IAN BAR NEWS

SUMMER 1989

The New Silks

Judicial Independence
Sir Ninian Stephen

Plain Talk on Plain English
David J. O'Callaghan

Bar News Calls on Judge Gorman
The Editors

Hockey — Bar Clobbers Law Institute

VICTORIAN BAR NEWS

No. 71
ISSN-0150-3285
SUMMER 1989

Obituary: The Honourable Sir John Minogue Q.C. — 1909-1989

David J. O'Callaghan

John Coldrey Q.C.

Cover: *The New Silks*
Back Row L to R: *Jack Keenan, Greg Garde, John Karkar, Graham Anderson, Bill Martin.*
Front Row L to R: *Tony North, Ada Moshinsky, Julian Burnside.* Not present: *Peter Galbally, Gordon Ritter, Sue Crennan*

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THE EDITORS' BACKSHEET

LAST ISSUE'S COVER

The cover of our last issue provoked much comment. Some claimed that it confirmed an alarming trend with Bar News increasingly adopting the role of an organ for the self-promotion of Bar Council Chairmen, Vice-Chairmen and other Mandarins of the Bar. "What next — a centrefold?" was one ribald jibe.

Such ephemeral chit chat was to be expected, but imagine our surprise when we received the following letter from Dr. Ursula von Hofbrauhaus, the distinguished Head of the Department of Socio-Psycho-Politico Analysis at La Trobe University.

The Editors,
Victorian Bar News

Gentlemen,

The cover photograph of your issue No. 70, Spring 1989, has been the subject of detailed analysis by our Department.

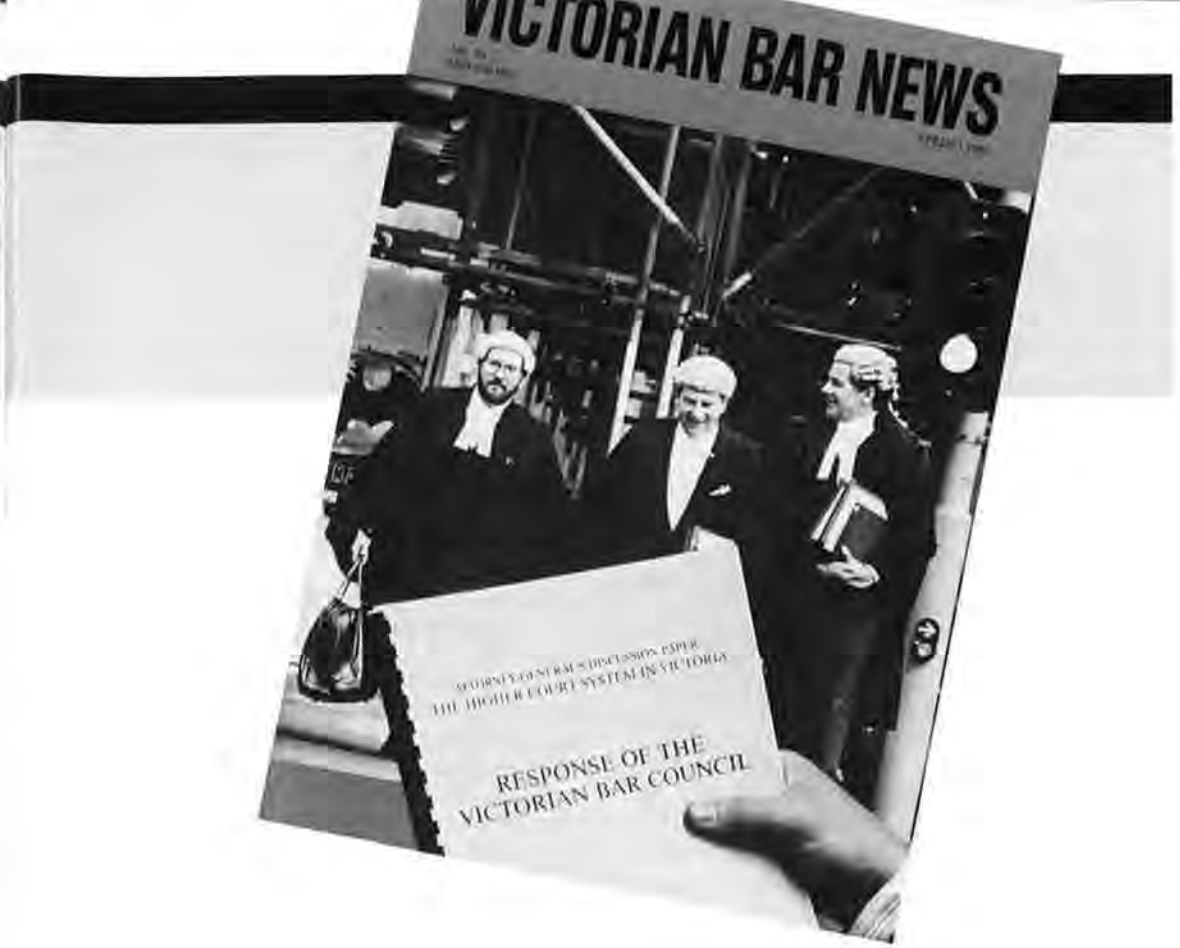
Three barristers are pictured against a background of scaffolding. Are they escaping from it? Are they moving on to more elegant and permanent structures? Or is the uncompromising structuralness of the scaffolding symbolic of a new order of the law — functional, attuned to practical solutions and working class values, eschewing both marble facade and Latin maxim?

The light is green, an arrow points to the Right, but the three are not heading Right — they are proceeding straight ahead. However, only the one on the Left seems to be looking where he is going.

Most symbolic of all is the Batman insignia in the background. The three barristers are represented as role-players; Batman, Robin and the Joker. But which is which?

INCREASING NUMBERS AT THE BAR

The Chairman's Message in the last issue mentioned the remorseless increase of numbers at the Bar — now 1108 on the practising list. This has resulted in two controversial decisions of the Bar Council; the March 1990 intake to be limited to 40 and Counsel to be moved out of the first floor ODCE to make way for the expansion of the Bar administration and relocation of the library and Readers' Course rooms. The latter decision provoked



reactions ranging from disquiet to outrage amongst the designated dispossessed of the First Floor and was later overturned by a ballot of the whole Bar.

But what does this trend tell us about the long term future of the Bar or, in Keatingesque terms, the big picture?

The work available to the Bar has expanded. Twenty years ago, the Bar comprised about 300. The Victorian population has increased since then but by nothing like an order of 3 to 4. What has increased is barrister-relevant legislation. Twenty years ago there was no Federal Court, Federal or State AAT, Trade Practices, Equal Opportunity or Freedom of Information legislation. There was of course divorce, but at any given time it occupied at the most one or two Supreme Court judges.

Some areas of practice have almost disappeared. The originating summons for the construction of a will — once a staple of the Equity Bar — is rarely seen, and indeed the expression "Equity Bar" itself is at best semi-obsolete. "Commercial Bar" sounds much better. Personal injury litigation has been drastically pruned. It is a hardy plant and predictions of its early eradication have proved premature. But a late luxuriant flowering seems unlikely.

Society has become more complex. People are better educated, more articulate (or noisy), less respectful and accepting of institutions. Political parties seek to gain, or retain, power by legislation which will impose new rules on society. Very often this legislation will provide legal restraints on the powers of those who previously suffered little or none — administrators deciding, industries polluting, employers discriminating, corporations misleading.

On balance this is probably a good thing for the community. It is certainly a good thing for the Bar.

MEAGHER JA

We hope CCH will soon put out a new loose-leaf series — The CCH Meagher JA Reports (only $800 p.a). As it is, we are compelled to wait for the occasional gems which appear in the austere pages of that scholarly publication Justinian. Recent examples:

> In this matter I agree with Kirby P. Whilst the conclusion which his Honour Judge Thomson reached is expressed with remarkable exiguity of language (perhaps disguising the paucity of logical analysis which led to it); and whilst I find his Honour's conclusion remarkable, nonetheless that conclusion was a conclusion of fact and this court therefore is precluded from examining it, no question of law being involved.

Meagher JA, *Australian Electrical Industries Pty. Ltd. v Marlborough*, NSW Court of Appeal, June 16 1989.

There is only one other matter to which I would advert. The words complained of, were apparently broadcast on a programme called 'PM'. The learned President (Kirby P) said of that programme:

> 'It is, generally speaking a serious and responsible programme, making an important contribution to the community's understanding of news events at home and abroad.'

There was certainly no evidence before the court to that effect, and it would certainly defy belief that judicial notice could be taken that any programme of the Australian Broadcasting Corporation fitted that extravagant description. However, as the matter is hardly relevant, I shall not pursue it.

Meagher JA, *Bond Corporation Holdings v Australian Broadcasting Corporation*, NSW Court of Appeal, June 28 1989.

JOURNOSPEAK

Mr. Gillard, however, says advertising and self-promotion go against the long and noble tradition of the bar, one that he, son of a judge and former president of the Liberal Lawyers' Association, sees little reason to change.

Kate Nancarrow, writing in the Herald, 27th October 1989.

What was the writer intending to convey by that passage? The following possibilities appear open —

(a) Gillard said to Ms. Nancarrow "I am the son of a judge and a former president of the Liberal Lawyers' Association and I see little reason to change the long and noble tradition of the bar against advertising and self-promotion."
(b) Only barristers who are sons of judges and former presidents of the Liberal Lawyers' Association see little reason to change the long and noble tradition etc.
(c) Barristers who are not sons of judges or former presidents of the Liberal Lawyers' Association do see reason to change the long and noble tradition etc.
(d) Ms. Nancarrow does not like barristers.
(e) Ms. Nancarrow does not like Gillard.
(f) Ms. Nancarrow is a terrific journalist.

Later in the article there is reference to the appointment of Silk, something said to be "shrouded in secrecy". Further journalists conducting in-depth investigative reporting into the mystique of the Bar are referred to Bar News No. 61, Winter 1987, which contains an article by the Chief Justice setting out in considerable detail the process by which members of the Bar are appointed Silk.

The Editors

CHAIRMAN'S MESSAGE

CONTINGENCY FEES

The issues raised by the funding of litigation by a Contingency Fees Scheme have been under consideration by the Bar Council for some time. A Committee of the Law Institute considered the matter over a period of two years and in a report published in July this year the Committee recommended to the Law Institute Council that a Contingency Fees Scheme be introduced into Victoria. The recommendation was adopted by the Law Institute Council.

Contingency Fees Schemes do operate in various parts of the world where the legal system is based on the Common Law. Nowhere does it operate where there is a separate Bar. Involvement of a barrister in such a scheme raises a number of problems. The Law Institute Committee concluded that barristers' fees should be treated as a matter of contract. One assumes the question of the fee depending upon the result and the quantum would be a matter of negotiation between the barrister and the solicitor.

The Bar Council has resolved that it opposes the introduction of a Contingency Fees System in this State. There are a number of reasons for the decision. The two most important reasons are the conflict of interest that will arise in the course of conducting the case and considering any offers of settlement and the risk of the lowering of standards and the breaching of duties, especially those owed to the Court, where the name of the game is "win at all costs".

Charles Francis QC on a recent visit to the USA discussed contingency fees with lawyers and judges. One big plus for the lawyers was the money that could be made from success. One-third of a multi-million verdict is, to say the least, appealing. However the disadvantages of the system are many. The main ones were, the inordinate amounts of money earned by some lawyers gave the profession a bad name, the Scheme tended to have a corrupting influence on trial lawyers who would use every trick to win at all costs, many speculative actions are brought with the result that court delays increase, successful defendants are left lamenting without costs and a blow-out in insurance premiums for professional people.

The professional bodies in this State have all voiced their opposition to the introduction of the Scheme.

The Bar Council is of the view that it would not be in the interests of the community to introduce

the scheme. Greater access to the system can be provided through Legal Aid, and it is in this area that lawyers should be concentrating their efforts to provide greater access.

TWO COUNSEL RULE

The Bar Council has set up a committee under the chairmanship of Alex Chernov QC to consider the Two Counsel Rule. The Bar has always taken the view that Queen's Counsel should only be briefed in cases warranting the retention of two counsel. There are sufficient barristers at this Bar always to provide a competent experienced Junior to do all types of cases and applications which do not warrant the briefing of two counsel. Some solicitors have urged that their clients should be able to brief a Queen's Counsel on his own in matters before the Master and the Practice Court and in some criminal and civil jury trials. The Committee's charter is to consider all aspects of the Two Counsel Rule and report back to the Bar Council.

ACTING JUDGES

In the Bar's response to the Attorney-General's Discussion Paper on the Higher Court System in Victoria, the Bar Council made it quite clear that it was opposed to the appointment of temporary judges. However, it was recognised that a situation may arise where the appointment of temporary judges for a fixed period of time would be warranted to move a back-log of work which was of a temporary nature. The criteria for appointment would be two-fold, namely, to deal with a specific problem and appointment for a fixed period.

Power is given to the Attorney-General to appoint acting judges in the County Court during a period when a judge of that Court is absent due to illness or leave. The County Court now comprises 48 judges. At any one time the full complement must be down because of unavoidable illness and judges absent on leave. At this moment, the full complement is down by 6 judges due to illness and leave. Whilst this situation prevails, appointment of temporary judges would always be a permanent feature of the Court. The solution is to increase the number of judges to accommodate the unavoidable reduction in numbers at any one point in time.

It is expected that the number of cases awaiting criminal trial in the Court will soon increase by some 25%. This will dramatically increase the delays in the court. There is an urgent need to bring the Court up to its full complement of available judges.

The Bar Council does not believe the provision of temporary judges, because the numbers are down due to illness and leave, meets the criteria set out in the response paper. The number of judges must be increased to meet the expected demand. The Attorney-General has been requested to appoint six more judges to that court as a matter of urgency.

E.W. Gillard

OBITUARY

THE HONOURABLE SIR JOHN MINOGUE Q.C. 1909-1989

SIR JOHN MINOGUE WAS THE MOST likeable of men, learned, gracious and urbane. He died on the 19th September 1989. A few days before his death, in typical Minogue fashion and quite undeterred by the knowledge that he was dying, he celebrated his 80th birthday, surrounded by old friends, many of whom had been his contemporaries at the Victorian Bar.

He was born at Seymour and educated at St. Kevin's. He completed a law degree at Melbourne University. At first he followed in his father's footsteps and practiced as a solicitor. Two year later, in 1939, he came to the Bar, read with his talented cousin Harry Minogue, and embarked on a successful career.

He was an active and popular member of the Melbourne University Rifles and was a company commander when war broke out. From 1940 to 1946 he was on the General Staff and after distinguished service in New Guinea and Washington was discharged as a Colonel and was Mentioned in Dispatches.

He then returned to Equity Chambers and was much in demand in the common law and criminal jurisdictions. He took Silk in 1957 after only 11

years practice as a junior.

He was a most persuasive advocate and a formidable yet utterly trustworthy opponent. Never was his integrity questioned by anybody. He possessed a charm and courtesy which for those of us who knew him will remain unforgettable.

He was a good companion and enlivened many a Bar party with his lifelike imitations of a marching soldier playing the bagpipes.

On one occasion he was on circuit with Dermott Corson as his junior. They were more than satisfied with the table of the hotel where they were staying but were disappointed at the absence of red wine. They spoke to the publican who was apologetic and said that all he had was some old dusty stuff in the cellar for which there was little demand. But they could have a look at it if they wanted to. The two renowned connoisseurs made a joint descent into the hotel cellar and could scarcely believe their good fortune. Not only did they drink well for the rest of the circuit but they came back to Melbourne with a boot chock-full of the "old dusty stuff" in the form of well matured Rutherglen Red. The publican expressed his gratitude that its removal had left more cellar space for beer.

In 1958 John Minogue was elected to the Bar Council and served on it for the next five years. His wisdom was invaluable. During the critical period when Owen Dixon Chambers was being built, he played an important role in rallying support for the project amongst the ranks of Counsel in Equity Chambers. After the move was completed he and Tony Murray (as he then was) were responsible for the furnishing and equipping of the Common Room and kitchen then located on the 9th floor. He left Equity and shared chambers with Jim Gorman (as he then was) at Owen Dixon Chambers. The chambers which he then had are occupied today by John Atkins.

In 1962 he was appointed to the Supreme Court of the Territory of Papua and New Guinea. He was a puisne Judge for eight years until he was appointed Chief Justice, serving in that position from 1970 until he retired in 1974.

John Minogue loved the law and loved the Bar. At Equity and Owen Dixon he had become imbued with its finest traditions. The Territory struck a very good bargain indeed in securing the services of such a man and such a lawyer. The years during which he served in the Territory were critical, straddling the grant of self government. The Territory might easily have followed other Third World countries and become a dictatorship in which a so called judiciary was merely another department of the state. In the event, it has become a democracy with a genuinely independent judiciary. This was no small achievement, given the presence of an entrenched bureaucracy which was accustomed to having its way and which saw the processes associated with the rule of law as irritating and unnecessary restraints on executive action.

The Victorian Bar has had a number of eminent sons and their contributions to its rich traditions have been many and varied. The distinguishing mark of John Minogue's contribution was that he gave himself to the service of an emerging country which was in desperate need of men of his character, vision and talents. He not only worked in the law but gave strong support to the University of Papua and New Guinea and was its Pro-Chancellor from 1972 to 1974.

When he retired as Chief Justice in 1974 he returned with his beloved wife, Molly, to live in Melbourne from which they had been absent for 12 years. He was knighted in 1976 and in that year he headed a Board of Enquiry set up by the Victorian Government into motor accident compensation. From 1977 to 1982 he was the Victorian Law Reform Commissioner. In 1982 he was elected president of the Graduate Union of the University of Melbourne.

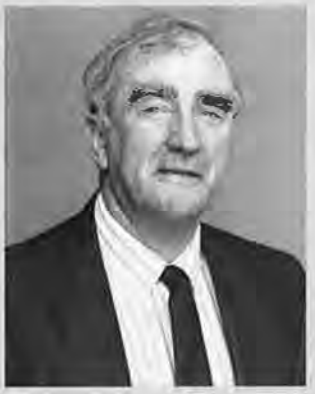
His wife, to whom he had been married for over 50 years died only months before him and while he was undergoing his final debilitating illness, but he bore both these burdens with typical courage and high morale.

