VICTORIAN BAR NEWS

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Mr Justice Ashley

The New Magistrates

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THE EDITORS' BACKSHEET

STOP! BARRIERS TO ENTRY!

Recently the Melbourne University Law School Foundation held a debate on the subject "Revolution or Reform in the Legal Profession". Distinguished speakers took part, including Ray Finkelstein Q.C. (Revolution) and Ron Meldrum Q.C. (Reform).

A memorable contribution on the Revolution side was made by Minter Ellison partner Mr. Norman O'Bryan. His manifesto for revolution was a simple and dramatic one — abolition of the Bar.

To illustrate his argument that the Bar did not change itself and therefore was opposed to all change, Mr. O'Bryan screened three slides each showing a robed barrister, one of the 1870s, one of the 1920s and one (incorrectly described as depicting the Chairman of the Bar) of Bill Gillard Q.C. For some unaccountable reason, the last-mentioned appeared in black and white.

Warming to his theme, Mr. O'Bryan said that the Bar had erected barriers to entry and in particular the rule requiring barristers to lease their rooms from Barristers' Chambers Limited. He said that tenants generally were "not queuing up to lease from BCL", since that company charged "three times market rent".

To check on that startling assertion, *Bar News* approached usually reliable sources close to the Board of BCL. It seems that the current rentals charged by BCL to barristers for air-conditioned accommodation are $40 per square foot per annum (Latham Chambers) and $41 (ODCW) which includes rates, cleaning, light and power and amortisation of fitout costs. Aickin Chambers is somewhat more expensive ($54) because of high fitout costs and ODCE, which is not air-conditioned, is cheaper ($32).

If Minter Ellison are paying about $13 per square foot, including rates, cleaning, light and power and fitout costs, that firm must indeed be a highly profitable operation, and no wonder it can attract partners of the calibre of Mr. O'Bryan who is, to put it mildly, no dill, having won the Rhodes Scholarship and the Vinerian Prize.

BCL's policy is apparently to charge its barrister tenants the rent the company itself has to pay plus about 10%. The purpose of this differential is to recover administrative costs and in particular the cost of holding vacant rooms. So insofar as barristers' rent is above market (albeit by 10%

and not 300%) the main reason is to have accommodation ready for those who want to come to the Bar. Thus the rental "surcharge" operates as the very opposite of a barrier to entry.

On the subject of barriers to entry, there must be few trades, professions, markets or other fields of economic activity where an entrant needs no capital, plant or stock and receives the use of business premises for an initial nine months, together with an intensive course of instruction in the business, all for $750.

So far from being faced with barriers, the new entrant to the Bar meets a prospect more like the welcoming swinging doors of a Wild West saloon. True it is, once you get inside things can be exciting and unpredictable, sometimes dull, sometimes dangerous, but the entrant is certainly not discouraged.

END OF JOKE

The *Australian Financial Review* reports that the famous firm of Argue & Phibbs in Co. Sligo is finally changing its name, some 50 years after the two gentlemen of those names ceased practising.

The report does not indicate the new name of the firm. Perhaps "Argues" or "Phibbs Irish Solicitors" will be chosen.

CONTINGENCY FEES

Elsewhere in this issue appears a response by the President of the Law Institute, Mr. Peter Gandolfo, to the article by Mr. Justice Thomas of the Queensland Supreme Court, published in *Bar News* No. 73 Winter 1990, which argued against the introduction of contingency fees.

Both supporters and opponents of contingency fees claim the experience of overseas jurisdictions lends support to their arguments.

What is clear, however, is that no jurisdiction with a separate Bar has introduced contingency fees. Indeed, it is difficult to see how a separate Bar could operate with contingency fees unless there were consequential modifications to its ethos so fundamental that the raison d'être for a separate Bar would disappear.

A unique feature of a separate Bar in the Anglo-Irish tradition is the cab-rank rule.

Under the cab-rank rule, "... no counsel is entitled to refuse to act in a sphere in which he practises, and on being tendered a proper fee, for any person however unpopular or even offensive he or his opinions may be, and it is essential that that duty must continue; justice cannot be done and certainly cannot be seen to be done otherwise. If counsel is bound to act for such a person, no reasonable man could think the less of any counsel because of his association with such a client, but, if counsel could pick and choose, his reputation might suffer if he chose to act for such a client, and the client might have great difficulty in obtaining proper legal assistance": *Rondel v. Worsely* [1969] 1 AC 191, 227 per Lord Reid.

Perhaps the "proper fee" part of the rule could conceivably be met by a barrister indicating that his usual fee was, say, 30% of judgment or settlement. But the essence of the cab-rank rule is that the barrister's decision to accept a brief must not be affected by any opinion as to the merits of the client or the case or its prospects of success.

At this level any contingency fee system hits a submerged rock. With a contingency fee, the lawyer becomes a joint venturer with the client. The lawyer undertakes to expend a limitless amount of time and skill on the case in return only for an agreed portion of judgment or settlement, *if any*. No lawyer would embark on such a venture unless he was satisfied the potential reward was worth the risk. Nor could any lawyer be forced to, whether by statute or ethical rule. Otherwise there would be a form of commercial and professional conscription.

Therefore under a contingency fee system a barrister's decision to accept a brief would not merely be affected by his judgment as to the prospects of success. That judgment would, of necessity, have to be the determinative factor.

A further practical aspect springs to mind. Barristers frequently form different views as to the prospects of success of the same case. Barrister A might return a brief which is taken over by barrister B, who, perhaps because of an opportunity to do more work, takes a much more pessimistic view. Barrister A might have quoted 30%. Is barrister B to be bound by that quote? And if he is not, what is the client to say? Can B be permitted to say that the case is so desperate that a proper fee is 80%, or that he won't take it at all?

The contingency fee system, whatever its defects, may be able to work in a system where advocates are members of firms, so that the firm makes the contingency agreement with the client and thus binds members or employees of the firm to perform it. One of the practical benefits of a separate Bar is the availabiltiy of a large number of barristers with skills and experience comparable to that of the barrister initially briefed, one of whom can take over a brief at short notice. But barristers cannot bind one another to any fee arrangements. This causes little difficulty at the moment because a barrister of the same standing will usually charge a fee identical with, or close to, the one initially agreed. Things would be vastly different however if the fee of each successive holder on the brief (or, more importantly, whether he would accept it at all) depended on his own assessment of the merits of the case.

The Editors

THE CHAIRMAN'S CUPBOARD

THERE ARE TIMES WHEN WORDS OF studied solemnity have their place even in the Chairman's Cupboard. This is my excuse for the observation that the most effective reforms build upon existing virtues and strengths. Reforms which, in the pursuit of some greater good, destroy established excellence generally result in no improvement at all.

I do not wish by this pronouncement to erect a Maginot line of portentous phrases against the inevitable victory of progress. My purpose is not to defend the indefensible, but to assert positively that any reform of the legal system the effect of which is to diminish the independence of the Bar or of individual barristers is against the public interest.

The proper administration of justice demands that there be a pool of independent and independently-minded counsel to stand between citizen and citizen and between citizen and state. Such a pool is best maintained by the existence of an association of lawyers who practise as advocates, and who are bound by their rules to act for any client who seeks for an appropriate fee to engage their services in any jurisdiction in which they profess to practise (the "cab-rank" principle).

In the United Kingdom, the Lord Chancellor's Green Paper entitled "The Work and Organisation of the Legal Profession", published in January 1989 (Cm. 570), proposed that the Lord Chancellor (and therefore the executive arm of government) be given powers to determine who might practise as an advocate before the courts and tribunals of England and Wales. The Lord Chancellor was also to be given power to determine codes of professional conduct.

These proposals introduced the possibility of a marked and dangerous diminution in the independence of the profession. I hasten to add that they were quite separate from the proposals to allow solicitors increased rights of audience. Fortunately, they appear in the relevant legislation (the Legal Services Bill 1990) in a modified form which reduces, but does not eliminate, the danger of executive interference in the right to practise.

Another point of considerable controversy has now arisen over a proposed amendment to the Bill. The mover of this amendment is Lord Alexander of Weedon Q.C., who was Chairman of the Bar Council in 1985–1986. His amendment would bind all advocates, from both branches of the profession, to the cab-rank principle. This the Law Society strongly opposes, although it equally strongly contends for rights of audience which do not discriminate as between solicitors and members of the Bar. The Law Society's position is that, whether or not members of the Bar are bound by the cab-rank rule, their members (including such of their members as practise as advocates) should not be so bound.

A client's right to choose his or her advocate, and the advocate's right to choose his or her client, are according to *Counsel*, the journal of the Bar of England and Wales (May 1990 p.17) "irreconcilable principles". At present, every litigant in any Victorian (or English) court or tribunal has the liberty to choose as his or her representative any member of the Bar who practises in the jurisdiction in which the litigant's case is to be heard. The only proviso is that the litigant tender an appropriate fee. Thus all litigants are guaranteed counsel of their choice, no matter how unpopular they or their cause may be. By contrast, any member of the Law Institute of Victoria (or the Law Society of England and Wales) presently has the right to refuse to act for any client or potential client. Solicitors can and do decline instructions from a potential client for no better reason than that a retainer would cause embarrassment to them or their partners.

Any reform the effect of which is to make it difficult for advocates to practise otherwise than as amalgams carries with it the danger that the cab-rank principle will be restricted in its application, or will disappear altogether. And, in the words of Thomas Erskine:

> *"From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end."*

Erskine was not being melodramatic. Already some English law firms have in the same breath advertised both their advocacy departments and their determination not to defend any man charged with rape, if his defence is consent (*Counsel*, May 1990, p.18). In the scramble for respectability, this kind of thing could easily snowball.

The continued independence of the Bar is not, perhaps, a precondition for the survival of the cab-rank principle. It is nevertheless clear that one nurtures the other. It is also clear that a private Bar, the members of which are independent of Government, of the Bench, of solicitors, of clients and indeed of other barristers, is essential if full expression is to be given to the liberties we expect in a civilised society.

David Harper

THE ATTORNEY-GENERAL'S COLUMN

DEFAMATION

Considerable progress has been made towards uniformity between the eastern States in the key areas of defamation law. In Alice Springs just prior to the Standing Committee of Attorneys-General meeting, I met with John Dowd and Dean Wells, my New South Wales and Queensland counterparts respectively. We agreed that New South Wales would prepare a discussion paper which would set out the areas of agreement between the States.

The paper has been available for public comment and it is hoped that legislation will be prepared for tabling in the Spring Session of Parliament.

The key areas of agreement between the States include a defence of truth plus privacy provision, agreement on the need for some provisions allowing for corrections of defamatory statements and restrictions on inappropriate forum selection. Regarding the truth plus privacy provision, in Victoria the present defence of truth alone would be modified with the addition of certain provisions to protect the privacy of people in relation to matters of a purely personal and private nature.

Whilst broad agreement has been reached on the important fundamental principles of defamation law there are differences between the States on procedural questions. For example, there are differences over the size of juries and whether a judge or a jury decide the quantum of damages.

The matters that are the subject of agreement to date between the States may yet be modified as a result of the public consultation process.

CORPORATE LAW

Also at Alice Springs the States agreed to hand over to the Commonwealth the regulation of companies and securities in Australia. The Federal Budget has increased the funding of the Australian Securities Commission with the promise of further increases in future years. Legislation is to be introduced in this parliamentary session in all the States and federally to formalise this arrangement. It is expected that the ASC will be operational on 1 January 1991.

The finalisation of the national scheme will contribute greatly to restoring confidence in the Australian market, particularly with overseas investors. The revitalising of the *Corporations Act* will also be undertaken to ensure that it properly reflects the present and future economic requirements.

JURIES

Legislation to be introduced in the Spring Session of Parliament will enable the empanelling of up to 15 jurors for long criminal trials. This will address a potential problem that more than two jurors may fall ill, die or otherwise be unable to continue, resulting in a trial being aborted. If necessary, at the end of the trial, a ballot will be held to reduce to 12 the jury which retires to consider its verdict. The foreman will not be subject to the ballot.

Queensland, Western Australia and the Northern Territory have a "reserve juror" approach where the court appoints three reserve jurors who only take their place as part of the main jury when another is unable to continue. The Victorian approach means that all additional jurors sit as part of the main jury for the duration of the trial. Jurors balloted out may have some sense of frustration but this should be weighed against the feelings of frustration that could be felt and the great cost if a long trial was aborted.

ALTERNATIVE DISPUTE RESOLUTION

To expand the use of alternative dispute resolution, a pilot project will be undertaken shortly to formalise links between the Magistrates' Court and dispute settlement centres in civil matters. In some cases mediation may be more appropriate to avoid acrimony between the parties and it would also reduce costs to the parties. It would also help reduce waiting lists of courts.

The pilot projects, one in the metropolitan area and one in a provincial city, will present parties with the option of having their dispute mediated, either by the clerk of courts or by referral to a dispute settlement centre. There are now eight dispute settlement centres in Victoria presently dealing with a range of disputes from neighbourhood disagreements over fences and noise to family disputes.

ADMINISTRATION AND PROBATE

A new fairer statutory scheme for the distribution of estates of people who die without leav-

ing a will is to be established with the introduction in the Spring Session of Parliament of the Administration and Probate (Amendment) Bill.

The new scheme for distribution will replace the archaic current scheme which barely differs from the one in force last century. The current scheme doesn't deal fairly with contemporary situations like the problems raised by divorce, by families with children from more than one marriage, or with de facto relationshps.

The amendments include a new statutory scheme of distribution and a widening of the categories of people who are eligible to apply to the court for provision from a deceased person's estate.

Victoria and Tasmania are the only Australian jurisdictions which do not permit de facto partners applying to the court for family provision. This will be changed under the Bill as will several other presently excluded categories of family members.

Victoria and Tasmania are the only Australian jurisdictions which do not permit de facto partners applying to the court for family provision. This will be changed under the Bill as will several other presently excluded categories of family members including former wives who have not obtained maintenance orders at the date of their former husband's death, former husbands, stepchildren and de facto partners.

Amendments will be made to ensure that former spouses are not disadvantaged by the interaction of Commonwealth and State legislation, while preventing former spouses who have chosen not to pursue their rights under the *Family Law Act*, or whose rights have been finalised, from delaying the distribution of assets by seeking family provision.

A child of a deceased's spouse or de facto partner may apply for family provision, provided the child lived in the deceased's household as part of his or her family at the date of death.

The new Bill also allows a de facto spouse to apply for family provision. Presently a de facto partner has no right to share in the estate under intestacy provisions, or to apply in the same way as a widow or widower for family provision.

The changes raise the statutory legacy from $50,000 to $125,000, which provides for purchase of the family home from the estate or discharge of the mortgage. This new figure covers the median price of a house in Melbourne.

Under the new legislation, de facto partners will be permitted to inherit the spouse's share of the estate in certain circumstances. A spouse who doesn't inherit because a de facto partner qualifies for the spouse's share of the estate can apply to court for family provision.

The amendments have already met with the approval of the Bar Council and the Law Institute. They ensure that estates are distributed as fairly as possible between family members, regardless of the type of family structure in which the deceased lived. The amendments seek to balance the respective rights of spouses, former spouses, de facto partners and children of first and subsequent relationships, and to allow the courts to make orders according to the justice of a particular case.

SPENT CONVICTIONS

Also being introduced in this session of Parliament is legislation which will erase past convictions from the backgrounds of people who have been law-abiding. The aim of this legislation is to overcome discrimination against people who are unlikely to re-offend.

It is proposed that a past conviction will become "spent" after ten years without re-offending for serious convictions (indictable) and five years for minor cases (summary).

For example, after ten years has expired from the end of a full gaol sentence imposed, then that information no longer needs to be disclosed. It is intended that if a person was convicted when a child, then the time is five years for a serious offence and two years for a minor conviction.

The legislation is similar to schemes in Queensland, Western Australia and overseas. A new Commonwealth law in this area was passed last year.

It is particularly relevant for people applying for jobs or to licensing authorities. Employers will not be able to take a spent conviction into account, even if they know about it, when making employment decisions. It also encourages offenders to rehabilitate themselves.

Some occupations such as police officers, prison officers and some people responsible for children will be exempted from the new scheme.

Jim Kennan
Deputy Premier and Attorney-General

THE CRIMINAL BAR ASSOCIATION OF VICTORIA

Annual Report 1989–90
For Annual General Meeting 10 September 1990

EXECUTIVE AND COMMITTEE

On 2 August 1989, the Criminal Bar Association held its Annual General Meeting. At that meeting the Executive of the Association was elected unopposed comprising:

Colin Lovitt Q.C. – Chairman
Bob Kent Q.C. – Vice Chairman
Lex Lasry – Secretary
Nick Papas – Treasurer.

Subsequently the following members were appointed by the Executive to the Association's Committee:

Robert Richter Q.C.
Michael Rozenes Q.C.
Dyson Hore-Lacy
Bill Morgan-Payler
Aaron Shwartz
John Barnett
Paul Coghlan
Roy Punshon
Ross Ray
Meryl Sexton
Gavin Silbert (representing Prosecutors)

At the beginning of 1990, John Barnett was appointed a judge of the County Court. He has not been replaced on the Committee. Later in the year Dyson Hore-Lacey resigned from the Committee. On 30 April 1990, Gavin Silbert offered his resignation on the basis that he was to end his appointment as a Prosecutor for the Queen. He has been retained on the Committee as an ordinary member of the Association.

ISSUES

During the year the Association has been concerned with a number of issues. The following is the briefest of summaries.

DELAYS

Delays in cases being listed for trial has been a prominent problem during the year. Prior to his appointment to the County Court, John Barnett represented the Association on the Criminal Delay Reduction Programme. His efforts and reports produced discussion and action concerning the funding for more criminal courts and judges and changes to the present system of listing cases. That role has now been taken over by Aaron Shwartz.

It was worth noting that as at 2 September 1989, there were 905 cases pending in the County Court and the rate of receipt of cases was much higher than the rate of disposition. By the end of October the number outstanding was 917.

Recently the Chief Judge of the County Court has introduced a Reserve List for criminal cases, which the Association supports and hopes will ease the backlog of cases, at least to some degree. It was noted during the year that new procedures in the Magistrates' Courts might increase the rate of incoming trials to the County Court and make the present backlog much worse.

FEES

Lovitt Q.C. and Pappas are both members of the Bar Fees Committee. Aspects of fees considered during the year included Crown fees and, as an aspect of that, overnight allowances for prosecutors on circuit. Also, the constant issue of preparation fees in long cases continued. The Association is concerned with a somewhat short-sighted attitude that is taken by some to proper preparation fees and early briefing in complex trials. The saga continues.

BLOOD SAMPLES

The Association was disappointed to see that the Victorian Government opted for the device of "reasonable force" in the legislation introduced to make blood testing of suspects compulsory in certain circumstances. It is worth noting that in recent publicity something which both this Association and the Consultative Committee on Police Powers foresaw as a problem, has become a problem — the medical profession is unwilling to co-operate.

The constant issue of preparation fees in long cases continued. The Association is concerned with a somewhat short-sighted attitude that is taken by some to proper preparation fees and early briefing in complex trials. The saga continues.

SEMINARS

A seminar on the *Appeals Cost Fund Act* was held again this year on 24 October with the assistance of Tony Hooper Q.C., whom we thank. For those attending, it was a helpful and interesting seminar.

GENERAL

The Committee has been asked to consider many other matters including proposed new legislation by the Victorian Government on the control of weapons, amendments to the court forms in the Magistrates' Court, video link hearings, spent convictions, procedural changes in sexual cases and the desirability of temporary judges. The Committee was concerned earlier in the year at the publication in the media of a conversation between a lawyer and his client which was being secretly tape-recorded by police and is considering the matter at present.

FINALE

The Criminal Bar has more than its fair share of 13th floor experts who can pick a fault in just about anything. When it comes to contributing, not just in the initial rush of enthusiasm, but over a longer period of time, resources available to a group like this have been very thin indeed. The Criminal Bar Association is a very important body. It is one of the most active groups outside the Bar Council itself. It has links around Australia and overseas. It is to be hoped that its influence and activity flourish rather than vanish.

Lex Lasry
Secretary
Latham Chambers
MELBOURNE
20 August 1990

LETTERS TO THE EDITOR

CONTINGENCY FEES

AT A TIME WHEN THE VICTORIAN LEGAL profession is under increasing pressure to solve the problem of access to justice, debate on alternative ways of organising the legal system is vital. The article in the Winter 1990 *Victorian Bar News* on contingency fees by Mr. Justice Thomas is welcome for its contribution to promoting debate on this issue. In some respects, however, I believe his Honour is mistaken in his analysis of the operation and effect of a contingency fee system.

As members of the Bar will be aware, in July last year the Law Institute Council approved a policy of introducing contingency fees in Victoria with appropriate safeguards. One of these safeguards was the retention of the costs indemnity rule (or costs indemnity convention as it is more correctly characterised) for the very reason given by Thomas J.: indemnity for costs is a disincentive to frivolous litigation and accords with community ideas of what is fair.

Removing the current prohibition on contingency fees simply offers the client and the lawyer another option. In some cases (such as criminal and matrimonial matters), a contingency fee would be quite inappropriate. In other cases, lawyer and client may agree to calculate payment in another way; making contingency fees available maximises the range of funding options available which is crucial.

His Honour's article concentrated on the operation of contingency fees in the United States. They do, however, operate successfully in a number of other jurisdictions (including the Nether-

lands and Denmark) and one of the factors which led to the Insitute investigating contingency fees was heightened awareness of the successful use of contingency fees in Canada.

