of his trousers. Stopping his car he went to the

Hartley Hansen Q.C., Geoff Nettle, Ken Hayne Q.C. and Mr. Justice Southwell.

Douglas Williamson Q.C., Sir John Young C.J., Alex Chernov Q.C.

Mr. Justice Teague, Bernard Bongiorno Q.C., Hon. Andrew McCutcheon A-G.

nearest house in the street and asked the lady occupant if she could lend him a needle and cotton. Being accommodating this lady asked his Honour to take off his trousers whilst she effected the repairs herself. It might have been difficult for the lady to explain had husband or friends arrived at an inopportune time. His Honour returned later that day with a bunch of flowers for the happy seamstress. I cannot say what happened to the relationship after that.

His Honour is already planning his retirement in ten years time. He is undertaking a real estate course at Prahran Institute. His son is already in real estate and word has it that signwriters have been hired for "Honest Judge Meagher and Sons' Real Estate Agency" which is sure to be a hit.

We wish his Honour well with present and future ventures.

JUDGE ROSS

Judge Ross is the closest thing to perpetual motion on any court in Victoria. He has done almost everything in life and is also a good sportsman.

By the time his Honour got to university he brought with him a lot of life experience. He first started working at the slaughter yards at Flemington when he was about 14.

One day when playing for the Law School against other faculties he led the Law School marbles team into the fray in full jockey silks on the back of a thoroughbred horse.

As a footballer at the university his Honour was a regular recipient of an award of extraordinary sophistication — the fur-lined, gold plated, jewel encrusted jock strap, an award that I doubt has ever been achieved by any of our first three distinguished guests.

His Honour is a regular golfer at Royal Melbourne and one of his regular companions is the Prime Minister who his Honour affectionately refers to as "son". He may have been appointed to keep up his fourball with Judge Keon-Cohen. His Honour also has a keen interest in fishing and some passing interest in racing. He owned "Gradvand", the slowest race horse in racing history.

His Honour also has an interest in opera, classical music, Gilbert and Sullivan and other cultural pursuits such as the Tall Girls Club, culinary pursuits, the occasional ale, the occasional wager, the occasional game of cards and in general living. So extensive are his Honour's interests that there may be room for wondering what time his Honour has had for the law.

According to one of his Honour's many good friends, all of whom have rushed forward with information about his Honour, his Honour's opening remark on Monday morning would invariably be "You wouldn't believe it". Usually a reference to the numbers that didn't quite come up or the fish that was almost caught.

Another little known facet of Judge Ross's life is that he is a philosopher. As a barrister his Honour had seen enough of life to realise what a land of riches the Bar represented. His perpetual nightmare was to come in one day to find Owen Dixon Chambers boarded over with a sign saying "Go Home, They Found Out". According to one of his Honour's readers, his honour could often be heard to say, whilst gazing through the window and reflecting on the greater issues of life "You can't stop the music, nobody can stop the music". You might say he was a working man's Phil Cummins.

Without doubt his Honour will become known as one of the characters of the County Court bench. We wish him well.

CONCLUSION

The Bar extends its congratulations and best wishes to all of our honoured guests.

Would you now charge your glasses for the toast to our honoured guests.

Our honoured guests.

Judge Strong and Mark Dreyfus.

JUDGE STRONG'S SONG

A Judge's Lot is NOT a Happy One

The Chairman's words of welcome had just ended (had just ended)
When to Causes at eleven I was sent (I was sent)
To begin, I hoped, with something undefended (undefended)
Or better still, an order by consent (by consent)
"It's a building case", my startled tippy uttered (tippy uttered)
"Six weeks they say the wretched thing will run" (thing will run)
As I wrestled with the file I weakly stuttered (weakly stuttered)
"A judge's lot is not a happy one" — Oh!
When it's certain that a building case (case will run)
A judge's lot is not a happy one.

Escape at last! — it's off to Civil Juries (Civil Juries)
My colleagues said "Don't worry, it's a snack" (it's a snack)
"They all settle! — you just certify the silks' fees" ('fy the silks' fees)
"And join McNab and Nixon at the track" (at the track)
But the plaintiff said he'd plead his case in person (case in person)
Translated to the jury by his son (by his son)
I gagged and felt my hypertension worsen (tension worsen)
A judge's lot is not a happy one — Oh!
When a plaintiff's case in person's to be done (to be done)
A judge's lot is not a happy one.

With shock therapy and potent medication (medication)
"A decent trial, you need!" declared the Chief ('clared the Chief)
'Twas a complex fraud — but to my consternation (consternation)
A reader held the prosecution brief! ('cution brief)
The accused was represented by a moron (by a moron)

Mary Stavrakakis and Bill Gillard Q.C.

Phil Kennon and Ross Robson Q.C.

Michelle Williams and Evan Smith.

And the voir dire took six days instead of one ('stead of one)
With a problem that there wasn't any law on (any law on)
A judge's lot is not a happy one — Oh!
When a voir dire takes six days instead of one ('stead of one)
A judge's lot is not a happy one.

When on circuit I was sent, in March, to Morwell (sent to Morwell)
And the weather bureau said it would be hot (would be hot)
You'll appreciate I didn't feel at all well (feel at all well)
I'd rather be in any other spot (other spot)
When the restaurant in the motel closed at seven (closed at seven)
And the brown coal dust descended by the ton (by the ton)
I exclaimed to my Associate "God in heaven!" (God in heaven)
A judge's lot is not a happy one — Oh!
When the circuit work at Morwell's to be done (to be done)
A judge's lot is not a happy one.

Please forgive me if I sound a bit dejected (bit dejected)
The last few months for us have been a test (been a test)
At the Bar our lives were quiet and protected (and protected)
Back at Owen Dixon Chambers — East and West (East and West)
But we thank you for inviting us to dinner (us to dinner)
With goodwill and cheer and humour you have come (you have come)
Though tomorrow we may not be any thinner (any thinner)
You have made these judges' night a happy one — Oh!
So we thank you, counsel, each and every one (every one)
You have made these judges' night a happy one (happy one).

BAR DINNER FASHION NOTES

Back: Grant Holley, Jim Parrish, Kathy Williams, Judge Croyle, Chris Wren, David Brookes.
Front: Sally Brown D.C.M.

IT APPEARS THAT SEQUINS ARE STILL DE rigueur. Last year everybody was in sequins right down to ex Lord Mayor and grand campaigner for the Olympic Crown — Thomas "Lunch" Lynch. (Tom couldn't attend because of a dinner date with Lord Mayor Winsome McCaughey). This year there were many stunningly low slung creations parading the tasteful environs of lovely Leonda. Is this a socio-economic statement about the state of the Bar? One daren't ask the wearers whether these were indeed the same ball gowns that they wore last year — even though one had to be a little suspicious. Such a question could only be taken as a comment on the health of the wearer's practice! A certain robust individual at my table had to be restrained from saying (after the consumption of the odd bottle of claret and port): "Not getting enough briefs to pay for a new dress this year, heh darling?" He was quickly reminded of the rules of etiquette and the book by Gowans, and thereafter confined himself to harmless abuse of the Cain government and society in general.

Ex Miss Victoria but better known as an ex-reader of John ("Drive My") Karkar, Michelle Quigley, had promised to wear a daring Paris creation in black and orange georgette (which is such a versatile material). However Michelle instead opted for a simple hip hugging outfit in black. Michelle exclaimed that the Bar is not yet ready for orange and black georgette. Perhaps she is right.