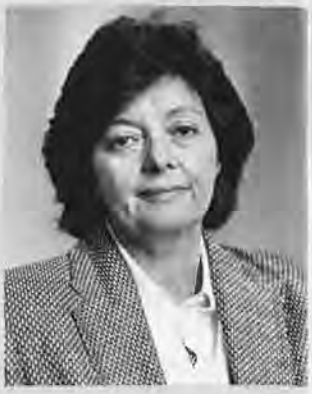
The Governor of Victoria and the Chief Justice attended his Requiem Mass, as did many of his old friends from the Bar. Dr Robin Sharwood gave a moving and memorable account of his life. Father Brian Leonard, who celebrated the Mass, expressed the feelings of everyone present when he said that the Honourable Sir John Patrick Minogue Q.C. was indeed "a verray parfit gentil knight".

R.A. Smithers
Xavier Connor

THE NEW SILKS

Queen's Counsel appointed by the Executive Council on 28th November 1989





Name:	**John Philip Keenan (Jack)**
Age:	52
Date of Admission:	April 1959
Date of Signing Bar Roll:	July 1962
Master:	Judge O'Shea
Readers:	Stephen Matthews, Michael Houlihan, Peter Chadwick, Paul D'Arcy, Peter O'Connell, Anthony Lupton
Area of Practice:	Common Law
Reasons for Applying to be Queens Counsel:	I'm getting too old to work so hard.
Reaction on Appointment:	It's a bit like getting a pip on your shoulder before you retire from the Army! Actually, I am quite thrilled.
Name:	**Peter Galbally**
Age:	49
Date of Admission:	1965
Date of Signing Bar Roll:	1965
Master:	S.E.K. Hulme QC
Readers:	John Noonan, Frank Saccardo, Joe Sala
Area of Practice:	Common Law
Reasons for Applying to be Queens Counsel:	If you can't beat 'em, join 'em.
Reaction on Appointment:	Acute dyspepsia from celebrations and looking forward to wearing my father's gown
Name:	**Ada Moshinsky**
Age:	49
Date of Admission:	March 1965
Date of Signing Bar Roll:	March 1977
Master:	Neil Forsyth QC
Areas of Practice:	Commercial, Tax and Company Law
Reasons for Applying to be Queens Counsel:	Pressure and encouragement from my family
Raction on Appointment:	Stunned and very delighted

Top row, left to right: *Jack Keenan, Ada Moshinsky, Gordon Ritter, Tony North, John Karkar, Sue Crennan.* Bottom row left to right: *Peter Galbally, Graham Anderson, Bill Martin, Greg Garde, Julian Burnside.*

Name:	**Graham Richard Anderson**
Age:	42
Date of Admission:	March 1970
Date of Signing Bar Roll:	March 1970
Master:	Peter Liddell QC
Readers:	Philip Cain, Paul Santamaria, Stephen Howells, Ian Dallas, Graeme Hellyer, Andrew Donald
Area of Practice:	Commercial, Equity, Commercial Arbitration

Name:	**Gordon Raymond Ritter**
Age:	42
Date of Admission:	April 1971
Date of Signing Bar Roll:	May 1974
Master:	Mr. Justice Tadgell
Readers:	Kim Baker, Brian Dennis, Andrew Zilinskas, John Langmead, Robert Cameron
Area of Practice:	Commercial
Reasons for Applying to be Queens Council:	There are several, none of which now comes to mind.
Reaction on Appointment:	Very happy to be included.

Name:	**William John Martin (Bill)**
Age:	42
Date of Admission:	March 1972
Date of Signing Bar Roll:	March 1972
Master:	Neil Forsyth QC
Readers:	Gary Foster, Ed Lorkin, David Doyle, Jim Delany, Sam Horgan
Area of Practice:	General Commercial
Reasons for Applying to be Queens Counsel:	I've been at the junior Bar long enough!
Reaction on Appointment:	Humility and challenge

Name:	**Anthony Max North (Tony)**
Age:	42
Date of Admission:	March 1973
Date of Signing Bar Roll:	February 1976
Master:	J. D. Loewenstein
Readers:	Neville Kenyon, Michael McDonald, Murray Carn
Areas of Practice:	Industrial and Commercial
Reasons for Applying to be Queens Counsel:	Are you serious! It seemed to be the time.
Reaction on Appointment:	Excitement and delight
Name:	**Gregory Howard Garde**
Age:	40
Date of Admission:	March 1974
Date of Signing Bar Roll:	December 1974
Master:	E. W. Gillard QC
Readers:	Andrew Jackson, Richard Pithouse, Nicholas Francis
Area of Practice:	Local Government, Commercial
Reasons for Applying to be Queens Counsel:	Overrun with work
Reaction on Appointment:	Pleased and honoured
Name:	**John Hanna Karkar**
Age:	41
Date of Admission:	March 1975
Date of Signing Bar Roll:	May 1978
Master:	Gavan Griffith QC and David Byrne QC
Readers:	Melanie Sloss, Tom Di Lallo, Michelle Quigley, Elisabeth Wentworth, Tim Walker
Areas of Practice:	Banking, Corporate Law, General Commercial
Reasons for Applying to be Queens Counsel:	No reason really
Reaction on Appointment:	Happy
Name:	**Julian William Kennedy Burnside**
Age:	40
Date of Admission:	April 1975
Date of Signing Bar Roll:	April 1976
Master:	Judge Rendit
Readers:	Peter Costello, Mark Settle, Anthony Kelly, Mark Dreyfus, Peter Pascoe, Ian Waller, Anthony Bodbard-Bean
Area of Practice:	Commercial, Intellectual Property, Insolvency
Reasons for Applying to be Queens Counsel:	My old Bar jacket was wearing out! I thought it was time.
Reaction on Appointment:	Delighted
Name:	**Susan Maree Crennan (Sue)**
Date of Admission:	September 1978
Date of Signing Bar Roll:	March 1980
Master:	D.M.J. Bennett QC (NSW) and Fred Davey
Readers:	Colin Golvan, John Billings
Area of Practice:	Intellectual Property

SOME STATISTICS ON SILK (UPDATED)

	1982	1983	1984	1985	1986	1987	1988	1989
Commercial	5	3	4	5	3	4	4	6
Common Law	1	3	2	2	2	—	1	2
Crime	1	2	3	1	3	1	4	—
Family Law	—	1	1	—	—	—	—	—
Industrial Law	—	—	—	—	—	1	—	1
Local Govt.	—	—	—	—	1	1	—	1
Intellectual Property	—	—	—	1	1	—	—	1
Politics	—	1	—	—	—	1	—	—
Average years since signing Bar Roll	16.5	17	18	17	15	16	20	15

JUDICIAL INDEPENDENCE

The Inaugural AIJA Oration in Judicial Administration delivered at Brisbane on 21st July 1989 by *Sir Ninian Stephen.*

THAT I SHOULD BE ASKED TO DELIVER this inaugural oration in what is to become a series of annual addresses, to be sponsored by The Australian Institute of Judicial Administration, is, of course, for me, a very considerable honour, and on the part of the Institute, what can only be described as a touching act of faith.

I have, in my time, served on two courts, but that is, as you will hear, scarcely qualification to speak about judicial administration. On the Victorian Supreme Court, in the early '70s, judicial administration was not, it is fair to say, a subject that was on everyone's lips. It is, after all, a relatively new discipline, gathering together a range of activities that in the past were perhaps not seen as one coherent whole. So judicial administration, as a single subject matter, was largely unknown to us 15 or 20 years ago. I suspect that some of my more sporting fellow judges of the Supreme Court, had they then been asked what they thought of the prospects of judicial administration, might have taken a shot in the dark and said that it all depended on the state of the track and the barrier position the horse might draw.

We did on the Supreme Court have occasional judges' meetings at which we must, I suppose, have discussed items many of which would today rank as matters of judicial administration. But as I recall it, we thought about administration rather as something involving only court calendars and files tied with white tape, something for the Law Department and the Prothonotary to look after, with the Chief Justice keeping an occasional benevolent eye on them both. And whether it was done well or ill certainly wasn't the prime responsibility of the body of judges; our concern was primarily with judging — dealing with the cases that came before us to the best of our individual abilities, which of course we each individually rated most favourably as compared with those of our brothers.

The criterion of success was whether or not you "ran a good court". What happened outside that courtroom, while it was certainly a matter of general concern, was in no way, I think it is right to say, regarded as the personal responsibility of oneself as a judge or indeed of the Bench as a whole. We had, we felt, more than enough to worry about with our own particular lists for the month. Perhaps, the fact that the court met together only rarely and that, at least from the view point of a new arrival on the bench, the administrative aspects of the courts were largely out of the hands of the judges, contributed to all this. Remember, I speak of a time almost 20 years ago.

Then, on the High Court for ten years, in the 1970s and early '80s much depended on the policy of the Chief Justice of the day. In Sir Garfield Barwick's time as Chief Justice judicial administration was really no part at all of the work of the individual Justice; it was quite clearly the Chief Justice's preserve, although in 1979 the court became self-administering in a formal sense, its affairs to be governed by the Justices in meeting assembled. Then, later, with Sir Harry Gibbs as Chief Justice, we did have more regular meetings of the Justices and our transactions were, I suppose affairs of administration, though we were delightfully unselfconscious about it all and would, I think, have been flattered to have discovered that

our discussions might, with a little stretching of the imagination, be dignified with the title of judicial administration.

So, all in all, I doubt whether my life on the Bench, back in those days, now approaching a decade ago, afforded me with any great practical insight into judicial administration. The major crisis in administration that I recall while on the High Court came soon after we had moved to Canberra. The splendid new court building, much visited by tourists, had the apparently obligatory Bistro-Cafe as part of its establishment. The catering was initially run by, of all unlikely bodies, a Government agency that had thrived on a captive clientele of unfortunates in the migrant hostels of the '50s and '60s. That agency was distinctly disconcerted to find that the High Court Bistro-Cafe enjoyed no such monopoly rights, instead facing lively competition from the rather more attractive National Gallery Restaurant right next door.

This became of high concern to the justices of the High Court and our hitherto largely untested talents in judicial administration were brought to bear upon it, and this because we had a real problem on our hands: our Bistro-Cafe was running at a considerable loss, which the court was having to make good under some indemnity arrangement with the caterers. We, the members of the Court, were told that the fault was ours; our Court was simply not drawing the crowds that Jim Mollison drew to the National Gallery, with Blue Poles and all. Hence our poor Bistro-Cafe's losses. The problem for we judicial administrators was what to do about it. The choices presented to us seemed stark: either we should make High Court hearings more entertaining to the public, with a more glamorous cast performing daily in No.1 Court and a much needed improvement in the scripting of judicial quips, or the High Court would simply have to close down, as no longer capable of drawing an adequate attendance to its loss-making Bistro.

Well, by a bit of lateral thinking we, the Justices, solved the problem. We changed caterers instead of changing our entertainment image and the problem solved itself. I cite this as the high point in my experience of judicial administration.

This being the extent of my background in the subject area to the study of which this Institute is devoted, I was much relieved, when invited to speak tonight, to have a topic suggested — that of Judicial Independence. I was both relieved and delighted because it confirmed to me that this Institute, in devoting itself to the advancement of judicial administration, is acutely aware that the doing of justice is the ultimate aim of all good judicial administration and that judicial independence lies at the very heart of that doing of justice.

Judicial independence is not lightly to be assumed as an unthreatened norm, existing as a

matter of course in every highly developed society. To read the literature in the field is immediately to be persuaded of this. Take, relatively at random, one issue of the CIJL Bulletin, the journal of the Centre for the Independence of Judges and Lawyers, itself a creation of the International Commission of Jurists. It is the issue of April 1988. In it is a graphic account, instance by actual instance, of pressures to which, in very recent years, the French Judiciary has in fact been subjected, in the performance of their judicial roles, by politicians and the bureaucracy. If the account fairly reflects the position, the author is justified in his conclusion that it discloses "a dangerous pattern concerning our judicial institutions" and that what is urgently needed is "a firmer affirmation of the independence of judges".

In that same issue is another report, from Italy, and in this case concerning the very recent abolition there of the laws limiting the civil liability of judges for errors committed in their judicial duties. The report, well worth reading, concludes with the statement that "in many civil law countries judges are liable to civil liability" in respect of acts performed in their judicial capacity, something not easy to reconcile with our own concepts of judicial independence.

Judicial independence is not lightly to be assumed as an unthreatened norm, existing as a matter of course in every highly developed society.

Like most concepts that mankind debates, judicial independence conveys different shades of meanings to different minds. But what it can never mean is some privileged position for judges, some special advantage given them for their benefit. What its precise meaning must always include is a state of affairs in which judges are free to do justice in their communities, protected from the power and influence of the State and also made as immune as humanly possible from all other influences that may affect their impartiality.

So it's not at all a question of independence *for* judges in the same sense that colonial peoples gain independence and freedom *for* themselves from imperial powers, or even as Victorians saw themselves, in the 1850s, gaining independence *for* themselves from New South Wales. Rather than independence for judges, its essence is the independence of a justice system, and hence of the judges who administer it, from sources of power and influence which exist within their community and which, without that independence, might affect the just and impartial working of the system. As Chief Baron Kelly said in 1868, in a case that affirmed a judge's immunity from suit while acting judicially, such independence is "not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest is it that the judges should be at liberty to exercise their powers with independence and without fear of consequences". Benjamin Disraeli wrote of justice as truth in action and, if it is to be that, judicial independence is an essential adjunct.

If understood in this sense I believe judicial independence to be not only of the essence of any worthwhile justice system but as also essential to any worthwhile democratic system of Government that respects and abides by the rule of the law. Only last year, in a notable address delivered in Canberra, Sir Robin Cooke, President of the Court of Appeal of New Zealand, made the point this way. He saw as a basic tenet of the modern common law the existence of a free and democratic society, one built on two complementary principles: a democratic legislature and independent courts.

This concept of judicial independence, though certainly not its existence as reality, is as old as justice itself, and this simply because independence of judgment is of the essence of the doing of justice. If we take Professor Hart's description of justice as the treating of like cases alike and different cases differently, a process of judging objectively what is like and what is different is inherent in the doing of justice; hence the need for impartiality of judgment. It is that element of impartiality that judicial independence is designed to promote. It cannot guarantee impartiality, human frailty being what it is, but it is the surest means mankind has yet devised to promote it.

In part judicial independence is a state of mind, fostered by long tradition and supported by judges' knowledge that the profession and the community expects them to be, above all else, immune to outside influences. Respect for the office of judge is, and always has been, based upon qualities of impartiality and integrity. As C.K. Allen puts it in 'Law and Orders': the judge, unlike the executive functionary, "imposes his own fetters upon himself, and this is the very substance of his office". The consequence should be what Edmund Burke described as "the cold neutrality of an impartial judge". Communities have high expectations of justice and if those expectations are not realised the disillusionment is extreme; the venal judge has, of course, everywhere and in every age, been anathema. He constitutes in a very real sense a contradiction in terms because a justice system staffed by judges exists only to deliver justice and if it is perceived

as failing to do so it both loses its reason for existence and rightly attracts the indignation of a cheated community. This applies equally to the judge who, though in no way venal, fails to bring impartiality to his work of judging. He too represents a contradiction in terms, a denial to the community of that even-handed justice which his appointment ought to have provided.

If judicial independence is, then, in part the product of a carefully fostered state of mind, it is also, and most importantly, a question of the setting up of appropriate institutions. Because the State is the most obvious source of power and influence that may affect the impartiality of judges, mechanisms have had to be designed to shield judges from the power and influence of the State. Judges must be allowed to carry out their judicial work with an impartiality unaffected by the day to day political and policy concerns and anxieties of politicians and public servants and the pressures they generate.

Against the possible "encroachments and oppressions" of governments and their bureaucracies judicial independence remains the most formidable barrier, primarily sustained by the now centuries old practice of giving judges security of tenure.

It was of this that Lord Alexander, long a leader of the English Bar, spoke in the Lords a couple of months ago in the debate on the three Green Papers on the legal profession which have this year caused such a stir in the profession in England. He said —

"To my mind, there is a most elementary conflict of interest, not even addressed in the Green Paper, for the Government to take power of control over the very profession that has as its central duty to act and stand up for the citizen against Government power and State prosecution".

In the same debate the Lord Chief Justice, Lord Lane, spoke of the rule of law and its meaning — that once the legislature made the laws, everyone must obey, including the executive branches of Government. He went on to say that situations may arise in which the executive may get ideas above its station. He saw the current separation between parliament and the executive as increasingly difficult to discern, with parliament increasingly liable to do what the Government of the day wished it to do; hence even greater was the necessity to preserve the court's power of judicial review and the all-important principle of judicial independence if, as he said, "justice is to be done". He illustrated this by reference to some common law jurisdictions with British-style systems of Government, which he tactfully did not name, where justice has "come under the heel of Government. Judges there are no longer independent. The principle of the rule of law is observed so long as it suits the Government and no longer".

Lord Lane's warning is not untimely even in Australia, a land where judicial independence still flourishes, just as it does in Britain.

It is, of course, not only the other arms of Government that may seek to influence the judiciary; commerce and industry, trade unions, employers' organisations, political parties and pressure groups of all kinds are all potential sources of influence. True judicial independence should mean immunity from the potential influence of them all, which in turn should mean maintaining a discreet distance from them all. Only if there exists that immunity will the conditions be met which promote the doing of impartial justice. Nothing can of course guarantee the impartiality of mere mortal judges but on the other hand if either conditions promoting judicial independence are *not* in place, or conduct is not such as to promote immunity, impartiality is clearly put at risk.

The need for institutional guarantees of judicial independence is, in a sense, an acknowledgement of the frailty of mankind. If all judges, on appointment, became, overnight, creatures of both high courage and unshakable virtue, selflessly dedicated to no other concern whatever than the pursuit of pure justice, then not only would they all be saints but there would be little need for guarantees of judicial independence. However saints do not abound and there is that need. It's worth stressing that what is involved in this matter of need is not at all the need of judges; it is the community's need. It is essentially the community that suffers when standards of judicial impartiality decline. Accordingly, judicial independence is a necessity for the health and well being of any community that respects the rule of law and expects impartial judges to do justice according to law.