A regulated form of this type of fee is available in most Canadian provinces, including Quebec (since 1968), British Columbia (since 1979) and Manitoba (since 1890). Canadian research on the operation of contingency fees and their effect on litigation practice suggests the safeguards in place in that country have prevented the American experiences referred to by his Honour from occurring in Canada. For example, in 1987, the British Columbia Law Society received 92 complaints about fees, only two of which related to contingency fees.

The examples cited are at the extreme of litigious practice in America; they are not representative. The majority of claims litigated in the United States are "run-of-the-mill" or mainstream accident and negligence claims.

Examples are often given of some of the more bizarre lawsuits which are fought in the United States, the implication being that introducing contingency fees in Australia would prompt a flood of similar litigation here. There are two points I would like to make about this. First, the examples cited are at the extreme of litigious practice in America; they are not representative. The majority of claims litigated in the United States are "run-of-the-mill" or mainstream accident and negligence claims.

Secondly, we must analyse these extreme cases in the context of America's particular legal system. The United States does not have a costs indemnity convention. It has comparatively higher damages awards and a greater number of strict liability torts. The country does not have a comprehensive national health insurance scheme or an adequate system of income support for the disabled or the unemployed. Its judicial system is highly politicised and thus functions (at least in part) as a system of wealth redistribution rather than merely as a system of compensation.

The Institute's investigation of contingency fees found that they would be a worthwhile option for funding litigation. Safeguards were considered essential to their successful operation and a number were proposed, including requiring contingency fee agreements to be in writing, and giving the Solicitors' Board power to vary or set aside unconscionable agreements.

The maintenance of the existing ethical framework of the legal profession is also important. Some may consider the profession's ethical fabric to be frail but I have more confidence in the integrity of the profession. Decisions about professional ethics are constantly being made in a proper and thoughtful way by lawyers in day-to-day practice and the profession has shown itself more than capable of dealing with those few members who cannot abide by our high standards. Opening the doors to our courts will not change this.

Yours sincerely,

Peter Gandolfo
President
Law Institute of Victoria

REPLY TO LEGAL AID COMMISSION

I REFER TO THE LETTER FROM THE legal Aid Commission of Victoria reprinted in the last edition of *Bar News*. I was the author of the article that so offended Mr. Crockett. Notwithstanding his feelings, I stand by each episode therein referred to, and maintain that each was solidly based on actual occurrences.

Whilst I would heartily agree with Mr. Crockett that those issues are not laughing matters, what else can one do when the Legal Aid Commission declines or refuses to communicate? If Mr. Crockett does not believe me, I have a drawer almost half-full of unacknowledged and/or unanswered letters to his Commission. He is welcome to inspect them at his leisure. I might add that telephone calls tend to be as fruitless.

If he does avail himself of the opportunity to inspect this correspondence I may take the opportunity to raise with him many unpaid Legal Aid accounts — many of which have been the subject of the previously referred to unresolved approaches.

Best wishes and congratulations on yet another great issue.

Graham A Devries

WELCOME MR. JUSTICE ASHLEY

THE APPOINTMENT OF DAVID JOHN Ashley to the Supreme Court has brought further Stud Book honours to his former Master, Mr. Justice Beach. After an earlier success at the 1990 County Court Show, when Judge Dee joined the winner's circle, Mr. Justice Beach has now become the third member of the present Supreme Court to have a former reader on the same Bench. (The other pairs are the Chief Justice with Mr. Justice Tadgell and Mr. Justice Crockett with Mr. Justice McDonald.)

The future Mr. Justice Ashley was born on Monday, 2 February 1942. And, of course, as the old rhyme tells us — "Monday's child is fair of face". He was educated at Melbourne Grammar and matriculated with considerable distinction in 1959.

In his school years he had already begun to acquire his well-merited reputation for dedicated hard work and unremitting application to the task in hand. This was further enhanced at the University of Melbourne from which he graduated with an Honours Degree in Law in 1964.

He was articled to Donald Chisholm of the firm of Maddock, Lonie & Chisholm and was admitted on 1 April 1965. His Honour signed the Roll of Counsel on 17 August 1965. Whilst reading with Barry Beach, his Honour laid the foundations of what rapidly became a large and flourishing practice. During the following year, his Honour began to be heavily engaged in the area of workers' compensation. These activities might well have been regarded by him as the second most important aspect of his life in 1966. Beyond any doubt, pride of place for that year went to the winning by his beloved St. Kilda of its first (and only) premiership in the Victorian Football League.

His Honour had six readers, Ireland, Jewell, Schneider, Bromley, A. Maguire and Nightingale. For several years before he took Silk in 1983 his Honour came to practise more and more extensively outside the workers' compensation jurisdiction, mainly in personal injuries actions and also industrial law. In 1980 he was a joint author of the publication *Victorian Workers Compensation Practice.*

As leading counsel his Honour appeared in many cases of major importance, not only in Victoria but also in Western Australia, where he became Queen's Counsel in 1987. He appeared, as well, throughout much of Australia in the Federal Court. These matters included lengthy and arduous trials at first instance, and subsequent appeals, in pioneering litigation concerning claims in respect of asbestosis and mesothelioma arising out of exposure to asbestos at Wittenoom in Western Australia.

Other notable litigation with which his Honour was closely associated was the claim by Mudginberri Station Pty. Ltd. against the Australasian Meat Industry Employees Union.

As counsel, his Honour well understood that for each individual litigant the proceedings in which he or she is involved is of paramount importance. His Honour demonstrated this understanding by invariably immersing himself entirely in his cases. When appearing in court his Honour could never be accused of being inscru-

table. An example of this was a non-jury action in which the learned trial judge had given a number of rulings adverse to the interests represented by the future Mr. Justice Ashley. While sorely aggrieved by these rulings, his Honour remained silent. Nonetheless the trial judge indicated that his Honour's pained facial expressions demonstrated such a want of enthusiastic approval as to be regarded as less than desirable.

No doubt now that his Honour is on the Bench his innate sense of fairness, not to say his ever present courtesy, will make it impossible for counsel to rely on the judge's genial countenance as any indication of the workings of the judicial mind.

It is well known that his Honour has been highly successful in breeding Beef Shorthorn cattle on his farm at Koyuga, a short distance north of Rochester. Some of his Honour's sporting interests may be a little less well known. Amongst these was the playing of football in the car park of the Commonwealth Golf Club. Curiously the august committee of that club failed to greet this with the warm appreciation that one might have anticipated. Another enterprise was the formation of a somewhat doubtful association called the Bank Place Cricket Club. By all accounts this institution has so far restricted its activities to the consumption of food and alcoholic beverages in the restaurant in which it was conceived.

All who know his Honour will be quite confident that as a judge he will be hard working, compassionate and courteous. The Bar wishes him well on his appointment and trusts that he will have a long and satisfying judicial career.

THE NEW MAGISTRATES

There is little doubt that the Magistrates' Court continues to be the favourite of the Government, which has the power to appoint its Bench, increase numbers on the bench and, very importantly, increase its jurisdiction.

It comes as little surprise that the position of magistrate now attracts talented members of the Bar.

PETER COUZENS

IN ACCEPTING AN APPOINTMENT AS A magistrate, Peter Couzens has returned to the court which gave him the grounding in legal skills which he so ably applied in his practice at the Bar. The experience he takes with him from an extensive personal injuries and family law practice will no doubt be of great assistance in his re-acquaintance with the areas where he spent his formative years as a practitioner.

"Cuzzo" was born on 8 June 1945 and grew up in the shadow of the Windy Hill grandstand. At the tender age of 6, dressed in a complete football uniform, he led his beloved Bombers on to the ground as club mascot. That was not the only source of his education; the balance of his schooling was at Melbourne Grammar School following which he obtained his LL.B. at the University of Melbourne in 1968. He was articled to Adrian Cliffton-Jones at the firm Eggleston Cliffton-Jones.

In 1970 Peter commenced working at Wundell Couzens & Co. and gained valuable experience in the Magistrates' Court with an extensive practice in debt collection.

In 1972 he travelled to England, where as well as playing cricket about 4 days a week he found employment in the London legal world. He was a clerk in the firm of Ellis, Piers, Young, Jackson, who in gratitude for his diligent approach to his work proposed him for membership to the Marylebone Cricket Club. He later spent a further eleven months prosecuting for the Royal Borough of Kensington and Chelsea. On returning to Australia in 1974 he worked as an employee solicitor for what was then Middletons Solicitors. He signed the Bar Roll in 1976. He read with Barton Stott, as he then was.

In addition to a wide legal experience Peter takes to the bench a breadth of experience from his leisure interest. His cricket exploits for the Bar have included some brilliant work behind the stumps and with the bat, and in recent years, tired of the dictatorial style of Gillard as captain of the firsts, Peter has captained "the Allstars" in which position he has been able to demonstrate some ability with the ball. Peter has represented the Bar in golf and is a member at Royal Melbourne. He is regularly seen at all the metropolitan racecourses and is a member at Flemington and Moonee Valley, but unlike most followers of horse flesh never invests on the outcome of the event. His most fervent passion is the Essendon Football Club, where he sometimes displays characteristics that belie his otherwise mild manner. Peter's wife Gail is a solicitor (she practises under the name Mather), and they have two sons.

BARBARA COTTERELL

HER WORSHIP SIGNED THE BAR ROLL in 1973, three years after admission to practice. At the time she was one of a mere handful of women at the Bar, of whom only Mary Baczynski and Beverley Hooper now remain in practice.

In the late 'seventies she ceased practice to live in Italy, where she remained for some years. On her return she redeveloped an active practice, mainly in crime and family law.

She brings to the Magistrates' Court broad and cosmopolitan experience, robust good sense and a degree of insight and compassion which equip her well for her future responsibilities.

JON KLESTADT

ON THE 19th DAY OF JULY 1990 THE BAR lost to the Magistracy the Commodore of the Wigs and Gown Squadron, Jon George Klestadt. Having been educated at Melbourne Grammar and completing his law degree at Monash University, Jon served his articles of clerkship at Braham & Pironi before reading with Barton Stott (as he then was). He signed the Bar Roll in 1978. In his early years of practice he was a well-known sight around the Magistrates' Courts riding his red Yamaha motorcycle with flair if not downright abandon. Although eventually persuaded to give up his leathers and helmet Jon remained flamboyant, pursuing his other love, yachting. A keen sailor and current Rear Commodore with the Royal Yacht Club of Victoria, Jon was instrumental in forming the Bar's own yacht squadron. He assisted in arranging regattas and functions which have been well patronised by the Bench and Bar alike. A man with much wit, style and grace who upstaged most at the last Bar dinner by "skippering" safely along the Yarra to Leonda and back a cuttter replete with a crew of jolly (read drunken) sailors. This event proceeded more or less without mishap save for the hapless captain who suffered from a subsequent loss of his land legs. Jon will no doubt bring to the Magistracy much humour, compassion and understanding of the *common* man. We wish him well.

DAVID McLENNAN

DAVID HARPER McLENNAN WAS BORN on 21 April 1939. After completing his secondary education at Melbourne High School, he went to the University of Melbourne, from where he graduated LL.B. (Hons.) in 1963. Thereafter, he was articled to Gerald Berrigan and signed the Bar Roll on 25 June 1964.

David McLennan had chambers on the 7th Floor of Owen Dixon, along with such other colourful characters as the late Fred James and

Peter Couzens M., Jon Klestadt M., Maurice Gurvich M., Barbara Cotterell M., David McLennan M.

Mr Justice Vincent. While building up a busy practice, he also found time to pursue a career as an officer in the Army Reserve. His continuing academic interest in the law was rewarded in 1980 when he was awarded an LL.M. by Monash University.

His other interests, which he pursued with enthusiasm and no little skill, include music, steam trains and photography. Realising that the age of computers is well and truly with us, he studied and gained qualifications in their operations. Somehow, as well as pursuing all these other interests, he found time to become a Colonel in the Australian Army Legal Corps. He served as a judge advocate on numerous occasions and was a Defence Force Magistrate for some five years.

He joins the Bench of Magistrates after having spent some time with the N.C.S.C. His undoubted intellectual ability, wide range of interests and thorough knowledge of the law assure his outstanding performance in that office.

MAURICE GURVICH

MAURICE GURVICH SIGNED THE BAR Roll in 1969, the same day as his admission. He read with N.M. O'Bryan (now O'Bryan J.). In his early years he developed a successful criminal practice. Later he moved his attention to the family jurisdiction where in, the early years of the *Family Law Act*, he was involved in many of the cases which now shape our view of the Act. In more recent years Maurice's practice has included general commercial work.

Though outwardly possessed of a forceful and combative style, rigorous preparation and attention to detail were always key features of Maurice's practice. It was clear he expected of himself and others nothing less than the highest standards, both in ethics and competence. Maurice is also an author of some distinction. His works include *Divorce in Australia* (with Guest Q.C.) and *Law for Young Australians* (with Chris Wray). Maurice brings to the Bench a wide experience of the law and sound experience in human nature. The Bar's loss is the Bench's gain.

NEW PERMANENT PROSECUTORS

Nick Papas and Simon Cooper have been appointed Permanent Prosecutors. Simon was admitted to practice in 1980 and signed the Bar Roll in 1980 after reading with Raymond Lopez. Nick was admitted to practice in 1982 and signed the Bar Roll in 1982 after reading with David Perkins. We wish them well in their new positions.

FAREWELL JOHN MILTON DUGAN

AS A SUBJECT OF THOUGHT, DUGAN IS demanding; elusive of description; repellant of caricature; resistant to any kind of comfortable integration. He is a taxing subject, and a serious one. Of the grand and cosmopolitan concourse of persons who daily think of him, perforce or persuasion, I do not believe one ever has done so frivolously.

In the behaviour of many, of course, he provokes frivolity — this by exercise of notorious and versatile humour, ubiquitously applied, which preserves itself keen and intact, while drenching in their own dampness its recipients:

"There was a leprechaun jocular
Whose japes grew wondrously popular
Until they hoist
By their own plants moist
His every interlocutor."

Surgical in exposure of pride, plumage and pomposity as it is, the Dugan humour never disowned its subject. The man, whose comic arsenal is so vast, does not employ the cheap shot. By instinct, he abhors it. However hilarious, his lines are captured from an innate and Irish sense of the absolute which binds and liberates all men — a sense expressed in the freedom and delight with which he receives, and is received by all faces, in all places:

"Chief Magistrate Dugan (John Milton)
Took pleasure, alike, in The Hilton,
On a bench, in a hovel,
With transcript or novel,
And with friends made of Cheddar or Stilton".

Dexterous and decorous devices enliven his pleasure, and his charisma. By one of these, he maintains the respect of those wired to his wit:

"In silk bow-ties
I win their sighs
And keep their gaze
From off my thighs;

Satiric darts,
Amusing arts,
Retire their thoughts
From nether parts."

Another device — in the corridors of the City Court, his indiscriminate use of an amalgam screech and whistle, suggestive of a splendid parrot in labour — brought official recognition:

"The Order of Australia
Implanted her regalia
Upon the chest
Of Melbourne's best
Cicada, inter alia."

I have heard it suggested that, in some, the use of such artifice argues moral laxity and indifference to conduct popularly expected of a leader. One fledgling magistrate expressed his expectations this way:

"When I became a magistrate
I thought 'this is a piece of cake';
The Chief will tell me, with precision,
How to fabricate decision,
And how not to procrastinate."

He was subsequently, and soon, disabused by what seemed to him a feckless and grotesque response by Dugan to his earnest pleas for direction. Of the response, particulars are too variegated to be given, but they include delivery of the pregnant parrot piece, from a-top the table of the City Court Library, trousers half-cocked, bow-tie about the ankle. Dugan himself confessed some bizarrity of behaviour, but avoided it thus:

"New magistrates' toilet training
I found a discipline draining
Till, acting demented
I retention prevented
And found their tuition less paining."

Whether this defence withstands objective appraisal is of little point. The man's song was written a long time ago. It is genetic composition. A long time ago the man himself recognised and embraced the compulsive chromosome:

"Ab initio
In Statu quo
My thermostat
Was always low.

'Dynamo
In Vertigo' —
That's me: Moto
Perpetuo."

If only those of us left behind could find the recipe. Mad intelligence, fashioned in vigour, love and compassion; especially compassion — for a judicial officer, that quality easiest to recognise, easier to put aside, hardest to put in place. Instinctively moved by it, John Dugan, properly, was determined that its exercise should be understood, particularly by those inclined to take it for granted:

"A libidinous, loathsome young man,
Deserving of years in the can,
Was sentenced to one
Of CBO fun
And a naughty behaviour ban.

'Thank you, yer Worship', he cried,
As he made for the door open wide;
'Stay!' yelled the Beak,
'If you *sat in this seat*
You'd be fingered, de-flowered, and fried'!".

Well, he is gone, this man, as leader, and it is idle to spend many more words on one of whose works and demeanour they are mere scribbles.

The quantum ramificatus of his departure is unknown. The benefits flowing from his term as Chief Magistrate are, as the man himself, extraordinary. His wisdom in the affairs of men and women is deep and rough-hewn. He moves easily among fellows more naturally inclined than he to sophistication, and while he does not choose for himself the sophisticated way, he is admired and, I believe, by the more perceptive envied, by those of that bent. He rejoices in the company and the gifts of those who cannot think as he does, cannot speak as he does, and no particle of condescension ever has been found in him. He has offered optimism and friendship, piquant or rumbustious, to countless magistrates, practitioners, officers of the law, clerks of court, defendants, litigants of every standing, and to thousands who will never read the pages of this journal — to all, without the slightest compromise of his office. He is a raconteur of astonishing virtuosity, employing, at great speed and simultaneously, bi-lingual fluency in body-language and "Duganese". The Law has been his theatre, but always his masterful performance in it has been self-consciously one with others. Where, necessarily, he has directed, he has done so with subtlety, by artful and sensitive play of a personality instantly inviting respect — respect so readily given. His vast talents he has devoted to brightening the lot of others. Without fear or favour, his time be held in trust for those who deserved it, and those who didn't.

We thank him for what he has entrusted to the Magistracy.

We thank his gracious wife Patricia for these things too, and his children Simon, Kate and Michael.

We wish him, with them, enduring happiness in his retirement.

Rowan McIndoe

THE FUTURE OF THE CLERKING SYSTEM

Gerard Nash Q.C., Chairman of a sub-committee of the Bar , Clerking Committee, writes about the future of the system

1. THE INQUIRY

On 1 May 1990 the Bar Clerking Committee set up a sub-committee to look into the future of the Clerking System. That sub-committee subsequently became a committee of the Bar Council.

To assist it in its task the sub-committee sought information and opinions from a number of sources including the Bar. Unfortunately, the responses from individual members of the Bar were few, and came mainly from senior members of the Bar who were critical of the present arrangement. Very few individuals who are happy with the present system bothered to reply.

Yet it would seem that issues such as the following ought to be of more than passing interest to most barristers.

1.1 Whether the present Clerking System should be maintained in the face of the Bar's increasing numbers.

1.2 If so where clerks should be allocated.

1.3 Whether specialist lists or chambers should be officially sanctioned or should be permitted to come into being by attrition.

Of these the most significant question is the fact, whether the mandatory requirement that each barrister retain a clerk approved by the Bar Council should be abolished.

2. THE NEED FOR INTEGRATION AND COHESION

It is generally accepted that it is of importance to the continued existence of the independent Bar:

(a) that the members of the Bar be grouped in such a way that there is peer pressure to comply with professional standards of ethics and competence;

(b) that members of the Bar have immediate access to the community of scholarship and community of experience which the Victorian Bar offers its members;

(c) that newcomers to the Bar be provided with access to work and be imbued with the professional standards which characterise the Victorian Bar.

If there were no clerking system and no requirement that barristers operate out of "approved" chambers, there could be "barristers" scattered throughout the length and breadth of Melbourne, operating as sole practitioners, without immediate peer pressure to comply with professional standards of ethics and competence, and without immediate access to the community of scholarship and community of experience which the Victorian Bar offers its members.

If such a pattern of "barristers' chambers" were to develop, the Victorian Bar in its present form would cease to exist.

3. THE QUESTION

To say that the Clerking System or some other method of integration is necessary to maintain the Bar as a viable separate entity is not necessarily to say that the Clerking System should be maintained in its present form.

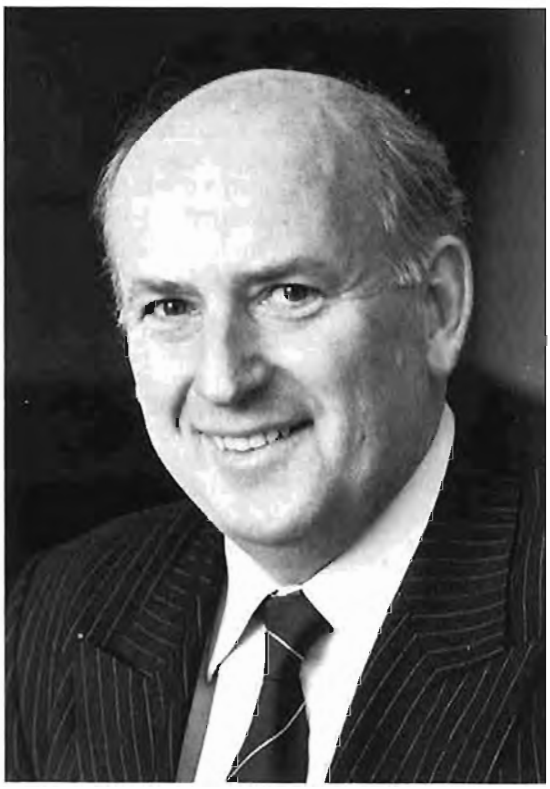
We need to ask whether a system that was devised for some 150 or so barristers, all inhabiting the one building, is appropriate for 1,100 barristers inhabiting a number of buildings some 70-odd years later.