We've all enjoyed the "Singing Detective" on television. Now we have our very own "Singing Judge" in the County Court. Judge Michael Strong began in theatre, moved to opera and ended up on the bench. He is well remembered for his excellent portrayal of a maniacal County Court judge presiding over a rape trial in the 1984 Bar Centenary Revue. Who would have thought then that five years later he would have ended up becoming one in real life? His sung "speech" "accompanied" by Judges Meagher Ross, Smith and Keon-Cohen was undoubtedly the highlight of the evening. The words

Robert Barry and Savas Miriklis

Tony Lyons and Elizabeth Murphy

Mark Gibson and Nicole Feely

Sir Ninian Stephen and Sir Kevin Anderson

are reproduced elsewhere in this Bar News. Perhaps in the future we can look forward to all kinds of acts being performed by newly appointed judges. You could have magic acts, juggling, ventriloquism, tight-rope walking and recitation. The kind of things judges are good at.

Peter Hayes QC was Mr Junior Silk. Colin Lovitt QC was overheard saying that he had taught Hayes everything he knew, and that it showed in the warm, heart-felt manner in which he had delivered his speech. I must say that this caused me some problems. In any case Hayes (who might be better known as Sir Ninian Stephen's son-in-law) gave a witty and erudite exposition, especially the happy anecdotes of family life with the ex-Governor General.

Leonda always make you think of Melbourne. Serving beef wellington was a stroke of Melbourne magic. It took one back to the early seventies when dinner parties were "in". It conjured up visions of exposed bricks in Armadale and young women with ribbons in their hair fresh from Lauriston or Mandeville, and a dinner party cooking course — in the full bloom of their first marriages triumphantly serving the then gastronomic wonder of the word — beef wellington! Thank you Leonda. Perhaps quails next year?

It was good to see a professional photographer (and such a charming lass) taking snaps for the Bar News. (Those wanting the negatives will be pleased to know they are on sale at a reasonable price.) I was a little miffed that the editors of the Bar News, in their wisdom did not direct her in my direction, but instead chose others "more important". Anyhow, I understand that a photograph of these gentlemen showing signs of the feared "over-extended cumerbund syndrome", undoubtedly caused by too many launches and lunches at the Bar's expense, will not be published. Never mind, there's *always* next year.

VERBATIM

Long v Thompson

Coram: Listing Master
25th May 1989
D. Levin for Applicant
T. Pagone for Respondent

Levin: If the Master pleases, this matter has been settled, but it is a claim by a Liquidator so the Court's approval of the compromise will be necessary.

P. Rattray: (to **H. Ball** who is also waiting for a jury case to be called). This Liquidator must be an infant!

Re K & H Mavros Transport Pty. Ltd.

Coram: Senior Master Mahony
17th May 1989
Application for Winding Up Order
J. Hammond for Applicant

(The Applicant sought an adjournment of the hearing to enable it to negotiate with the Respondent and to enable it to remedy certain matters in the Applicant's material. Master Mahony granted the adjournment.)

Hammond: (hopefully) Would the Master be kind enough to reserve costs?

Master Mahony: Under the circumstances I do not believe such an order would be appropriate.

Hammond: No, I suppose not. After all, today is not 25th December.

Master Mahony: You are quite correct, and it is not 1st April either.

Tamvakalogos v Mihelakos

Melbourne Magistrates Court
Coram: Purcell M
8th May 1989
Kouris for Complainant
McEachern for Defendant

McEachern objected to evidence of statements made by the complainant in the absence of the defendant.

His Worship: Mr. Kouris, the big "H" is known throughout the length and breadth of Victoria for two reasons: firstly, Harry Beitzel and secondly, Hearsay.

Broadmeadows Magistrates Court

Coram: Moloney M
P.D. Drake for Complainant

Drake: If the Court pleases, I appear for the defendant.

His Worship: The court file has a note that Mr. Duffy is appearing for the defendant.

Drake: Your Worship, a duffer I may be, but a Duffy I am not.

Melbourne Magistrates Court

Coram: Rodda M
22nd July 1988
John McClaren Emmerson, sworn

P.J. O'Callaghan QC: An in addition to your legal qualifications, have you any other qualifications?

Dr. Emmerson: Yes. I have qualifications in science. For the first part of my working life I was a nuclear physicist.

O'Callaghan: And you are a doctor of what?

Dr. Emmerson: I'm Doctor of Philosophy in nuclear physics from Oxford.

O'Callaghan: And, Dr. Emmerson, with respect to your practice at the Victorian Bar, there probably is not a great opportunity to involve yourself in nuclear physics — what is the nature of your practice?

Dr. Emmerson: The nature of my practice is commercial but with a strong emphasis on industrial and intellectual property.

R.J.K. Meldrum QC (cross-examination): . . . although I think non-scientists give too much certainty to science, but there are some questions that one can answer with a degree of certainty that one cannot in the law?

Dr. Emmerson: Well, I accept that there are elements of uncertainty in the law. The whole of the area that I worked in in science was governed amongst other things by what is known as Heisenberg's Uncertainty Principle —

Meldrum: I do not propose we would be enlightened about that particular Principle now, we can leave that for over a drink?

Dr. Emmerson: Yes.

O'Callaghan (re-examination): Can I — just one final question, and it is perhaps a question of not as much importance as others. Can you tell his

Worship how you spell Heisenberg?

Dr. Emmerson: H-e-i-s-e-n-b-e-r-g.

County Court Chambers

Coram: Judge Crossley
18th April 1988
Unusually large assembly present

His Honour enters court and calls for consent orders. A small number of Counsel come forward and their matters are dealt with.

His Honour then calls for any short unopposed matters. Nobody stands. His Honour then asks are there any more substantial unopposed matters. No movement in the Court.

His Honour ruefully surveys the very considerable number still waiting and bravely calls for opposed matters. Still no one stands.

"Well, what are you all here for?"

After a short pause one courageous soul speaks up:

"We're the Bar Readers Course".

His Honour adjourns.

D.P.P. v Karaglanis and 3 others

Coram: Judge Shillito
21st April 1989
County Court Plea

(Four accused charged with false imprisonment and blackmail of their friend who refused to give evidence for them in another case and then refused to pay their fines!). 4th Plea maker, Peter Randalls, after hearing much urging of the Judge for leniency by other Counsel, commences his plea:

Randalls: "Your Honour, I submit there should be a non custodial penalty".

His Honour: "Yes, well you've persuaded me".

Plea maker looks baffled and slowly sits down. Sotto voce: "How the hell am I going to explain my fee to the client's father after that?"

R v Bracey

Coram: Wright J (Supreme Court of Tasmania)
7th August 1986

Mr. Bowen: Is there anything else that you can recall about the conversation on that date?. . . No, I think I—

Was anything said in that conversation that you can't recall? . . . Um

Mr. Hill: Well, strange —

His Honour: That is a rather Irish question is it not Mr. Bowen?

Russell Street Bombing Trial

Coram: Vincent J

J.H. Morrissey QC: I refer your Honour to *De Jesus v R* (1987) 61 A.L.J.R. 1.

His Honour: Is there an authorised version?

Mr. Morrissey: De authorised version of De Jesus is in De Acts of De Apostles.

Re Medical Board of Victoria

Coram: Phillips J
D. Curtain for Plaintiff

Paul Damien Blake Barber, sworn and examined.

Mr. Curtain: Mr. Baker, is your full name Paul Damien Blake Baker?

Witness: Yes, it is.

Mr. Curtain: Are you a legally qualified medical practitioner?

Witness: No.

Mr. Curtain: Are you a practising solicitor and associate of the firm of Phillips Fox?

Witness: Yes.

Re Koala Skin Bounty

Coram: Federal Court, Sydney

Mr. Roberts: So how many skins do you say you had filled, koala skins do you say you had filled by 3 September 1986? . . . We would have only had — we would have only had a very small number. I would not be able to tell you how many.

One, two, ten, a hundred? . . . Well, you do not — you know, when samples are sent it is only one or two pieces that you get.