This affair of judicial independence has, as I have said, roots stretching far back in history. The recently articulated concept of justice as involving treating like cases alike, doing so regardless of distinguishing circumstances extraneous to the matter to be judged, also has ancient origins. In the days of absolute monarchs, just as today in totalitarian states of both left and right, it was a courageous judge indeed who would, without, more, feel able to treat a case in which the king or those close to him had an interest in quite the same way as he would the case of lesser mortals; yet he doubtless knew well the injunction of the Lord to

Moses, as given in Leviticus: "To do no unrighteousness in judgment and not to honour the person of the mighty but to judge in all righteousness".

> Judicial independence . . . must always include . . . a state of affairs in which judges are free to do justice in their communities, protected from the power and influence of the State and also made as immune as humanly possible from all other influences that may affect their impartiality.

What presented a true dilemma for judges of the past was that relatively early in the history of English law the king had come to be seen as himself subject to the law of the land — the rule of law applying to him equally as to his subjects, although, of course, that same law conferred on him special powers, rights and privileges appropriate to his sovereignty. Bracton, writing in Henry III's reign, in the mid-thirteenth century, could speak of the law as the bridle of royal power which bound the maker of laws, the king, equally with his subjects. The king, he wrote "ought to give to the law the authority which the law has given to him; for it is the law which makes him king".

This may have been excellent doctrine, but to judges of the day, lacking any formal structures that might support judicial independence, it could not always have been easy to give effect to it. They were in an invidious position because, once this notion of the monarch as subject to the law was accepted, it should logically follow that those who administered the law, the judges, should be free to treat the king's case and those of his agents as no less subject to the law than that of any commoner. To adopt Shakespeare's words in Macbeth, there needed to be judges "that no king can corrupt". Parliament came to the judges' aid in the fourteenth century. In Ewards III's reign and that of Richard II, came statutes decreeing that the king might not instruct his judges to disturb or delay common right and that the judges should ignore those royal instructions that were not themselves in accordance with law. This seems to mark the beginnings of institutional steps to secure judicial independence from the Crown.

Nevertheless, for centuries the Crown continued to retain the power to remove at will the troublesome judge, the very power which, more than any other, had the capacity to threaten the doing of equal justice. As it happens, during the 15th and 16th centuries the judges were in fact little involved, in their judicial capacity, in the great political events of the time. The power struggles of the time took place primarily on other battlefields. The judges seem, in consequence, to have enjoyed relative freedom from political interference.

It was in the 17th century, with the advent of the Stuarts and the great constitutional crises that followed, that the judges were thrust with a vengeance into the political arena. The Stuart kings wanted to use the courts as positive instruments of policy and naturally enough expected those instruments to be compliant to their needs. They used, as never before, the Royal Power to unseat judges. It was this that, in 1640, led an ultimately exasperated Parliament to curtail the Sovereign's power to remove a judge at will. In that year the Long Parliament, with the memory of James I's arbitrary removal of Sir Edward Coke from the Bench in 1616 still fresh, and having seen Charles I summarily remove in succession the heads of three great courts, Exchequer, King's Bench and Common Pleas, took the decisive step, the only one that would better establish judicial independence. It required the king, in his appointment of judges, to make them removable only for misbehaviour and no longer simply at the king's pleasure. To this, in January 1641, King Charles reluctantly agreed. So, for the first time, an adequate institutional foundation was created to support judicial independence, a foundation that still proves its worth now almost three hundred and fifty years later.

Appointments continued to be made 'during good behaviour' during the Commonwealth and for some years after the Restoration. Then, in the 1670s, Charles II reverted to arbitary dismissals from judicial office and to the making of judicial appointments merely during pleasure. James II in turn excelled him. In his reign of four years no less than thirteen judges were removed from office, four in one day in 1686. This was their penalty for failing to do the King's will, regardless of the law.

With the Glorious Revolution of 1688 judicial tenure during good behaviour returned de facto, the public evil of judges holding office merely at the pleasure of the Crown having been clearly enough demonstrated by the House of Stuart. Then, by the Act of Settlement of 1701, it was provided de jure that, once the House of Hanover should ascend the throne, which proved to be in 1714, all judges were to be appointed not during pleasure but during good behaviour. They were also to be made removable by the Crown upon address of both houses of parliament. Thus, as the old encyclopedia of the laws of England happily puts it, "were the judges withdrawn from the capricious action of the Crown, and brought under the control of

Parliament". Until 1760 the sovereign's death still automatically terminated all appointments, and in fact in the 1700s a number of judges were not re-appointed on the accession of the new king. But with this sole exception, English judges have continuously since 1688 held office during good behaviour, subject only to removal on an address of both houses, and since the reign of George III their salaries have been fixed by statute.

Across the Atlantic Alexander Hamilton saw for the infant United States as much merit in judicial independence as had the British Parliament. Of judicial independence he wrote that —

"In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the legislative body";

and Thomas Jefferson shared with Hamilton this recognition of the value and importance of judicial independence, although on much else they so bitterly disagreed. Hence the security of tenure of federal judges which the U.S. Constitution provided: they were to be removable only by impeachment.

In the constitutional monarchies of today Hamilton's despotism of princes no longer threatens; but against the possible "encroachments and oppressions" of governments and their bureaucracies judicial independence remains the most formidable barrier, primarily sustained by the now centuries-old practice of giving judges security of tenure, so that they are free to devote a working lifetime on the bench to the doing of equal justice to all without being called on to exercise undue heroism or risk martyrdom because the trend of their judgments is unpopular with a particular government of the day.

The founding fathers of our own Federal Commonwealth knew all this and not only enshrined this principle of security of tenure in our Constitution but gave it added strength. They provided by s.72 of the Constitution that Federal Judges may be removed from office by one means only: by the Governor-General in Council on an address of both Houses of the Parliament and then only for proved misbehaviour or incapacity.

Our early colonial judges had of course no such security of tenure. They could be, and occasionally were, removed by the Crown at will. Moreover, Burke's Act of 1785 (22 Geo. III C 75) clearly gave to colonial governors in council power to remove, on specified grounds, any colonial official holding office by letters patent, subject to an appeal to the Privy Council. Even long after responsible government came to the Australian colonies and the judges of the Supreme Courts came to be appointed on Act of Settlement terms, that is, during good behaviour subject to removal following address of both houses, the continued operation of Burke's Act remained a matter of at least academic interest.

But this legislative curiosity apart, there remain differences in the security of tenure of the judges of Australian Superior Courts. The judges of the

States, other than New South Wales, hold office on traditional Act of Settlement terms so that they can, a I would understand it, in theory be removed by the Crown either for misbehaviour without any address from parliament or following such an address. In fact, as a matter of practical politics, in a quite literal sense of that phrase, the latter course is no doubt the only one that would ever now be even contemplated.

In New South Wales, since 1986, the tenure of the judges has been expressed to be during ability and good behaviour, subject to the usual provisions for removal by address, but that must be preceded by investigation and report by a judicial commission which establishes disability or misbehaviour warranting parliamentary consideration of a judge's removal.

Judges must be allowed to carry out their judicial work with an impartiality unaffected by the day to day political and policy concerns and anxieties of politicians and public servants and the pressures they generate.

This places New South Wales judges in a position much akin to that of Federal Judges under s.72 of the Constitution. However, as actual events of recent years have proved, and now in high contrast to the N.S.W. position, to describe the procedures and mechanisms in place for effecting removal in the Federal sphere as even ad hoc would be unduly flattering. One of the recommended alterations to the Constitution put forward last year by the ill fated Australian Constitutional Commission in its final report sought to remedy this by establishing, as part of the Constitution, a procedural framework for removal of a Federal Judge, a regimen not dissimilar from that now in place in New South Wales. The alteration, as recommended, would, incidentally, go further and apply such a regimen to all State Superior Court judges.

Section 72 of the Constitution took the form it did because it was well understood in the drafting of our Federal Constitution that judges entrusted with the very special responsibilities of passing upon the constitutionality of legislation may be even more in need than most of protection against the pressures of governments and legislatures.

This was much discussed in the convention debates of the 1890s and the unique form of section 72 reflects the outcome. It was very specifically with judicial independence in mind that it was so framed. Originally the draft Constitution had provided only that Federal Judges should hold office during good behaviour and be removable by the Governor-General on the advice of the Federal Executive Council following an address of both Houses of the Parliament, traditional Act of Settlement terms.

At the Adelaide Constitutional Convention of 1897 a range of alternatives was discussed, including that traditional one and the U.S. Constitution's provision, which appears almost sub silentio, for removal by process of impeachment, initiated in the Lower House and adjudged by the Senate. The outcome, however, was a then novel formula omitting reference to appointment during good behaviour and providing simply for removal for misbehaviour or incapacity, and then only by the Governor-General in Council upon address of both Houses. Discussion on s.72 was resumed in the Melbourne Convention of the following year and the principles of the present even stronger wording of s.72 were ultimately agreed upon, with "proved" misbehaviour or incapacity now constituting the only grounds for removal.

If substantial security of tenure is one aspect of the formal structure needed to support judicial independence, it is often suggested that another is economic security, and certainly the Act of Settlement itself recognised the need to declare that judicial salaries should be "ascertained and established". It must be beyond dispute that continuing inflation makes a mockery of any provision that a judge's salary shall not be reduced during his term of office. There are a number of good reasons, questions of recruitment of suitable candidates to judicial office, of their retention once appointed, of public respect for the judicial office in a community that tends to measure most things in money terms, and perhaps even questions of placing judges in a financial position beyond the reach of temptation, all good reasons for ensuring proper and, in real terms, secure salaries and, for that matter, pensions for judges.

The evil of this erosion of judicial salaries will continue as a threat to judicial independence so long as sporadic and partial correction of the process of erosion is left to depend upon the very arms of government of which the judiciary should be independent — it being dependent upon the executive for effective initiation and upon the legislature for implementation.

The best that can be said of the present situation, and I speak of Australia as a whole and not of particular jurisdictions, is that at least this process of erosion necessarily affects equally all judicial office holders in a particular justice system and does not open the way to any threat to a particular judge, singled out as one likely to prove awkward to handle; which is, of course, precisely

what lack of security of tenure does lead to, with the threat of arbitrary removal always lurking in the background. But in the long term, by affecting the whole quality of the judiciary and their repute, the matter of remuneration bears quite directly on judicial independence.

There are two other, perhaps less obvious, factors, each institutional in character, which seem to me of relevance to the topic. First, the marked tendency Australia-wide to create new statutory jurisdictions and vest them in tribunals the members of which are expected to act fairly and without favour and yet who lack anything at all comparable to judicial tenure. It would be invidious to mention any particular tribunals by name but their ranks are becoming legion. The position is made the worse if the jurisdiction is one in which Governments or their instrumentalities habitually appear as parties.

The second is another marked tendency of the present day, that of removing from the jurisdiction of Act of Settlement tenured judges whole classes of cases, usually doing so by reference to the amount in issue in the cases so removed, and investing jurisdiction over such cases in judicial office-holders not so tenured; I think particularly of District and County Court judges and of magistrates.

Neither of these situations directly affects the judicial independence of the judges of our Superior Courts but each very directly affects the availability to the citizen of justice administered by a judge secure in his possession of judicial independence; and that is what matters. The remedy in the second of these cases is both simple and revenue neutral, as the presently very fashionable phrase has it. It is to confer more widely the security of tenure at present enjoyed by the judges of Superior Courts, something I would have thought long overdue in the case of all District and County Court judges and which indeed has already happened in the case of the Victorian County Court and perhaps too in some other Australian jurisdictions. There may also be much to be said for doing likewise in the case of the magistracy, which in Victoria at least, has been given a very substantial degree of assured tenure, so that removal now is confined to specific grounds, which have first to be made out before the Supreme Court. This is a welcome change from the pre-1984 position, under which magistrates were treated in the same way as any other public servant.

I specifically refrain from comment upon any possible effect that statutory complaints procedures, inviting litigants to make complaints about judicial conduct, may have upon judicial independence.

I do so because it has already, and recently, been discussed in the Institute's published work on the accountability of the Australian Judiciary.

Of course this whole question of judicial independence and of what it is designed to promote — the delivery to the community of untainted justice, involves two other aspects which are seldom mentioned in this context, though otherwise much debated. They are the initial appointment to judicial office and the promotion of judges within judicial systems. Each has traditionally been left in this country to the executive and I know that this Institute has given much thought to the question of methods of selection and appointment of judges. The promotion of judges for instance to Superior Courts or to Courts of Appeal or to the office of Chief Justice, may not have received the same degree of study.

Judicial independence is a necessity for the health and well being of any community that respects the rule of law and expects impartial judges to do justice according to law.

Each, appointment and promotion, could be used to affect judicial impartiality, given the worst of all possible worlds: in the case of appointments, because of gratitude for the favour done; in the case of anticipated promotion, in the expectation of future favours in the shape of such promotion. In the case of Chief Justices, what I understand was until recently the New Zealand practice of appointing always from the profession rather than promoting from the ranks of puisne judges disposes of one facet of the problem. But such a rigid rule would deny to the executive a desirable freedom of choice and would do so to a crippling degree were it also to be applied to, for instance, appointment to Courts of Appeal. It would in that instance also carry with it other disadvantages no doubt wholly outweighing its possible virtues.

Perhaps a consoling thought on the question of appointments is that not infrequently appointees disappoint the illegitimate expectations of those who appoint them. And of course appointees are free to do that very thing because of the independence which appropriate tenure confers on them, which is perhaps the point at which to leave both this whole topic and my audience, leaving you with the wish that judges, once appointed, may long go on disappointing such expectations and with the further wish that the Australian community may long go on enjoying the great blessing it now possesses yet is scarcely conscious of, the long and strong tradition of judicial independence of its judiciary.

PLAIN TALK ON PLAIN ENGLISH

Part of an address given by *David J. O'Callaghan* at a recent meeting of The Intellectual and Industrial Property Society on the subject of Plain English.

I HAVE BEEN ASKED TO SAY A LITTLE about Plain English, from a practical point of view. My first practical brush with proponents of Plain English, and the thing that prompted me to become interested in it, was my involvement in a case in which various of my client's finance documents (mortgages and the like) were subject to scrutiny and then roundly criticised in aid of an argument that they were incomprehensible and therefore arguably either unenforceable or unfair.

A so-called Plain English policy of drafting has been in force in the Victorian office of Parliamentary Counsel since 1985. The Patents Bill is an example of what now happens at the Federal level. The fundamental tenets of Plain English are, in most respects, unarguable and largely uncontroversial. We must write clearly, use short words and sentences rather than longer ones, and consider the needs of the intended audience. We must clarify our thoughts before committing them to writing and organise our thoughts and use good grammar. For these are the basics of Plain English.

Ultimately, once you have read something like Robert Eagleson's very useful drafting manual ("Plain English and the Law", Appendix 1 published by the Law Reform Commission of Victoria) there is little that one can usefully say, at least in the abstract, about Plain English. People do go on endlessly comparing some supposedly ghastly old statute with some supposedly wondrous modern equivalent. The Companies Acts, the Tax Code, the Victorian Credit Act and now the Patents Act have come in for a canning, and to some extent not without good cause. People also have a bit of fun tearing Plain English drafts to pieces. The principles are simple enough and the proponents of Plain English say that the real job lies in attempting to persuade the legal community that everyone's interests are best served by abandoning the archaic language of the past and being more straightforward about our words. That too is a worthy enough objective and if it went no further than this I would have no quarrel with it.

But the Plain English movement — if a movement is what it is — is running the very real risk of losing or not getting the respect of the legal profession. There are two reasons.

First, some of the views expressed by its leading lights are too often couched in derisive, aggressive and at times ludicrously exaggerated language. The language and the tone are neither constructive nor helpful and these writers run the real risk that people will not take them seriously.

Mr. Kelly, the Chairman of the Law Reform Commission of Victoria, recently claimed in an article contained in "Essays on Legislative Drafting" (Adelaide Law Review Association, 1988) that "legal drafting, particularly legislative drafting, is seriously defective" and that this "should surprise no-one". He contended: "It is now widely recognised that a great deal of Australian legislation cannot be understood by its audience. It is convoluted, repetitive and cumbersome. Little effort is made to present ideas simply and directly, let alone in a coherent order". With respect to Mr. Kelly, we all have our faults and doubtless Parliamentary counsel are as vulnerable as all of us, but I certainly do not think that what he says is true of the vast bulk of Australian legislation. To my mind it is also insulting of the very people Mr. Kelly would do better to gently encourage.

But our erstwhile Attorney-General, Mr. Kennan, is a more serious offender because he combines his savaging of the legal profession with a shameless immodesty and historical ignorance.

In his article entitled "The Importance of Plain English in Drafting", also contained in "Essays on Legislative Drafting", Mr. Kennan proffered this extraordinary assessment:

"It is of course, not only legislative drafting which is in dire need of improvement. The drafting of legal documents, even letters, leaves a great deal to be desired. Many legal documents are a pastiche of various precedents,

David J. O'Callaghan: *seeks a more realistic assessment of the contribution of Australian lawyers to our way of life.*

collected and treasured like icons over several generations. Small wonder then, that they speak to us in a strange tongue. The fact that there has been so little effort in this country to eradicate drafting defects indicates that there may be a more serious underlying problem. That problem is that there has been lacking in Australian legal circles the abundance of intellectual and cultural activity we find in other parts of Australian life relating to the expression and communication of ideas. A few examples from a range of endeavours should suffice."

He then goes on to catalogue and detail the virtues and praise the contributions of Sidney Nolan, Albert Facey, Sally Morgan and Laurie Duggan and various unnamed Australian scientists and medical researchers. By comparison, says Mr. Kennan, lawyers do not measure up at all:

"A comparison may be drawn between these achievements in a range of intellectual, cultural and scientific pursuits, on the one hand, and our relative lack of achievement in the law, on the other. As a lawyer and politician interested in a wide range of ideas, I cannot help thinking that while we can boast a great many artists, writers, scientists and others in the field of intellectual and cultural endeavour who may be truly seen to be in a world class, we cannot be so confident when it comes to the area of the law. At a time when we are being urged on all sides to become internationally competitive as a nation in the economic sense and to recognise our deficiencies to date in failing to reach world standards in that area, it is important to reflect on the achievements of lawyers in this country."