The present Clerking System grew up *ad hoc* when the Bar was housed in Selborne Chambers; it was the subject of a "revolution" when Calnin was appointed to act as clerk for those barristers who moved to Equity Chambers; it has grown and expanded as the increase in numbers has been seen to require the appointment of new

John Dever

Wayne Duncan

Kevin Foley



Ric Howells

clerks. The system has sentimental value; it does seem to work in a pragmatic fashion; but it has at no stage been the subject of any tight logical analysis.

It is not the product of a philosophy. The mere fact that it has been used to implement a philosophy does not mean that the system is a *sine qua non* for the continued implementation of that philosophy.

4. THE ROLE OF THE CLERK

4.1 The Virtues of the Clerking System

In favour of maintaining the present system it is contended in summary that the Clerking System:

(i) maintains a peer pressure and administrative pressure on barristers to comply with professional standards;

(ii) provides an effective and appropriate means of subsidising the junior barrister;

(iii) enables the re-allocation of barristers' work to be performed professionally, quickly and competently;

(iv) despite the increase in numbers, provides a focal point for solicitors who are attempting to engage barristers.

4.1.1 Each clerk serves as a focus for solicitors who wish to brief the most appropriate counsel with as little inconvenience as possible.

The list and its clerk promote the interests of members by bringing work to the list and by sharing work within the list. In the case of each clerk there is a number of firms of solicitors who regularly brief through that clerk. This is especially but not exclusively so with work in the lower courts.

In this sense, there is "goodwill" attaching to the business of each clerk which enures for the benefit of those new members of the Bar who engage that clerk. In this way, the new member does not start "from scratch". He or she does not have to depend wholly on contacts or good connections to develop a practice.

This is not just the theory of the present system but the practice.

4.1.2 The system assists new members of the Bar in the development of their practices by offering them a clerking service that is in fact subsidised by more established members of the list.

The Victorian Clerking System is unique. It has operated for many years with more senior members subsiding the cost of clerking services for the more junior. If part of the present subsidy goes merely to increasing the remuneration of the clerk, that may provide grounds for reviewing the current basis of remunerating clerks, but it is not a reason to abandon the principle that the more senior members subsidise the more junior in meeting the costs of clerking services.

4.1.3 The list fosters a collegiate spirit amongst members; this function is increasingly important as the Bar continues to expand. The list provides an ideal unit within the Bar for members to develop a real sense of belonging.

Abolition of the rule that it be mandatory to engage a clerk is likely to lead to a proliferation of floor lists and specialised lists will develop. It is likely that such lists would draw together the more senior and successful barristers into small groups. This could lead not only to elitism but, more dangerously, to nepotism.

This would create an extremely divisive atmosphere at the Bar and damage what is left of the collegiate spirit. Specialised lists and floor lists would tend to introduce and then institutionalise such nepotism and elitism at this Bar.

4.1.4 The list provides an opportunity for new members of the list to become acquainted with more experienced members.

4.1.5 The clerk ensures that outstanding fees of members are collected efficiently. The Clerking System provides an ideal means by which there can be a more or less uniform approach by members of the Bar to the difficult questions of the collection of outstanding fees.

4.2 The Arguments for Abolition

4.2.1 The function of the clerk as a focus for solicitors has diminished as the number of clerks has grown. At the beginning of 1991 there will be eleven clerks. If growth at the Bar continues, the number of clerks will increase in every year. It is a far cry from the situation which prevailed in Selborne Chambers when a solicitor could ascertain the availability of every member of the Victorian Bar by making two (and in later years three) telephone calls.

4.2.2 The re-allocation of work between members of the Bar, which is seen as a function of the Clerking System, could operate better under a system of floor clerks as exists in Sydney or under a system of chambers as exists in London.

Under the Clerking System as it stands the re-allocation of work, in the sense of advis-

Jack Hyland

Doug Muir

Peter Roberts

Ken Spurr

ing the solicitor who is available as a replacement counsel, does often fall on the clerk. However, within a list exceeding 100 barristers such re-allocation has to be, to a certain extent, random.

4.2.3 Experience would seem to indicate that, (certainly in the case of large lists) the collegiate spirit depends upon geographical location, rather than list membership. The sense of fellowship is engendered by those with whom one is in daily contact, i.e. the barristers in adjoining chambers.

If the administrative services provided to barristers were closely linked to their geographical location the sense of "belonging" and the collegiate spirit would be strengthened.

4.2.4 The subsidisation role of the Clerking System could equally be achieved within a system of floor clerks or a system of chambers. It could also be achieved by providing a highly subsidised rent at the expense of more senior members of the Bar. The subsidy provided through the present Clerking System is (at least partly) used to increase the clerk's income rather than to subsidise the junior barrister.

4.2.5 The collection of fees can be achieved by other centralised means or through a system of floor clerks, through a system of secretaries to chambers or individually.

4.2.6 The rules imposed by the Bar Council should only be such as are necessary to ensure the integrity, viability and competence of the Bar.

5. ACCOUNTABILITY OF CLERKS

Historically, the Bar Council has not concerned itself with knowing the net, or gross, income of barristers' clerks.

5.1 The Need for Information

If there is to be a continuation of the mandatory rule that each barrister must employ a clerk, then, it has been suggested, the basis of remuneration of all clerks should be reconsidered.

It may be that in some circumstances the payment of a flat percentage of a barrister's gross fees to the clerk does no more than adequately reward the clerk and compensate him for his expenses. The Bar should not, however, encourage a payment regime which (however fair and reasonable in some circumstances when lists were in the order of 40 to 60) in actual existing circumstances gives clerks net incomes which may be regarded as excessive.

The lack of any financial accounting, confidential or otherwise, by clerks for the considerable moneys received each year is wholly undesirable. It leaves neither the Bar Council nor the List Committee in any position to assess the value for money of the services provided by a clerk.

5.2 Clerks' Incomes are Irrelevant

The contrary view is that the present system operates satisfactorily and should be retained. When a machine is operating satisfactorily the amateur should not tinker with it.

The size of clerks' incomes is irrelevant to the operation of the system. Whether or not a clerk's income is higher than that of the barristers who engage him is of no real importance. The system in fact costs the individual barrister less than would any viable alternative.

6. LOCATION OF CLERKS

6.1 The Clerks Should be Relocated

The corporate spirit and the sense of belonging which is felt by barristers emanates much less from the list than from the persons with whom a barrister is in day-to-day contact (i.e. the counsel in adjoining chambers or other chambers on the same floor), and that corporate spirit would be increased and fostered if people on the same floor shared the same administrative facilities.

The Clerking System should be adapted to meet the needs of a Bar of 1,100 (not 200) counsel and to facilitate the provision by the clerk of an efficient service in today's context. This would be partly achieved by re-location of the clerks and the aceptance that the number of clerks should increase significantly.

Clerks should be located throughout the buildings occupied by the Bar and not in a group on the ground floor of ODCE and ODCW.

If this proposal was implemented, persons on the relevant floor or on adjoining floors might opt to be members of the list served by the clerk on that floor.

6.2 Relocation Should be Resisted

The relocation of clerks would result in:

(a) a movement of barristers to the clerks who were most accessible; and

(b) a desire to relocate chambers in close proximity to one's clerk.

Over time this would result in elitist groupings and the development of a *de facto* system of floor clerks. Equality of oppor-

Barry Stone

Michael Tippett

tunity would decrease. Success would become dependent upon acquiring the "right" chambers and any present difference in opportunity arising from the list which a young barrister joined would be exacerbated.

7. SPECIALIST LISTS

7.1 Specialist Lists Should not be Permitted

The development of specialist lists will deprive new members of the Bar of the opportunity of competing on equal terms. The capacity to develop a practice in one's chosen area will depend very much on obtaining membership of the relevant specialist list.

Specialist lists will lead to elitism and nepotism and will damage, if not destroy, the collegiate spirit of the Bar. See comments at 4.1.3 (above).

Moreover, the development of specialist lists may create a group of displaced persons. Those who are not specialists but who regard themselves as old-fashioned barristers able to practise in all or most areas may be seen as second-rate and may not have a place where they "belong"; barristers who are not acceptable to the specialist lists may find it hard to develop expertise; the existing lists may be left with a "rump" of barristers who are (rightly or wrongly) seen as less competent than those on the specialist lists. If those consequences follow there may be a disintegration of the entity known as the Victorian Bar into a group of separate Bars.

7.2 Specialist Lists Should be Permitted

There appears to be no philosophical basis for prohibiting specialist lists. Although every list purports to "cover the field," it is already accepted that some lists have an expertise in one area and other lists have an expertise in another area.

The only argument with *any* merit which has been advanced as a basis for prohibition of specialist lists is that of "equality". It is contended that the creation of specialist lists will make life difficult for those who wish to practise in a particular area and who are unable to joint the specialist list (or lists) operating in that area.

To prohibit specialist lists in the name of equal opportunity is to espouse equality at whatever cost. It ignores:

(a) the collegiate advantage which a specialist list may bring;

(b) the increase in the service to the solicitors and the public which could be achieved if there were specialist lists.

THE RIGHT TO SILENCE REASSESSED[1]

by John Coldrey Q.C.
Director of Public Prosecutions Victoria
A paper delivered at the A.B.A. Conference July 1990

THE "RIGHT TO SILENCE" IN THE INterrogatory stage of a police investigation is generally understood to involve the right of a person to refuse to answer police questions without suffering any adverse legal consequences at a subsequent trial.[2]

But, how substantial is that right? Although intellectual assent is given to the proposition that no adverse inference may be drawn from the exercise of the right to silence, the English case of *Ryan* (1966) 50 Crim. Appeal Reports 144 and the Victorian case of *R. v. Bruce* (1988) V.R. 579 confirm the proposition that the fact that an accused, having availed himself of the right, advances an explanation for his activities for the first time at the trial, may (subject to judicial discretion) be taken into account by a jury in assessing the weight to be attributed to the accused's account.

This distinction has been described by Professor Rupert Cross as "legal gibberish". I am inclined to align myself with the Professor. At the very least the distinction is so subtle and finely honed as to render the right to silence hollow.

Whether the English and Victorian gloss on the right to silence will receive the blessing of the High Court of Australia is a matter of considerable doubt. Whilst the High Court in refusing special leave to appeal in *Bruce's case* was not required to undertake an examination of the principles involved it did permit itself the tantalisingly Delphic utterance that "Insistence on the right . . . does not of itself and standing alone have any probative force at all against an accused".[3]

It is not the purpose of this paper to discuss the genesis or evolution of the right to silence. Its survival in its modern form is justified by its proponents on the basis of both principle and pragmatism. It is a matter of fundamental principle that it is the function of the Crown, representing the State, to prove the criminal charges that it brings against its citizens. It is not for the citizen to prove his innocence. Nor should a citizen be forced by his own testimony to incriminate himself. These concepts are exemplified in the right to silence.

On pragmatic grounds it is asserted that confessional evidence provided as a result of the free exercise of the right to speak or remain silent is more likely to be reliable. Further, and if I could put this compendiously, since the various arguments in favour of the right to silence are reproduced in the vast quantities of literature, the abolition of that right would have the potential to operate unjustly in respect of those persons embroiled in the criminal justice system as suspects or accused.

The right to silence has formed an integral part of the English criminal justice system, and those systems based upon it, for the last 300 years. The concept has survived despite periodic criticisms of it. Consequently it is not unreasonable to cast upon those who seek its abolition or modification the onus of justifying the necessity for change.

The present balance in the criminal justice system is, it appears to me, designed to prevent what most persons would regard as the ultimate injustice. This is not that guilty people are acquitted, but that innocent people are convicted. Assuming that the proponents of abolition or modification subscribe to the same value system, it would seem imperative that any evidentiary procedures they might postulate in substitution for the status quo do not increase the possibilities of injustice.

There is, and always will be, an uneasy tension in the administration of the criminal law between the competing public interests of convicting the guilty and protecting individual citizens from unfair, illegal or arbitrary treatment. There is ample scope for persons of goodwill to differ as to where the balance between these competing interests should be struck. Commenting on the question of balance Mr. Justice Vincent of the Victorian Supreme Court has remarked:

"The task is to recognise that the problem which exists in the community in relation to criminal behaviour is, in a sense, part of the price which is paid for freedom. It is important to understand that there is a balance to be struck between these respective interests; . . . that we are aware of the importance of that balance and do not, in any enthusiastic endeavour to prevent particular forms of anti-social behaviour, create a situation which threatens individual liberties that every man, woman and child in this community are entitled to."[4]

Is the price paid for the right to silence too great?

There is no evidence to demonstrate, at least in the superior courts where the most serious cases are tried, that the effectiveness of prosecutions is being frustrated or that the acquittal rates from the perspective of the community interest in convicting the guilty, is too high.

In support of the assertion that it is, the general increase in the crime rate is frequently called in aid. Presumably this increase is attributed (at least in part) to the exercise of the right to silence. First, because it is said to impede police investigations and secondly because it hampers the prosecution of offenders resulting in a higher than desirable acquittal rate. Furthermore, the persons being acquitted are designated as "hardened" criminals.

The suggested causal link is, at best, tenuous. Police powers (including those of interrogation) are necessarily predicated upon the commission of pre-existing crimes. Crime itself will always be with us. Its sociological, psychological and environmental causes can never be eliminated. Crime reduction may be occasioned by many factors. Not least among these are preventative activities exemplified by security devices on motor vehicles, homes and buildings, efficient screens in banks, programmes such as Neighbourhood Watch and increased police presence on the streets.

Any benefit at all in the reduction of crime deriving from the abolition of the right to silence could only be confidently asserted if it could be demonstrated, first, that such abolition would result in a significant increase in the solution of crime (i.e., charging of suspects) with a commensurate increase in the successful prosecution of criminal offences and secondly, that this process would result in the incapacitation (albeit temporarily) of active criminals and the deterrence of potential criminals from engaging in illegal activity. Even if these matters could be demonstrated one could safely assume that the impact on the crime rate would be no more than minimal.

In Australia there are no objective and reliable figures available, so far as I am aware, that indicate that the exercise of the right to silence has proved to be a major hindrance to crime solution.

Even if one assumes that such an exercise makes the task of the police more difficult, all this must be placed in the context of modern-day police investigatory techniques which involve sophisticated surveillance (both visual and audio), the tapping of private telephones and, in many jurisdictions, the power to obtain from persons reasonably suspected of having committed a criminal offence, real evidence in the form of bodily samples and fingerprints.

Further, there is no evidence to demonstrate, at least in the superior courts where the most serious cases are tried, that the effectiveness of prosecutions is being frustrated or that the acquittal rates, from the perspective of the community interest in convicting the guilty, are too high.

The conviction rate in the superior courts of Victoria for all completed cases in 1987/88 (excluding those terminated by the entry of a nolle prosequi) was 89%. In 1988/89 it was 88.6%. Such a conviction rate could hardly be regarded as unsatisfactory. Indeed, a criminal justice system in which a percentage of persons of this order are being acquitted is one which, arguably, is functioning adequately.

More enlightening and more pertinent to the argument are figures which focus upon those cases in which the right to silence was invoked. Accordingly, I caused a survey to be carried out by lawyers within the Office of the Director of Public Prosecutions to ascertain the number of persons who, in the superior courts of Victoria, utilised that right during 1989. This was not a precisely monitored statistical study so on the scale of lies, damned lies and statistics I am uncertain where this survey falls. However I regard the data obtained as tolerably accurate. Out of 1836 completed prosecutions the right to silence was exercised in 170 (or just over 9%) of them. In approximately 80% of the cases (or 129) convictions were obtained. (As with the total conviction rate such a figure excludes cases terminated

In approximately 15% of all cases persons without prior convictions sought to exercise the right to silence . . . 75% of persons with prior convictions . . . did not choose to exercise the right to silence.

by the entry of a nolle prosequi.) Whilst this percentage is lower than the conviction rate generally, it would be a mistake to infer, without additional study, that the primary cause of any acquittal was the absence of inculpatory material from the accused (even making the unwarranted assumption that all persons who exercise the right were guilty). In 85% of the prosecutions the person exercising the right to silence had prior convictions. It was not possible on this cursory analysis to determine how many of those persons might fall within the concept of hardened criminals (which I take to mean serious recidivists.)

This figure indicates that in approximately 15% of all cases persons without prior convictions sought to exercise the right to silence. The figures also disclose that 75% of persons with prior convictions (who may or may not attract the appellation of hardened criminals) did not choose to exercise the right to silence.

(The results of this survey were similar to one conducted in 1988 save that there was a 2% increase in the number of persons who exercised the right to silence, a 5% increase in the conviction rate and a 9% increase in the number of persons exercising the right to silence who had prior convictions.)

One must, of course, be cautious as to the conclusions to be drawn from the figures presented. However, they do suggest that the right to silence is utilised by a significant number of persons prosecuted in the higher courts. Further, they demonstrate that the exercise of that right provides no guarantee whatever of ultimate acquittal in the courts. The figures also indicate that it is not merely persons with criminal records who choose to remain silent and, indeed, whilst a person with a criminal record is more likely to decline to answer questions, most persons who have acquired prior convictions do, in fact, answer police questions.

(The figures provide no information as to the number of persons who exercised the right to silence spontaneously and those who did so after obtaining legal advice.)

This survey does not bear out the proposition that the exercise of the right to silence is a major impediment to successful prosecutions.

A principal assumption by those who advocate either the abolition or modification of the right to silence is that an innocent person has nothing to fear from fully and frankly answering police questions. Indeed, it is often put that there are unlikely to be any reasons for silence consistent with innocence. In my view this is a far too simplistic proposition. The Australian Law Reform Commission dealt with that argument in this way:

> *". . . there may be good reasons for silence. The theory underlying reliance on silence by a suspect to an accusation is that the 'normal' human reaction would be to deny such accusation if untrue, but the truth of this generalisation turns on a number of factors, including the circumstances in which the accusation is made, by whom it is made, and the physical and psychological state of the particular person involved. In particular there are a number of reasons for silence consistent with innocence. The suspect may wish not to disclose conduct on his or another's part which, though non-criminal, is highly embarrassing. He may wish to remain silent to protect other people. He may believe that the police will distort whatever he says, so that the best policy is to say nothing and stick rigidly to that policy. Even more significant are communication factors. People accused of crime tend to be inarticulate, poorly educated, suspicious, frightened and suggestible, arguably not able to face up to and deal with police questioning, even if that questioning is scrupulously fair. They may misunderstand the true significance of questions. People are commonly unable to sort out and state the factual aspects of their problems clearly even after time for studied reflection and discussions with friendly legal advisers . . . Doubts also exist as to the ability of the tribunal of fact to assess properly the probative value of a suspect's silence in the face of police questioning. The tribunal might not be aware of the accused's reasons for pre-trial silence, since those reasons may still apply so that he feels it necessary not to give evidence . . ."*[5]

There may, in relation to an alleged criminal act, be various degrees of involvement, or differing mental states which could be of the utmost importance in inculpating or exculpating the suspect. Clearly (and even after the assistance of legal advice) the inadequate and inarticulate person subject to the inevitable psychological pressures that exist in a situation of interrogation within the confines of a police station may make unjustified concessions or inadvertent omis-

sions in attempting to formulate an account of his actions and the mental state which accompanied them. Nor should it be assumed that a more intellectually accomplished suspect will not encounter similar difficulties. It is, in the end, a matter of degree.

It follows that I consider the proposition that the innocent person has nothing to fear from the abolition of the right to silence as one which is not sustainable.

It cannot be gainsaid that people who choose to speak, having been cautioned, may create for themselves the same difficulties which have previously been enunciated, but this can hardly be seen as a satisfactory argument for withdrawing the capacity of choice from all suspects.

I consider the proposition that the innocent person has nothing to fear from the abolition of the right to silence as one which is not sustainable.

In recent years jurisdictions such as the United Kingdom and, within Australia, the States of Victoria and South Australia and the Northern Territory have substituted for the old requirement that persons arrested be brought before a Justice of the Peace or magistrate "forthwith," or "without delay" or "as soon as practicable" (or similar expressions) provisions enabling investigating police to initially detain such persons in custody for periods varying from 4 to 24 hours or for an unspecified "reasonable time". Given the pressures upon an arrested person inherent in such extended detention, it might be argued that the capacity of such person to avail himself of the potential safeguard constituted by the right to silence is now more, rather than less, important.

The introduction in several jurisdictions of the audio or video recording of interrogations will, to some extent, enable an independent assessment to be made of the level of understanding and the psychological state of the interviewee, but such insights are essentially superficial and, save that electronic recording should ensure the existence of an accurate record of the interrogation, curtail the use of any technique of active psychological pressure, and allow an assessment of the rapport existing between interviewer and interviewee, it does not provide sufficient protection for the removal of the right to silence.