So it is not correct to say that the first time that you had stuffed one of these koala bears was at the end of October 1986?

Mr. Neil: I object to that, your Honour.

Re Tracey, ex parte Ryan

Coram: High Court

Berkeley QC, Solicitor-General: So that if I see a man pushing a wheelbarrow down Collins Street and I look inside the wheelbarrow, if it is full of ammunition he is subject to the Defence Act, if it is full of bills of exchange he is subject to the Banking Act and if it is full of second-hand clothes he is, undoubtedly, subject to the Immigration Act.

Dandenong Magistrates Court

Coram: Winton-Smith M.
28th April 1989
Prosecutor Snr. Constable Kilpatrick
Houlihan for Defendant
Cross-examining Defendant

I put it to you the Complainant wasn't staggering drunkenly on the dance floor — she was merely dancing in the 'head banging' fashion.

Defendant — "No, she was drunk alright!"

Prosecutor: "Come on witness, if you go to

discos — you've seen 'head bangers'?"

"Not that I go to discos myself."

Houlihan: "So Senior you get your experience of head banging elsewhere do you?"

Rusin v Scanlon

Sandringham Magistrates Court
23rd June 1989
Coram: B.M. Gillman. M.
Michael King for complainant
Paul Collins for defendant

(Friday morning at 9.50 a.m., his Worship sat down at the bar table and commenced to hear an "arbitration")

After hearing an opening from both counsel.

His Worship: Hmm, sounds like . . . 70% your way (to King) and 30% your way (to Collins).

King: But, sir, I would have thought at least 80-20.

His Worship: Look, we're not going to argue over 10%, are we?

King: If your Worship pleases.

(Hearing completed 10.01 a.m.; all witnesses excused: *exeunt omnes*)

OUT AND ABOUT OWEN DIXON WEST

Why pink? Who chose pink? Should it have been discussed? Was it a political decision? Why is Owen Dixon Chambers West pink? Theories abound.

RECENTLY A CREW FROM THE AUSTRALIAN Broadcasting Commission was present in the building to shoot some interior shots for its new legal serial "Inside Running" (an extremely strange name which seems to have more in common with the racing fraternity). In between technical talk about the shape of briefs and colour of ribbons we got chatting about Owen Dixon West, its "architecture" and above all its colour.

An extremely artistic and creative man from the ABC (it was obvious he was artistic and creative because he wore a wide brimmed hat indoors) informed me that the building was in the "Memphis Style". Immediately it all fell into place. Memphis — the birth place of Elvis Presley — pink — *his* colour — pink — the theme of his tasteful mansion Gracelands. It seemed to make sense that Elvis Presley would be the role model for the colour and design of the Victorian Bar's glistening new building.

But I was wrong. Memphis is not the Memphis, Tennessee of Elvis. It is the Memphis of ancient Egypt. Ah Hah! Of course. ODCW is a metaphor for the great pyramids, the sphinx, the tombs of the pharaohs. Like the mystery of how the pyramids came to be built, there is the mystery of ODCW and how it came to be built. How did the Egyptians do it without the wheel? How did the Bar Council do it with one thousand barristers? Pink represents the filtered colours of an Egyptian dusk behind the glowing texture of the mysterious sphinx. Pink represents the glowing colours of a Melbourne sunset against the granite like strength of Owen Dixon West.

But I was wrong. The "Memphis style" was thought up by a group of Italian architects. Evidently the style of ODCW is prevalent throughout the world. There was a need for a name for this style and so it was called "Memphis". Although relating to Egypt it did not necessarily have anything to do with the pyramids. It is just a high tech type name. What a pity.

Other theorists of the modern prevalence of the colour pink believe that its origin springs from the womb. That surrounding the workforce with pink environs takes them back to pre-natal times and the foetal comfort of a mother's womb. This must be extremely unconscious and Freudian as for the life of me, I cannot remember that far back. Perhaps inquiries with forensic psychologists may throw some light on this extremely interesting theory. Look about you as you read this article, and ask yourself does the pink carpet, pink walls, pink granite and the pinkish hue of the chipboard cupboards and shelves, make you feel warm, contented, comfortable and foetal.

Please correspond on this vital topic. Head correspondence "Why Pink?" care of the Editors and they will forward it to me.

Meanwhile I shall continue to investigate this truly mysterious building.

Comoedus

TOP SILK

BARRISTERS ARE AMBITIOUS, AVARICIOUS, amoral, grasping, gutless, deceitful, disloyal, conniving, contemptible, heartless people. This is the message that David Williamson is attempting to convey in Top Silk. He is attempting to make a deep social comment. He is attempting to strike a nerve in the profession. He has failed on both counts.

As Shakespeare said "First thing we do, we'll kill all the lawyers". As some politicians and sociologists would say, "Eliminate lawyers and society's problems will vanish". Top Silk is jumping aboard this old hackneyed bandwagon of barrister bashing.

One wouldn't mind Williamson making this statement if it had been made in a good play. It hasn't been. Top Silk is not a good play. Barristers do have an ability to laugh at themselves, and I for one was looking forward to Top Silk, fully expecting an attack on the legal profession.

All I got was theatrical journalism. Instead of a play full of real characters with the usual excellent Williamson dialogue, it was a bunch of cardboard cut-outs mouthing the type of stereotyped cliches that Williamson obviously picked up during one of his deep and meaningful dinner-parties, overlooking Sydney Harbour.

The story concerns a Labor Party QC who wants to sell out and appear for a Rupert Murdoch type figure instead of accepting a safe seat in Parliament. He is married to a legal aid solicitor who represents her childhood sweetheart who has become a drug pusher. For some unknown reason the audience is supposed to feel pity for this man who is "a product of society". So much so that the solicitor feels obliged to bribe the police in order for him to be acquitted. The QC couple have a teenage son. Of course dad doesn't relate to sonny because dad is too busy and the son is dumb and therefore a disappointment. This is the family — inter-personal — sub-text of the play.

The best thing in the show is young Simon Kaye as the son Mark. This is his debut stage performance in this country. He brought freshness and some believability to the play. Perhaps because he didn't have to mouth as many slogans as the other characters.

Tina Bursill soldiered on womanfully in her part as the legal aid solicitor/wife/mother. It was not her fault that the character was totally unreal. However Geoff Morrell did not fare so well as the QC. He has a strange manner of speaking, somewhat reminiscent of Fred Dagg. This made it difficult for him to be convincing that he was a brilliant QC let alone ruthless, ambitious or even an aspiring Labor Party politician for that matter.

Of the rest of the cast Helmut Bokaitis was hopelessly miscast as the Rupert Murdoch type media baron. Barbara Gowing played the drug pusher's wife. In the programme she says: "I take one day and one job at a time". This was one of her off days in an off job. John Clayton as the judge and Alan Fletcher as the Attorney-General/former lover (of the wife/solicitor/mother) made the best of the paper thin characters they were dished up.

The set and staging of the show were grubby and uninspiring. It had a real Melbourne-Theatre-Company-night-at-the-theatre feel about it. For some unknown reason it was performed in the Athenaeum. This meant bone hard seats with your knees tucked under your chin as that inevitable race the "late-comers" trickled in and proceeded to have a conversation about their extension or the size of their car. One would have expected better from the direction of Rodney Fisher. But it turned out he directed only the original, this production was directed by Graeme Blundell.

Williamson delights in the criticism he has received from the legal profession. But he is fooling himself if he believes he has struck a nerve and that the criticism is sour grapes. He has failed to make this play alive and full of real people. He should go back and look at the "Removalist" and "Travelling North" to see how poorly this play compares with those. His recent plays have been over-concerned with making a statement at the expense of the play itself. They are just pieces of theatrical journalism.