Mr. Kennan then offers his — needless to say unfavourable — view of some judges' performances. As a lawyer and politician interested in a wide range of ideas, as he so describes himself, Mr. Kennan obviously thinks nothing of the contributions made this century by such jurists as Sir Owen Dixon, H.V. Evatt, Sir Frederick Jordan,

Sir Victor Windeyer, Sir Robert Menzies and Sir Ninian Stephen.

At the end, Mr. Kennan dubs our legislative drafting "among the most convoluted and uncommunicative in the common law world". In my own experience, particularly in the U.S., where I worked and studied for some years, our drafting measures up in the incomprehensibility stakes pretty well. It is neither any better nor any worse. That does not excuse poor or convoluted drafting but it highlights the need for people like Mr. Kennan to be less aggressive in his attacks on those whom he needs to persuade to his cause and to be more realistic in his assessment of the contribution of Australian lawyers to our way of life.

The second development in the movement that causes me to worry that the legal profession will no longer take it seriously is the recent suggestion made by Mr. Kelly that it is possible to apply a mathematical formula in order to determine what is known as "a readability score". The formula is called the Flesch test and it was invented by an American called Flesch who wrote a book called, I think, "How to write Plain English". Mr. Kelly extolled its virtues in a recent case in which he gave evidence.

The test requires one to multiply the average sentence length by 1.015, multiply the average word length (that's the average syllables per word) by 84.6, add those two numbers together and then subtract the sum from 206.835. The balance is your readability score.

That formula apparently requires the scorer to count concepts like "ABC", for example, as three syllables, despite the fact that readers would be hard pressed to think that expression as multi-syllabic. The test also counts as one sentence a sentence divided up into sub-paragraphs or lines. Neither Mr. Flesch, let alone Mr. Kelly, have been able to offer any explanation of the formula other than that "it is based on some very complicated facts of human psychology".

I do not know why anyone would want to advocate use of this test. It is, with respect, a nonsense and it seeks to elevate to an art form an exercise which is not capable of mathematical analysis. It may be that because it is difficult to lift discussion of the abstract principles of Plain English above banal generalities, that people feel compelled to fortify their views with such theories or with the sort of socio-economic-artistic-medico-multi-disciplinary analysis of Australian history given by Mr. Kennan. If the proponents of the movement continue with such antics and if they continue with the derisive dialogue to which I have referred they will be rightly shunned by the profession.

From a practical point of view, it is important to recognise that, on some occasions, a draftsperson quite consciously wishes not to be plain about something. Our Federal Consitution is riddled with ambiguities and uncertainty, largely because it was the result of numerous political compromises. In legislation, Parliament itself sometimes quite deliberately intends not to be plain. In a 1984 case called *Manda v Lee* the House of Lords had to interpret the most basic issue in interpreting the *Race Relations Act* (1976) — the meaning of the word "race". In particular, they had to decide whether a Sikh boy was being discriminated against on the ground of race when a school refused to admit him unless he cut his hair and did not wear a turban. After the Court of Appeal held, unanimously, that he was not, the House of Lords held, unanimously, that he was. It was obviously a hard and controversial question and Parliament was quite happy to leave that hard and controversial job to someone else, by being anything other than plain in their drafting of the legislation. In our own practices, we all, at various times and for an infinite number of legitimate reasons, may wish a document to be vague, forbidding, or even not altogether frank. There is a legitimate role for all these and to my mind it has everything to do with not being plain.

BAR NEWS CALLS ON JUDGE GORMAN

LATE IN THE AFTERNOON OF A SUNNY October day, his Honour Judge James Galvin Gorman is engaged in a familiar task: waiting for the verdict of a civil jury. The jury has been out since lunchtime. The case has been a difficult and unusual one. The plaintiff lost the sight of an eye as a result of the detonation of a smoke bomb worn by a rodeo clown. This stint in civil juries running to the end of the year will culminate a career in the law going back to the late 1930s.

Admitted to practice 1941, signed Bar Roll 1943, Silk 1961, County Court judge 1971. The familiar professional milestones have marked out a long and fruitful career.

His Honour went straight from St. Kevin's College to Melbourne University in 1936 with fellow student and later colleague at Bar and Bench Ivan Franich. His Honour admitted quite freely and voluntarily that he secured "no exhibitions" but pointed out that Ivan Franich "ran Zelman Cowan very close". There were only two full-time lecturers, Professor K.H. Bailey and Professor George Paton. Many of the students were articled clerks and the total first year class was only about 100.

His Honour served articles with J.J. Carroll, a sole practitioner who had been admitted to practice in 1910, in his Honour's words, a "very straight and honourable man". Mr. Carroll's office was in Chancery House. He had a general practice including conveyancing and probate and also some criminal work for which he usually briefed the legendary Jack Cullity. Mr. Carroll did a fair amount of police court advocacy himself and was a very competent practitioner who taught his Honour a great deal, especially a sense of the importance of high ethical standards. His Honour commented that he had a high regard for some of the solicitor police court advocates that he met in his early days and in particular mentioned Bill Jones, Louis Le Grand and Jim Ogge.

Having been rejected for military service on medical grounds, his Honour went to work for Arthur Robinson & Co upon admission to practice and stayed there running their conveyancing department from 1941 until August 1943 when he signed the Bar Roll. He worked at times with Sir Arthur Robinson, "a most pleasant and very amiable man". Because religious divisions are a part of Melbourne legal folklore, we asked his Honour whether he encountered any problems working at Arthur Robinson & Co, in those days a bastion of the Presbyterian Establishment. "Not at all", said his Honour. "I was interviewed for the job by Wesley Ince. He asked me where I had been to school. I said St. Kevin's. He seemed unfamiliar with that school so I told him it was out in Toorak. He seemed impressed at that and asked who ran it. I told him the Christian Brothers and he said that he didn't have any views about religion. So it was never a problem."

During his time at Arthur Robinson & Co his Honour became an expert in such arcane areas of the conveyancer's art as closing cul-de-sacs (or is it culs-de-sac?). He also acted for Dunlop Ltd which had purchased large areas of land at Beaumaris with a view to building homes for employees. The blocks sold for 10 pounds although, as his Honour put it, "you needed a compass to find them".

His Honour had always wanted to go to the Bar. But in those days a barrister's life appeared very remote to a young solicitor. Going to the Bar was "something you didn't undertake lightly". Because the war was on, not many started at the Bar in those days. His Honour mentioned John "Wingy" Moloney, later a Crown Prosecutor, Des Walsh (who died a few years later) and John Lewis (father of Gerald). His Honour read with J.F. Mulvany, an outstanding barrister who later became a County Court judge because he was "sick of paying high taxation". In his early years at the Bar, the staple work was landlord and tenant cases and crime. Compulsory third party insurance had come into operation in 1941, but because of petrol rationing during the war there was not much use of motor cars and consequently running down was not the major field which it became after the war.

His Honour had always wanted to go to the Bar. But in those days a barrister's life appeared very remote to a young solicitor. Going to the Bar was "something you didn't undertake lightly."

The two outstanding criminal advocates were Jack Cullity and Rob Monahan. They had very different styles. Monahan was flamboyant and colourful, a great jury advocate. Cullity was very analytical and a deadly cross-examiner. The leader of the Bar was Wilbur Ham KC but quite unaccountably his following declined dramatically and he "went out of the game" in three or four years, which caused his Honour some mild concern. It showed him what a gamble the Bar could be. There weren't too many silks around in those days and the practitioners in the "whispering jurisdiction" whom his Honour recalls were Gerry Hasset, Wilfred Fullagar, Gregory Gowans and George Pape, the latter being known as a specialist in shipping work.

His Honour had a retainer as a reporter for the Victorian Law Reports. In those days this involved actually going along to the courts, and in particular the Practice Court, where the reporter would take notes of ex tempore judgments. His Honour would

scribble down the judge's reasons as best he could in longhand. As a result there are many reported decisions of that era of only two to three pages but on very practical points.

His Honour's first clerk was Fred Muir, the father of Doug. After the war David Calnin set up as a clerk at Equity Chambers and his Honour joined that list. Upon the move to Owen Dixon Chambers in 1961, two new clerks commenced operation. One was Jack Hyland whose list his Honour joined and there remained for the rest of his time at the Bar. The initial Hyland list of 32 included such distinguished figures as Sir Ninian Stephen, Sir Reginald Smithers, Sir Gregory Gowans and Sir Murray McInerney.

The other clerk who commenced at this time ran into very stormy financial waters, much to the detriment of those unfortunate enough to join his list. One of his Honour's friends had a resultant loss of 1,400 pounds, a large sum indeed in the early 1960s. His Honour's practice developed substantially in the field of personal injuries. Running down burgeoned in the late 1940s and the 1950s and brought into prominence a number of very competent counsel. His Honour mentioned in particular Reg Smithers, Snowy Burbank and Oliver Gillard, although the latter had a very general practice. Most of his Honour's work was in Melbourne although he did do the Warrnambool circuit for Dan Madden, an old school friend, and also went to Mildura for Ian Ryan. His Honour took Silk after 19 years at the outer Bar, although Jack Hyland "wanted me to jump in earlier than I did". In those days there was not the requirement of annual applications for Silk and hence the practice, discontinued a few years ago, of sending out letters to counsel senior on the Roll to the applicant had a real function. The recipient was given notice so that he could retain his seniority by applying for Silk himself. At the time his Honour applied he was accompanied by Crockett, Murphy and Connor. Anderson and Kaye had been appointed Silk two months earlier that year, so it was quite a lot for one year at that time.

After taking Silk his Honour remained in substantially the same areas although he did do a few Will cases and TFMs. He also did more crime. Shortly before his appointment to the Bench in 1971 he was being led by Tony Murray QC, Solicitor-General, for the State Government in the inquiry into the collapse of the Westgate Bridge. His leader had to leave the inquiry for a substantial period to work on a High Court case appearing for the State of Victoria so his Honour took over the reins, leading Jack Mornane.

Upon Sir Murray McInerney's appointment as an acting judge in 1965, his Honour was elected to the Bar Council and served on the Council for the rest of his time at the Bar. With Peter Coldham QC he ran an earlier version of the Black List.

His Honour does not subscribe to the familiar judicial theory that the Golden Age of advocacy ended with his appointment to the Bench. He thinks the present standards are as good as ever and there are quite a few counsel with whom he is impressed. However he does notice a tendency to much longer cross-examinations in criminal matters which he considered "a bit out of proportion". He has seen some "real fireworks", notably one occasion when Colin Lovitt was prosecuting and his Honour's present colleague W.M.R. Kelly defending. Things got so heated that his Honour was provoked into the unjudicial plea "Will you gentlemen cut it out!"

His Honour has found the judicial work in the County Court in recent years "immeasurably harder". The work is "very tough". He cited as an example the case on which he was currently sitting. It raised some very difficult questions about liability to trespassers. He thought that criminal trials were prepared better and there were more very complicated matters such as white collar crime. The new jurisdiction of the County Court meant that granting of injunctions was now an everyday occurrence and his Honour was concerned with "things I hadn't looked at for 15 years".

Looking back his Honour considered his career in the law as "a great life — hard, demanding and competitive". As long as your health stood up it was a very good life. His Honour thought that promotion to the Bench was something which should not be sought in too much of a hurry but it was a natural gradation. You still remained part of the camararderie of the Bar.

His Honour has no very specific plans for retirement. He enjoyed travel and hopes to do some more. He remembers with particular pleasure a trip to China a few years ago.

His Honour leaves the Bench as a deservedly popular figure, hard working, good humoured, and possessing a keen sense of justice. Barristers are not reticent in talking among themselves about the shortcomings, real or imagined, of members of the Bench. But you would have to wait a long time before hearing an unkind word about his Honour, long known as Gentleman Jim.

Editors Paul Elliott and Peter Heerey QC hard at work interviewing his Honour.

CONSTITUTIONAL PROTECTION OF SUPREME COURT JURISDICTION — JUDGES' SUBMISSION

There is presently before the Legal and Constitutional Committee of State Parliament a proposal to alter s.18 of the *Constitution Act* 1975. This provision at present provides in effect that any Act repealing, altering or varying s.85 of the Act (which confers unlimited jurisdiction on the Supreme Court) shall be void unless passed with an absolute majority.

The Judges of the Supreme Court have made a submission to the Committee and the Chief Justice has requested that it be published in *Victorian Bar News.*

Legal and Constitutional Committee
Reference dated 1st August, 1989

Section 85 of the *Constitution Act* 1975 is the only legislative provision which refers comprehensively to the ambit of the jurisdiction of the Supreme Court. It apparently represents an attempt to state in condensed language the effect, or part of the effect, of sections 15 to 19 of the *Supreme Court Act* 1958 and their forerunners. The earliest of these in Victoria were contained in the *Supreme Court Act* 1852, by which the Court was established, and the Court's jurisdiction was classically defined in the *Judicature Act* 1874 (Act 502).

There are three linked characteristics of the Supreme Court's jurisdiction to which section 85 refers —

1. Subject to the Constitution Act, where the Court's jurisdiction runs it is exercisable in all cases whatsoever.
2. The Court is the superior Court of Victoria of general jurisdiction.
3. The Court has and may exercise the jurisdiction that it had immediately before the commencement of the Supreme Court Act 1986 on 1st January 1987. This depends on the Acts of 1852 and 1874, amongst others.

Section 18(2) of the Constitution Act, so far as it refers to the repeal, alteration or variation of section 85, appears to affect only the diminution and not the enlargement of the jurisdiction of the Supreme Court: section 85(4). Section 18(2), then, is concerned with the exercise of the parliamentary power to diminish the authority of Victoria's superior court of general jurisdiction. In order to appreciate the gravity of that power and the significance of its exercise it is essential to concentrate on the function of a superior court of general jurisdiction.

The Supreme Court was established as a court of judicature and its chief function always was and is to guarantee within Victoria the administration of justice according to law. The Court was granted in 1852 a common law jurisdiction equivalent to the jurisdictions then exercisable by the Courts of Queen's Bench, Common Pleas and Exchequer at Westminster, and a jurisdiction in equity equivalent to that then exercisable by the Lord Chancellor. Those initial grants of jurisdiction have remained fundamentally the yardsticks of the Supreme Court's jurisdiction ever since its foundation subject, of course, to additions to and subtractions from it by Statute. The Court has thus inherited and has naturally and beneficently exercised the "very high and transcendent" jurisdiction of the Court of Queen's Bench of which Blackstone wrote two centuries and more ago. It is therefore a cardinal

task of the Supreme Court to keep all inferior jurisdictions within the bounds of their authority. This task the Supreme Court has performed as a matter of course during the 137 years of its existence because it has acted as *the* superior court of Victoria of general jurisdiction — there is no other. Given this basic tenet there should be no misunderstanding, in the light of modern parlance, about the relationship of a superior court and inferior courts and tribunals within the one body politic: the title accorded to a superior court is no mere matter of pomp or form. An inherent and necessary function of a superior court of judicature is to keep in check, within allotted bounds, every activity that is subject to the rule of law. It is in this sense that the Supreme Court is to be understood as one of the organs of government of the State. The present shape of the *Constitution Act* 1975, acknowledges as much, and is designed to secure the position of the Supreme Court as part of the essential legal framework of the State. It is indeed more than simply an organ of government. As Brennan, J. has recently said in the High Court, a State Supreme Court is one of the essential organs of government on which the existence and nature of the body politic depend. It is "the court of general jurisdiction in which, subject to the jurisdiction of this Court [*sc.* the High Court], the laws of the State are finally interpreted and the constitutional and administrative law of the State is applied": *State Chamber of Commerce and Industry v. The Commonwealth; The Second Fringe Benefits Tax Case* (1987) 163 C.L.R. 329, 362-363.

A State Supreme Court is one of the essential organs of government on which the existence and nature of the body politic depend.

It is because the Supreme Court has been able to fulfil its function as a superior court of general jurisdiction that citizens of Victoria are able to say, with truth and pride, that they live under the rule of law. Any depletion of that jurisdiction must impair or gravely strain the Court's capacity to fulfil its function.

The federal compact welded by the Commonwealth Constitution assumes that the country's essential institutions are to be governed by the rule of law, of which the ultimate arbiter is the High Court of Australia. Those who wish to appeal to the High Court from a decision in Victoria dependent on State law can do so only from the Supreme Court of Victoria. To the extent to which the Supreme Court of Victoria has no jurisdiction to deal with a given subject matter of Victorian law, that subject matter is potentially placed beyond the rule of law.

The Committee is directed by its terms of reference to respect the principle that one Parliament should not seek to fetter the ability of another to legislate except "to the extent necessary to safeguard the continued existence of the fundamental constitutional components of Victoria's system of government". The thesis above set out is that the jurisdiction of the Supreme Court is one of those fundamental constitutional components. No other view is reasonably open. Any bill for an Act of the Victorian Parliament, therefore, that subtracts from the existing jurisdiction of the Supreme Court is one that demands the closest possible scrutiny — a scrutiny at least as penetrating as that for which section 18(2)(b) now provides.

It would be invidious and naive to abandon the safeguard now provided by section 18(2)(b) of the Constitution Act for any repeal, alteration or amendment of section 85 and yet preserve it for other provisions referred to in section 18(2)(b). Section 18(2)(b) now affords a degree of protection to all provisions of Part III of the Constitution Act. The provisions in Part III include those designating the Supreme Court as a court of record and regulating the office of its judges and their tenure, obligations and privileges. These provisions cannot be sensibly segregated, or hived off, from those in section 85 which stipulate the jurisdiction of the Court. Once given, the safeguard for section 85 cannot without mockery be dissolved. Without an equal safeguard of the Court's jurisdiction, a stated safeguard of the terms of office of its judges would now be a hollow thing.

Section 18(2)(b) also affords protection to the provisions of Part IIA of the Constitution Act, dealing with Local Government. Are these to be thought worthy of greater protection than the jurisdiction of the Supreme Court consistently with a principle designed to "safeguard the continued existence of the fundamental constitutional components of Victoria's system of government"? If so, the principle has been either imperfectly formulated or imperfectly understood.