The placing of a suspect under a measure of compulsion to talk when questioned by police by means of the threat of some form of adverse inference arising from silence — which is the proposal of the abolitionists — would create a forensic nightmare. It would set the stage for confused, inaccurate, contradictory, fearful or untruthful answers and for the subsequent use of them by the prosection.

There is, however, a more fundamental legal repercussion which may flow from the adoption of this course. At present a confessional statement made out of court by an accused person cannot be admitted in evidence against him upon his trial unless it is shown to have been voluntarily made. This means substantially that the confession has been made in the exercise of a free choice. If a person speaks because he is overborne or as a result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure it cannot be voluntary. Neither is a confession voluntary if it is preceded by an inducement held out by a person in authority such as a police officer. An inducement may take the form (inter alia) of some fear of prejudice held out by the person in authority.[6]

It would seem to me that a warning by an investigating police officer that a failure to answer questions may lead to consequences adverse to a suspect might in some instances come close, at least in its practical effect, to infringing aspects of the common law criteria of voluntariness.

A further argument advanced by the protagonists of change is that the present case law in the United Kingdom and Victoria which, whilst prohibiting any adverse inference from the exercise of a right to silence nonetheless enables a jury to consider the failure of an accused to provide police with an immediate explanation, in assessing the credibility of any later account proffered by him, constitutes an absurdly fine distinction for juries to confront. As I have already indicated I have no doubt that this is so. The most rational solution, however, lies not in eliminating the right to silence, but in proscribing the attack on the credit of an accused who has utilised it. Finally, it is said that it would be in the accused's own interests to have the right to silence abolished since juries faced with its exercise do, in fact, react adversely to an accused. This is so since silence in the face of accusations of wrong-doing is not the normal re-

sponse of innocent people in real-life situations. The assumptions here are two-fold, first, that juries, in determining guilt, act in defiance of judicial direction and secondly, that they draw no distinction between a person exercising an accepted legal right in the unusual situation of interrogation within a police station and the responses of individuals to allegations made by their peers in a community setting.

Even if both these assumptions were justified (and I await empirical evidence of their validity) it may be argued that it is the province of the suspect (perhaps in consultation with his legal representatives) to determine whether he will assume the risk claimed to be inherent in his silence.

Apart from canvassing the arguments against the abolition of the right to silence, it is pertinent to consider the practical effects upon the criminal trial of its elimination.

If an inference were to be drawn from an accused's refusal to answer questions put by police, a veritable "Pandora's Box" of issues would arise for consideration at trial. In such circumstances the accused must be given the opportunity to rebut any adverse inference and this could result in a host of witnesses being called to give evidence on the accused's general background and behaviour including expert evidence of the accused's psychological make-up and the relevance of that to interrogation by police. It may be that this material could be adduced during the course of a *voir dire* as a pre-emptive strike, as well as in the course of the trial itself.

The potential exists therefore for a number of cases to become very complicated and the length of time taken by both the trial and pre-trial process may be significantly increased. Such a result would run counter to the current aim of shortening criminal trials to ensure that justice is both swift and attained at a reasonable cost to the community. Those who advocate change are obliged to define what it is they mean by the term "adverse inference". Is the failure to answer police questions to be effectively regarded as a direct admission of guilt? Is it, on the other hand, to be regarded simply as a factor which may be taken into account in assessing the credibility of a version of events proffered by an accused at his trial?

Will the refusal to answer questions corroborate, for example, evidence of non-consent by a complainant in a rape trial or the unsworn evidence of a child witness? Will the effect of the inference be such as to create a *prima facie* Crown case where without it there was none? The answers to these questions have far-reaching implications for the operation of our criminal justice system.

I offer one example to illustrate the potential difficulties. Two accused are alleged to be joint participants in an armed robbery where the sole evidence available to the Crown is that of purported identification. The first accused upon being questioned by police offers an alibi, the second, after caution, declines to answer police questions. At the trial the second accused gives evidence revealing, for the first time, his alibi. Will the effect of the adverse inference be to strengthen the Crown case against the second accused and if so to what extent? Assume that the alibis are identical — both the accused and their families were enjoying a barbecue. Would considerations of fairness to the first accused require an order for separate trials? (If nothing else this would double the cost and the ordeal of participating witnesses.)

If an inference were to be drawn from an accused's refusal to answer questions put by police, a veritable "Pandora's Box" of issues would arise for consideration at trial.

It is sometimes argued that to permit the drawing of an adverse inference from a refusal to answer police questions offends against the principle that the burden of proving the guilt of an accused is on the prosecution. It is a matter of strict logic that the ultimate onus remains unaffected by the proposed change. The potential effect of the proposal, however, is more insidious. Its introduction will assist the Crown in its endeavours to construct an edifice of guilt, by providing it with an evidentiary building block which may be fatally flawed.

I have thus far directed my remarks to the abolition of the right to silence, although some commentators suggest procedures for modifying the right.[7] One model proposed envisages the presence of a lawyer during an interrogation. Apart from initial advice, the lawyer's presence, it is asserted, will guarantee fair treatment of a suspect and, more importantly, it is envisaged that a lawyer would help clarify questions and answers which may arguably be ambiguous. Whilst the suspect would be under no compulsion, legal or psychological, to speak, the pro-

ponents of this innovation envisage a jury being informed of the silence of a suspect and reasonable adverse inferences being drawn from that silence.

The practical difficulties of such a proposal include the availability of lawyers at odd hours and in geographically distant locations and the financial cost. Further, one may doubt the enthusiasm of lawyers to adopt this new role or that of investigating police to accept it.

Moreover, in the age of the tape recorder and video a suspect may well be worse off with a lawyer present, particularly if the lawyer involved is inexperienced, lacking in competence or has failed (perhaps through time constraints) to thoroughly grasp the legal and factual situation facing the client.

In short I do not see this proposed restructure of the right to silence as either workable or necessarily desirable.

In modern times the principle of the right to silence has the important functions of excluding the potential for erroneous inferences to be drawn against accused persons, ensuring that material that could cloud the real issues in a case is not placed before the jury, and in containing the length of criminal trials. Of equal if not greater importance is the fact that the right renders it more likely that confessional evidence will be both voluntarily provided and reliable.

The proponents of change have yet to discharge the burden of justification cast upon them. They have not demonstrated that the effects of reform would enhance the operation of criminal justice or, at the very least, would not increase the risk of injustice. The right to silence should be retained.

END NOTES

[1] This paper is a truncated and updated version of "The Right to Silence. Should it be Curtailed or Abolished?" delivered to the Society for the Reform of the Criminal Law (Sydney, March 1989).

[2] The precise ambit of the right is unclear and varies between jurisdictions. See *R. v. Beljajev* 1984 V.R. 657, *R. v. Bruce* 1989 V.R. 579; *Hall v. R.* 1971 1 All E.R. 322 and *R. v. Salhattin* 1983 1 V.R. 521.

[3] *Bruce v R* (Unreported 9/9/88).

[4] "Focusing on Police" *Law Institute Journal* (Victoria), July 1987, p. 708.

[5] Australian Law Reform Commission: Criminal Investigation (1975) para. 150.

[6] *McDermott v. R.* (1948) 76 C.L.R. 501. See also Brennan J. in *Collins v. R.* (1980) 31 A.L.R. 257.

[7] "Police Interrogation and the Right to Silence" Stephen Odgers. Vol. 59 *Australian Law Journal*, p. 78.

DELAYS AND THE COST OF JUSTICE

Gerard Nash Q.C. sees a need for major changes in procedures and listing systems

THE MAJOR FACTORS IN THE COST OF justice to the community are:

- ☐ legal fees;
- ☐ delays in the determination of matters;
- ☐ the cost of bringing litigants and witnesses to court and keeping them there.

LEGAL FEES

Legal fees may in some cases be excessive. Unfortunately the adminstration of justice, despite the computer, the word-processor and other technical aids, will remain labour-intensive so long as it remains the administration of *justice*. What lawyers sell are their skills and their time.

Much of the working time of lawyers is wasted by the listing of cases which are not in fact reached. This results in a direct cost in terms of conferences, preparation and the like which are effectively thrown away. Insofar as the wasted time is not directly compensated, it tends to drive legal fees generally higher.

The present cost of legal services in relation to litigation is, however, increased by the fact that no-one can be certain that a case will commence on the day for which it has been listed. The time lost is reflected in bigger fees for the work actually done.

COSTS OF LITIGANTS AND WITNESSES IN ATTENDANCE

The money paid to lawyers represents only part of the real cost to the community of postponements in litigation and of the unnecessary protraction of litigation. A major part of the cost stems from the time wasted by litigants and witnesses in attending court and from the economic loss caused by postponing action on a particular project or leaving money in a bank account pending final determination of the litigation.

While this cost cannot be eliminated, it could be reduced if:

(a) cases did commence on the date for which they were listed;
(b) unnecessary evidence was not presented;
(c) evidence in chief could be put in short compass;
(d) actions which are "try-ons" could be detected prior to the hearing;
(e) unnecessary steps in the litigation were removed;
(f) judgments could be handed down promptly after the close of evidence and argument.

THE LISTING SYSTEM

The difficulties with the present listing system arise from four fundamentally false premises:

(a) that a judge is not occupied if he is not sitting in court;

Under the present listing system a judge is expected to move from one case to another before he has given judgment in the first or even had an opportunity to write a draft judgment in the first.

(b) that listing more cases than can be heard, so as to encourage settlements and decrease the backlog in the courts, is consistent with the proper administration of justice;
(c) that the cost of bringing litigants and witnesses to court for a case which will not be heard is justified in the interests of reducing the backlog of cases;
(d) that the present number of judges in the Supreme Court of Victoria is adequate for the needs of this State.

Under the present listing system a judge is expected to move from one case to another before he has given judgment in the first or even had an opportunity to write a draft judgment in the first.

The consequence is that in the interest of speeding up the hearing of cases, the capacity of

Her Majesty's judiciary to administer justice is inhibited, the determination of cases is often delayed further, and judges are required to work in a way which no trade unionist would accept, and which exceeds the demands which are normally placed by a good professional upon himself.

This excessive work load is caused by adherence to propositions (a) and (d). In particular, the assumption that a judge is not carrying out his judicial function unless his bottom is placed on a bench and counsel are appearing before him has no basis in fact and is not entitled to even lip service, never mind the slavish adherence which it presently receives.

There is an urgent need to appoint more judges to the Supreme Court. But suggestions that there be more judges tend to be met by the assertion that in order to appoint more judges it is necessary to build more courts. That is not in fact the case. The same courtroom can be used by more than one judge in the course of a day, if court hours are extended.

While long witness actions can for many reasons only be conducted over the court hours which now exist (or hours very similar to the present), there is no reason why court hours (as such) should be limited to the time between 10.30 a.m. and 4.15 p.m.

A matter like an order to review, for example, lasting three or four hours could commence at (say) 8.30 a.m. A second case of similar length could be heard in the same courtroom by another judge between 2 p.m. and 5.30 p.m.

The Practice Court could start earlier and run later. Urgent applications should be able to be made in the ordinary course (without having to hunt for a judge) before the business day commences and after 5 p.m. There is no reason why the Practice Court, for example, should not operate from 8 a.m. to 7 p.m., with one judge sitting in the morning and another in the afternoon.

Short appeals of the one-to-two-day variety could be dealt with by the Full Court during a sitting which ran from 9 a.m. to 5 p.m. with short breaks in morning and afternoon. There would be a break of one day between appeals. On the days when the Full Court was not sitting the court-room could be used for directions hearings or for half-day cases.

PROCEDURAL CHANGES

Matters should not be unnecessarily protracted. Unnecessary interlocutory steps should be avoided; pleadings should not place in issue matters which are not genuinely the matter of factual dispute; unnecessary evidence should not be presented to the court; and judgment should follow promptly upon the close of evidence and argument. To assist in achieving this:

(a) every proceeding should, immediately upon the issue of process, be allocated to a judge (who will normally try the case) and no interlocutory steps other than the delivery of pleadings (supported by affidavit — see (b) below) should take place without leave of the judge;
(b) each party should be required before a matter is set down for hearing to verify by affidavit (even if hearsay) the contents of his pleadings, so that all positive allegations are verified and a denial in a defence represents an allegation on oath (even if hearsay) that the contrary of what is alleged in the Statement of Claim is the fact;
(c) a "refusal to admit" should be permitted only where the party has no knowledge or belief as to the truth of the allegation;
(d) trial should normally be by affidavit and cross-examination thereon.

RECOMMENDATIONS

In essence I would recommend:

(i) court hours should be longer and more flexible, although the hours spent by any judge in court in any one day should not be expanded except in the case of some short non-witness actions such as orders to review (or appeals on points of law from Magistrates' Courts) and appeals to the Full Court;
(ii) no judge should commence a case until he has had an opportunity (during working hours) to hand down an *ex tempore* judgment or a judgment reserved overnight, or at least to prepare a first draft of his reasons for judgment;
(iii) the Full Court should not sit on the day following the completion of any appeal;
(iv) cases should be listed on the assumption that they will run, not on the assumption that half the cases will settle. In many cases the settlement at the court door will enable the relevant judge to catch up with his outstanding judgments;
(v) the court should sit in divisions and each judge should, subject to the overall supervision of the judge in charge of the particular list, have charge of his own list which should consist of cases allocated to that particular judge as at the date on which the proceedings issued. Although some interlocutory matters might (with the permission of the judge) be dealt with by a master, the judge should know what is going on with each case at all stages. (In fact query the continuation of the office of Master as it at present operates);
(v) evidence should be shortened by the means suggested in 4(b), (c) and (d).

ADMINISTRATIVE TRIBUNALS — SOME EMERGING ISSUES

A paper given by Richard Tracey at the ABA Conference July 1990

IN HIS VOLUME *ENGLISH HISTORY 1914–1945* that great historian A.J.P. Taylor observes that until the eve of the First World War a "sensible law-abiding Englishman could pass through life and hardly notice the existence of the State beyond the post office and the policeman" (at p. 1). That may have been a slight over-statement because the tax collectors and inspectors were at large even then and had been in one form or another since 1660. Nonetheless there is a large measure of truth in the remark. There is also truth in the statement of Lord Reid, made less than thirty years ago, that England then lacked "a developed system of administrative law — perhaps because until fairly recently we did not need it": *Ridge v. Baldwin* [1964] AC 40 at 72.

The need has certainly impressed itself on both judges and politicians in recent years. The burgeoning welfare state has brought with it an array of bureaucratic institutions which, in one form or another, touch our lives on a regular basis. Like his English counterpart, a law-abiding Australian citizen in 1914 would never in his wildest dreams have contemplated the need for (much less the existence of) Human Rights Commissions, Equal Opportunity Boards, Social Security Appeals Tribunals, and the many similar bodies which come to mind so readily in 1990. They are the product of a perceived need to place independent review mechanisms between bureaucrats and the citizens who are affected by their decisions. The method of providing redress has varied. In some cases appeals on the merits have been provided for; in others, review is available for error of law; and some legislation provides for both appeals and review. Redress is provided by specialist and general appeal tribunals, by "internal review" by senior public servants, by ombudsmen and by Parliamentary committees. The grounds upon which redress may be granted have been broadened.

Jurisdiction has been conferred upon these tribunals in preference to courts because it has been thought that they are more accessible to the average person. It is said that tribunals have many advantages over courts. Their members are specialists in the field over which the tribunals exercise jurisdiction and are therefore able to provide speedy hearings on the merits. They do not require to be "educated" about the matters which come before them. They are not bound by the rules of evidence and may therefore inform themselves about relevant matters in any way they see fit, subject, of course, to the requirements of natural justice being observed. Speed and lack of formality in turn are said to ensure that justice is administered at a considerably lower cost than would be the case if the same matter was heard by a court.

In many instances the jurisdiction with which specialist tribunals have been clothed has been made exclusive. Rights of appeal to the courts have been curtailed. Where appeals are provided for they are generally on questions of law. In some case legislatures have gone even further. One notable example is mentioned in the 1988 *Annual Report* of the Supreme Court judges in Victoria:

> *"The* Retail Tenancies Act *1986 provides that any dispute between a landlord and a tenant under a retail premises lease (other than certain accepted disputes) must be referred to arbitration under the* Commercial Arbitration Act *1984 and is not justiciable in any Court. The parties are obliged to have their dispute submitted to an arbitrator appointed by a third party. The arbitrator must be appointed from a panel of arbitrators appointed by the Governor-in-Council on the nomination of the Minister. Arbitrators need have no particular qualifications, they have no security of tenure and they take no oath. It seems that unlike Judges they can engage in other lucrative employment. The Governor-in-Council may specify the terms and conditions of appointment of panel members and may at any time remove any member of the panel from office. An arbitrator's powers are extensive and include power to make declarations and give injunctive relief. The Governor-in-Council may exempt any class of premises from the operation of the Act and thus the Executive has an absolute and unfettered discretion to deal unequally with retail premises' leases. The right of appeal is very limited. The* Retail Tenancies Act *appears to be unique in*

this country in denying access to the Courts to privately contracting parties. The consequences are potentially far-reaching and serious": at pp. 23–24.

There is, therefore, reason to pause to consider the other side of the ledger. Has experience demonstrated any countervailing disadvantages which may cause legislators to hesitate in future before further inroads are made upon the jurisdiction of courts? Such reflection is made all the more necessary by the range of significant functions which have recently been removed from courts. In my home State of Victoria these include the power to appoint and remove guardians and administrators to control the affairs of disabled persons, proceedings for damages or other remedies in nuisance or under the principle in *Rylands v. Fletcher* arising out of the flow of water or interference with the flow of water upon land and the landlord and tenant matters to which reference has already been made.

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INDEPENDENCE

At the end of his response to the toasts in his honour at a recent New South Wales Bar dinner, Gleeson C.J. observed:

"It is an extraordinary feature of the way in which public business in this country has been conducted for generations that politicians of all political colours have been extremely anxious to establish decision-making tribunals and bodies which have some superficial resemblance to the Judiciary and which are represented to the public as 'independent tribunals'. Very few people seem to have noticed that the only independence which some of these tribunals enjoy is the freedom to do whatever the government of the day wants them to do, and that they operate in practice as a method of distancing potentially unpopular decision-making from those who should take the responsibility for it. In a spirit of disarming frankness, a new phrase has been coined. It has now been declared that some people who are, by their style and title, represented to the public as Judges are in truth only quasi judges. We are not told that the corollary of that is that such people enjoy and exercise quasi independence. The independence of the Judiciary is regarded by all public figures in our community as of such fundamental Constitutional importance and such self evident value that it is the subject of almost universal lip service. What is, however, of interest and deserving of a great deal more attention and public investigation is what might be called the quasi independence of the quasi judiciary. I hope that recent and current events might arouse, amongst members of the legal profession, a lively interest in that subject, which is worthy of close consideration.

We have in this country a proliferation of decision-making tribunals which are represented to the public as being 'independent'. I cannot believe that much more time will be allowed to elapse before the correctness of that representation is made the subject of close public examination."

His Honour's prediction has proved to be accurate. His theme has been taken up by all of Victoria's Supreme Court judges in their 1988 *Annual Report* to Parliament. They expressed their "great concern" about the manner in which jurisdiction, previously exercised by the courts, has been passed to bodies which are not truly independent. Their Honours' remarks warrant careful consideration. They said:

"Justice and stability within a democracy depend upon those who administer justice being independent of the Executive and independent of popular control but controlled by the law.

The concept of judicial independence, correctly understood, does not refer to independence of the Judges as such: no Judge properly exercising the judicial function thirsts for independence or independent power, and a Judge can have none except by earning it according to the rule of law. The true concept allows the operation of the judicial process according to law to go unhindered by the political and administrative executive.

Judicial independence is of vital importance because without it impartiality is at risk. Judges must be free of pressures which might tend to influence them to reach decisions other than those which are indicated by law and by the Judges' intellect and conscience.

A cardinal requirement of independence from the Executive is that the Judge have security of tenure. The pressures on persons appointed for a period and depending on the approval of the Executive for futher appointment, or liable to be summarily dismissed by the Executive, are obvious. A Supreme Court

Judge is appointed to the age of 70 . . . and may be removed upon an address of both Houses of the Parliament . . .

To deprive the Courts of jurisdiction in favour of others who do not have the independence of the Judiciary must weaken the rule of law. It is to be remembered that the law truly rules only if there is an objective finding of the facts from the evidence and a correct application of the relevant principles of law . . .

The characteristic of impartiality which is inherent in judicial independence is related to the provision of adequate judicial remuneration. The principle that the earnings of a Judge are limited to judicial salary reinforces this characteristic, but the principle has been disregarded in the removal of jurisdiction from the Supreme Court and the vesting of it in persons who, not being holders of full time office, remain free to carry on other work for their own profit, while exercising their new-found jurisdiction. This development not only denigrates the impartiality necessary to the administration of justice, but also undermines judicial status and morale": (at pp. 18–19 and 24–25).

Given that the primary function of specialist tribunals is to stand between the Executive and the citizen, any means by which the Executive is able to exert subtle pressure on tribunal members or any powers which inhere in the Executive which may give rise to the appearance that such pressure might be exercised is undesirable. Part-time membership of tribunals may not be as serious an impediment to the independence of tribunals as the Supreme Court judges suggest. The part-time member who is actively engaged in professional work can always return full-time to that work if his or her tribunal appointment is terminated. The person who is in a far worse position is the full-time tribunal member who has short-term tenure and who is dependent on the Executive for re-appointment. Such persons may well have cut their former professional ties and are therefore more dependent on the Executive for their continued employment. The recent controversy surrounding Mr. Justice Staples provides a good illustration of the vulnerability of even the most senior members of tribunals which are presented to the community as being independent. There is therefore much to be said for conferring secure tenure upon full-time members of tribunals whilst allowing greater flexibility where part-time members are concerned, thereby ensuring a reservoir of expertise that can be called upon as and when required.