Evidently he left Melbourne to escape the "warfare" of the dinner party. Perhaps the arguments at these dinner parties gave him something to fight against and express in his plays. These arguments apparently don't exist in Sydney. Like poofter bashing, barrister bashing will appeal to some sections of society. That does not make it good theatre.

Paul Elliott

LAWYER'S BOOKSHELF

ANNOTATED TAKEOVERS CODE
by Darryl D. McDonough, 2nd edition, The Law Book Company Ltd. rrp. $45.

THE FORMAT OF AN ANNUALLY PUBLISHED soft cover annotation to a particular Act likely to be much used in litigation was pioneered by Russell Miller's Annotated Trade Practices Act, now in its 10th edition.

Now Darryl D. McDonough, a Brisbane solicitor, has done the same with the Companies (Acquisition of Shares) Code, the second edition being published this year. Although in his preface he refers to "Takeovers Code", correctly, as a misnomer, it is a snappy title and certainly will not mislead or deceive any prospective purchaser into any misunderstanding as to the subject matter of the work.

Mr McDonough's work is clearly and logically set out and contains reference not only to the burgeoning body of case law on this legislation but also to NCSC policy statements, practice notes and commentaries.

There is a consideration of the new s.265B of the Companies Code (the inspection of records provisions) and of cases such as *Humes Ltd. v. Unity APA Ltd.* and *Intercapital Holdings Ltd. v. MEH Ltd.*, along with over 50 further cases relevant to the Code's operation. In addition, the introduction to the second edition contains an outline of the proposed restructuring of the entire area of companies and securities legislation in the form of the "Plain English" Corporations Bill and the Australian Securities Commission Bill.

Amongst the further cases which have considered the operation of the Code are *Westel Co-op Ltd. v. Foodland Associated Ltd.* which held that the Code did not apply to co-operatives, *Albert v. Votraint No. 2 Pty. Ltd.* which held that an invitation to shareholders could be made by way of radio announcements, *NCSC v. Brierly Investments Ltd.* concerning "downstream acquisitions", *Corbell Pty. Ltd. v. New Zealand Insurance Co. Ltd.* where it was held that shares were "acquired" for the purpose of the Code as a result of an agreement reached by telephone, *Clements Marshall Consolidated Ltd. v. ENT Ltd.* which considered a director's "relevant interest", *ICAL Ltd. v. McCaughan Dyson & Co. Ltd.* where a Part C offer was held to be "a standing readiness" to acquire shares on stated terms.

Like the first edition, the headings are eye-catching and the text easy to read. The world of takeovers evolves at such a speed that an annual edition of this work would be most welcome in the way that Miller's Annotated Trade Practices Act is.

As a matter of economics, the format of annual soft cover annotations has much in its favour when contrasted with the spiralling cost of loose leaf services. Obviously the latter have an advantage in that they may be anything up to 12 months more up to date than the soft cover annual. You pays your money and you takes your choice. But certainly McDonough does represent excellent value for money. One practical alternative would be for a group of Counsel who share Chambers to share a subscription to a loose-leaf service while each retains a personal copy of McDonough.

Finally, a historical footnote. The late Larry Adler's FAI Group must surely have been the most enthusiastic corporate litigator in Australia in living memory, their great triumph of course being *FAI Insurances Limited v. Winneke* (1982) 151 CLR 342 in which the High Court held that the rules of natural justice could apply to the Governor-in-Council. The table of cases in McDonough notes no less than 10 separate cases involving FAI Companies. Indeed the only other case referred to under F is *Foss v. Harbottle* (1843) 2 Hare 461.

J.D. Wilson

ROMALPA CLAUSES
Reservation of Title Clauses in Goods Transactions, Berna Collier, Law Book Company, 1989. pp 1-192 $36.00 (Hardcover only)

OF THE TRILOGY OF NOMENCLATURES coined in the mid-seventies; Mareva injunctions,

Anton Piller orders and Romalpa clauses, the latter is probably the least well known. This inferior recognition is not however a true reflection of the importance of Romalpa clauses in a commercial context.

As the full title indicates Romalpa clauses deal with reservation of title clauses in goods transactions. The most common situation where the effect of Romalpa clauses is felt is when a vendor seeks to retake goods sold, or to obtain payment in full of goods sold upon the insolvency of a purchaser.

In this compact little book, which is the expanded version of a minor thesis written for her Master of Laws, Ms. Collier has brought a commendable degree of clarity to a highly complex area of law. A study of the law ranging through the considerable breadth of agency law, bailment, trusts, mortgages and tracing together with a consideration of the effect of the Chattel Securities Act, Goods Act, Companies Code and Bills of Sales legislation (other than in Victoria) will more than likely be necessary in examining any particular Romalpa clause.

The first chapter introduces the reader to the leading cases in the area and the later chapters clearly signpost factors relevant in determining the effectiveness and extent of operation of Romalpa clauses. Chapter 5 concludes by outlining elements required in a Romalpa clause to enable tracing of the proceeds of goods which have been sold; the most difficult Romalpa fact situation. A reading of Chapter 6 "Romalpa Clauses and the Mechanism of a Charge" highlights the need for registration of charges over company chattels as the failure to register may prevent the enforcement of any interests sought to be protected by the Romalpa clause.

Even noting Ms. Collier's observation that there is a lack of authority on the effect of the Chattel Securities Act upon the operation of Romalpa clauses I found her treatment of this area less than satisfying. The discussion would have benefited by analyzing the effect, if any, of the Chattel Securities Act on the cases previously discussed in the book. Further in dealing with registration of security interests the conclusion at p.168 that "it is highly unlikely that the registration of the reservation of title clause would be of much benefit to the vendor", is not clearly obvious to the reviewer, given the present provisions relating to the registration of security interests in respect of motor vehicles and trailers.

If, having read the book the reader feels that he has not come to grips with Romalpa clause issues, this is not necessarily a shortcoming of the book itself. The varied wording of Romalpa clauses and the myriad of fact situations that may effect their operation prevents a definitive analysis being undertaken. Also there is little Australian authority on Romalpa clauses which makes an already difficult area less certain.

Nevertheless, this work presents the issues involved in a clear and eminently readable fashion. It is sure to be a particularly handy reference for practitioners considering the operation of Romalpa clauses.

Murray Garnham

THE EXPERT MEDICAL WITNESS
Edited by Rosalind Winfield, pages v-xiv, 1-141, index 143-150. The Federation Press 1989
rrp Price $35 (limp cover).

THIS BOOK BRINGS TOGETHER AN unusual blend of medical and legal expertise in the context of personal injury litigation. As the title suggests, the main emphasis of the book is on the way in which the medical person fits into litigation where his or her evidence is a key factor. Medicos number strongly amongst the list of contributing authors — four of the seven chapters have been written by doctors. Of the balance, one chapter has been written by Judge Mahoney of the New South Wales District Court concerning qualifying the expert witness. Not surprisingly, that chapter is the most detailed in its references to decided authorities on point and humorously describes how some experts have become "liars for hire".

Of greater relevance to the barrister is chapter four entitled "cross-examination of the expert witness", written by a practising member of the Sydney Bar. It covers the customary themes in a chapter of this type such as the applicable Rules of Court, the limitations upon cross-examination of the expert, use of subpoenae and other documents. Additionally, it contains a sixteen page extract of the transcript in the trial of *R.* v. *Chamberlain* where Ian Barker QC performed what the book describes as the "most devastating example" of an attack upon the qualification of an expert witness.