The diminution of the jurisdiction of the Supreme Court should not be the prize of party political ambition. The present form of section 18(2)(b), if it is heeded and allowed to take effect, provides a worthwhile safeguard of what section 85 enshrines. It does so because it serves to separate in some degree the administration of common justice from the purely political and administrative executive. There is no better justification for the preservation of the safeguard.

CRIMINAL BAR ASSOCIATION DINNER

Speech by John Coldrey Q.C. — Expurgated Extracts

I AM, AS MANY OF YOU KNOW, A MAN OF few words. My problem is I tend to recycle them. But I have always been fascinated by the witty comments of others. Sometimes you find them in graffiti, as on the South Melbourne building bearing the title "Bob Shearman's Tool Works" under which somebody had sprayed "So does mine".

Or in politics when Arthur Calwell, speaking about the brief period of Prime Ministership of Mr. Arthur Fadden, remarked: "You know Artie, for 40 days and 40 nights you held the destiny of Australia in the hollow of your head."

In New South Wales recently I noted a comment by a barrister about the controversial Sydney counsel, Clive Evatt: "Doing a case against Clive Evatt is like trying to stuff an octopus into a coca cola bottle. Just when you think you have the whole creature inside the bottle a tentacle comes out and whacks you across the head." The beauty of that comment is that you can insert the name of the counsel of your choice.

It is also hard to forget a historian's description of the late 19th century landed gentry in Ireland:- "Their principal utility was as a conveyer of red wine from the bottle to the chamber pot." There are of course worse occupations.

A number of interesting events have occurred since I was last forced to speak to the Criminal Bar Association for a free meal.

The level of judicial salaries has again been in the news. It is asserted that if you wish to make judges immune from bribery you must pay higher salaries. I have always found the opposite argument persuasive. Persons who accept judicial appointment at the present salary are clearly above bribery since they obviously have no interest in money whatsoever.

Incidentally, I understand that when Mr. Justice Hampel received his first pay cheque as a Judge he remarked to a colleague: "That's not much for a week's work." Only to be told: "It's a fortnightly pay cheque, George!"

Another proposal to surface during the year is the creation of an appellate court. In contemplating such development one is reminded of the definition of appellate court judges as persons who wait in the hills until the battle in the valley is completed before descending to shoot all the wounded.

My younger daughter Vanessa is doing legal studies this year and she had to write a 1½ page essay on the advantages of appellate courts. I confess I was quite unable to help fill the space.

And now to my speech.

Every criminal barrister who has been blessed with a touch of the Rumpole will, at some stage, undergo the character building experience of being junior to a silk.

In my first murder trial I was junior to Charles Francis. Charles allocated the witnesses we would cross-examine on what appeared to me to be a random and commendably democratic basis.

Sometime after lunch on day one the first witness I was scheduled to cross-examine was completing her evidence in chief. I was about to immortalise the Coldrey name in purple print! As the evidence concluded Charles turned to me and said: "Gee, John, she's a pretty important witness." I nodded enthusiastic agreement. "I think I'd better take her", said Charles as he rose to his feet. His cross-examination took the balance of the afternoon and he settled the case for manslaughter before court the next morning.

A number of interesting events have occurred since I was last forced to speak to the Criminal Bar Association for a free meal.

The second murder trial in which I had a junior brief was with Peter Murphy (now of course Mr. Justice Murphy). A fortnight before the trial commenced I was sent away to write an exposition on the law of self defence, provocation, and accident and to draft a final address. Our situation could be described as well prepared but flexible.

Peter Murphy decided to cross-examine all the witnesses himself.

As luck would have it, about three days into the trial, and during the evidence in chief of an analyst from the Forensic Science Laboratory, my learned leader turned to me and said: "You can take this witness, I'm going out for a smoke."

Rarely have I heard such portentious words. The time for greatness had arrived. Did I cross-examine this expert? Did I what! We converted the blood alcohol level of the deceased to 7oz. glasses of beer, to pots, to nips of whisky, we chatted learnedly about absorption and elimination rates, and we drew meaningful comparisons with the .05 legislation.

By the time Peter Murphy had reached the butt end of his filter tip I had secured myself a niche in history.

That night I waited until 6.30 before breathlessly

ascending the stairs of Birkdale House to obtain the transcript. There it was, all the insightful questions, all the respectful answers but under the heading **"Cross-examined by Mr. Murphy"**

I recall appearing with Phil Opas in a manslaughter in which our client was charged with killing her young child. With some reluctance Phil let me loose on the investigating police who I cross-examined at length about their outrageous treatment of the accused. As I left the court Phil patted me on the shoulder and remarked: "That was excellent John. It only goes to show that in these courts the bludgeon is just as effective as the rapier."

My final vivid memory of life as a junior is of appearing once again with Charles Francis in an insanity murder. Our client, whom I will call Fred, suffered from alcoholic dementia. When, in the middle of a drinking bout he and his friends were faced with a liquidity problem, Fred, who exhibited leadership qualities, despatched a rooming house colleague called Bert with an axe. He and his friends were drinking the flagons purchased with Bert's money when police broke up the party.

At my first meeting with Fred he announced "What I desire is oblivion." I had to inform him that this was beyond the capacity of the Legal Aid Commission.

On reflection I am not certain all their clients would agree with that assessment.

Fred went on to explain his actions: "There was a full moon on the night, Mr. Coldrey, and a full moon does strange things to men's minds."

The trial before Mr. Justice Anderson went so well that, at the end of the psychiatric evidence, and before any final addresses, Charles persuaded the Judge to charge the jury briefly and send them out to determine whether they needed to hear any more or whether they were prepared, at that stage, to find Fred not guilty on the grounds of insanity.

At 12.55 after Mr. Justice Anderson had completed a mini-charge, which forcefully emphasised Fred's mental shortcomings, and the jury were about to retire, Fred stood up in the dock and called out: "Your Honour I would like to make a statement."

Not to be outdone, Charles leapt to his feet and announced that since we had closed our case no statement was possible. The Judge was not so sure that Fred could be shut out that easily. Fortunately, at that point, we adjourned for lunch. We met Fred in the cells and explained that the case was going well and there was absolutely no need for him to make any statement.

"It's my case isn't it?"

"Yes".

"Well, I want to make a statement. I'm not as silly as they say. I've had a lot to do with psychiatrists and I can fool them."

"Listen Fred", said Charles, "Nobody's saying you're insane at the moment. If you needed money for grog now you wouldn't go killing someone with an axe to get it."

"Bloody oath I would!"

Somewhat depressed we left Fred to his lunch.

Before Court resumed I encountered Fred in the ante-room.

"I'm sorry for my outburst before lunch, Mr. Coldrey", he said, "The screws hadn't given me my valium and I was a bit upset."

"That's O.K. Fred I understand".

"It still is my case isn't?"

"Yes."

"Then I still want to make a statement."

What followed was the only genuinely unscripted unsworn statement of the 1970s. Fred told the jury: "I killed Bert. I done it with the axe. He was a mongrel and a dog. I knew what I was doing. There's nothing wrong with me. I've had a lot to do with psychiatrists and I can fool them. Thank you."

Mr. Justice Anderson enquired what should next occur. Charles urged him to add to his mini-charge by informing the jury of the weight to be attached to an unsworn statement compared with evidence on oath. This his Honour duly did. Once again the jury rose to retire at which point Fred interjected: "Your Honour, I would like to give evidence on oath."

Not to be outdone, Charles leapt to his feet. "He can't do both," said Charles "He's already had his go."

But His Honour was not sure Harry could be shut out that easily . . .

Fred took the oath with all the aplomb of a senior sergeant: "Ladies and Gentlemen, I killed Bert, I done it with the axe. He was a mongrel and a dog and he deserved to die. I knew what I was doing. There's nothing wrong with me. I've had a lot to do with psychiatrists and I can fool them." For good measure Fred added: "I'm a Roman Catholic and I knew what I was doing was wrong."

By that stage Fred's desire for oblivion was being shared by his counsel.

The jury duly retired and our client sat relaxed in the dock. "Well, you've had your say Fred, what do you think will happen?" "Ah, Mr. Coldrey, they will find me not guilty on the grounds of insanity."

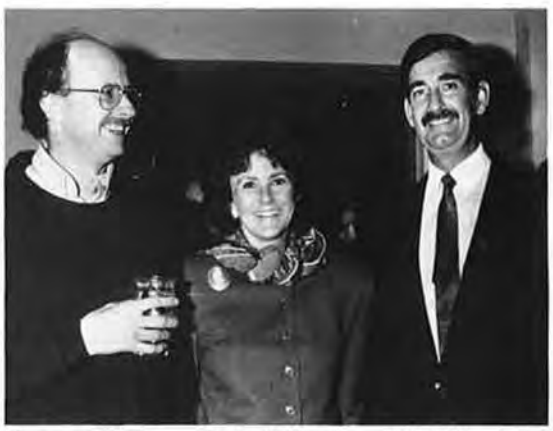
And 15 minutes later they did.

One week after this I ran into the Judge's Associate — one of those retired naval types: "I was very interested about that business of the full moon", he said. "So I looked it up in Moore's Almanac. You might be interested to know that it was a new moon that night."

Mr. Chairman, further startling revelations of this nature will be contained in my soon to be written autobiography entitled "All's Well That Ends."

CRIMINAL BAR ASSOCIATION DINNER

Judge Fagan Judge Hart Colin Lovitt QC



Graeme Hicks Judy Gillard Bill Gillard QC

John Coldrey QC Karin Coldrey

Tom Gyorffy Paul D'Arcy

Tony Howard Linda Dessau

Margaret Lovitt Sean Cash Tim Sephton

HYLAND LIST DINNER

Judge Gorman, Sir Reginald Smithers QC, Pat Dalton QC, Xavier Connor QC.

Bob Monteith, Judge Gorman, Michael Dowling QC.

Tony Brown, Louisa Baggani.

Brian Lawrence, Geoff Eames, Margot Brenton, Bob Johnston, Ian Hardingham.

John Monahan, Craig Porter.

Jack Hyland.

THE FAR NORTHERN CIRCUIT

Bryan Keon-Cohen (r) with colleague at lunch.

BRYAN KEON-COHEN HAS BEEN RECENTLY involved in a land claim for traditional native title at common law over land and sea areas at Murray Island in the eastern fringe of the Torres Strait.

The case was commenced in the High Court diversity jurisdiction and remitted to the Queensland Supreme Court (64 ALR 1). A successful demurrer by the claimants was the target of Queensland legislation, which in turn was declared void by the High Court (83 ALR 14).

CONFERENCES, SEMINARS

5th-17th August 1990
University of Glasgow,
European Legal System,
Commercial Law in the UK,
Law of the Economy in the European Communities,
Human Rights
Tel: UK (Glasgow) (041) 339 8855
Fax: (041) 330 4900

25th May — 1st June 1990 Second Greek/ Australian Medico-Legal Conference
(Details elsewhere in this issue.)

December 1989 to April 1990
Medico-Legal Conferences
US Ski Resorts
American Educational Institute
401 S. Woodward, Suite 333
Birmingham, Michigan 48009, U.S.A.
Tel: 8004 354 3507
(313) 433 0606
Fax: (313) 433 0615

7th-12th July 1990
ABA Conference, Darwin NT
(Details elsewhere in this issue.)

SECOND GREEK/AUSTRALIAN INTERNATIONAL MEDICAL AND LEGAL CONFERENCE

EMINENT LEGAL AND MEDICAL SPEAKERS guarantee high standards at the Second Greek/Australian International Medical and Legal Conference in Athens and Corfu in 1990.

The success of last year's conference is indicated by the 80 percent repeat acceptance rate for the second conference scheduled for 25th May to 1st June next year.

Already, there has been overwhelming response to the preliminary announcement, with over 500 people from both professions having registered their intention to attend.

Speakers will include Sir Ninian Stephen, Sir Gustav Nossal, Mr Justice John Phillips, Professor Graham Burrows, Dr Paul Nissele, Professor Steve Cordner, Dr Nick Bouras from Guy's Hospital, London and a number of eminent Greek speakers including Professor Papadatos of the University of Athens.

State Bank Victoria will again be the major sponsor of the conference with the Bank's Chief Executive Officer, Mr Bill Moyle, attending as a keynote speaker.

The conference will include four full days of sessions with a social program featuring a full day cruise to Kassiopi and a performance at the Herod Atticus Theatre by internationally acclaimed young pianist, Demetri Sgouras. There will also be tours to Egypt and Turkey before and after the conference.

Chairman of the conference committee, Miss Eugenia Mitrakas, said the second conference will maintain the high standard and value attained at the first conference.

"The conference will benefit any practitioners or people interested in the fields of law and medicine. We are confident that the conference will be professionally and socially beneficial for all," she said.

For further information write to
PO Box 29, Parkville 3052
Tel: (03) 387 9955
Fax: (03) 387 3120

DIVISIONS OF THE BAR ROLL

AT A SPECIAL GENERAL MEETING OF THE Bar on 27th September, 1989 Counsel Rule 25A.(1) was amended by deleting the expression "Part 1: Retired Judges" and substituting the expression "Part 1: Retired Judges and Other Judicial Officers".

Accordingly, the names of Masters Jacobs and Brett were moved to the list of "Retired Judges and Other Judicial Officers".

AUSTRALIAN BAR ASSOCIATION CONFERENCE

THE ABA IS HOLDING ITS BIANNUAL conference in Darwin between Saturday 7th July and Thursday 12th July, 1990.

The Conference can be combined with a vacation in Alice Springs, Ayers Rock, Kakadu and South East Asia.

An interesting and varied programme has been arranged and members of the Bar are encouraged to attend what will be an enjoyable week in the Northern Territory.

BAR HOCKEY 1989

ANY DOWNTRODDEN SPORTING TEAM must ensure that when stunning success finally comes its way, it accepts that outcome with the same good grace and humility as it faced defeat. There is nothing worse than a gloating winner.

One can be sure that when Bill Gillard's cricketers had an unlikely victory over the solicitors a few years ago, they bore this rule in mind. Likewise, the Victorian Bar Hockey team, following recent events, attempted to conduct itself in accordance with the best tradition of the Bar.

Having said all that, I can't hide the fact that it gives me enormous pleasure to inform all who read this that the Victorian Bar Hockey team has come out of the wilderness to record a memorable victory against the arch enemy. The Scales of Justice Cup will be returning once more to the hallowed precincts of Owen Dixon Chambers East, and any

Left to right: David Beach, Richard Brear, Gordon Smith, John Bryson, Tom Lynch, Andrew Tinney, Ian Dallas, Phillip Burchardt, Rupert Balfe QC, Peter Burke *(behind R. Balfe)*, Roger Young, Michael Tinney, Sue Hurley, John Coldrey QC, DPP, Tom Grogan V.H.U.A. *Umpire (behind J. Coldrey).*

move to paint it pink will be strongly resisted.

But I am getting ahead of myself. Our campaign started as usual with a match against RMIT. This was the first chance for an eager and clamouring public to see the new look Bar side.

Those in the know in Bar Hockey circles felt that the shock defection of Michael Tinney to the Bar side from the Law Institute might be enough to swing the pendulum our way. In the past, he had often stood between us and victory. His appearance in the familiar walrus-betoothed black shirt of the Bar side followed a bitter clearance wrangle between the Bar and Bruno Kiernan in Carlton. The forms were lodged in March, and he went into full training in June.

What we were not expecting was to recruit four other brand new players — Philip Burchardt, Sue Hurley, Andrew Watson and Roger Young.

All recruits were on show against RMIT, and did not disappoint. Though tentative at first, and falling

John Chapman, Andrew Tinney, Vaughan Lamb.

one goal behind, we recovered to secure a very meritorious draw against a side that had given us a terrible hiding the previous year.

Sitting in the pub after the game, we reasoned that the solicitors would be older, slower and less fit than RMIT, so we had to have an excellent chance. Of course, this had all been said before.

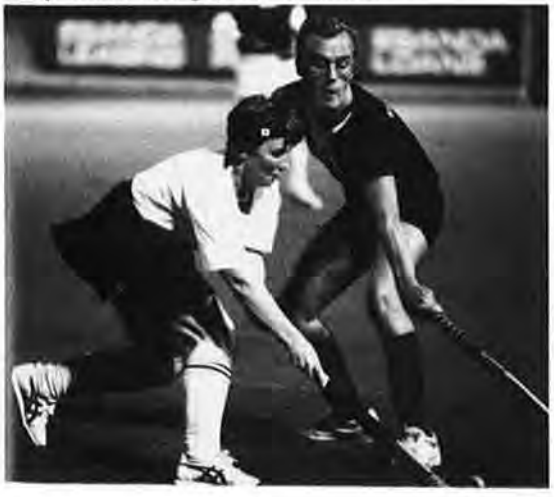
The atmosphere was electric at the Astroturf on Thursday 19th October at about 6.05 p.m. The crowd was restless and fidgety, sitting in the grandstand. I suggested she come and sit down with the team at ground level.

Walking out onto the ground, I was stunned to see a dozen or so Bar players warming up. The solicitors only had about five. We did our best to get the game started straight away, but to no avail. By the time team photos had been taken, the solicitors had a team, and our early advantage was gone.

On the sidelines, and ready to play if required, was Damian Bugg, D.P.P. for Tasmania, with Crown Counsel, the charming Helen Lambert. In previous years we would have tried to sneak Damian into the side, but we had fourteen players and, hopeful of victory, we didn't want to give the solicitors any cause for complaint.

We started well, putting on a lot of pressure, but missing easy opportunities in attack. The solicitors, weighed down by the responsibilities of running busy practices, keeping trust accounts, and dreaming up new ways of putting off paying counsels' fees, were sluggish at first, but we could

Sally Wansborough, David Beach.