The appearance of independence is also important. Too often administrative support to tribunals is provided by Government departments which have a close interest in the outcome of proceedings before the tribunals concerned. Tribunal registrars and secretaries often have other work to do within the same departments and, all too regularly, the tribunal has offices within the same building as the department. Sometimes common facilities are shared, even though an administrative separation is maintained. If one telephones the number of the Victorian Administrative Appeals Tribunal, for example, one's call is answered: "Ministry of Planning". Although the Tribunal has its own staff, it shares a common switchboard with the Ministry which is actively involved in many proceedings before the Planning Division of the Tribunal. Such arrangements can hardly inspire confidence in parties who appear before tribunals that those tribunals will render truly independent decisions. Some tribunals such as the Remuneration Tribunal appear to sit to suit the convenience of the Governement. A recent hearing was adjourned to enable the Government to recast its submissions in the light of ACTU opposition to proposed increases in the salaries of senior public servants and judges. On earlier occasions, Tribunal decisions which have not suited the Government have not been implemented and have been referred back to the Tribunal for further consideration. Such events undermine confidence in the independence of the tribunals concerned and provide ample support for Gleeson C.J.'s expressions of concern.

On earlier occasions, Tribunal decisions which have not suited the Government have not been implemented and have been referred back to the Tribunal for further consideration. Such events undermine confidence in the independence of the tribunals concerned . . .

RESOURCES

An issue which is closely related to the question of independence is the allocation of resources to enable the tribunals properly to carry out their functions. There has been a strong tendency recently to place judges in administrative control of their own courts. Thus the High Court,

the Federal Court and the Family Court now operate under the administrative direction of their Chief Justices. Similiar power has recently been conferred on the President of the Commonwealth Administrative Appeals Tribunal. This, so far as I am aware, is the only tribunal which has a measure of control over its own resources but even it is ultimately dependent on the Executive to provide the necessary funds. Shortly before the Tribunal was given this important power the Attorney-General's Department had withdrawn funding for many support staff in the Tribunal. Court attendants were no longer available and many of the Members lost their associates. This has made the conduct of proceedings extremely difficult, particularly in matters in which a large number of exhibits are tendered and in which reference is made in argument to a good deal of authority.

A similar lack of resources has meant that members of the Victorian Administrative Appeals Tribunal and the Accident Compensation Tribunal have to record proceedings on their own machines and make private arrangements to have them transcribed. When proceeding on circuit Members of the Administrative Appeals Tribunal are unaccompanied by staff. It is not uncommon for them to have to attend at the local police station to obtain the key to the court-house where a hearing is to take place and then to proceed to open the court-house and admit the parties and their representatives before the hearing can get under way. They then have to receive, mark and file all exhibits themselves and cope with the numerous administrative matters which are an unavoidable adjunct of oral hearings.

Under-resourcing or the withdrawal of resources can have obvious repercussions for the quality of decision-making and the speed with which decisions are made. More importantly, however, they may act as yet another subtle pressure on tribunals and their members.

THE RULES OF EVIDENCE AND PROCEDURE

A common feature of the legislation which establishes tribunals is the inclusion of a provision which frees the tribunal from a need to observe curial procedures. A typical section reads:

> *"In inquiries and proceedings under this part, the Board shall act fairly and according to the substantial merits of the case and, except insofar as it otherwise determines, is not bound by the rules of evidence or by practices or procedures applicable to courts of record"*: *Equal Opportunity Act* 1984 (Vic), s. 51.

A good deal of material is emerging which suggests that some tribunals at least are adopting practices and procedures which are not consistent with the ends of justice.

A good deal of material is emerging which suggests that some Tribunals at least are adopting practices and procedures which are not consistent with the ends of justice.

In March 1989 the Administrative Law Section of the Law Institute of Victoria produced a "Position Paper on Statutory Regulation of Tribunals". It recorded that the Institute's tribunal Committee had received many complaints about denials of natural justice by tribunals. It identified:

> *"weaknesses in the procedures governing the conduct of Tribunal hearings and many instances of poor decisions resulting therefrom . . . Too often we have found that the quite laudable objective of reducing usual formalities has been allowed to be taken too far, with the result that administration of the Tribunal is too open to abuses which those formalities sought to guard against . . . It is in our view often unrealistic to expect a fully fair hearing by the modified principles of natural justice alone"*: at pp. 1 and 2.

One hesitates to draw conclusions from anecdotal material. However, the Committee came to its conclusions having made due allowance for the self-interest of informants.

I too can speak from experience. That experience was gained when I had the misfortune to appear before the Victorian Guardianship & Administration Board last year. I had been briefed to appear for the relatives of an intellectually-disabled person whose affairs had been placed by the Board in the hands of an official known as the Public Advocate. My instructing solicitor told me that the matter had been adjourned part-heard because the Board wanted to receive evidence about one aspect of the conduct of my clients in relation to the disabled person's affairs. The matter was listed for a Wednesday and my instructing solicitor told me that the point was a short one and should take no more than half a day. The necessary evidence was available and could be disposed of in about an hour. The hearing was to take place at the Board's offices. A

large number of the disabled person's relatives attended and the public official who had charge of his affairs was represented by counsel. The Members of the Board entered the room unannounced from a side door. They took their places at a table and before a word was spoken one of the Members got up with a Bible in her hand and commenced to administer the oath customarily made by witnesses to everyone seated in the public area of the room. She even tried to swear my opponent! When all this had been done the Chairman explained that everyone was a potential witness and it would really save time if everyone had been sworn before it was necessary for them to give their evidence. My instructor informed me that two of the three Members of the Board, including the Chairman, had not sat on the previous occasion. When this matter was drawn to the attention of the Board we were advised that the matter had been listed for a rehearing *de novo* on all issues relating to the appointment of a guardian. When it was submitted that to so proceed was inconsistent with the terms of orders made on the previous occasion, the Board reacted by calling the person who had chaired the Board on the earlier occasion and had him give evidence as to the intentions of the former Board members when they made the orders concerned. The Board then ruled that it would proceed. I made an application for an adjournment on the basis that we had only come prepared to deal with the narrow issue which had been reserved, as we understood it, for hearing. That application was rejected, in part, because the three part-time Members of the Board had set aside three days from their other activities to hear the matter and that an adjournment would cause them inconvenience. The Public Advocate had been informed of the fact that three days had been set aside for the hearing; my instructing solicitor had not. During argument, Members of the Board insisted on addressing counsel and witnesses by their Christian names. When counsel rose upon the return of the Board from one of the many adjournments that it took, they were firmly told that such a courtesy was not required. I exhausted my evidence and renewed the request for an adjournment. It was refused. The Public Advocate had no evidence to call at that stage. The Chairman then went round the assembled relatives, asking whether any of them wanted to give evidence. None appeared to wish to do so but the Board insisted upon a nephew of the disabled man, who had not seen him for fifteen years, taking the witness stand and answering a series of questions about what he knew of the way in which the disabled man was cared for over fifteen years earlier. At this point I withdrew. My instructor continued to attend with a watching brief. The hearing continued in this unorthodox way during the following day and at the end of the evidence the Board ordered that the Public Advocate should continue as guardian of the disabled man's affairs and that my client should pay costs. No submissions had been invited in relation to the issue of costs and none had been made before that order was announced.

A colleague had a siminlar experience before the same Board. His client had been married to a retired businessman for a short time. Prior to that she had been his housekepper for a number of years. The businessman was in his late 70s or early 80s. The marriage had caused family friction. In particular there were objections that the wife had been spending the husband's assets at a great rate. Just before Christmas 1988 the wife was informed by telephone by an officer from the Board that an application had been made by the husband's son for the appointment of a guardian and administrator to look after his affairs. She was told that the Board would be visiting her home the following day. On the following day, shortly before the Board arrived, another telephone call advised her that the Board would be holding an interim hearing at her home that day. She contacted her local solicitor and he was present when the Board attended. Also present was the solicitor acting for the son. When the wife's solicitor asked for copies of relevant documents he was told that they would be faxed to him that afternoon after the hearing was completed. As a result of the interim hearing conducted informally in the loungeroom of the family home an interim guardianship and administration order was made. The businessman was taken from the family home on that day and was cared for at the local golf club over the Christmas period by a former housekeeper employed by the Board. When the matter next came before the Board my colleague appeared. He found the Board highly resistant to basic adversary procedure. A social worker employed by the Public Advocate's office had provided a report supporting the continuation of the interim order. My colleague sought to cross-examine her on the basis that she had not consulted the various people who had direct knowledge of the financial circumstances and family situation. The Board tried to prevent a conventional cross-examination by suggesting that, as some of the people who had not been consulted were present in court, they could be called and questioned about the matters which the social worker had not taken up with them. The Board did not appear to appreciate that my colleague was seeking to persuade it not to rely upon the social worker's report. The lack of structure in the hearing also presented difficul-

ties. There was no guidance given by the Chairman at the outset as to what procedures would be followed, save that he said that the inquiry would be conducted informally and that the Board regarded its function as being to intervene and pursue its own inquiries. He said that the Board would not adopt a court-like procedure and simply permit parties to submit opposite cases. As a result, my colleague did not know whether he should commence his case first, whether he had an onus to persuade the Board to set aside the interim order or whether the applicant for the order had the onus to persuade the Board that it should be continued. This in turn created difficulty in determining a proper order for witnesses. The Board appeared content to hear whoever wanted to give evidence in any order, regardless of the nature of that evidence.

Too much informality can impede the pursuit of truth. It is also often forgotten that the body of rules of evidence which have been developed over the years have, in large measure, been designed to exclude evidence which may mistakenly be treated as relevant and unduly significant by non-lawyers.

Those who are bent upon expediting proceedings before tribunals and who seek to introduce a "user-friendly" atmosphere at tribunal hearings often overlook the reasons which have led courts to adopt rules of procedure. Essentially, they exist to ensure that all parties are treated fairly and that they can make informed submissions on all relevant issues of fact and law. Too much informality can impede the pursuit of truth. It is also often forgotten that the body of rules of evidence which have been developed over the years has, in large measure, been designed to exclude evidence which may mistakenly be treated as relevant and unduly significant by non-lawyers. This is done to ensure that injustices arising from prejudice or assumption should not occur. Legislatures appear to have overlooked the fact that many of the tribunals from which they have removed the constraints of the rules of evidence are constituted by non-lawyers. There is much to be said for justice being done speedily and with a minimum of formality. Ultimately, however, it is more important that justice be done.

It is suggested that a better solution would be to require tribunals to adhere to the rules of evidence and procedure which would bind a court, but to leave them free to depart from those rules for good reason. Such should certainly be the case where the jurisdiction being exercised by a tribunal is jurisdiction which has traditionally been exercised by courts.

CONCLUSIONS

One can well understand the attraction of tribunals to politicians. When new regulatory mechanisms are introduced it is good to be able to say that the interests of citizens will be protected by the conferring of a right of appeal on an "independent" tribunal. The existence of such tribunals also serves to place a buffer between a disgruntled citizen and his Member of Parliament. Tribunals can be represented as being relatively inexpensive to operate and as offering a means whereby disputes may speedily be resolved. Members of the public have difficulty distinguishing between such tribunals and courts. The distinction is all the more blurred when members of the tribunals are given the style and title of Judge and the tribunals exercise powers which have traditionally been associated with courts.

In addition to the creation of new rights of appeal, there is also the tendency which has been identified in this paper for powers to be removed from courts and conferred on tribunals. Again, one can see such transfers of jurisdiction as appealing at a time in which court lists are subject to long delays.

It is submitted that recent experience suggests that steps need to be taken to ensure that existing tribunals and any created in the future should:

(a) at least as to their full-time members, be constituted by appointees who enjoy security of tenure to retiring age;
(b) be regulated by administrative arrangements which enhance rather than qualify the appearance of independence;
(c) observe the rules of evidence and established procedures unless good reason for departing from them in a particular case is made out; and
(d) be properly resourced so that they are able to perform the tasks committed to them.

Unless these steps are taken there is a significant risk that the public will lose confidence in justice administered by tribunals. Given that the public has difficulty distinguishing between courts and tribunals, there is the further significant risk that, in time, the administration of justice according to law in this country might also be called into question. This should not be allowed to happen.

DARWIN — AUSTRALIAN BAR ASSOCIATION CONFERENCE

Felicity Hampel, Michelle Quigley, Chris Jessup Q.C., John Hardy, David Harper Q.C., John Coldrey Q.C., George Beaumont Q.C., Bill Gillard Q.C., Bernard Bongiorno Q.C.

THIS INTREPID CONFERENCE ATTENDER, complete with "accompanying person" and showing stamina and indurance (and a distinct abhorrence of Melbourne's weather), moved on from, or should that be having survived, the Medico/Legal Conference in Bali and another Garuda airflight, arrived at Darwin for an ABA Conference held at the Darwin Diamond Beach Casino.

I immediately knew that this conference would be different to the Bali conference when upon arrival at the Darwin Casino, Jack Hammond was in the process of being mistaken for a taxi driver by a fellow conference delegate from Sydney. Jack in his usual quiet way explained to the gentleman that taxi driving wasn't his usual occupation, he was just helping us out of the taxi as a courtesy, and yes, that was the direction of the city centre.

This was a much more heavy-weight conference — the papers weighed ten times that of the Bali ones for a start!

The conference papers began at 9 a.m. and went through to at least 4.30 p.m. each day with a guest speaker at lunchtime as well. Gillard Q.C. made sure no one got a reprieve and bought at least two t-shirts each. Men wore proper shirts and even ties, women wore dresses. There were more judges of the High Court, of the Supreme Court and of any other court, Attorneys-General, Solicitors-General, Q.C.s, legal novelties, including Australia's first woman Master, and more barristers of much greater seniority than yours truly everywhere one looked.

The keynote address was given by Sir Daryl Dawson whose topic was "The Independence of the Judiciary". The topics for the conference ranged far and wide, canvassing issues in criminal law, civil law and alternative dispute resolutions.

Victoria was well represented as was Canberra, which at first I thought reflected the abundance of legal talent in those southern parts. This was until I saw the weather forecasts for southern Australia. How the conference organisers enticed George and Felicity Hampel away from so much snow, one can only speculate. Mark Weinberg gave his paper early in the week

before heading even further north to Scotland to give another paper.

I winced at the length of Mr. Justice McGarvie's paper (52 pages, single spaced.) Fortunately he spoke to it. The prize for the shortest paper went to Mr. Justice DeJersey (5 pages). Unfortunately he also spoke to his paper. Myers Q.C., Bongiorno Q.C., Coldrey Q.C., Tracey, Meagher Q.C. and Jessup Q.C. gave the benefit of their wisdom in their respective fields. Alternative dispute resolution, the erosion of traditional safeguards in criminal law, commissions of inquiry, administrative tribunals, managing the long criminal trial, the conduct of complex civil litigation, advocacy, practical lessons from psychology, and what every barrister needs to know about income and capital gains tax were covered during the course of the week.

This hectic programme was a slight encumbrance to the social programme. Though I suspected with the age and position of the majority this was intentional, I was fooled. The hospitality of our brethren (I use the word deliberately, there was only one female member of the N.T. Bar, and she was definitely one of the boys) from the NT Bar was boundless.

The highlights, chronologically and not in order of importance, embarrassment or significance, included:

- ☐ dinner at the magnificent home of Peter Bracher (gentleman barrister) at Myilli Point;
- ☐ chilli prawns cooked with care by N.T. Solicitor-General Tom Pauling (recipe on application to the writer) were especially noteworthy.

An opening of an exhibition of Aboriginal art by Chief Justice of The Northern Territory Supreme Court Justice Asche (formerly of our Bar) was certainly an event. Probably most notably for the fact that Mr. Justice Asche displayed skills of advocacy to be aspired to by any junior barrister.

Further highlights included drinks at Government House as a guest of the Hon. James Muirhead Q.C., Administrator of the Northern Territory. This was followed by what was described in the conference programme as a "surprise evening". On reflection I now realise that the surprise was Gillard Q.C. and Jessup Q.C. joining vigorously in a brolga dance with an Aboriginal group which had entertained us after a superb dinner in the exotic setting of the Darwin Botanical Gardens.

As it seems is usual mid-week, there was a lay day. "Lay" only from the rigours of more papers. One was not expected on this lay day to "lay" by the pool. No, one was expected to further participate in golf or tennis. The writer was fortunate to be invited sailing from the infamous Fanny Bay Yacht Club. To watch the sun set over Fanny Bay from the beer garden of the Yacht Club must be close to paradise.

Luchtime speakers included Ian Hunter Q.C. from London, who encouraged us all to attend the international conference with the impossible sounding French name. I was impressed just by his ability to pronounce it, let alone by his credentials and experience which were noted in the introduction of him by Gary Downes. The Chief Justice of Singapore spoke later in the week's lunchtime programme. The exhortation to "please book early to avoid disappointment" didn't seem to be necessary in the latter speaker's case. Perhaps we were all saving our concentration for George and Felicity's advocacy paper that afternoon.

Forget the legal reputations and stature. The Gala Evening Finale gave each State the opportunity to show where the real talent was. NT's performance was robust. NSW was good but a little pompous. WA tried hard. Canberra gave Victoria a run for its money. Victoria, I must say with all modesty, put up a more than creditable performance.

John Hardy's interpretation of Jana Wendt's (or was it Derryn Hinch's) style of investigative journalism was complimented by Coldrey's performance as the NT Police Commissioner. Coldrey's explanation of the investigation by the NT police of the great road train robbery was consumate. The chorus of all Victorian representatives singing a Coldrey-penned Gilbert & Sullivan ditty about magistrates, more than ably conducted by Hampel J., did our Bar proud. Solo efforts by Coldrey Q.C., Bongiorno Q.C. and Jessup deserve special commendation.

The delight of the conference was seeing Gillard Q.C. down to his last $50 in the casino (yes, I did actually see him put his money into the poker machines and laughing about it). The stayers ended up in the disco until 5 a.m., when the powers-that-be at the casino turned off the music. Unfortunately it was right in the middle of a Jimmy Barnes song, and despite protestations that this was a very unAustralian thing to do, the music was not revived.

Verdict: I was glad to return to Melbourne (despite the weather). This conference-attending was getting a little too much like hard work.

Note: I did promise Trevor Riley Q.C. of the NT Bar that I would tell you all that Darwin and the Northern Territory was an awful place, lousy weather, dull and boring, unfriendly people and generally not a place to go. One can sort of understand why they would like to keep it to themselves.

Michelle Quigley

BALI—MEDICO/LEGAL CONFERENCE

Tony Howard, Linda Dessau M., Michael Dowling Q.C., Mrs Michael Dowling

ONE COULD BE FORGIVEN FOR WONdering why one would take a week off and purposely choose to spend it with a group of doctors and lawyers.

It didn't start off too promisingly. The first mistake was travelling Garuda Airlines. The second was getting to the airport at the time specified by that airline. Not a Garuda flight had left on time all week, sometimes not even on that day, let alone within the appointed hour.

So there we were, me as a registered delegate of the Medico/Legal Conference and my handbag — sorry — "accompanying person," sitting in the Garuda Lounge from 6 a.m. The excitement of overseas travel and the lure of warmer weather was beginning to fade. I was regretting the late evening and the number of drinks and beginning to get just a little irritable when lo and behold an announcement — our aircraft was now ready for boarding. We were finally on our way.

Now, if you think it was a little uncomfortable and you can understand this intrepid conference-goer's tiredness, spare a thought for Linda Dessau and Tony Howard, who were also up at sparrows but spent nearly the whole of the flight to Denpasar chasing their two small children around the aircraft. Parents seem to wilt after a while; unfortunately for Linda and Tony the children didn't.

Most of the delegates, their "accompanying persons" and families arrived on this flight to be met by the genial and concerned-looking representatives from ANZ Travel, who pointed us all in the direction of the buses which were to take us to our hotel at Nusa Dua. The commentary and travelogue given by the smiling Balinese gentleman during the transfer were probably wasted upon the travellers, as were his attempts at humour.

Arrival at Nusa Bua Beach Hotel. Dowling Q.C. was spotted well and truly in conference mode. As was Pam Darling, though Dowling had not gone as far as fragapani in his hair nor could he quite compare in the suntan stakes. Leis were presented and Balinese girls danced and sang and we all headed for room allocation. Rooms allocated, we checked our conference diary and found that the first event of the conference was scheduled one hour hence — the welcome cocktail party. ("Don't forget your vouchers!") The heavy part of the conference was to begin on the morrow.

With topics such as "Who is fit and proper to practice medicine and law," "Nervous shock," "Legal liability of health care professionals — today . . . and tomorrow" and "The medical evaluation of permanent musculo-skeletal impairment (using whole person impairment model)" we were in for some soul-searching, conscience-raising, education and enlightenment. Fortunately many of the delegates decided that a balanced approach was required, and as much commitment was put into the social implications of such topics. Consequently suntans, hangovers, tourism and general fraternisation were given equal billing on the conference agenda.