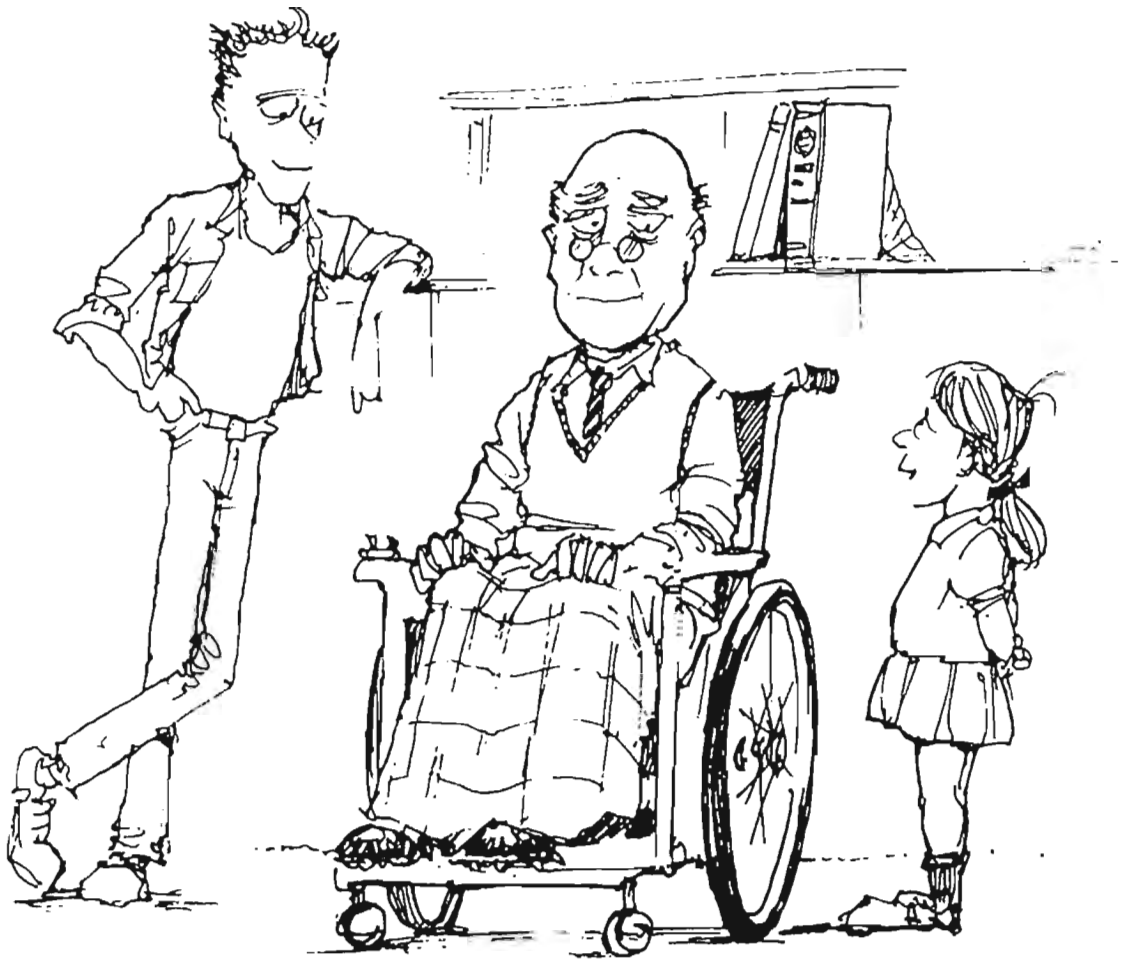
More disturbing, however, is the chapter concerning the medical expert in cases of child abuse where the author considers the extreme care and delicacy required of the medical person in that context.

The introduction explains that the book was "designed to guide legal and medical practitioners successfully through medical content of litigation". The book achieves that end.

J.D. Wilson

HOW THE GIANNARELLIS MADE A REAL BARRISTER OUT OF ME

GD Grandpa . . . Grandpa.
GF mmm.
GD Wake up Grandpa.
GF What is it?
GD Were you a barrister once?
GF On that . . . yes . . . So was your grandmother.
GD When?
GF Oh, I don't remember exactly.
GS In 1988?
GF Yes.
GS When barristers ate vogel bread and drank light beer.
GD That long ago. Were you a real barrister? Were you fearless and powerful?
GF Fearless . . . powerful . . . let me think . . . Powerful . . . well of course I was powerful, as I have often told you over dinner; but fearless . . . I wasn't the only one . . .
GD Tell us about it again Granpa . . . what was it like to be a barrister in 1988.
GF There was a fear.
GD I bet Grandma wasn't afraid.
GF Yes even your grandmother . . . but it was the Victorians who were most afraid.
GS They still are, but what were they afraid of then?
GF Section 10 of the Legal Profession Practice Act.
GD Why?
GF They thought it meant that barristers were like solicitors.
GD You never thought that did you Grandpa?
GF Certainly not. We didn't think much about Victoria; that is until our premiums started to rise, thanks to Marks J.: and then we heard rumors about . . . them.
GD Who were "them"?
GF The Giannarellis.
GD Gee, where did they come from?
GF The docks.
GD What for?
GF For being wrongly sentenced: one on a bond; and two to prison.
GD Who did they blame?
GF Three barristers.
GD What did they have to do with it?
GF They appeared for them, one at the committal, one at their trial and the third in the appeal court.
GS What did that Victorian Act have to do with us?
GF That tricked a few people. At first we felt O.K.; only the Victorians' houses were on the line. As it turned out that Act shouldn't have worried them either, it had nothing to do with work in court.
GS Didn't Toohey think it did?
GF Oh yes . . . he did.
GS Gaudron agreed with him.
GF Her! She was a dissenter!
GS So was Deane.
GF Who cares about dissenters. You probably don't remember Bob Askin.
GS Who was he?
GD Were the barristers negligent Grandpa?
GF No-one knows, but they were immune anyway.
GD Why doesn't anyone know if they were negligent?
GF Because it was decided on a preliminary question on pleadings, not after a trial.
GD What were pleadings Grandpa?
GF They were an art last practised in New South Wales in the 60's my darling.
GS Did the preliminary question clarify anything?
GF No, it never does.
GS Did it clear up anything?
GF Of course.
GD What?
GF A lawyer can't be sued for what he does in court no matter how badly he does it. He is immune.
GD Did many people enjoy immunity?
GF Most didn't appreciate how enjoyable it was until they lost it. Politicians in Parliament and judges in court enjoyed it; but it was being lost systematically: local councils found theirs shrank in the 80's.
GD Grandpa, is it good to be immune?
GF Yes, it's good for everyone — well, practically everyone.



GS Why?
GF It stops the fear!
GS Why shouldn't you be afraid if you are negligent?
GF Public schools! You don't understand the fear. It was the fear of being sued when you were not negligent.
GD What was that?
GF The fear of the claim that was likely to fail.
GS Oh . . . that fear.
GD Was there anything else good about immunity?
GF Oh yes, it stopped the fear of endless lawsuits arising out of the same incident, some of which might succeed although the first failed. And then there was the "cab rank" principle.
GS Most of the Court didn't think it justified immunity.
GF Them! . . . Well . . . It was a principle I often expounded in our Common Room.
GS Deane wasn't convinced either.
GF Him! All he could think about was negligence, gross and callous in its nature and devastating in its consequences. It is hard to accept that he had been a member of the New South Wales Bar.
GD Did you change after the Giannarellis' case Grandpa?
GF Oh yes, and so did your grandmother.
GS How?
GF After the Giannarellis' case I became totally fearless.
GS Let me help you with your rug . . . There now, tell us about the fearless bit.
GF After the Giannarellis' case, I became decisive in Court.
GS No more unnecessary arguments, defences, questions or witnesses?
GF Well, I don't remember that so well. But once I realised he couldn't make me a cross defendant I stopped asking my solicitor if I had forgotten any questions.
GS Did you become manifestly independent?
GF What is independence?
GS Did you use your immunity to strip away false issues?
GF "Strip away" . . . that sounds like your old Grandad.
GS Did you use this immunity to dismiss witnesses who would waste time?
GF Always, at least before lunch I always did.
GS Did anything else change for you after the Giannarellis' case?