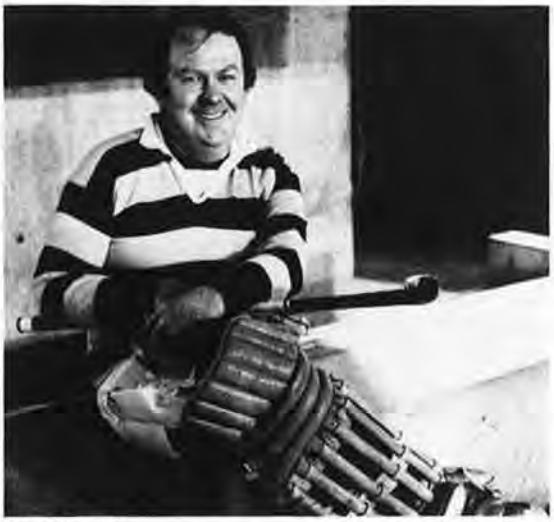


not take advantage.

Our defence, though, stood up well whenever pressured. Peter Burke and Roger Young formed an impenetrable and pleasingly nasty barrier against opposition forwards. The skull and crossbones motifs on their shirts served fair warning to any solicitor straying into their domain, and one could detect a glint in their eyes whenever either of the skilful McNab brothers approached with the ball.

Goalie Tom Lynch, mopping up behind the fullbacks, did what little he was required to do with a minimum of fuss.

We scored first off a short corner after about twenty minutes, the blow being struck by Burke. We continued to apply the pressure but missed opportunities, though it should be noted the Law Institute goalie was doing a fine job.

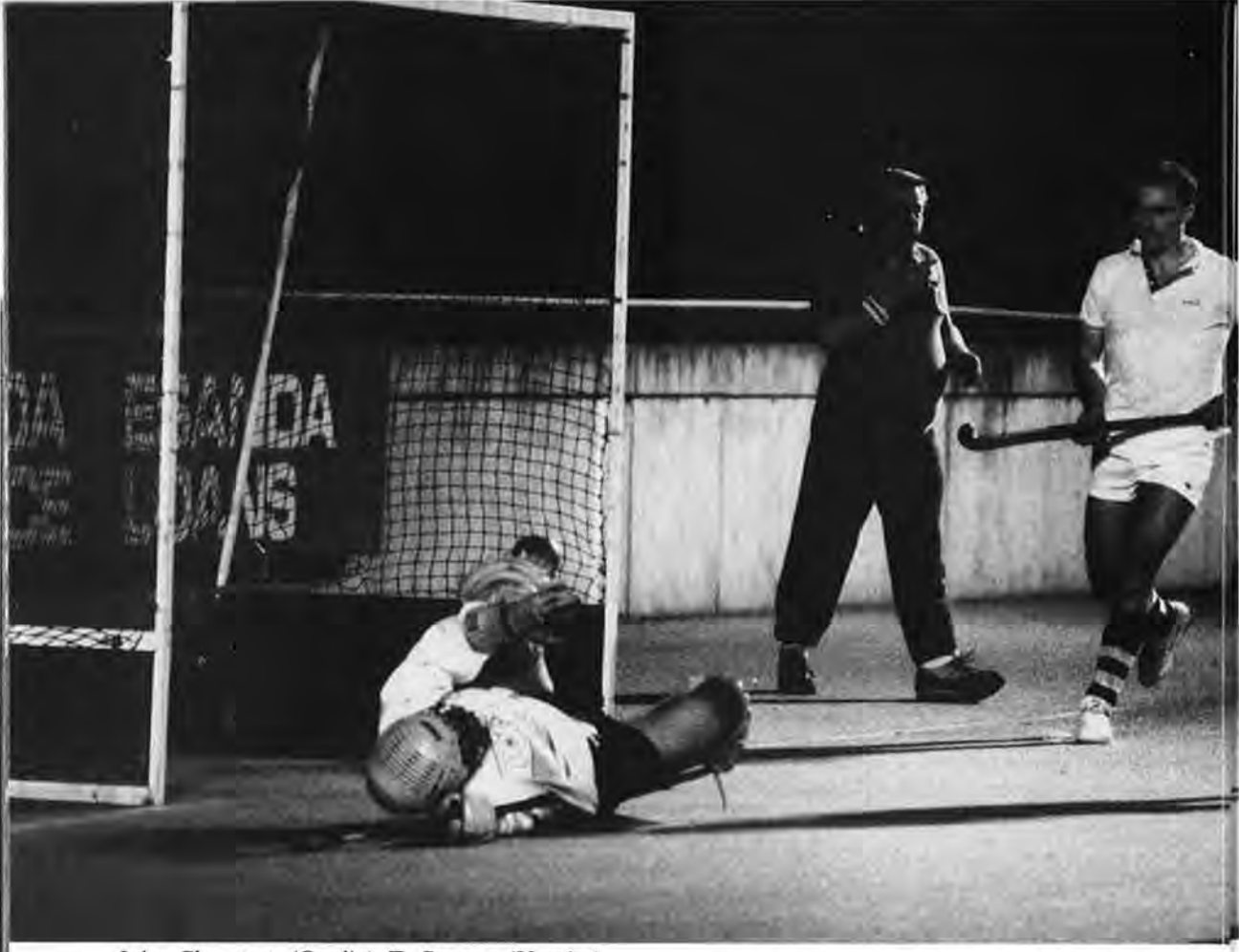


Tom Lynch.

We were getting great drive from our halfline of Gordon Smith, Burchardt and Hurley, with Rupert Balfe also coming on during the first half. It may have seemed like a matter of time before the forward line could score, but only 1-0 up at half time, some players were feeling quite uneasy, remembering similar positions in the past which had turned into ignominious defeat.

The uneasiness continued for fifteen minutes into the second half until the Bar side, finally casting aside its doubts, changed in a matter of minutes from an ugly and rather clumsy caterpillar to a beautiful and well co-ordinated butterfly and inflicted upon the solicitors a beating the like of which had never . . . SORRY, good grace and humility!

Burke scored his second from a short corner. Then followed a goal by John Coldrey that defies sensible description. I won't attempt to do it justice. A special author has been engaged to write this portion of the article.



John Chapman *(Goalie)*, T. Grogan *(Umpire)*, Andrew Cassidy, Lynne Barry, P. Burchardt.

THAT GOAL

In every sporting contest there is a moment when the tide of battle irrevocably turns. In this game it came in the 55th minute when Coldrey, moving with the speed of a judge leaving the Bench, intercepted a blazing pass from right wing. Maintaining perfect balance he swung into the ball in a manner reminiscent of the great Sir Garfield Sobers and sent it hurtling head high towards the goal.

The goalie seemed to catch a glimpse of what must have appeared to him as a miniature version of Halley's Comet for he was attempting to raise his right arm (whether in self-defence or as a salute to greatness was not clear) as the ball crashed into the back of the net.

The effect upon the solicitors was devastating. They huddled together in small partnerships with that look of fear and resignation that comes with the news that the Law Institute Auditor is on the way.

Anon.
C/- Office of the Director of Public Prosecutions
565 Lonsdale Street, Melbourne

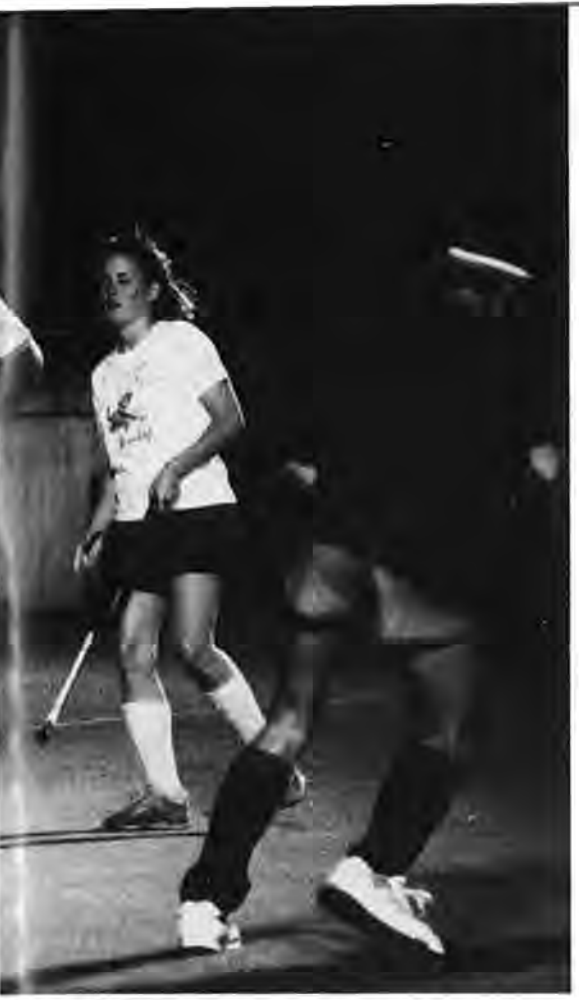
The solicitors were understandably shocked and deflated by this outrageous goal, and never recovered. Burchardt scored shortly afterwards and only a lucky goal in the last minute gave the solicitors any consolation. The final scoreline was 4-1.

There followed scenes of great jubilation for the Bar. On receiving the Scales of Justice Cup, Balfe could hardly contain his glee. This victory had been a long time coming.

As usual we adjourned to Naughton's for some drinks. The solicitors were philosophical in defeat. We were humble in victory, some more than others.

Congratulations to all the Bar players who took part in this victory. It was great to have some new blood at last. It has also been pleasing to see the continued improvement in players such as Brear, Bryson and Beach who have become stalwarts of the side. Add to those players Coldrey, M. Tinney, Ian Dallas and Watson and we have the basis of an exciting forward line. Enough has already been said of the back and half-line players. They did a sterling job.

Anyone involved in these games over the years will be aware of the importance of Richard Brear to Bar hockey. If not for him, the games would not



have taken place. We greatly appreciate all he has done.

Thanks are due also to Tom Grogan and Ganasan Narianasamy (VHUA) for being kind enough to umpire the game. Ganasan also umpired the RMIT game with the help of Brendan Smale, Prabha Ramanathan and Mike Archer of RMIT. We thank RMIT for that game as usual. Mention must also be made of Gillianne Tedder who was in attendance to take photos for the Bar News. Also, thanks to the V.H.A. for the use of the Astroturf and provision of ground manager Heather.

Of course, we thank the solicitors, ably led by Andrew Tulloch who drove back from Adelaide specially for the occasion. The match was played as usual in fine spirits, and it was an honour to have been able to win at last.

A final thank you to Ganasan who was good enough to take it upon himself to entertain our Tasmanian visitor and was seen at Lazars at 4.00 a.m. the morning after the match.

Our condolences to Meryl Sexton who was on a pre-earthquake tour of San Francisco and missed the game. She would have enjoyed it.

Andrew Watson and Anita Muller played in the RMIT game, but not against the solicitors. The following are the players who returned the Scales of Justice Cup to its rightful place: Rupert Balfe, David Beach, Richard Brear, John Bryson, Philip Burchardt, Peter Burke, John Coldrey, Ian Dallas, Sue Hurley, Tom Lynch, Gordon Smith, Andrew Tinney, Michael Tinney and Roger Young.

May their names be glorified forever, and may we have even more recruits next year. And apologies to any solicitor who has had to read this article.

Andrew Tinney

GOLF

THE BAR TEAM FINISHED 3RD IN THE Victorian Council of Professions Golf Day held on October 23rd at Yarra Yarra Golf Club. The Council Shield was won by the Australian Dental Association from a field of 13 teams.

The Bar results were as follows:

Lovitt Q.C.	28 points
S. O'Bryan	34 points
Scanlon	33 points
Rice	33 points

The Dentists obviously take their golf seriously — they even held a play-off to qualify for the team!

Gavan Rice

MARTIAL ARTS

IN FEBRUARY 1990 REGULAR TRAINING IN Ju Jitsu in the vicinity of Owen Dixon Chambers will be offered subject to the level of interest. If you are looking for exercise with a difference this could be for you!

Ju Jitsu, one of the oldest martial arts, offers increased fitness, muscle strength and tone, flexibility and confidence. Differing levels of fitness and experience are expected and will be catered for. Techniques include breakfalling and rolling, locks and holds, throwing, punching, kicking, strangulation and self defence against single and multiple attacks.

Sessions are open to both men and women and will be geared towards personal attention for all students with the utmost care and safety. The instructor, Mark Todorovic, is graded to 4th dan with 22 years participation. He has substantial phys. ed. qualifications and extensive teaching experience.

Students will be asked to pay an annual registration fee and $7.00 per class. It is also desirable that the appropriate martial arts clothing be worn.

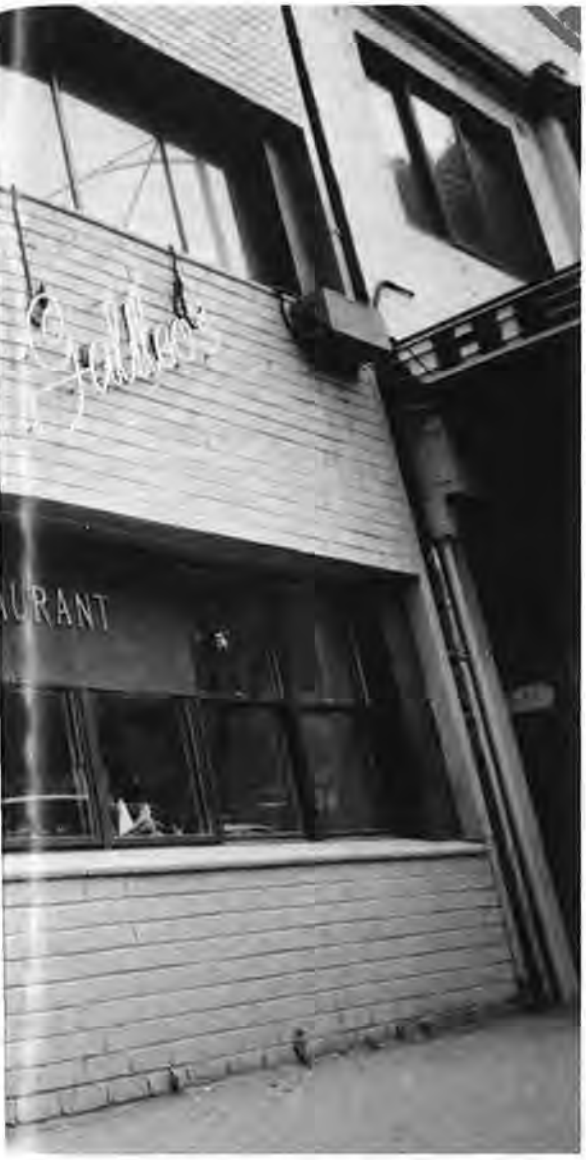
Sessions will be on Thursday nights at 5.30 p.m. in the Lifestyle Gym at the rear of 500 Bourke Street. For further enquiries — Lex Lasry — 608 7434 or the Lifestyle Gym.

LUNCH

AT THE REQUEST OF THE EDITORS, ROBIN Brett and I set out to sample the fare at Galileo's at 215 King Street one Friday after the usual torrid Friday morning in the Seventeenth and Nineteenth Courts.

Galileo's is an excellent spot for those diners who feel intimidated by a menu with 300 or 400 items to choose from, many of which are in foreign languages. For a start there are no entrees at all. All lunches come with fresh pasta of the day. I found this pasta to be a very satisfactory appetizer. It was not too large and was served in a light tomato based sauce. Robin was not quite so impressed, although the problem may have been that his pasta had arrived while he was nipping over the road to the hotel to buy a bottle of wine. The proprietor informed us (at some length) that he had decided to set up a "budget" restaurant and this had meant a B.Y.O. licence.

The main courses are set out in categories of



"fish", "poultry", "veal", and "beef". The "beef" meals were essentially two versions of steak. The "fish" was prawns (the most expensive item on the menu at $21) and fish of the day. There were two poultry dishes and five veal dishes. There were also one or two specials. Robin and I had the fish of the day (rockling) which was grilled, plain and quite palatable without being inspiring.

There is no selection of desserts, simply a "dessert of the day". We did not sample the dessert being satisfied with our entrees, main courses, coffees and complimentary glasses of port. I was attracted by the menu which seemed to me to be well adapted to a lunch when one has at least some work to do afterwards. The total price for the two of us (not including Robin's bottle of wine) was $38.

I found the decor quite attractive although others may disagree. There are a number of interesting original paintings on the walls, and some others which are pretty ordinary. It is a small restaurant and the atmosphere is friendly.

I think it is fair to say that Galileo's will not be

I was attracted by the menu which seemed to me to be well adapted to a lunch when one has at least some work to do afterwards.

one of the great restaurants of Melbourne. On the other hand it's an Italian restaurant offering reasonable food at a reasonable price. It also boasts the most loquacious restaurant proprietor I have yet come across, with the possible exception of Joe Alagona at Amaretto's restaurant in East Melbourne. Joe probably has the edge over the proprietor of Galileo's as, although the Galileo's proprietor is certainly keen to give you his views on whatever might cross his mind as he passes your table, I did not detect in him any sign that he might suddenly burst into a rendition of "My Way" or "New York, New York" which is a frequent occurrence at Amaretto's.

The only complaint I would make is that when I rang to make a booking the proprietor seemed very keen to argue with me about whether he had room or not. When we arrived the restaurant was only approximately half full and it remained that way until we left.

Galileo's is probably not the place to go for a slap up lunch on a Friday, but if one does not have all afternoon to spend you could certainly do worse. Robin and I arrived about 1.20 p.m. and after eating at a leisurely pace had no trouble getting back to chambers by about half past two.

Simon Whelan

Galileo Restaurant, 215 King Street. 670 4744

R v Malcolm Maxwell Barr

Coram: Judge Murdoch and a Jury
4th September 1989
J. Bolton for Crown
K. Wilkinson for Accused

Wilkinson: How often would you have these muscle spasms?
Witness: Well, they come on in different circumstances — because I've also got a scoliosis, which is curvature of the spine it's made the muscle spasms a lot worse as well.
Wilkinson: Well, do you have them once a month, once a week?
Witness: Well, it depends — like, sometimes I just bend down to pick up my pussycat — pussy weighs — well, he did weigh — he was found murdered this morning on my doorstep — pussy weighed two and a half stone — and I bent down to pick pussy up, and when I came up I went into a muscle spasm.