Michael McInerney found out about two hours too late that the going rate for a fake Rolex was about $10 less than he paid. Dowling Q.C. was trembling at the site of yet another market. Mrs. Dowling seemed to be intent on injecting considerable foreign exchange into the Balinese economy, and Dowling Q.C. was just a little concerned about how he was going to get all the purchases back home. Wright Q.C. honed his negotiating skills to perfection just in time for his three children to arrive. The Wright household had at last count 23 Balinese-purchased watches, a dagger, a blow-pipe and a set of arrows, five sarongs and several wood carvings of indeterminate Balinese gods.

Judge Strong was educated into the ways of Legian Beach shortly after his arrival. Wanting to get out of the somewhat antiseptic international hotel, Judge Strong joined a group led by Balinese devotee ("I've been here at least 17 times!") Malcolm Strang, and headed to Legian,

a somewhat horrific 20 minutes drive from Nusa Dua, to see if he could catch a wave.

Unfortunately the surf was not great, but the experience of Legian Beach was educational. The sun was quite strong, and after his swim Judge Strong, not wishing to frazzle, put his long-sleeved striped shirt, trousers and large straw hat back on. This was seen as unacceptable dress by both his colleagues and the Balinese hawkers, who were as anxious to sell him a sarong as we were for him to conform to a more relaxed style of dress.

Judge Strong entered into the spirit, and was soon at home in his sarong. He also succumbed to a beach massage by a Balinese lovely, whilst Anthea McTiernen and I were content with negotiating a two-for-one price for a manicure and hair plaiting.

Back to the rigours of the formal part of the conference. Dowling Q.C.'s paper bore a strange resemblance to several professional conduct lectures. "Nervous shock" was thought by some to be what was experienced at 2 a.m. if one dived into the hotel pool (just ask Eddy Power who did it nightly), or alternatively, the emotional trauma of facing the conference sessions at the early hour that was required.

Michael Wright Q.C. bartering with the natives

Mid conference a lay day was called and we were all put on buses and headed for the hills ("vouchers required!"). Some delegates were more adept at touring than others. Michael Salter from Phillips Fox was heard to mutter later in the day he'd rather be dictating answers to interrogatories.

Back to the serious stuff; day four brought the paper on Medical Negligence. This was a chance for the lawyers to get stuck into the doctors and the doctors, of course, returned the compliment. The final paper, which dealt with "The whole person impairment model," was most apposite for that stage in the conference week. The last session was questions to a panel made up of all speakers and chaired by Bob Monteith (who had barely recovered from the shock of a call a few days previously from his son with the news that Monteith's new Mercedes had come to grief at the hands of his offspring. Bob's decline was dramatic and painful — no one likes to see a grown man cry). The questioning was spirited and varied as were the answers.

The social finale was a Balinese dinner. Conference issue sarongs and head dresses were expected to be worn. All joined in the spirit of the evening so no-one felt especially foolish, and a great evening was had by all.

The verdict: get in early and book for the 1991 Medico/Legal Conference. Aloha Hawaii, here we come!

Michelle Quigley

MONASH LAW SCHOOL

Law Graduate Scholarship Worth up to $25,000

THE DEAN OF THE LAW SCHOOL AT Monash University, Professor Bob Williams, has announced that in 1991 the Faculty of Law will be awarding a **Silver Jubilee Postgraduate Scholarship** to a graduate student in the Faculty of Law. The stipend for this prestigious award will be $15,160 per annum with the possibility of it being inceased to $25,000 a year for an extremely well-qualified candidate. Additional allowances are also payable. Graduates of any Australian or overseas university are eligible to apply. The award is tenable for up to two years for a Master's candidate and up to three years for a Ph.D. candidate.

The Dean said that he hoped that the scholarship would be attractive to applicants from within the profession as well as those who have only recently completed their undergraduate studies, particularly those interested in a future in law teaching. A candidate is required to hold at least a bachelor's degree with upper second class honours or the equivalent. Closing date for application is 31 October 1990. Application forms are available from the Higher Degree and Scholarships Office, Monash University and further enquiries could be addressed to Graduate Studies Office at the Faculty of Law, on 565 3329.

VERBATIM

In Re Linard: Part IV Application

Coram: Master Barker, 14th Court
8 August 1990

McInis, explaining circumstances of application "... an unusual case, the plaintiff is a protected person who has been in institutions all his life"...

Scarfo, sotto voce from the body of the Court Room, "What is he, a barrister?"

Re Popple

Coram: Road Transport Licensing Tribunal

Mr. Riggall: And what is happening at Dinner Plain at the moment: could you tell the tribunal of this future sub-division and process what that is about? ... It's an alpine village on freehold land it's grown to more than a village now of course.

What will the number of beds be in that village? ... Well, it's a 2000 bed development but this is often a point of contention. We're not quite sure how many people are in a bed sometimes.

Chairman: Especially in the snow.

R. v. James Patrick Gerrard Hughes

Coram: Smith J.
24 July 1990
David Ross Q.C. and P. Priest for prosecution
Ross: Have you ever had the experience, sir, of conducting an autopsy on a person who is totally dead, that is, clearly — sorry, I withdraw that?
Witness: In my practice that is a prerequisite for autopsies.
Ross: That is, who is clearly dead and who should have no blood pressure and is demonstrating some aspects of blood pressure?
Witness: Yes, I think what you are really getting at is there any exudation out of the blood vessels when you do the autopsy?
Ross: Thank you for bailing me out on both counts.
Witness: The answer is yes.

DPP v. Marabito

Coram: Judge Kimm and a jury
25 June 1990
F. Gucciardo for prosecution
G. Thomas for defence
Gucciardo: Who was present with you when that search was begun?
Witness: Constable Hood, who is now Senior Constable Walker, was standing beside the defendant at that stage.
Gucciardo: Constable Hood is now Senior Constable Walker by marriage, I take it?
Witness: By divorce, actually.

Balog v. Independent Commission Against Corruption

Coram: High Court
5 April 1990

Mason C.J.: Section 13(2)
T.E.F. Hughes Q.C.: Section 13(2)
Mason C.J.: (a)
Hughes: (a)
Mason C.J.: (i)
Hughes: (a)

PLEADING PRECEDENTS

FROM THE CHELTENHAM MAGISTRATES' Court comes a collection of Special Summonses. The spelling could stand improvement but the terse pleading style is surely reminiscent of the Third Edition of Bullen and Leake.

DEFECTIVE BUILDING WORK

[The defendant] accepted, renovation worke, on a property, at ... Street Melbourne. He started the worke but, did not complite the worke aftere 5 yaeres. The worke which he started did not comply with the Uniform Building Regulation Code. The damige to the property is substantuale. The inconviniance of the worke not being complited is unberabale. He accapted the payment for the worke but did not complit it. The worke has been payed for but it is not complited, aftere 5 yeares.

The dores were fited bacvordes, the fence poste is totaly loose, the gutering had not been repaired, the bungalow was built without foundation, the dore does not close.

RUNNING DOWN

On the 12/7/1981 [the defendant], hit the back of, a stationary car No. ....., on the cornere of North Road and Kooyong Street Brighton 3186 Melbourne. She was driving a car registerd No. ..... This accident caused $1,300 dolares worth of damige to No. ..... This amount has not been payed for. This accident resolted in, damiging my spine, and spinale cord, which resoted in totale parelisses of my body. I aske the cortes for the maxsimume sentince posibale, to protekte the publick form dangerase kriminales. This is an accte of crualty beyonde humane comphrentione. How many more livese havto be ruened, before the Cortes accte responcibaly, to protecte the publick.

ARREARS OF RENT AND BREACH OF COVENANT

[The defendant] renred the property at ..... Street. When the lease expired she id not pay rent, but she did not move out. She sublised the premises, without promission. She capte about 30 cates and 2 doges inside the home. She drove through the front fence whill it was closed. She stole my curtaines, bed and other thinges. When the petes were lefte inside, the urane whent through the polished flore bordes. The inside of my home was a desatere. The matiriales to repair the home coste $1,000. Stolen property $100. Damige to fence $200. Unpayed rent $?. She shot through, without paing her account.

CHINESE CRICKET

THE BRIEF

COUNSEL WAS BRIEFED TO APPEAR ON behalf of four co-owners of a suburban Chinese Restaurant each of whom faced six *Food Act* informations arising out of the alleged unexpected appearance of an Australian black cricket in the beef in black bean sauce.

THE CONFERENCE [AND VIEW]

Counsel and the instructing solicitor arranged to meet the next Sunday at the restaurant. Counsel thought it would be a good idea for both of them to bring their families and have a pleasant Chinese lunch. Counsel started to worry when he was able to park right outside the restaurant at 12.30 p.m. His concern grew when he discovered there were no other customers. By the time he and his family and the instructor and his family left, at 3 p.m., the restaurant had done a roaring trade — three take aways and the legal eagles' meals. The food was 1950s country Victorian Chinese — meat, Chinese Cabbage, Bean Sprouts, soy sauce, stock and plenty of corn flour.

With a great deal of trepidation a view of the kitchen was undertaken to confirm, inter alia, instructions that there was "no way" a cricket could have entered the kitchen through alleged gaps in the walls. That was not to say that it might not have ventured through the 1–1½" gaps between door frames and walls or through fly wire doors which did not close unless pulled hard. It was fortunate they had eaten as the kitchen was primitive — spotlessly clean but deserving of Heritage classification.

THE HEARING

The clients declined the prosecution's kind offer to plead guilty to one information in return for the other 23 being withdrawn even when the magistrate kept giving bonds to other *Health Act* and *Food Act* miscreants including one who had somehow connected with the nose of the council inspector.

At 3.15 p.m. the hearing started. The court sought to swear the interpreter. The Cantonese interpreter could not speak enough English to complete the oath. In response to some deft cross-examination by the magistrate the interpreter admitted that he was not a professional interpreter and was indeed just a student. He readily conceded that he was not competent to do the job and accepted the court's invitation to leave the witness box with obvious great relief.

Shortly after, those in court could hear an irate member of counsel take the interpreter to task for sitting mute for six hours about his lack of self-confidence, "suggest" to the interpreter he get his agency to get someone along immediately and that he himself disappear quickly. The same audience heard counsel ask his intructor's work experience student — who coincidentally could also speak Cantonese and a reasonably good degree of English — if she would pitch in and help out. Her quick response was that she had just then developed a "tellibrall" headache and felt quite ill.

He then proceeded to regale the Court with an account of his horror in discovering the cricket in the bottom of his reheated beef in black bean sauce. Brave as he was he was unable to resist a feeling of growing nausea.

A Police Constable was called and gave evidence of purchasing a series of take away dishes for members of the local Police Station. Then a Police Sergeant, somewhat florid of complexion, strode to the witness box and proceeded to inform her Worship of his request to a member of staff to purchase the meal, of his consumption of half of the beef dish and half of the fried rice, of his careful sealing of the containers and placement in the plastic bag the purchases came in, of his care in tying the bag up and the placement of it and its contents in the mess refrigerator. He then proceeded to regale the court with an account of his horror in discovering the cricket in the bottom of his reheated beef in black bean sauce. Brave as he was he was unable to resist a feeling of growing nausea. Of course none of his members would dare play a practical joke on him — they would know the measure of his outrage.

After the council inspector had given her evidence, which included an account of how she could hear crickets outside, on the main road, when she knelt down at the front of the restaurant and placed her ear to the ground.

An entymologist was then interposed. Although the cricket had been deceased for some six months he was able to positively identify it as the one inspected in the company of the council's health inspection staff. He testified that whilst it still had black bean sauce adhering to it, it also had all of its extremely fragile appendages intact. He did not believe a cricket's appendages would survive stir fry cooking.

The restaurant manager was called. Yes, he remembered the Constable coming in to purchase the take away order. It is rare indeed that he got such a large order — it must have been all of $30. [Counsel mused over the wisdom of having eaten at his client's establishment.] No, he could not remember any crickets coming into his establishment. Yes, they could be heard outside at that time of year.

The replacement interpreter arrived. He was every bit as confident as his predecessor was uncertain. Dare I say it — he was every bit as competent as his predecessor was not.

The cook was called. With the aid of the interpreter and a series of props including a steel wok, a metal soup ladle, bowls of meat and vegetable and black beans he gave a vivid, vocal and gesture laden demonstration of how beef in black bean sauce was prepared. He went to considerable lengths to demonstrate how a black Australian cricket could not have skulked amid the ingredients without being spotted by his ever vigilant eye, and how a black Australian cricket could not have survived intact the ministrations of the flailing ladle used in the stir frying of this dish.

Her Worship had a reasonable doubt about the ability of the cricket to have found its way into the Sergeant's dinner at the hands of the restaurant and dismissed all 24 informations.

CONCLUSION

The Sergeant of Police, declining to perceive that he may have been sufficiently unpopular to attract the attentions of a practical joker or even an attempt to deliberately sabotage his meal, resolved to stick with McDonalds in future. Counsel and his instructor concluded it would be prudent to confine Sunday lunches to restaurants which require bookings an ample time ahead. The restaurateurs decided that after more than 30 years of running that business it was time to move on. The council health inspector girded her loins and returned to the battle with local adulterators. Her Worship, seemingly unimpressed by the free lessons in Cantonese stir fry cooking, adjourned to 10 a.m. the next morning.

[This has been a true story. Only the identity of the black Australian cricket has been concealed to protect the innocent.]

Graham Devries

LUNCH

IT IS INDEED A BRAVE VENTURE TO launch a restaurant in these economic times. But that is what Noel De La Hunty and Maurice Kaminsky have done in opening "Kayes on King". Indeed there appears to be a proliferation of restaurants, bars and brasseries in King Street in recent times. Very much against the tide.

This establishment is situated at 225 King Street near the corner of Lonsdale Street in a new modern building of greenish tones — empty except for the restaurant. Do not mix it up with another new venture of similar name in King Street.

It is really not a restaurant. It is a licensed brasserie and bar. The type of venture that is very much in vogue at the moment — lots of polished granite tops and steel with a large modern bar area.

The aim is not to limit things to a formal restaurant. Light snacks are available for those in a hurry. You can make your own sandwich with a cup of soup and a glass of wine. Or you can drop in after work for a drink. Very much a product of the supposed loosening of our Victorian licensing laws. Very much a New York-style concept. Very much an un-Melbourne concept. It still has to be proved that these brasserie/bar arrangements will be a long-term success and be able to catch or combine the pub/restaurant crowd.

This establishment deserves to succeed. It is professionally run (the owners also have Onions restaurant in South Yarra). It is comfortable to be in. It is not noisy—like many of its competitors. The service is efficient but friendly at the same time.

On this occasion I lunched with Michael McInerney and my reader Gerard Meehan, the art of serious luncheons being a subject which masters should impart to their pupils at every possible opportunity. As editors, Heerey and I had asked others to review this restaurant. They cried off, citing pressure of work, but I suspect, in reality, on discovery that it was the policy of the *Bar News* not to pay for the lunches of reviewers. There is no such thing in life as a free lunch.

McInerney exuded his usual oozone layer of charm and the waitress approached. Her name was Fiona and she too had charm. We interfaced in a meaningful way about the menu. On sound sociological grounds Michael opted for the Victorian mussels cooked in a classic white wine sauce, $7.50, and the sirloin steak from the grill with a red wine sauce, $14 (there being a choice of T-bone, fillet and sirloin with either mustard, peppercorn, mushroom sauces as well as the red wine sauce). He justified the conservatism of his main course by announcing that "you can always judge a restaurant by its steaks". A true enough observation, but I suspected that under the double-breastedness of his Louis Feraud suit a Gaelic heart yearned for rump and chips (real ones) in the public bar of a hostellerie deep in Magpie land or even sturdy Yarra Ville. My reader arrived late flushed with the thrill of a court appearance — and a successful one at that. He was immediately ordered to eschew *his* naturally conservative instincts and ask Fiona for the marinated quail, grilled and served with a liver crostini, $18, just so we ate a wide spectrum of the menu.

I was in a quasi-dietary mode caused by seeing Simon K. Wilson on a regular basis. So it was soup and an entree. The Mediterranean fish soup with, ($7.50) followed by the antipasto ($7.50) was to be my lot.

Fish soup is found all around the Mediterranean — but especially in Provence. It is usually accompanied by aioli, a type of mayonnaise sauce consisting of a large quantity of garlic with egg yolks, salt and pepper. Frederic Mistral, the father of Provencal heritage, wrote that "aioli epitomises the heart, the power and the joy of the Provencal sun, and also it drives the flies away."

My fish soup (or bourride, as it is known in Provence) arrived in a pleasant bowl accompanied by toasted bread and a side dish of aioli. Both the soup and the aioli were tomato based. The aioli was fine — of an appropriate consistency and full of garlic. Alas, the soup was not quite so good. It was not strong enough on fish so that the tomato dominated too much. A strong fish stock base was what was needed.

However, the antipasto in this restaurant is one of its best features. It is a meal in itself. Not the usual old Lygon Street collage of tired salami, pickles and commercial cheese, this antipasto is a subtle collection of many varying flavours and ingredients. The pickled vegetables, lightly fried fish and vegetables, some octopus and many

other and varied ingredients make this one of the best antipastos in Melbourne.

McInerney, of course, surrounded himself in controversy as is his wont. His large bowl of steamed mussels arrived and there followed a deep discussion about whether one should eat mussels whose shells have not opened during the cooking process. McInerney announced to all and sundry that he could not open up his mussels and that if he did eat one he could die with mussel poisoning. However, having sent the dish away, which is his wont, Fiona returned to inform him that the shells actually were open and it was only that he lacked the muscle to open his mussels that had caused the problem. Having been assisted inside the obstinate crustaceans, Macca said that they were superb, as was the white wine sauce.

The restaurant passed the steak test. The sirloin had been grilled on a real grill, rather than semi-fried as often is the case, was medium/rare, and tender. It came with a large and unusual green salad and a huge bowl of thin chips (thick ones are also available).

Gerard gazed at his marinated quail with suspicion. What were these crostini things? In fulfilling my solemn duty as a master, I told him that crostini is an Italian dish of toasted bread which is soaked in olive oil and then baked in the oven. Upon this Italians heap many varied pastes of olives, cheese, chicken livers and such. The restaurants of Assisi are famous for their crostini. This version was covered with an excellent mixture of liver and onions. It offset the grilled quails with a strong robust flavour. My reader announced that he would eat quail on a regular basis, depending, of course, on the vicissitudes of the Bar.

This was neither a marathon nor mammoth lunch. However, we managed to compare two versions of the sauvignon blanc, a 1989 Bridgewater Mill from South Australia ($18) and a Cloudy Bay 1989 from New Zelanad ($26). Both had the cut grass/gooseberry essence of a sauvignon blanc, but all agreed that the Cloudy Bay was an outstanding wine.

Annie Smithers is the chef at Kayes on King. She formerly worked at Stephanie's; but thankfully she does not appear to have adopted that restaurant's tiresome obsession with offal. The menu ranges through soups and entrees, to an interesting range of pasta and rissotto, proper grills, whole fish, to steak and kidney pie and potroasted rabbit. Being young and thin my reader sampled the golden syrup pudding. It was excellent, albeit of a dainty rounded nouvelle size. She is obviously a chef of talent.

Prices are reasonable, the entrees range from $6 to $7.50, pasta $7–$10, grills $14–$18, mains $12.50 to $17.50, and sweets $3.50–$7. Light meals around $7 are available at the bar and tables in the bar area. The wine list ranges from good house wines at $2.50 per glass, or $10 a bottle, to $18 to $26 in the middle range and then $140 for a 1982 Krug in the workers' compensation range.

There are regular wine tastings and dinners.

This establishment is a welcome addition to this end of the city. On all levels it has attractions for the Bar. It even has the McInerney steak of approval.

Kayes on King,
Licensed Brasserie and Bar,
225 King Street, Melbourne
10 a.m.–8 p.m.
Monday–Friday
Telephone: 642 0102

Paul Elliott

BOOK REVIEWS

LEWIS AUSTRALIAN BANKRUPTCY LAW 9th Edn by Dennis Rose, Law Book Company, 1990, pp i–xxiv, 1–283, index 285–301; Price: $34.50 (soft cover)

THERE ARE TWO BOOKS ESSENTIAL FOR the running of a practice involving some bankruptcy work and this is one of them. The 9th edition of this book continues as the only text available on Australian bankruptcy practice structured in such a way as to steer the practitioner through the process of a bankruptcy. While it lacks the detail of McDonald Henry & Meek, the other standard work in the area, its approach is significantly more practical, making it essential for any practitioner whose client is actually going to face the court in relation to a bankruptcy matter.

The 9th edition also contains a new chapter on "Recovery of Property from Controlled Entities" taking account of the amendments to the *Bankruptcy Act* 1966 contained in the *Bankruptcy Amendment Act* 1987.

I recommend this book to all practitioners as an excellent book in the area and one which will when consulted enable those who have bank-

ruptcy matters to get an appreciation of the problems they are likely to encounter and the areas upon which more attention is needed in order to get the matter through court.

Justin O'Bryan

LIABILITY OF THE CROWN
Peter W. Hogg, 2nd Edn, Law Book Company, 1989; pp i–xxxiv, 1–277, index 283–290; Price: $79.50 hard cover.

THE SECOND EDITION OF THIS BOOK comes 18 years after the first edition. It is the type of book which only really needs to be revised every few decades. Notwithstanding that, the second edition is an entirely revamped book. Its emphasis now is on Canadian law but not to the exclusion of the law obtaining in England, Australia and New Zealand and as such covers essentially the entire Commonwealth.