GF Oh yes, my premiums went down. And the Bar Council and the brokers both claimed credit.
GS Did you lower your fees?
GF Did I what?
GS Remember what Brennan said.
GF He didn't say anything wrong, he was in the majority.
GS He said the immunity to the extent it was based on the "cab rank" principle was in turn based on reasonable fees.
GF Oh, reasonable fees, Oh yes, I missed you the first time. I thought for a moment you said lower fees.
GD What else did you do after the big case Grandpa?
GF I told my solicitors that only barristers should settle pleadings.
GS That's not what the headnote in the A.L.J. said.
GF You know that, and I know it; but a lot of them didn't, and the ones that did, I was told to read Wilson J. again. He never said solicitors were immune for out of court work.
GS Aren't barristers in the same boat?
GF What was that?
GS All Wilson's remarks were confined to advocacy in court. So there was no majority on that point. And even Brennan left aside a failure where that failure impairs the conduct of the case in court in the way intended.
GF Intended by whom?
GS He didn't say. Anyway all that stuff about work out of court was obiter if you read the questions carefully.
GF It was! But what about the headnote in the A.L.J.?
GS You could have read the headnote in the A.L.R.
GF It read more like a novel than a note.
GS Grandfather, after the Giannarellis' case was your mind entirely free?
GF I liked Brennan's idea that a barrister lends his exertions to all, but himself to none; but he didn't say that anything had to be free: ha ha ha.
GD Ha ha.
GS Were you prolix before the Giannarellis' case?
GF I don't think I ever laboured under such a reputation. I wouldn't have listened to such a suggestion. I feel sure I can say, without fear of contradiction, that I learned nothing on that particular subject.
GS Indeed.
GF Let me reiterate.
GS Must you.
GF I suppose I can sum it up in this way. It was the Giannarelli's case that made me a real barrister.□

P.M. Donohue

The author acknowledges his indebtedness to W.C. Fields, Cat Stevens, Whoopie Goldberg and the Giannarellis.

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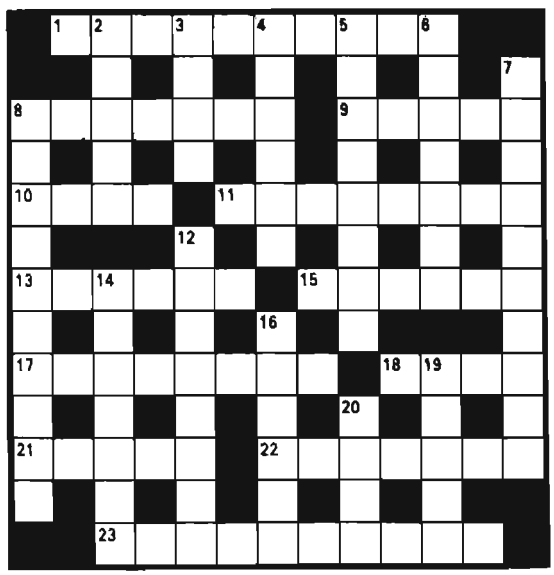
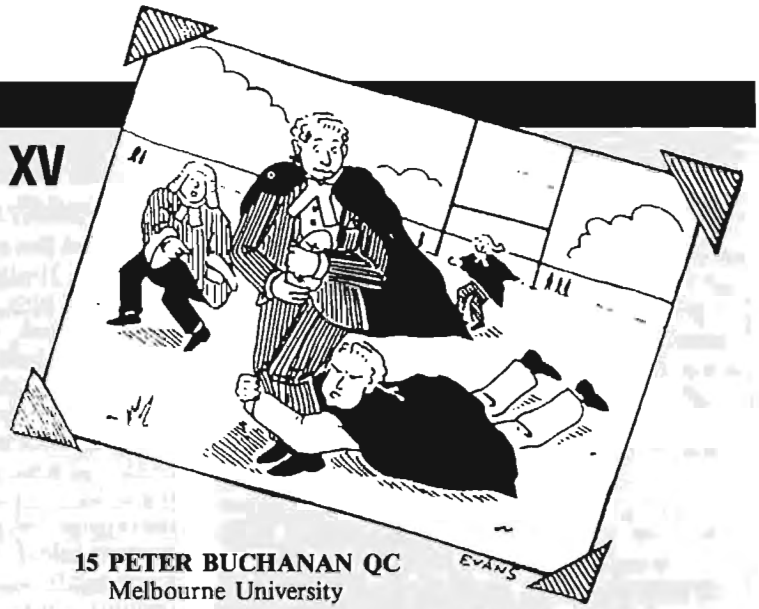
CAPTAIN'S CRYPTIC No. 66



ACROSS
1 Document containing criminal charge (10)
8 NCA director apparent (5,1,1)
9 Upset (3,2)
10 Pain (4)
11 No (8)
13 Reduce in status (6)
15 A ham (6)
17 One given a licence (8)
18 Talk about case before evidence called (4)
21 . . . wink, say no more (5)
22 Annuity shared by loan subscribers (7)
23 Offence in R v Crimmins [1959] VR 270

DOWN
2 What will poor Robin do when this wind blows (5)
3 In itself in its Latin (2,2)
4 Entitlement to convict leave (6)
5 Pixilates (8)
6 Local district forming part of hundred (7)
7 Showing an intention to contest (10)
8 Guilty of deceit (10)
12 Difficult, offensive, as in judges (8)
14 Nuts to the Scot road builder (7)
16 An ower of money (6)
19 First in the Latin as in loco geniture (5)
20 Do the means justify? (4)

BAR ALL STARS XV



Fullback		**15 PETER BUCHANAN QC** Melbourne University	
Left Wing			**14 GERRY NASH QC** Tasmania University
Outside Centre			**13 JACK HAMMOND** Power House RUFC
Inside Centre		**12 DAVID PARSONS** Melbourne University, Victorian Colts XV	
Right Wing	**11 FRED DAVEY** Melbourne University		
Five-eighth		**10 JOHN RAMSDEN** Melbourne University, Melbourne RUFC	
Halfback		**9 ARTHUR ROBERTS** Melbourne University, Victorian 2nd XV	
Lock		**8 BILL GILLIES** Melbourne University, Victoria	
Breakaways	**7 CHRIS MAXWELL** Trinity College, Melbourne University, New College Oxford, London House		**6 JOHN RICHARDS** Monash University
Second Row	**5 STEPHEN CHARLES QC** Melbourne University, Victorian Colts XV		**4 JACK STRAHAN QC** Melbourne University
Front Row	**3 PETER HEEREY QC** Tasmania University, London House, Melbourne RUFC	**2 REX WILD** Melbourne University, Victoria	**1 TIM NORTH** Monash University

SELECTORS' NOTE

Rugby Union — the game they play in Heaven — must, we thought, have distinguished exponents at the Victorian Bar. And so it proved to be.

We approached our task of selection with some understandable preconceptions. Those who had in the past been honest forwards, toilers in the scrum, would, we thought, be most likely found amongst the tradesman-like ranks of the Common Law Bar. The fire and volatility of back row forwards on the other hand would be qualities leading naturally to the dramatic clashes of the Criminal Courts. And where else to look for flashy, shifty and evasive backs than among the high-flyers of the Commercial Bar?

As things turned out, these stereo-types proved rather misleading. Stephen Charles QC for example was a second row forward renowned for what was described as "Attila-like ferocity" in ruck, maul and lineout. Indeed he even played Rugby League for a country town team somewhere near the Snowy River.