★ ★ ★

Wilkinson: Who were the girls that were working with you at the time?
Witness: Excuse me, I'll have to cast my mind back. They were mostly Turkish and they had funny names. I think there was Zorran, and a Zoola, and a Moola, and a Coola, and a Moola —
Wilkinson: Now look, we have had Moola, were there two Moolas, lots of Moolas?
Witness: Lots of Turkish women are called Moola.
Wilkinson: Yes.
Witness: And Yugoslavs. It's not funny. It's all here.
Wilkinson: No, I'm not laughing.
Witness: Zorran, Nooran, Doran, Melooza, Bernoola.
Wilkinson: I will ask you not to read from that document, thank you.
Witness: Oh, sorry. You wanted me to remember the names.
Wilkinson: Yes, well, those names, incidentally, were they names that are familiar to you?
Witness: They're Turkish — some of the Turkish Yugoslav girls that were blond and skinny.

★ ★ ★

Wilkinson: You seem to know a lot about Social Security and medical conditions?
Witness: Well, I've worked, and I've been to University, and I completed High School, and my father's very intelligent, and my mother is too, in her own way.
Wilkinson: Did your mother work?
Witness: Yes, she's a registered nurse.
Wilkinson: What's your relationship with your mother now?
Witness: I'm her daughter.
Bolton: How is that question relevant, Your Honour?

Wilkinson: It is relevant, Your Honour.
His Honour: Yes, I am not stopping you.
Wilkinson: How do you get on with your mother now?
Witness: Like a daughter and mother usually get on, up and down.
Wilkinson: Do you have a good working relationship with your mother?
Witness: My mother and I don't work together.

★ ★ ★

Wilkinson: The first time you went there was in January, your foot was in plaster. Do you remember your foot being in plaster?
Witness: Yes, and he tried to say that it had been incorrectly plastered, so I'd have to keep going back.
Wilkinson: Well, you had seen a locum?
Witness: That's what he hoped.
Wilkinson: You had seen a locum, who had put your foot into plaster?
Witness: Dr. O'Halloran put my foot in plaster, as well.
Wilkinson: He did it as well?
Witness: Yes.
Wilkinson: As well as the locum?
Witness: Yes, because they — Dr. Barr was saying it had been put on incorrectly.
Wilkinson: Dr. O'Halloran must have thought it was put on incorrectly as well, if he put another on?
Witness: Yes, he did. He had to remove it because it was wet, because my daughter set off the neighbour's automatic watering system when she stole their goldfish out of their pond.
Wilkinson: It is a bit hard for me to take that in, but . . . ?
Witness: Well they've got hydrangeas, and they need a lot of water, and in Ivanhoe there's a lot of wealthy people, and they have hidden devices, like hidden watering sprinkling systems, and I went in there to stop her fishing the goldfish out, and stopping her from putting them into milk bottles and ice cream and margarine containers, and because the neighbour came in to complain that my daughter was putting the goldfish into little containers, margarine containers, and I had to go in there, and as I wobbled up the pathway on my crutches, I happened to tread on the buzzer that set off the automatic watering system, and I got soaked.
Wilkinson: I suppose there are two possibilities about that, either. . .?
Witness: My plaster got very wet, and it had to be sawn off and re-put on.
Wilkinson: They either murdered your cat to get back at you?
Witness: No, this is in — this when I was living in Ivanhoe.
Wilkinson: Or they are ASIO agents. I see?
Witness: The cat got murdered yesterday morning, and its kittens were displayed.
Wilkinson: That is nice?

Witness: They were still inside her womb. And I'm a bit distressed about that too.
Wilkinson: That is a very distressing thing to happen?
Witness: Because I can't explain to Joanna where puss is.
Wilkinson: The result of all that is that you've got wet plaster on your foot?
Witness: Yes.
Wilkinson: It is not put on properly?
Witness: None of the goldfish died.
Wilkinson: I am pleased to hear that. And who did you see to have the plaster replaced — Dr. Barr, Dr. O'Halloran?
Witness: Dr. O'Halloran replaced it because it was saturated, and I had to get there quickly because my ankle was sort of hanging — and I wanted to get away, because the neighbours were going beserk about their goldfish, apparently they're a rare tropical breed. I think they might have had them smuggled into the country illegally, because some of them had feet on them — they're called Mexican Walking Fish. They've got — they're sort of prehistoric looking — they can stand up on two legs — and got whiskers.
Wilkinson: What course were you doing at Latrobe University?
Witness: Legal studies and psychology, clinical psychology. That is why I had medical books at home.
Wilkinson: You deferred your course?
Witness: That's correct.
Wilkinson: How far did you go in your course?
Witness: Two years.
Wilkinson: How long was the course?
Witness: That depended on me, whether I wanted to major and go on and do honours, and everything else.
Wilkinson: Did you get a qualification?
Witness: Do you mean did I get my degree? No, I deferred.
Wilkinson: And you never went back?
Witness: No, but I'm planning to go back next year, to complete.
Wilkinson: When did your plaster get wet?
Witness: Because I think I'll make either a good psychologist or a good solicitor.

Anderson v. Zammitt & Ors.

Coram: Tadgell J.
20th October 1989
Michael Shand for Plaintiff
Jack Hammond for 1st Defendant
Simon Wilson for 2nd & 3rd Defendants
Tom Hurley for 4th Defendant
(Each Defendant in turn had submitted that the proceeding should be removed from the Commercial List as a matter not appropriate for that List)
Shand: I'm out-numbered.
His Honour: Do not worry Mr. Shand, the Court is more interested in the quality of the argument, not its quantity.
Hammond: He's still out-numbered.

Nicholls & Anor. v. Department of Primary Industries & Energy

Coram Federal Administrative Appeals Tribunal
12th October 1989
A.G. Uren QC with J. Hammond for Applicants
C. Maxwell for Respondent
(Uren QC taking an elderly, slightly deaf, male

witness through his evidence-in-chief, and trying to elicit evidence in relation to a proposed joint venture involving a fishing vessel.)
Uren: Did you also have a relationship with somebody who was involved with the boat?
Witness: How do you mean "relationship"?
Uren: That's a bit wrong. Sorry sir . . .
Did you know Mr. Diorio's brother-in-law?
Witness: That is right, yes.
Uren: It shows you the value of us being allowed to ask leading questions.

Philip Morris Ltd. v. Commissioner of Business Franchises

Coram: High Court
Mason C.J.: It is an entirely irrelevant question, but how is it that Victoria has a higher borrowing limit than New South Wales?
G.L. Davies QC: I do not know the answer to that question, Your Honour.
Mason C.J.: That is because you are a Queenslander.
H.C. Berkeley QC: I am an expensive Solicitor-General.

Building List — Directions Day

Coram: Judge Lazarus
29th June 1989
(Numerous counsel present. Much chatter and hubub among those waiting for their matters to be called on)
His Honour: Does anyone require a conference room? I understand there are some available downstairs — IN THE CELLS!
(Sudden quiet)

ANZ Banking Group Ltd v Horsburgh

Coram: Tadgell J
6th October 1989
J. Loewenstein for Plaintiff
F.G.A. Beaumont QC and Garantziotis for Defendant
His Honour: Well how did it get to this stage? Why has Mr. Horsburgh been given such poor advice?
Beaumont: Mr. Horsburgh may be asking the same question.
His Honour: Well I am asking it. I am not just asking you to beg it, either — Why has it?
Beaumont: No, your Honour. It appears, Your Honour, that the solicitor just mucked it up. Full stop. No other excuse.
(After further discussion)
Loewenstein: And I would seek your Honour, with respect, costs on a solicitor/client basis, given that my learned friend says it has been mucked up, then that 'muck up', if it be that, should not be borne by my client.
His Honour: I do not think this is an expression which ought — the use of which ought to be encouraged in the courts generally, and in particular in this court. We can use more elegant language than that. It has been incompetently handled by the solicitor for the defendant.

R v Smith & Ors

Coram: Judge Smith
28th July 1989
L. Lasry for Crown
R. R. Vernon for Accused
Vernon: I'll bear Your Honour's phrase in mind. I don't mean that, in any way, flippantly. I will reflect on that phrase, but my, to use that technical term — my *gut reaction* — is that I would call him.
His Honour: I'll give you time for a more *cerebral* reaction.

Curran v Thomas Borthwick & Sons (Pacific) Limited

Coram: Gray J
25th October 1989
Peter Heerey QC and Tony Kelly for Prosecutor
Richard Tracey for Defendant
Tracey: Did you observe Mr Davey addressing other workers as well as yourself?
Witness: Yes, I did.
Tracey: Were some of those workers female workers?
Witness: Yes they were.
Tracey: Would you tell his Honour some of the things you heard Mr Davey say to the female workers?
Witness: I could not repeat them. I am not the sort of person who would repeat . . .
Tracey: If you are embarrassed, you can certainly write it down and hand it up, if you would prefer to do that?
Witness: I will repeat it, I suppose, if I have to.
His Honour: We are all grown up enough, Mr Tennant.
Witness: Calling them sluts, molls, and anything they could lay their tongue on to. At any stage that we went to retaliate, we were not allowed because the police would come and tell us off for using abusive language back at them.
Tracey: Thank you. What was your reaction to, firstly, the general abuse that was directed at you at the earlier stages of the picket? What was your reaction to it?
Witness: I was pissed off about it, that I could not come to work without being abused at any stage, and just go to work and go home.

MOUTHPIECE

At the Essoign Club one Friday lunchtime

Derek: Howard, can I have a red with a bit of Oomph please?
Howard: One that'll knock your socks off?
Derek: Yes
Howard: I know just the thing — a Petaluma Cabernet 1990
Derek: It won't cost too much will it?
Howard: About normal.
Derek: OK bring it on.
Angela: Did you see the circular about the expansion of the Bar?

Random reflections on a nisi prius trial holden at the diggings at Ballarat in the Colony of Victoria or

"THE BEST OF LUCK TO ALL"

It was bruited on the wind that McLeod versus Lind
Was altogether an extraordinary affair;
Of the three defendants named, one was quite erroneously blamed,
And in point of fact was never even there.

Said Mr. H.G. Lander: "It is libel, if not slander,
To impute unto my client any fault;
My perusal of the pleadings in these scandalous proceedings
Reveals the Plaintiff either knave or dolt.

That you may understand it better, I have set it out by letter,
And explained the whys and wherefores of the case;
From heroics I abstain, but it is abundant plain,
That my insured was never near the place.

So no monies I'll distribute, to no compromise contribute,
The Plaintiff's pride rides here before her fall,
And thus, in accounts gruff, I call your collective bluff,
On liability, the best of luck to all.

Now if I your ranks affront, and you brand this as a stunt,
And execrate my name with jeers and groans,
Pray, please terminate your tricks, it's only stones and sticks,
Not words, that hurt these aching, ageing bones.

Peter: The one where they announce the clearing of the First Floor.
Angela: It was a bit sudden wasn't it?
Howard: That'll be $27.60.
Derek: Bloody hell! Can anyone help me out. That's more than I got paid this week.
Angela: I liked the bit about 'inconvenience'.
Peter: Especially after all the trouble the occupants have gone to choosing carpets, paint colours and decor.
Angela: Just because the intake of readers looks like increasing a little, they need a whole new floor.
Derek: Reminds me of that bit in 'The Hitchhiker's Guide to the Galaxy' where they decide to blow up the Earth because it blocks an intergalactic bypass route.
Derek: I am still at a loss to see why so many members of the Bar have to be forcibly ejected just because the Readers' Course grows a bit.
Peter: It's the tail wagging the dog. Although it's quite some dog.
Derek: What is it — 35 members of the Bar being slightly 'inconvenienced'? Does that mean Barristers' Chambers and the Bar will now be employing another 35 people?
Angela: Imagine the extra cost to us: 35 middle management salaries, rent for 35 rooms foregone and spread amongst the Bar, $1 million for partitioning and extra furniture.
Peter: What do you think 'adequate alternative accommodation' will be? Unsoundproofed rooms on the second floor of Four Courts? Half a presently unlet "A" room in the Pink Palace? A broom closet on the 12th floor of ODCE? A partitioned corner behind the bar over there?
Derek: And how are people going to continue their present shared arrangements when they are dispersed throughout the other buildings? A keyboard here, printer over there, secretary somewhere else, fax rotated around, photocopiers split in three bits?
Angela: And what about the people being displaced by the need to reaccommodate the first floor?
Peter: You can just imagine the letter can't you?

I have instructed B.R. Dove to eschew the velvet glove,
And watch unmoved the bitter tear-drops fall,
This whole alleged collision excites my sharp derision
On liability, the best of luck to all!"

Then assembled from afar a most distinguished Bar,
To try the case McLeod v Lind and others.
Of Counsel there were four, deemed learned in the law,
A happy band of fratricidal brothers.

There was Barry Robert Dove (whom his wife and children love)
Of dignified and sacerdotal bearing,
Next, that famous steak and claret man, Peter O'Callaghan,
Upon his pumpkin head a shamrock wearing.

To withstand the battle's shock for the third defendant Lock
Appeared a most engaging circuiteer,
Frank Dyett was his name, moderate drinking was his game,
Beloved by Licensed Victuallers far and near.

Versed in contract and in tort, he strove mightily in Court,
The day's work done, his full cup runneth over,
From Bordertown to Sale he had quaffed the amber ale,
As light relief from detinue and trover.

In this tangled legal wood the hapless Plantiff stood,
Oppress'd by apprehension and concern,
"Must I tread this fearsome journey, without mouthpiece or attorney,
Will no one's heart, for me, to pity turn?"

Then spoke a figure spare, with a quiet ascetic air,
"I prithee, Madam, set your cares at nought,
With earnestness and pith, I Cairns William Villeneuve-Smith
Will urge your cause unto the waiting Court.

Fear not your dread foes' fury, we have a judge and jury,
And seven noble hearts will beat as one,
We shall not fail or falter, nor our objective alter,
Till we emerge from darkness to the sun!"

'Dear Cliff, It is now necessary to give you six months notice to vacate Golan Heights. We appreciate how much you like it there but the needs of the Bar must prevail. We know that we tried to forcibly close down Aickin before but we need all of the Floors for our revised grandiose plans'!

Derek: And it will not end there. Where will they put the new Clerk they keep talking of employing? The Second Floor?

Angela: Do you think that there is some hidden agenda that prevents them making better use of what they already have?

Peter: Perhaps the bureaucrats have tired of the hopeless lift service and want somewhere where they don't have to rely upon lifts.

Derek: That makes as much sense as trying to relocate a whole floor of barristers.

Angela: Obviously they have run out of rooms elsewhere. That means that the great hunt will be on for cheap accommodation for all these extra readers. Pity they let some good opportunities go like that building behind Four Courts.

Peter: Surely there must be heaps of room in these new buildings in which to relocate the administration of the Bar and Barristers Chambers. They could take a floor that is presently unpartitioned and design it specifically.

Angela: You mean like ODCW with all those half size rooms and alcoves and the like.

Derek: There's heaps of room at 575 Lonsdale street and a barely utilised training centre already set up.

Angela: But that is too logical. That would cause too little inconvenience to too few. That would not have repercussive effects like relocating the First Floor people. That may even be the cheapest alternative apart from getting the administration to make better do with what they already have.

Peter: They could always move the library, and use those rooms.

Angela: Where would you move the library?

Peter: It could be combined with the Board Room.

Derek: Or it could be relocated over with the Supreme Court Library.

Angela: Perhaps a deal could be done with the

Said the pensive lady "Sir, it were churlish to demur,
My piteous pleas from trembling lips must fall.
But I do not fancy you can long survive this murderous crew,
So, on every issue, God have mercy on us all!"

Bawled O'Callaghan the Celt "Into action let us belt,
My shillelagh is poised ready for the fray,
If this cause grows sometime dull, I'll slip out and smash
an English skull

As befits a corps commander of the I.R.A.

My temper does not mix with pommie legal tricks,
Now hearken to old Erin's battle call.
One cannot be serene, when a wearin' o' the Green
So, on liability, the curse o' Cromwell on ye all!"

Said amiable Frank Dyett: "This case will be a riot,
From curial inculpation I am free.
With no forensic pressures, I'll just chalk up the refreshers,
and, to keep Chick on his toes, a circuit fee.

At this caper I'm no fool, as I proved at Warrnambool,
When I overcame the ravenous Neil McPhee,
(He's gone respectable with silk, with others of his ilk,
And struts around in dull sobriety).

Our appetites are hearty and the scale is party party,
For beer and briefs our prospects never pall.
Let insurers court disaster from the genial taxing master,
With refreshers and refreshments "Good Luck All"!"

Said Mr. Justice Nelson: "You're worse than Jack Mornane or Belson,
Seldom have I had to listen to such crap.
All the merits here lie with the Plaintiff's counsel, Villeneuve-Smith,
Whom I hold to be a very decent chap.

He's not difficult to please, seeks but a modest 40 G's,
As some solace for this badly injured dame,
Yet for her legal quittance, you proffer but a pittance,
Why don't you clowns pay up and play the game?"

Melbourne Magistrates Court Civil Branch and locate it there?

Peter: And while that goes on the question on everyone's lips will be 'When can I expect a letter giving notice of the "least possible inconvenience" to me to fit some grandiose and unnecessarily complex hairbrained ill conceived scheme.'

Derek: One wonders why such a major move was kept so secret and sprung so suddenly as a 'fait accompli'. I know that the Bar as a whole is impossible to get to make a decision on accommodation but this really takes the biscuit.

Angela: More importantly, whose turn is it to get the next bottle?

Derek: Not me I bought the last one.

Peter: I've bought mine for the year.

Angela: Howard, a glass of your House Red please.

MELBOURNE LAW SCHOOL CLASS REUNION

A reunion dinner will be held on 16 February, 1990 for the 1959 Melbourne University Law Graduates. A preliminary notice has been sent to those who have been identified as having:

(a) completed their law course in 1959; or
(b) commenced their course in 1956 or earlier and completed in 1960.

It is quite likely that some graduates who should have received a notice have not been contacted. Anyone in this category should contact one of the dinner convenors.

Stephen Charles QC	608 7000
Judge Hanlon	603 6463
Peter Polites	670 5085
Michael Robinson	614 1011

Then spake egregious Dove, eyes lifted piously above:
"In this regard, I cannot help at all.
I can make no proper offers from Lander's pregnant coffers,
But I can say this — 'The best of luck to all'!