The book is unique in its systematic organisation of a multitude of Crown privileges and immunities dealing with the way in which those privileges and immunities have been effected by statute and a re-working of the common law by judges.

The author's approach to the subject appears to be that the Crown should not, in today's world, enjoy most of its traditional privileges and immunities. That approach, regardless of where one sits in that argument, makes the book all the more useful as most of its readers who are using it from a practical point of view will be acting for private individuals. For example, the chapter on remedies focuses on remedies available against the Crown. In addition, the general theme of the book, focusing as it does on the Crown, also means that topics such as the extent to which the Crown is affected by statutes is covered much more usefully in this book than, say, in a book on statutory interpretation.

The other aspect of the book which is worth mentioning is that it contains material on the fundamentals of many theoretical problems which exist in a tripartite system of government. In that regard it contains material on definitions of the Crown, how the Crown is affected by its courts and, as has already been mentioned, how the Crown is affected by statutes. As such the book is very useful to the student and any practitioner who doesn't mind being reminded of the way in which those fictions operate.

I commend this book to all lawyers who at any time need to consider the way that the Crown fits into the litigation process as a litigant. Any lawyer who does not buy the book should at least know that it exists.

Justin O'Bryan

MOUTHPIECE

Opening Gambits

In the Supreme Court of Victoria at Melbourne

If Your Worship pleases . . .

In the County Court of Victoria at Melbourne (Causes List)

If Your Honour please I appear for . . . er . . . the . . . er . . . omigod I've left my brief behind at Domino's er Chambers . . .

In the County Court of Victoria at Melbourne (Appeals List)

If Your Honour pleases notwithstanding my clients three priors for . . . you didn't allege any priors? . . . oh dear . . .

In the Magistrates' Court at Oakleigh

If Your Worship pleases I appear for the Defendant. He is in Court . . . Well he was in Court . . . Where in the hell is he? Er would you stand this matter down?

In the Residential Tenancies Tribunal of Victoria

If the Tribunal pleases I appear for the Landlord . . . What do you mean? Leave to appear?

In the Federal Court of Australia at Melbourne

If Your Honour pleases, I appear for the sixth-named Cross Respondent to the Third named Applicant's application . . .

In the Industrial Relations Commission of Australia

My name is Harry Smith and I am the organiser of the Grummet Makers Union of . . . and my blokes wanna have their say . . .

In the Family Court of Australia at Melbourne

I am the Husband and I want to see my kids and . . . get your hands off me copper . . .

In the Criminal Injuries Compensation Tribunal of Victoria

Er yes sir that's me.

In the . . .

Where in the hell am I?

WESTERNPORT REFLECTIONS

By Clive Penman

A LEARNED BROCHURE WRITER TRAVelled to Phillip Island in 1985 and his impressions were;

"The Island's accommodation . . . and many attractions, both man-made and natural, are all internationally renowned . . ."

Sitting at my desk, trying to sort out my photographs of my last trip, I can appreciate his feelings. It certainly is necessary to close one's eyes and to shut out the ambience of Four Courts Chambers in order to complete the task.

We had been going to Rosebud for many years. We knew it well. Unfortunately, financial pressures and the lack of flexibility with having children prevented us travelling further afield. When we first went there, there was no freeway and no fast food outlet. Nevertheless, it had many attractions. We always had the same neighbours at the caravan park, so we didn't have to deal with strangers or cope with foreign languages. There was no airport queue, no passport, no fear of having someone slip illicit drugs into our luggage, no long boring aeroplane journey (not that either of us had ever even had a short boring aeroplane journey!), no jetlag and no turning back because of engine trouble. The wife was pleased that she did not have to learn exchange rates and deal with foreign currency and traveller's cheques. I, for my part, was always relieved that I did not have to pretend to enjoy exotic food or drive on the wrong side of the road.

This year, taking a leaf out of the book of fellow practitioners, we decided to go "overseas" and we went to Phillip Island. This time our holiday was of a very different kind. As the booklet says:

"Highly acclaimed by visitors from all over the world, this top rating seaside resort is a unique island where the picturesque farmland is joined to sea with an undulating coastline transforming from massive rocky outcrops to surf and safe swimming beaches".

The author had obviously spent much of his life in Phillip Island observing it change from a quiet holiday spot to a vibrant international resort.

I had read somewhere that travelling by car was possible to Phillip Island. Having packed everything into our trusty Commodore, convinced the kids that not all of their toys needed a holiday, experienced the last-minute panic when we realised that neither of us had cancelled the milk, the paper and the mail deliveries, we finally got away at midday on Christmas Eve although we had planned to leave just after 7 a.m. Apparently, everyone else travelling there had decided to leave at the same time. It was bumper to bumper all the way and we were hardly ever out of second gear. Naturally, we hadn't travelled much more than about 200 yards when the children started to complain about being hungry. It transpired that there was a McDonald's not too far away. We experienced our first exotic meal and then rejoined the crawl to Phillip Island. Fifteen minutes later one of the boys remembered that he had left his pullover back at McDonald's. We turned around, went back and could not find it anywhere. We returned to the car and lo and behold it was there on the back ledge.

Two and one half hours further on, we saw Westernport Bay. The brochure had promised us, "spectacular scenery . . . beaches . . . charming villages . . ." I really did not have time to appreciate it as we still had to get to the campsite. It was fortunate that we had daylight saving or we would never have got the tent up in time. We got everything sorted out, stored away and assembled. By that time, it was too late to enjoy the promised sunset, "the shifting light patterns" and the variable weather.

Over the ensuing two weeks, we did get to experience the variable weather. It was sometimes dull, sometimes cloudy, sometimes rainy, occasionally hailing, and almost inevitably windy and hardly ever sunny. When the winds moved the surface of Westernport Bay it was indeed "like watching the agitated movements of a Jason Pollock".

The attractions were already well-known and enjoyed by much earlier generations which gave the names which are still used today. They themselves added to the magic of the Island. "Penguin Parade," "Koala Reserve," "Churchill Island," "Nobbies," "Clock Museum," "Giant Earthworm," "Pyramid Rocks," "Forest Caves" and "Grumpys".

There were the world famed shell gardens with the shells in studied disarray. There were the famous formal cactus gardens with the cacti randomly distributed in their Castrol 4-gallon tins.

There were the renowned penguins, too small and distant to see from the new viewing stands. There were the unique quaint asbestos cement shacks redolent of a bygone era. There were historic tearooms. There was the ubiquitous mini-golf. There was even one of the world's last remaining drive-in cinemas!

Nothing I had ever read or been told adequately prepared me for the impact of the Island. I had read the brochure's lavish description:

"Birds and other animals live free alongside men on Phillip Island, some in special sanctuaries, others in their natural habitat.

. . .

Seals near the sea, koalas peering down from the gum trees, or flightless birds are the real inhabitants of this special island.

Some 120,000,000 years ago dinosaurs were roaming around . . . Their sudden disappearance is an unsolved mystery. Their places were taken by other unusual creatures such as the mutton birds."

I thought that this was typical tourist bureau hyperbole, and that all of the other descriptions I had read were variations upon a similar thing. I was proven wrong.

Two weeks later, we were back on the road at the end of our first overseas trip. It had been marked by the flooding of the campsite on Boxing Day, one son cutting his foot badly on a broken beer bottle and the other being stung by a jellyfish, the daughter being chased by one of the local louts, the wife losing her handbag and me getting food poisoning at the local souvlaki shop. We had plenty of time as we crawled home to relive our memories and to dwell on its high spots.

As I sit here in chambers poring over the photographs and pondering why so many of them are out of focus, I wonder why the editors asked me for my experiences. Perhaps it was because one had recently returned from his overseas trip and had told us all about it and the other was still overseas and yet to have the opportunity to regale us with his experiences. In any case, it cannot do any harm to have my name in print. As they say, all publicity is good publicity and times are tough with these new Magistrates' Court Arbitration Rules.

RECENT ARTICLES

A selection by James Butler, Librarian of the Supreme Court

COMPANY LAW

Smart, P. St. J., "Corporate domicile and multiple incorporation in English private international law" 1990 *Journal of Business Law*, 126–136.

Stapleton, G.P., "*Locus standi* of shareholders to enforce the duty of company directors to exercise the share issue power for proper purposes" (1990) 8 *Company and Securities Law Journal*, 213–239.

CONSTITUTIONAL LAW

Kenny, Susan, "Constitutional fact ascertainment" (1990) 1 *Public Law Review*, 134–165.

McLachlan, James, "Constitutional validity of orders for divestiture of property under the Trade Practices Act" (1990) 1 *Public Law Review*, 120–133.

CONTRACT

Coste, Brian, "Consideration and benefit in fact and in law" (1990) 3 *Journal of Contract, Law* 23–29.

Drahos, Peter *et al*, "Critical contract law in Australia (1990) 3 *Journal of Contract Law*, 30–49.

Stoljar, Samuel, "Estoppel and contract theory" (1990) 3 *Journal of Contract Law*, 1–22.

CRIMINAL LAW

Odgers, Stephen J., "Police interrogation : a decade of legal development" (1990) 14 *Criminal Law Journal*, 249–264.

Williams, Glanville, "Obedience to law as a crime" (1990) 54 *Modern Law Review*, 445–452.

EVIDENCE

Clarke, Lister G., "The scientist as an expert witness" (1990) 22 *Australian Journal of Forensic Science*, 68–80.

INSURANCE

Yeo Hwee Hing, "Common law materiality — an Australian alternative" 1990 *Journal of Business Law*, 97–109.

INTELLECTUAL PROPERTY

Dworkin, G., "The concept of reverse engineering in intellectual property law and its application to computer programs" (1990) 1 *Intellectual Property Journal*, 164–180.

Hughes, Gordon, "Computer crime and the concept of "property" (1990) 1 *Intellectual Property Journal*, 154–163.

Terry, Andrew, "Proprietary rights in character merchandising marks" (1990) 18 *Australian Business Law Review*, 229–253.

BIRTHDAY CELEBRATIONS

In August Ramon Lopez became a proud "legal grandfather". In a remarkable series of coincidences Chris Gilligan and Simon Cooper, both former readers of Lopez, became fathers during the same week. Their wives Mary and Treena were confined in the same maternity Ward at Jessie Macpherson at the same period of time. The Maternity Ward was located on the 5th floor of the hospital, which is the same floor that Ramon had his Chambers on in Owen Dixon when Gilligan and Cooper read with him. A happy "grandfather" visited the Gilligans' second-born and Coopers first-born in hospital and the champagne is reported to have freely flowed — another proud tradition of the Lopez Chambers. At last reports both Abbey Rose Gilligan (8lb 15oz) and John Joel Cooper (6lb 5oz) were doing extremely well.

85th BIRTHDAY CELEBRATION

ON 26 JULY LAST RETIRED SUPREME Court judge Sir Esler Barber celebrated his 85th birthday. The Melbourne Family Court judges held a reception to celebrate with him a long, happy and rewarding life. The guests included the Chief Justice, three former judges, Sir Reginal Smithers, the Honourable Xavier Connor and Mr. H. T. Frederico Q.C., and counsel from the *Matrimonial Causes Act* days, Ivor Misso.

In brief speeches, Sir Esler was described as an outstanding judge, a model for Family Court judges. The allegorical tale was repeated how once, following its defeat of Hawthorn, the Geelong Football Club ceremonially buried a hawk in the middle of Kardinia Park. Then a few days later, Treyvaud of Counsel, as he then was, a fierce Geelong supporter, required to see Barber J., as he then was, an equally fierce Hawthorn supporter. In response to the knock, Barber J., seeing Treyvaud, said "Come in, you hawk-burying bastard!"

PERSONALITY OF THE QUARTER

Dyson Hore-Lacy was born in Hobart during WWII. He attended a total of seven schools in Tasmania and Victoria before one of them let him matriculate. He attended the University of Melbourne between 1960–1964 and was articled to George Kouvaras. He signed the Roll in 1967 and read with J.W.J. Mornane. Dyson, well-known for his flamboyance and gregariousness, works in the criminal field and has done an enormous amount of work in the Northern Territory, including a lot of less glamorous murder trials. More recently he has acted for Gary David and for the Abdullah family. He is also the member of our Bar who came closest to appearing for Robert Trimbole — he tried, but the judge refused him leave to appear!

The name is hyphenated because Dyson's father wanted to preserve the connection with Emily Lacy, who in 1890 was the heroine survivor of the *Quetta* shipwreck in Torres Strait. (The then uncharted rock is now known as "Quetta Rock".) She survived an incredible 36 hours unsupported in the water. Dyson's mother said she was so tough the sharks wouldn't touch her!

He is also, along with McIvor, Connell and this writer, a fanatical supporter of the beleaguered Fitzroy Football Club. (I bet you didn't know half the club's membership was at the Bar?)

Dyson, ever cautious, married relatively late — to Margaret, ex-ODC secretary to Searby and others. He lives in Kew and has two children, Andrew and Sarah.

That other double-barrelled doyen of the Criminal Bar, Bill M-P, tells the story of Dyson's response to Bill's question about how he enjoyed going to Darwin post-marriage. Dyson replied: "Well, I don't pack my speedos and I no longer whistle all the way to the airport".

He is an epicure, to be sure, but for some reason, unfathomable to most of us, he only ever eats at the Lonsdale Street Bar & Grill.

Dyson has had a staggering 12 readers (at last count anyway), a tribute to his contribution to this Bar.

CIRCUIT LIFE IN IRELAND

THE ENTRANCE OF THE BAR INTO AN assize town, though still an event, has nothing of the scenic effect that distinguished it in former days. At present, from the facilities of travelling, each separate member can repair, as an unconnected individual, to the place of legal rendezvous. This has more convenience, but less of popular éclat. Till about half a century ago, it was otherwise. Then the major part of the Bar of each circuit travelled on horseback, and for safety and pleasure kept together on the road. The holsters

in front of the saddle — the outside-coat strapped in a roll behind — the dragoon-like regularity of pace at which they advanced, gave the party a certain militant appearance. An equal number of servants followed, mounted like their masters, and watchful of the saddle-bags, containing the circuit wardrobe, and circuit library, that dangled from their horses' flanks. A posse of pedestrian sutlers bearing wine and groceries, and such other luxuries as might not be found upon the road, brought up the rear.

Thus the legal caravan pushed along; and a survivor of that period assures me in a style somewhat quaint (which however I adopt) "that it was a goodly sight; and great was the deference and admiration with which they were honoured at every stage; and when they approached the assize town, the gentlemen of the grand jury were wont to come out in a body to bid them welcome. And when they met, the greetings, and congratulations, and friendly reciprocities, were conducted on both sides in a tone of cordial vociferation, that is now extinct. For the counsellor of that day was no formalist; neither had too much learning attenuated his frame, nor prematurely quenched his animal spirits; but he was portly and vigorous, and laughed in a hearty roar, and loved to feel good claret disporting through his veins, and would any day prefer a fox-chase to a special retainer; and all this in no way detracted from his professional repute, seeing that all his competitors were even as he was, and that juries in those times were more gullible than now, and judges less learned and inflexible, and technicalities less regarded or understood, and motions in arrest of judgment seldom thought of, — the conscience of our counsellor being ever at ease when he felt that his client was going to be hanged upon the plain and obvious principles of common sense, and natural justice, so that circuit and circuit-business was a recreation to him; and each day through the assizes he was feasted and honoured by the oldest families of the county, and he had ever the place of dignity beside the host; and his flashes of merriment (for the best things said in those days were said by counsellors) set the table in a roar, and he could sing, and would sing a jovial song too . . . "

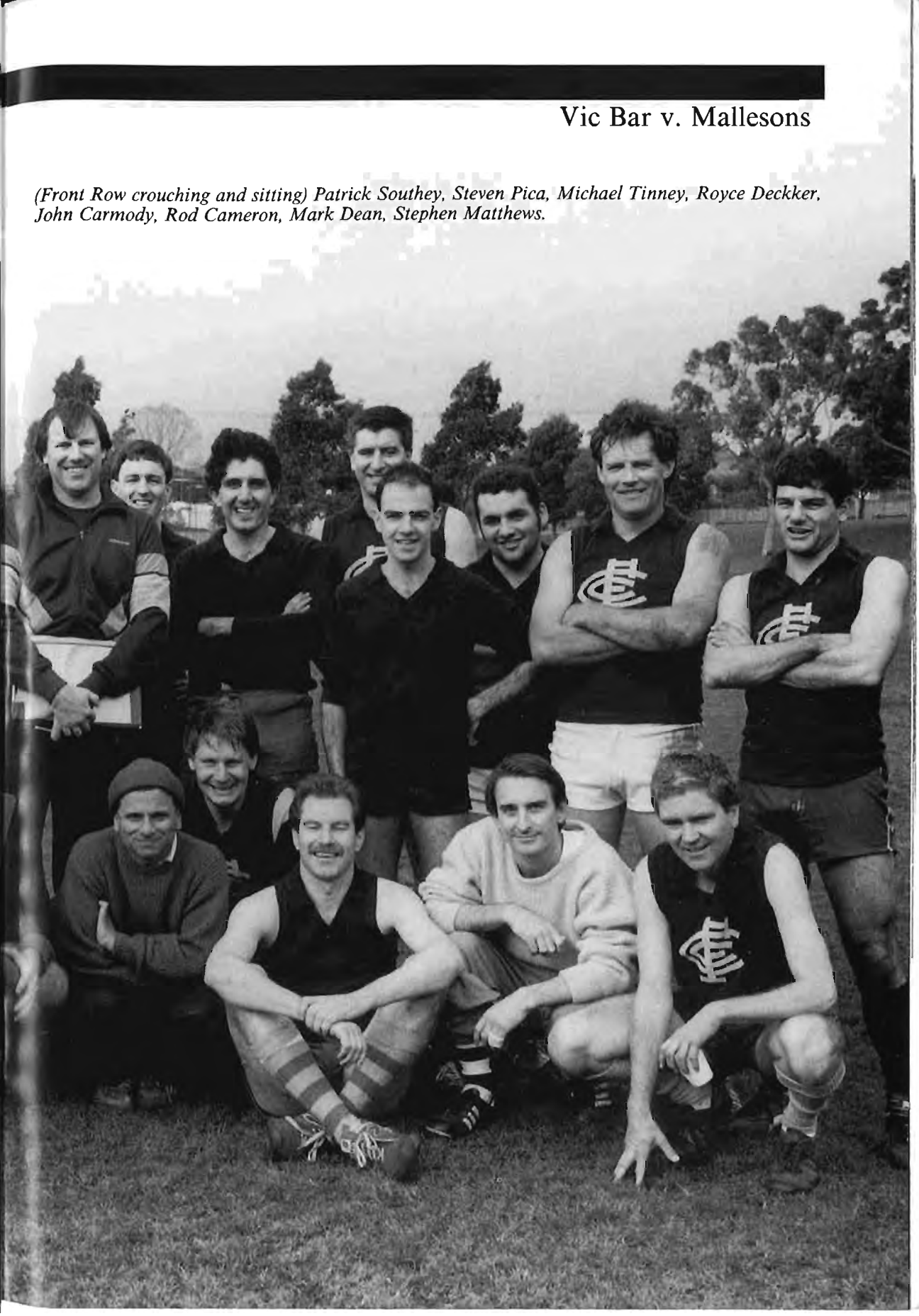
Extracts from An Irish Circuit *by William Henry Curran Esq., November 1825.*

BAR FOOTBALL

L–R (Back row standing), Michael Bourke, Joseph Tslanidis, Dean Ross, Andrew Donald, Chris Spence, Bill Gillies, Phil Kennon, Peter Rattray, Peter Lithgow, Damien Maguire, James Elliott, Mordy Bromberg, Frank Parry, Temi Artemi, Frank Goinfriddo, John Jordan, Savas Miriklis.

Vic Bar v. Mallesons

(Front Row crouching and sitting) Patrick Southey, Steven Pica, Michael Tinney, Royce Deckker, John Carmody, Rod Cameron, Mark Dean, Stephen Matthews.



ON A COLD, BLUSTERY SUNDAY IN JULY when sensible barristers were beside an open fire, sipping a port and reading their brief for the following day, thirty-two hardy barristers represented the interests of the **BAR** in the first representative game of Australian Football engaged in by the **BAR.** The opponents were **MALLESONS STEPHEN JAQUES** who, it was rumoured, had players at least fifteen years younger on average and a fair percentage who played regularly.

The **BAR** team on the other hand had about two or three who played regularly and many former champions who were intent on re-living the glories of their youth.

The first quarter was fairly even with the **BAR** having the advantage of the wind. In keeping with the wearing of Carlton jumpers, a simple game plan was employed. **DEAN ROSS** was to control the rucks and get the ball to **MORDY BROMBERG** or **PAUL SANTAMARIA** who would then deliver the ball to **JOHN JORDAN** at centre-half forward. **JOHN** was to then get the ball to the forward area to **MICK QUINLAN** and **PETER RATTRAY.** The plan worked moderately well with the assistance of **PETER LITHGOW** on the wing, **JOHN CARMODY** at full-back and **PHIL KENNON** at half-back, who were all playing well.

The score at the end of the first quarter was, the **BAR** 1 goal 2 behinds (8) to **MALLESONS** 3 goals 3 behinds (21).

The next two quarters were diabolical from the **BAR**'s point of view, with **MALLESONS** running riot and scoring 5 goals 1 behind (31) in the second quarter, to the **BAR**'s 2 goals 2 behinds (14).