Readers will note an unusually large number of reserves. The reason is that we were requested to

RESERVES

BACKS	**BRUCE GEDDES** Caulfield Grammar, Moorabbin RUFC, Victorian Under-age XV
	HUGH FOXCROFT Caulfield Grammar
	SELWYN NEWHAM Scotch College, Victorian Schoolboys
	RON CLARK Moorabbin RUFL
	JULIAN BURNSIDE Monash University
FORWARDS	**BRIAN McCULLAGH** Melbourne University
	IAN ROBERTSON Otago University Law School
	ANDREW McINTOSH ANU
	IVAN BREWER Moorabbin RUFL
	PETER VICKERY Melbourne Grammar
	MARK DREYFUS Ormond College
	DAVID BLACKBURN Harlequins RUFC
COACH	**TED LAURIE QC** Played in Melbourne University Premiership team 1934
MANAGER	**HEATHER CARTER** (3 sons represented Victoria)
HALF-TIME ORANGES	**CLIVE PENMAN** Melbourne University 5th XV

select sufficient for a touring party next summer. The itinerary will make Bill Gillard's cricket tour look like a weekend at Rosebud. Fixtures have been arranged which include matches against the English Bar at Twickenham, the Scottish Bar at Murrayfield and the Irish Bar at Lansdowne Road. Some special rules have been negotiated, including a novel handicapping system under which each team must field at least three Silks. In the event of any dispute as to the construction of the rules, Jack Hammond will be taking certain jurisdictional points.

GOLF

THE ANNUAL GOLF MATCH BETWEEN THE Bench and Bar and the Law Institute took place at Kingston Heath Golf Club on Tuesday 20th December, 1988. This meant that the trophy was in fact contested twice during 1988, as a previous contest was held early in February.

On the second occasion however, I am pleased to report that the number of participants from the Bench and Bar had increased considerably from 10 to 42. This meant that for the first time in many years the contest was able to be held in accordance with the original format, i.e. individual fourball matches between pairs from the Bench and Bar and the Law Institute. In excellent golfing weather the Law Institute managed to regain the trophy, 11 matches to 10. It would seem from the large attendance that the idea of holding the match in the week prior to Christmas at the same time as the various other sporting contests was a great success and the trophy will in future be contested annually at this time. It was particularly pleasing to note that approximately one third of the Bench and Bar team was comprised of members of the judiciary.

The trophy was unable to be handed over on the day of the competition due to the fact that the key to the trophy cupboard in the Bar Council Chambers had been lost. However I am advised by Anna Whitney that the trophy cabinet was successfully opened by a locksmith during January and the trophy was subsequently delivered to the Law Institute. The failure to produce the trophy for handing over at the conclusion of the competition could not be used against us by the Law Institute, who have a prior conviction for a similar offence. Some years ago a well known retired solicitor and former president of the Law Institute Mr. Hartwell G. Lander persuaded the Council of the Law Institute that it would be a good idea to conduct a golf match between the various Country Law Associations and the Metropolitan Solicitors. He agreed to donate a trophy known as the H.G. Lander Trophy to be contested annually between the various associations. At that time the Law Institute was located at 471 Lt. Bourke Street. Several years after the inception of the trophy the Law Institute was destroyed by fire and among the items claimed for on insurance was the Lander Trophy. After payment of the insurance claim no one could quite recall what the Lander Trophy looked like so enquiries were made of Mr. Lander in order to make arrangements for purchase of a replacement trophy. The donor had to sheepishly admit that the trophy had in fact never been purchased. I am advised that the insurer was duly reimbursed and a suitable trophy belatedly provided by the donor. Gavan Rice

CRICKET MATCH v. N.S.W. BAR

AS THE PROUD HOLDERS OF THE "SUB-standard" Trophy for the past 4 years, the Victorian Bar cricket team travelled to Sydney in March this year, brim full of confidence of another victory. Upon our arrival in Sydney on the Friday evening, rumours were around — the New South Wales Bar had persuaded grade cricketers to come to the Bar with offers of the best chambers and junior briefs. This year they meant business. The message came home to us when we were not greeted by any members of the N.S.W. team on our arrival and then were led astray by one member who turned up and kept us out late. Obviously the opposition were resting up, ready for battle.

Sydney, renowned for its sultry inclement wet weather, had excelled itself all the year (and indeed, is still doing so). Every weekend, since Christmas 1988, had seen rain. This weekend was no exception. As a result, we were unable to play the game on Saturday. Fortunately, our hosts were able to locate a hard wicket at Mosman so that the game could be played on the Sunday.

The opposition won the toss and decided to bat. Our opening bowlers performed brilliantly. David Harper's 8 overs cost 21 runs with a wicket, and Chris Connor bowled 8 very tidy overs and obtained figures of 2/18. At the half-way mark, the opposition, 4/50, and we were looking very good. The bowlers toiled manfully, and David Myers and Andrew Donald are to be congratulated on their accurate bowling. We won't mention the other two bowlers who proved to be a little bit expensive. In the end the opposition got to 9/182, thanks to a 107 run partnership by Foord and Wilkins. Despite the large total we thought we could reach it.

Unfortunately, Peter Lithgow was run out at the beginning of the innings and despite stout opposition from Peter Couzens (18), Bruce McTaggart (16) and Chris Connor (26), the batting crumbled. The tail wagged a little (Harper (15) and Donald (16)), but in the end we were all out for 124 and the New South Wales Bar won convincingly by 58 runs.

We have no excuses. We congratulate the N.S.W. Bar team on its success. Rest assured, next year in Melbourne we will be fielding a very powerful side to wrest the trophy back.

We thank our hosts for their hospitality and, in particular, we thank Peter Maiden and Larry King for their planning and organisation over the weekend.

The Bar team was — E.W. Gillard, Q.C. (Captain), David Harper, Q.C., Peter Couzens, Chris Connor, Bruce McTaggart, David Myers, Ross Middleton, Phillip Trigar, Peter Elliott, Peter Lithgow and Andrew Donald.

E.W. Gillard

BAR NEWS PERSONALITY OF THE QUARTER

DAVID "HABS" HABERSBERGER

DAVID "HABS" HABERSBEGER is of Bohemian stock. He was born David John Habersberger on 31st January 1946. He grew up in North Balwyn, went to Wesley and matriculated in 1963 and 1964. He obtained honours degrees in Arts (Political Science mainly) and Law (nothing in particular) and married Pam Walsh in 1968 when still at Law School. Enslaved to The Establishment during his Articles year he was appointed Associate to the Chief Justice of the High Court in January 1972. Sir Garfield travelled widely overseas, so David enjoyed a succession of (junket) trips, including to Hong Kong, South Korea and New Zealand. He signed the Bar Roll on 22nd February 1973 and read with S.P. Charles (as he then was). His very first appearance as counsel was before the High Court of Australia. He took silk in November 1987. Unfortunately, his first, and thus far only, appearance as a silk was somewhat less glamorous. David has been, and still is, involved in a marathon licence application before the Credit Licensing Authority.

David does have a penchant for long running cases. He (with J.D. Phillips QC) acted for St. Andrews in a building arbitration arising out of the construction of the hospital, that ran for most of 1983 and 1984 and then well into 1985. 1981 was taken up with the Norris Inquiry into ownership and control of newspapers. He has also been involved in a number of interesting matters, including *The Franklin Dams Case*, *Varty v. Ives* (the Nunawading Election Case), the ACI Takeover battle and the *D.O.G.S. Case*.

David played Aussie Rules for Collegians during the early seventies, although his football reputation was really made in the courts and many years later. He is now often, some say unfairly, blamed by Melbourne supporters for Melbourne's loss in the 1987 Preliminary Final (see *Buckenara v. Hawthorn Football Club Ltd* [1988] VR 39).