But if litigations shift and fluxions call for some fresh instructions,
And it appear our dubious cause is lost,
Safe in my encircling arm, she need fear not hurt nor harm,
If she decently withdraws, and pays our costs.

But I'll not chaffer with these codgers, I have spoke with
Lander (and with Rogers)
My instructions they are brief and pristine clear —
Unless the plaintiff do rescind, qua my guiltless client Lind,
Her fate will be draconic and severe."

Then were summoned the stout jury, and they list with mounting fury
To the recapitulation of her plight,
And their tears commingled with the broken hearted Villeneuve-Smith,
And their looks the first Defendant did indict.

It was then relayed by phone to the non-combatant zone,
That disaster's tide was running strong and swift.
But the voice replied serene, with not a hint of spleen,
"Among defendants, I trust, there is no rift?

If we unite and fight, we'll put this harridan to flight,
And make her taste the wormwood and the gall.
'Twill be exceeding droll, if we knock off this old doll,
So, on liability, 'The best of luck to all'!"

You could pierce the silence with pin, as the jury filed back in,
Their righteous anger awesome to behold,
Said the foreman: "If you please, we have fixed on 50 G's.
It's nice and high. But not too high to hold!

I think we've nicely pinned the first defendant Lind,
His guilt was clear, as in a crystal ball.
To our sense of fun we pander, what's sauce for Lind is sauce for Lander,
So liability's the biggest joke of all."

THE LAWYERS' BOOKSHELF

LITIGATION
Evidence & Procedure, Aronson Hunter Weinberg, pp 1-1152, Butterworths 1988. $89.00 (Hard cover), $65.00 (Limp cover).

THE FOURTH EDITION OF LITIGATION, Evidence & Procedure sees the introduction of a new co-author Jill Hunter, a lecturer in law at the University of New South Wales. Norman Reaburn, one of the original authors, is now working in the Commonwealth Attorney General's Department. The law is stated as at the end of January 1988.

Very broad in its compass, the fourth edition of this book covers the major procedural and evidentiary rules affecting criminal and civil cases in the various State and Territory Supreme Courts, the Federal Court and the High Court. At page xvii of the Preface the authors, in describing the scope of the book, state that it "looks at the major pre-trial stages of gathering and exchanging evidence, formulating and defining the issues, attempts to settle and securing the presence of witnesses and material for the trial. It then proceeds to an examination of the major inclusionary and exclusionary rules of evidence, and of the permissible inferences which can be drawn from the evidence which has been admitted."

Since the publication of the third edition in 1982 new Supreme Court Rules have been introduced in some jurisdictions, and there have been many legislative changes affecting criminal law. There has also been much judicial scrutiny of the common law and legislative provisions dealing with the rules of evidence. In taking account of these changes the size of the book has been increased significantly from 876 pages to the present 1152 pages.

Extracts from relevant legislative provisions, rules, cases, and Law Reform Commission reports are drawn upon within a commentary that provides a sound theoretical analysis of the various topics dealt with. Many useful references are made to books and articles, and there are questions posed, which beyond being thought provoking would be of a particular use to the student and teacher.

This is a well presented book and should serve as a particularly useful practical reference for those concerned with the conduct of criminal and civil cases.

Murray Garnham

REGULATED CREDIT: THE CREDIT AND SECURITY ASPECTS
Duggan, Begg & Lanyon 1989, Law Book Company. i-lx : 1-776 : index 777-848. Hardback $127.50

THIS BOOK WORK IS DISTILLED FROM an impossible tangle of syntactical obfuscation, enough to make Sir Humphrey Appleby justly proud. Without it, the Credit Act remains "not only extremely difficult to read, but the ideas are presented in a confusing and incoherent way": David St. L. Kelly, Chairperson, Law Reform Commission. But like it or not, so long as our commercial and consumer endeavours remain dominated by credit, this legislation is here to stay.

Regulated Credit: The Credit and Security Aspects is the companion volume to the highly successful 1986 publication entitled *Regulated Credit: The Sales Aspects.* The first publication was concerned with product liability in credit transactions. The second publication is concerned with the law of consumer credit.

The book attempts to place the highly restrictive

uniform consumer credit scheme of Victoria, New South Wales, Australian Capital Territory, South Australia and Western Australia into some useful and practical context. It begins with the satanic condemnation of usury reflected in the Biblical belief that it is wrong for a person to profit from the necessity of another. Happily, that belief is not shared by members of the Bar. Then follows a brief historical analysis of other money lending legislation of England and Australia and of the Molomby Committee Report, presented in 1972. Even the introduction to the book contains illustrated examples of the various forms which multi-party consumer credit may take.

Chapters 2-12 deal with the substantive provisions of the uniform legislation into which the authors have woven general common law principles. Whereas a number of texts in this field are tainted by obvious bias towards consumers, the content of this book is entirely impartial and logical. In chapter 5, the strictures of pre-contractual dealings are analysed. In subsequent chapters, the meticulous formal requirements of regulated credit contracts are considered as is the protection given to sureties. The regulation of insurance in the provision of credit is also considered. As a special bonus, for readers who find the interpretation of complicated arithmetical formulae impossible to decipher (let alone advise on) appendices 1-8 explain such things as compound interest, "the rule of 78", rate comparisons, accrued credit charges and actuarial comparisons.

Stylistically, the text is set out using the three digit numbering system and catch-phrases are in bold letters. Large portions of the legislation are transcribed verbatim which in one sense leads to the enormity of the publication. The index is elaborate and comprehensive, as is the table of cases. Very usefully, the book contains a comparative table of legislation providing an easy reckoner of the legislative scheme on an Australia-wide basis.

The book is not cheap, but in the writer's opinion, it is the best presently available and indispensable to Counsel appearing for debtor and creditor alike.

J.D. Wilson

A CAREER IN LAW
Edited by J.F. Corkery 2nd Edition, The Federation Press, 1989
(i) - (viii) 1 - 265; Index 266 - 270;

IF YOU BELIEVE WHAT YOU READ IN THE Graduate Career Guide in The Age you will be left with no doubt that a flourishing career awaits you when practising law. As one first year solicitor recently interviewed by The Age has said when describing his new-found profession, "Failure or success is purely a matter of motivation".

How then does one acquire a career in law? The title to this book suggests that the answer lies within, to be extracted from the reflections of legal mentors such as Dame Roma Mitchell, Mr Justice Kirby, President of the New South Wales Court of Appeal and Professor Margaret Lusink, formerly of the Family Court of Australia but more recently of Bond University. Hope builds when the cover photograph depicts two counsel strolling across the entry to the High Court.

If the answer is within this book, it is well hidden. A Career in Law is the second edition of a 1988 publication, first sent to press under the name The Study of Law. In creating the second edition, the editor sought contributions from representatives of six law schools (even one in Tennessee), librarians, historians, one or two practitioners and four judges with a view to providing an "interesting portrait of law today".

Other than in a smattering of discursive passages, the subject matter of this book falls far short of that intention. It is more a light weight tip-toe through matters deeply entrenched in our legal system. An illustration is to be found in Chapter 3 entitled "The Development of the Australian Legal System". The author has no trouble at all in allocating on average one page of text to the topics of the legislature, the executive, the judiciary and the monarch. In another chapter, a different author condenses the origins and development of the common law, equity and legislation (including the legislative process and delegated legislation) into a massive 12 pages. Elsewhere, chapters appear dealing with such matters as the 13 rules for taking law exams, materials and methods used in the teaching of law, effective legal writing and rules for writing Plain English.

One author espouses Socratic dialogue in teaching the law. A reader might well ask, what has the bulk of this publication to do with a career in law? The Socratic response must be, "precious little". The title should have remained as it appeared in the first edition, as that is what this book is really about.

Other valuable contributors throw the editor a lifeline, but to no avail. One chapter by W.A.N. Wells, QC (formerly Mr. Justice Wells of the Supreme Court of South Australia) writes on learning to work in the law. Considerable years of practical experience is imparted to the reader. Equally, an interesting chapter about Baker & McKenzie, written by one of the two founding partners, appears for persons aspiring to be partners in international firms of solicitors.

The book may be of interest to a secondary school student yearning for background knowledge in a profession about which he or she knows little.

J. D. Wilson

THE MOST AVERAGE CRIMINAL MIND IN MELBOURNE

Once again Bar News has come into possession of an article not fit to print in a Melbourne daily newspaper — this time it is The Sunday Age of 24th September 1989.

HE'S KNOWN AS "CRIMINAL CLIVE" AND his clients are so unremarkable as to beggar remembrance. We meet a Junior Barrister who has made criminal law a small part of his life.

Criminal Clive Penman is the barrister most Melbourne criminal lawyers would never give a passing thought to retain if they ever found themselves accused of any criminal offence whether it be a mere traffic offence or murder (perish the thought!).

It is hard to ascertain whether the various descriptions given of Criminal Clive accurately describe him or are borne of the well known competitive nature of peer comparisons at the Victorian Bar.

A moderate gift for eventually mastering the latest amendment to the Road Safety Act and the Regulations regularly made thereunder, and then conducting cross-examination with occasional success have made Clive something less than a legend in Melbourne's legal fraternity.

The authorities also have great respect for the young battler's average intelligence and occasionally cool, perhaps logical approach. Although the 33 year old is more often than not at the Defendant's end of the Bar Table, he has been occasionally sought after by the odd Municipality to prosecute its by-law infringements and once represented the State Electricity Commission in a meter fraud matter.

"There's little doubt that he's no better than any of us" said one contemporary on a recent Friday evening in the Essoign Club, "In fact, I reckon, his pleas are rather ordinary."

Penman's role as a Council prosecutor also surprised many of his colleagues. "I would never have thought that any of the big firms would have known about him. I wouldn't have been all that surprised if his client had wondered who he was."

It is hard to ascertain whether the various descriptions given of Criminal Clive accurately describe him or are borne of the well known competitive nature of peer comparisons at the Victorian Bar.

"Can he tell jokes? I dunno. I have never heard him tell a joke — he doesn't appear to find anything funny about life at the Bar."

Life at the Bar wasn't easy for the Western suburbs boy. Being a Footscray supporter he found little in common to communicate about with his peers. "There weren't any other fellows from the Western Suburbs. I thought I had found a kindred spirit but it turned out that he was from Geelong. We did try though. We didn't talk much at first and come to think about it we don't talk much now."

The fact that Penman isn't much talked about by his colleagues is not in itself a measure of his talent. A short spell in the Essoign Club on a Friday evening reveal that gossip and bitchiness are the lifeblood of the profession. They would prefer to say nothing about a colleague than to give him or her even the most grudging of praise. Barristers relive their own cases repeatedly and, like the car drivers they represent, they always put their own actions in the best of lights and the actions of the others are always painted in the murkiest of tones.

But the unreverential tone in which the name Clive Penman is mentioned tells its own story.

Nobody bitches about him. Nobody says he is overrated. In fact nobody professes to venture any opinion about him at all. At times it is almost as if he never existed, as if he never encountered a client, as if his dulcet tones never caressed the ears of the Magistracy.

MEMBERSHIP OF COMMITTEES

From the secret files of the Bar Council comes this application.

I READ YOUR CIRCULAR TO ALL MEMBERS of the Bar of 19th October 1989 on the above subject with much interest. I would like to be considered for appointment. I have an abiding interest in many of the Committees you referred to.

For instance, I believe I am eminently suited to the Ethnics Committee. After all, some of my best friends are ethnics and I believe in a multi-cultural Bar provided that there are appropriate quotas on the selection of readers who have graduated other than from Melbourne University.

Having spent many a moment breasting the Bar in the Essoign Club I am all for a Bar Clerking Committee. After all, if a person with a proper clerical background were to be appointed to look after that Bar the prices of drinks could be kept down with proper efficient management.

Likewise, I think that the fees for the right to breast that Bar are excessive and with proper attention could be brought back to manageable levels. I therefore volunteer my services for the Bar Fees Committee.

I am all in favour of a law to reform Committees. The time is well past due for legislation to resolve all this silly debate about Committee titles and structures. When will the Government take matters in hand and decide whether it is to be "Chairman", "Chairperson", "Convenor" or

"Chair" or whether in this day and age of egalitarianism such artificial ranks are to be abolished. Likewise, "Secretary"; how demeaning for a person on a committee to be given a title synonymous with "teamaking", "answering the telephone", "squaring off with the Missus". Likewise, in these times of deregulation there is no position for a "Treasurer". Yes I am all in favour of reforming Committees and thereby an ideal appointee to the Law Reform Committee.

I agree that there should be a Committee to review the applications to which the Bar could be put. The Committee could and should recommend the return to the Bar of all judicial, semi-judicial and quasi judicial appointments. It could examine other roles for the members of the Bar including Chairpersonship of the Pilots Federation, tram conductor, Philip Island circuit marshall and other endangered species. After all we are an endangered species ourselves and we thus have had ample experience in hanging onto positions that Governments are hell bent on eliminating, whether or not there is good reason for such policies.

Whilst we are on endangered species, I would be happy to be considered for the Bar Council and Barristers Chambers Ltd Relocation Committee. I believe that I am thick skinned, tough, insensitive, ambitious and optimistic enough to fit the bill. (No pun intended.)

Thank you for sending me your circular and in anticipation of serving the Bar on its many Committees I remain,

Cooperatively Yours

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COMPETITION

IT'S COMPETITION TIME AGAIN. THIS TIME the *Magnificent First Prize* is an invitation to the launch of the next issue of Bar News at which you will have the opportunity to meet and rub shoulders with such luminaries as the Editors. Second prize will be lunch with a member of the Bar Council of your choice. We will choose the venue and select the menu.

And the Competition is *so easy*. Just tell us of the *most outrageous Legal Aid story* you know of. Come to think of it: the prizes will be 80% of an invitation to a Bar News Launch and 80% of a lunch with a Bar Council luminary.

The following stories will not be accepted on the grounds that they are too common:

- ☐ Phone call from instructing Solicitor: "Thanks for doing such a great job on the rape trial. We really appreciated all the extra hours you had to put in preparing the case. Errr, I might have forgotten to tell you that it is legally aided and they are not allowing preparation time and, errr umm, they are only aiding it as a plea."
- ☐ Or the one about the building case which has gone on for five days before you find out it is legally aided.
- ☐ And there are the tales of legal aid unilaterally, without notice or explanation, reducing aid for a fully defended Family Court Case to a consent Pre Trial Scale.
- ☐ We all know of the adjournments sought by the other side and paid for by the other side where we only get 66% of 80% of Sweet Fanny Adams.
- ☐ Don't bother to mention the cases where you get up 100%, get all the costs for your legally aided client and you and your instructors still get 80% *after* all sorts of items have been pared off.
- ☐ From the Legal Aid Commission: "We will get your file out of archives and call you back." Of course, you never hear from them.
- ☐ And the many letters to Legal Aid which go unanswered and unacknowledged.
- ☐ And the rude and abrupt letters from the Legal Aid Commission advising you of the letter they sent you months back which you know you never saw and you are equally convinced your Clerk never received either.

- ☐ Of course, you needn't mention the lack of contrition when the Legal Aid Commission finally finds your answer to the letter they accused you of ignoring.
- ☐ Then there is the case where you've reluctantly accepted a Legal Aid $120 brief to do a quick Use and Possess plea only to discover when you get to Court that there are at least ten briefs to be consolidated most of which allege quite serious indictable matters the Police and your client want dealt with summarily. It is usually a Friday and you spend the best part of the day negotiating with the Police and having it all sorted out only to be told by the Court that the now consolidated cases will be dealt with on a later date. Legal Aid then steadfastly refuse to either increase the original brief fee to accommodate the extra briefs or to allow any more than 66% of the nominal fee already allowed for that first day.
- ☐ You needn't mention the extremely complex matters you and your client have spent many hours preparing for only to find out on the eve of the trial or contest, or even the day itself, that the Legal Aid Commission have decided to "pull the plug". The variation on that theme is the last minute decision of the Legal Aid Commission, against your advice, the advice of your instructors and the quite reasonable instructions of your client that it will only aid the client if she pleads.
- ☐ Forget the ones about the solicitors who can't be bothered finishing off a file thus leaving you years to wait for your 80% share of a mere pittance, or the solicitor who gets into an argument with the Commission over his quite outrageous claims whilst you wait on, or the solicitor who persistently gives you a fictitious or incorrect file number.
- ☐ We will ignore the attempts by thankfully few instructors to suggest that the client might be prepared to slip you a few dollars to top up the meagre Legal Aid Fee.
- ☐ Or the heartfelt plea from the solicitor: "Look I know it's Legal Aid, and I know that it's a totally inadequate fee. But the client is a good bloke and deserves the best representation. I'll remember this favour later on". And of course you do the job, get a great result, the client shows absolutely no gratitude and you never hear from that solicitor again.
- ☐ No one need relate the tales from the Commission about how much we receive for a single day compared to their weekly take home pay.
- ☐ And forget about the endless hours of unpaid for preparation time — especially of briefs received directly from the Commission that have been inadequately prepared — and unpaid for conferences.
- ☐ And there are the very expensive never ending frustrating cases, especially in the Family Law jurisdiction, where the parties have gone on for years, through endless appearances, without reason appearing on either side because they are legally aided and their costs don't bite.
- ☐ Don't even mention the Magistrates Court interrogatories which cost you more in typing costs than the Scale fee allowed by the Commission — even before their 20% comes off.
- ☐ And then there is the client who has had to spend a small fortune fighting an unmeritorious opponent only to discover that not only will he fail to recover his successful claim [counterclaim/ cross claim] or even the costs that you succeeded in getting for him but that the opponent has been legally aided all along and has lost nothing but a bit of time.
- ☐ Forget the hours of complex free advice you've given to Legal Aid Commission solicitors or the precedents they've "borrowed" from you.
- ☐ And we don't need to know how much you've lost through the depreciation of your brief fee over the many years that the Legal Aid Commission takes to pay it or the many hours you've lost chasing up the Commission to get some answer or your outstanding fees or even how the Legal Aid Commission only bursts into action when you threaten legal action or actually initiate legal action.

Perhaps we may need to offer third, fourth, fifth, sixth, seventh, eighth, ninth and tenth prizes. If so, we will provide a bottle of Patrick's vin ordinaire for each story printed.