It is alleged (by David) that he can be found pounding the pavements of Hawthorn each weekday morning around 6.15 a.m., sometimes with his 13 year old son, Jamie. He once enjoyed camping, but after being beset by a series of disasters (among them, flu, freezing weather, blisters, becoming lost and abscessed teeth) and logistical difficulties (craming his 6ft frame and all wordly possessions into a Mini Minor), the Habersbergers resolved to spend most of their spare time at their place, or the golf-course nearby, at Foster in Gippsland.

RECENT ARTICLES

In what will become a regular feature of Bar News, Supreme Court Librarian *James Butler* notes articles in recent journals which may be of interest to members of the Bar.

COMPANY LAW

Gay, G.E. & Pound, G.D. The role of the auditor in fraud detection and reporting. (1989) 7 *Company and Securities Law Journal,* 116-129.

CONSTITUTIONAL LAW

Byrnes, Peter. Constitutional validity of commencement clauses in legislation. (1989) 9 *Queensland Lawyer,* 152-159.

CONTRACT

Swanton, Jane. Incorporation of contractual terms by a course of dealing. (1989) 1 *Journal of Contract Law,* 223-248.

CRIMINAL LAW

Lanham, David. Provocation and the requirement of presence. (1989) 13 *Criminal Law Journal,* 133-150.

Spencer, J.R. Public nuisance — a critical examination. (1989) 48 *Cambridge Law Journal,* 55-84.

EVIDENCE

Bates, Frank. Of beating and bondage — sex, shame and similar facts in recent law. (1989) 13 *Criminal Law Journal,* 117-132.

Naylor, Bronwyn. The child in the witness box. (1989) 22 *Australian & New Zealand Journal of Criminology,* 82-94.

FAMILY LAW

Bates, Frank. Reforming Australian matrimonial property law. (1988) 17 *Anglo-American Law Review,* 46-65.

FEDERAL COURT

Aitken, Lee. The meaning of "matter": a matter of meaning — some problems of accrued jurisdiction. (1988) 14 *Monash University Law Review,* 158-185.

FUTURES

Markovic, M. The legal status of futures market participants in Australia. (1989) 7 *Company and Securities Law Journal,* 82-100.

LABOUR LAW

Stewart, Andrew. *The Industrial Relations Act 1988:* the more things change . . . (1989) 17 *Australian Business Law Review* 103-125.

TORT

Cane, Peter. Economic loss in tort: is the pendulum out of control? (1989) 52 *Modern Law Review,* 200-214.

Logie, J.G. Affirmative action in the law of tort: the case of the duty to warn. (1989) 48 *Cambridge Law Journal,* 115-134.

AUSTRALIAN BAR REVIEW

THE *AUSTRALIAN BAR REVIEW* IS PUBlished three times a year by Butterworths under the auspices of the Australian Bar Association. Its policy is to publish articles about substantive and procedural law of particular relevance to practice in the courts. Articles from 4,000 to 8,000 words or less are preferred, but, as the occasion demands, shorter notes, comments and reviews of significant books are published as well.

The Victorian member of the Editorial Committee is Merralls QC who will be grateful to receive contributions submitted for consideration and will be pleased to discuss topics with potential contributors from the Victorian Bar. Most of the material hitherto published has emanated from New South Wales. Interested members of the Victorian Bar are invited to speak to Merralls about the *Review.*

PRACTISING CERTIFICATES FOR SOUTH AUSTRALIA

The following request has been received by the Hon. Secretary of the Bar Council:

A SLIGHT PROBLEM HAS RECENTLY arisen in this state whereby some interstate practitioners have not realised that in order to practise in South Australia even as a visiting Counsel it is necessary to obtain a Practising Certificate.

Practising Certificates run from the 1st January to the 31st December in each year. Practitioners who do not receive trust monies in South Australia are obliged to obtain an exemption from the Registrar of the Supreme Court from appointing an auditor. They then lodge a Regulation 58 Statutory Declaration on or before the 31st October in each year to the effect that they neither received nor held any trust monies in this state for the audit year 1st July to 30th June.

Normally at the time of admission the Supreme Court Admissions Clerk does remind practitioners of the need to obtain a Practising Certificate. However sometimes in the rush of the moment (especially insofar as some practitioners apply for admission on the day they intend to appear) the need for a Practising Certificate may be overlooked.

In order to alleviate problems of this nature it may be appropriate if the necessity to obtain a Practising Certificate in this state is publicised through your own Bar magazine.

Would you please let us know whether you are prepared to assist us in this regard.

If you have any further queries at this stage please contact the writer direct.

Yours faithfully,
Joan A. Whyte
Director
Professional Conduct and Practice

CONVENTIONS

AUSTRALIAN SOCIETY OF LABOR LAWYERS
Sydney, 11-13 August 1989
Tel: (02) 211 3093
Fax: (02) 281 1230

26TH AUSTRALIAN LEGAL CONVENTION
Sydney, 13-18 August 1989
Tel: (02) 241 1478
Fax: (02) 27 6940

AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION SEMINAR
Sydney, 18-20 August 1989
Tel: (03) 347 6815
Fax: (03) 347 2980

UNION INTERNATIONALE DES AVOCATS
Interlaken, Switzerland, 27-31 August 1989
Tel: (61) 691 5111
Fax: (61) 691 8189

11TH LAWASIA CONFERENCE
Hong Kong, 18-21 September 1989
Tel: (5) 844 8482
Fax: (5) 845 2418

ENGLISH BAR CONFERENCE
London, 30 September-1 October 1989
Tel: (01) 722 9731
Fax: (01) 586 0639

AUSTRALIAN INSURANCE LAW ASSOCIATION NATIONAL CONFERENCE
Melbourne, 1-3 November 1989
Tel: (03) 629 7848
Fax: (03) 614 6587

AUSTRALIAN CORPORATE LAWYERS CONFERENCE
Hyatt Hotel Melbourne, 8 November 1989
Tel: (03) 629 7848
Fax: (03) 614 6587

SEMINAR ON INDUSTRIAL TRIBUNALS
Melbourne Unviersity, 13-14 October 1989
Tel: (03) 344 6199
Fax: (03) 344 6206

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FOR SALE From the library of Dr. T. W. Smith Q.C., Australian Digest (2nd Edition). All England Law Reports. Replies to Judge Smith, County Court.

AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION

EIGHTH ANNUAL SEMINAR

SYDNEY, 18-20 AUGUST 1989
(Following the Law Council of Australia's Legal Convention)

THIS YEAR'S SEMINAR WILL COMMENCE with a Dinner at the Sheraton Wentworth Hotel in Sydney at which the Guest Speaker will be The Hon. Mr Justice Niall St. John McCarthy of the Supreme Court of Ireland.

The Seminar itself, to be held in the Banco Court of the Supreme Court of New South Wales, will feature sessions on the New South Wales Supreme Court Delay Reduction Project, the Victorian Criminal Case Delay Project, the AIJA's own project on Preliminary Hearings in Magistrates' Courts, the United Kingdom Green Papers on the Legal Profession, and Court Reform in New South Wales and New Zealand.

Participants will hear from over twenty speakers from the judiciary, the legal profession, government and court administration during the one and a half days of Seminar. And the programme provides plenty of scope for discussion. Seminar programmes and registration details are available from:

Mrs Margaret McHutchison
at the AIJA Secretariat
103-105 Barry Street, Carlton South Vic 3053
Tel: (03) 347 6815, 347 6818
Fax: (03) 347 2980
We look forward to seeing you in Sydney.

SOLUTION TO CAPTAIN'S CRYPTIC