In the third quarter, 6 goals 4 behinds (40) were scored by **MALLESONS**, to the **BAR**'s 2 goals 3 behinds (15). **MICHAEL BOURKE, ANDREW DONALD, STEVEN PICA, MICHAEL TINNEY** and **BILL GILLIES** tried to stem the tide, but to no avail.

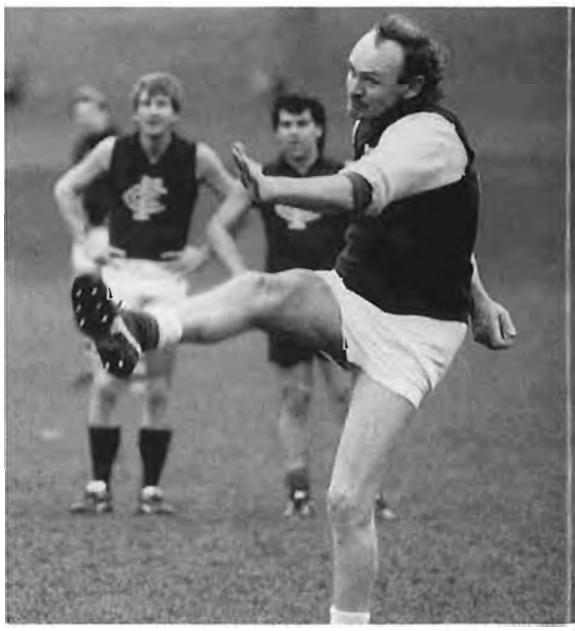
The situation at three-quarter time therefore was **MALLESONS** 14 goals 8 behinds (92) to the **BAR** 5 goals 7 behinds (37). The expected age difference was not exaggerated and the **BAR** Team was having difficulty keeping up.

Up to three-quarter time, the Captain-Coach (your correspondent) had not taken the field, being fully occupied in trying to stem the tide of opposition goals and in giving all of our players, which included 10 interchange players, a fair run.

As the leeway at three-quarter time was substantial, desperate measures were called for and your correspondent took to the field.

The last quarter saw a substantial change in the game. The **BAR** team became dominant.

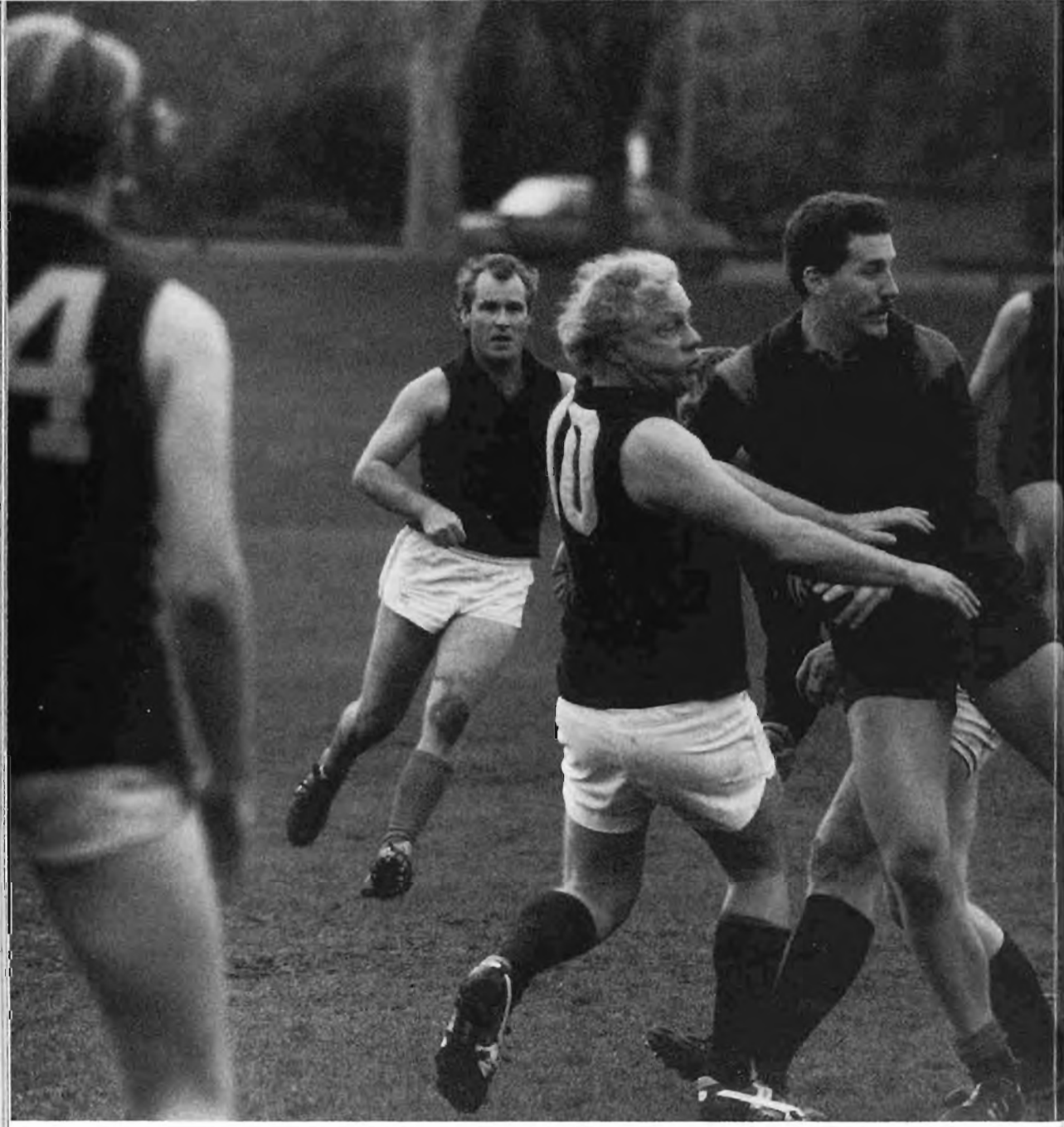
Unknown solicitor, Mordy Bromberg (long sleeves), James Elliott (No. 11), in background Savas Miriklis.



2 players in background unknown, Patrick Southey (socks up Carlton jumper), Steven Pica (Carlton jumper socks down), Michael Quinlan (kicking).

Frank Parry (13), next 3 including No.12 unknown solicitors, Paul Santamaria (kicking foot) Peter Lithgow, Dean Ross (Carlton jumper T-shirt under jumper), unknown solicitor.

Unknown solicitor, Patrick Southey (in background), Peter Lithgow (kicking), unknown solicitor (on ground).

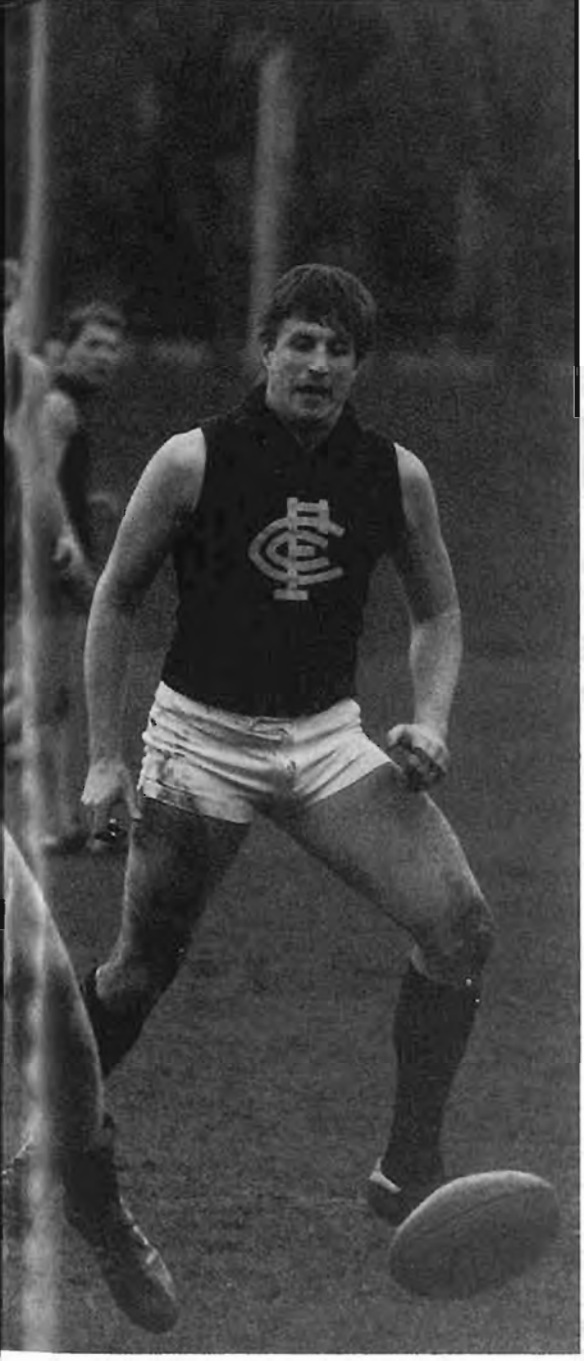


Michael Bourke, Phil Kennon (10), unknown solicitor, Peter Lithgow (Carlton jumper).

MORDY BROMBERG was getting better as the game went on, **JAMES ELLIOTT** was proving a handful for the opposition on our forward line, **SAVAS MIRIKLIS** was dominant around the packs and **JOSEPH TSLANIDIS** was taking over on his wing, giving us a deal of drive. **JOHN JORDAN** was a focal point up forward, **FRANK PARRY** and **PATRICK SOUTHEY** continued to drive the ball forward.

In the final result, the **BAR** simply ran out of time and were thus deprived of an inevitable victory. In the last quarter we kicked 6 goals 3 behinds to **MALLESONS** 1 behind, with the final score being, the **BAR** 11 goals 10 behinds (76) to **MALLESONS** 14 goals 8 behinds (92).

Apart from those already mentioned, other players to perform well were **TEMI ARTEMI, ROD CAMERON, MARK DEAK, ROYCE DECKKER, FRANK GOINFRIDDO, STEPHEN MATTHEWS, CHRIS SPENCE** and **MICHAEL WYLES** (and it is rumoured, your correspondent).



Special mention should be made of **THRACY VINGA** who launched himself into the game in the second quarter with extraordinary vigour, no doubt to impress the large number of his family who were present. Unfortunately, he suffered a dislocated shoulder in his endeavours and had to reluctantly leave the field.

The game was of a high standard and was played in a fine competitive spirit. This was assisted greatly by the umpiring of **RICHARD TRACEY** and **MARK GIBSON** who, with **MALLESONS'** umpire, did an outstanding job. **JOHN LEE**, our goal umpire, was fair in the extreme, such that, according to reliable sources, he judged a certain **BAR** goal to be a behind.

The "Mark of the Day Award" went to **PETER RATTRAY** when, in the last quarter, he jumped high over the back of his opponent to pull down a screamer. Unfortunately, there was no photographer present to record this event.

Despite great confusion as to where the After-Game festivities were to take place, the majority of the **BAR** Team gathered afterwards at the Royal South Yarra Tennis Club for very enjoyable food and drinks to finish a most pleasant and enjoyable day.

This was the first recorded occasion that Members of the **BAR** have joined in a representative game of Australian Football. It seems remarkable that this is so.

The game was a great success with the **BAR** able to field a side of thirty-two players, together with two field umpires. A number of barristers have spoken to me subsequently, expressing a wish to play next year.

It is to be hoped that the game against **MALLESONS** will be a regular event, with perhaps a second game being organised with an appropriate lengthy time-lapse in between.

Damien Maguire

A Bar supporter.

BAR VOLLEYBALL

Spectacular Volleyball win over Mallesons

Nemeer Mukhtar, Darren Mort, Kathy Bourke, Andrew Zilinskas, Peter Heerey Q.C., David Habersberger Q.C., Julian Burnside Q.C.

IN A 2 : 1 RESULT ON SUNDAY, 22 JULY 1990, the Bar volleyball team triumphed brilliantly over Mallesons Stephen Jaques, with a dazzling display of skill and teamwork.

The Bar team was captained by Peter Heerey Q.C. who, after a flawless game distinguished by masterly footwork and astounding co-ordination, commissioned this article.

The history books of volleyball will now have Heerey's name added to its distinguished list of Great Balls, along with legendary stars such as Clive Penman, Dave Sorensen and Dieter Togbor.

In the course of a victory celebration spanning several weeks, Heerey paid tribute to Mukhtar's mobility ("only Hayes could be in more places at one time") and Habersberger's giant frame and good figure ("the human Pyramid"). He praised Zilinskis' aerial work ("what a spike") and made a passing reference to my own heroic effort in playing with a broken rib, and Darren Mort's playing without one.

Heerey became warm and emotional when recalling some of Kathy Bourke's great plays ("Do it again for me") and commented frequently on her splendid hands.

The Mallesons team attracted a murmur of disapproval by having the game stood down at moments of extreme difficulty, and would probably have sought an adjournment if the Bar had not let them win the second game of the contest. "It was agreed by all that this demonstrated the great sportsmanship of the Bar team," said Heerey, as he reminisced about the shots he had missed.

Above all however, the spectacular victory demonstrates again the true independence of the Victorian Bar: it was generally considered unlikely that Mallesons would brief any of us again.

J.W.K. Burnside

NETBALL

Corrie Searle, Michele Williams, Anthea McTiernan, Margaret Pavey, Anna Sango, Diana McTiernan.

ON SUNDAY, 22 JULY THE TRADITIONAL rivalry between barristers and solicitors was played out in the form of a netball match between members of the Bar and of Mallesons Stephens Jacques (MSJ). The two teams consisted of enthusiastic, mostly female members of the Bar and several equally determined female representatives of MSJ.

The match took place at the Prahran Secondary School gymnasium. The MSJ team came to the competition with a pretty solid reputation, having recently beaten a team from Baker & McKenzie. In contrast the Bar team was an unknown quantity, not all members having played netball before.

In the course of the pre-match warm-up, both teams effected an aura of relaxed indifference to the possible outcome, but from the first whistle the game was fiercely contested.

At times the game was physical to a degree that was not in keeping with the usually refined and polite character of its participants. Special mention goes to Michelle Williams who demonstrated, with skill clearly borne of experience, an ability to give at least as good as she got in this department.

The scoring was initially brisk by both teams, with the Bar team establishing a slight lead early on in the game. MSJ nevertheless remained well in touch, being only 7 points behind at half-time. The goal-scoring on behalf of both teams was accurate and stylishly impressive.

In the second half of play Kathy Bourke, who had valiantly but somewhat unsuccessfully tried

to learn the rules of the game as she played, was replaced by Peter Searle playing wing defence for the Bar. This was despite the looks of disapproval from the MSJ players (particularly Peter's opponent). Such a move no doubt gave the Bar team a psychological advantage, as one disappointed MSJ player was overheard after the match to be complaining that the opponent had won because of the use of "a Man"!! (That is, it's assumed this was a reference to Peter Searle!)

The Bar beat MSJ by 6 goals, the final score being 27 to 33. The match was well fought by both teams, each player putting in an outstanding performance!

No doubt everyone concerned is looking forward to a rematch . . .

Bar Team: Michelle Williams
Diana MacTiernan
Margaret Pavey
Anna Sango
Anthea MacTiernan
Kathy Bourke
Corrie Searle
Peter Searle
Anna Sango

Anthea McTiernan, Anna Sango.

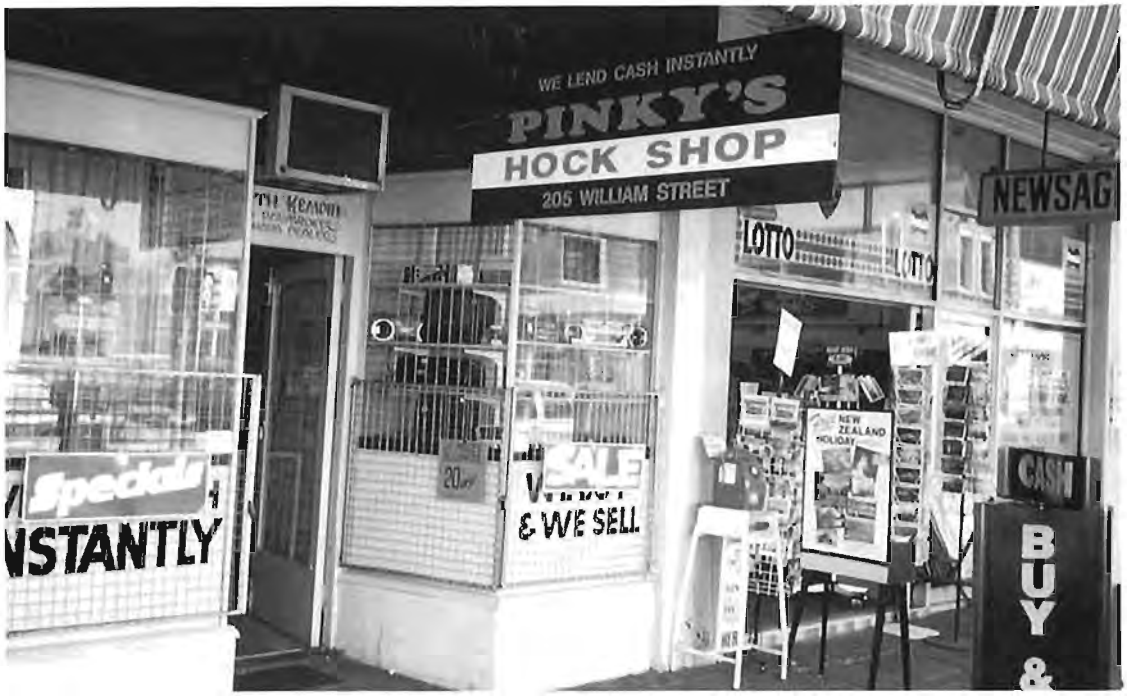
YACHTING

THE THIRD ANNUAL WIGS AND GOWNS Squadron (WAGS) regatta was held on a breathless 18th of December last year. Gathering initially at the Ferguson Street Pier in scenic Williamstown some nine yachts and 65 souls took part in the first half of a race which by mutual agreement had no second half owing to a complete lack of wind.

The hardy sailors then repaired to the Royal Yacht Club of Victoria for a welcome lunch with the usual unseemly debate about the distribution of trophies. The Squadron's Flag Officers, in a Solomon-like exercise of their discretion, awarded the "Thorsen Perpetual Trophy" to Rattray and his hard-working crew (who can expect no further trophies for at least three years). The minor prizes were awarded to Judge Crossley (sailing Mr Justice Rowland's boat in his absence) and Michael Kildea.

Other than a near-sinking involving Moore and the demolition of some gear on the recently refurbished pride and joy of Brustman, Liversidge and Pithouse, the remainder of the day passed pleasantly enough. It is only to be hoped that the proclamation of Part 4 of the *Marine Act* 1988 (No. 52 of 1988) will not dampen our members' enthusiasm for, nor alloy their enjoyment of, this year's regatta. The Kommodore

COMPETITIONS



Pictured above
205 William Street, Perth.
Not thought to be connected with the Law Society of Western Australia.

Please send in any photograph of other "205 William Sts" anywhere in the world. Prize: A bottle of pink wine.

MEDICO-LEGAL SOCIETY OF VICTORIA

THE NAME OF THE MEDICO-LEGAL SOciety conceals as much as it reveals. At first blush, the name suggests an organisation concerned with personal injuries work and medical negligence. The object of the Society, according to its constitution, is ". . . the promotion of medico-legal knowledge in all its aspects". This, more than the name of the Society, gives a clue to the range of subjects discussed at meetings of the Society.

The Society was established in 1931. An idea of the diversity of its members' interests may be found in the Foreword to the first published volume of the proceedings of the Society. The Foreword, by Sir John Barry and Sir Albert Coates, said in part: "In the life of the community there must arise many problems which may be approached from both the legal and the medical standpoints, and, in the nature of things, an approach that is restricted to one or the other standpoint must be incomplete. That legal and medical men should be able to meet and discuss such problems, and thereby come to a fuller realisation of their nature, and be assisted towards their solution, is obviously desirable. Both professions exist to serve the community, and anything which enables their members to discharge that public service more intelligently and efficiently is for the public good . . ."

The Society meets four times a year. At each meeting, an invited guest delivers a paper, after which the subject of the paper is open for general discussion. A random sample of the papers presented during the past 59 years gives a fair impression of the breadth and depth of the proceedings of the Society:

The Man from Snowy River!
Please send in an appropriate caption for this photograph and give the horse and dog a name!

Prize: A bottle of bubbly.

Medical Murderers (Eugene Gorman K.C., 1931)
Professional Confidences (R.G. Menzies K.C., 1932)
Are Modern Awards of Damages for Physical Injuries Becoming Excessive? (Oliver J. Gillard Q.C., 1953)
Life and the Law in Matrimonial Causes (E.H.E. Barber, 1954)
The Influence of Disease in History (Dr. J. Bryant Curtis, 1964)
Professional Senility (Professor E. Glasgow, 1977)
Wine as Medicine (Dr. Peter Burke, 1984).

Meetings of the Society have nothing in common with modern professional seminars. The atmosphere is that of a learned society which values learning for its own sake. Some speakers adopt the topic as a convenient starting point for a voyage of intellectual discovery. Others attend more rigidly to the stated subject. With very few exceptions, however, all papers draw on diverse fields of learning and are enlivened by wit and intellect. It is refreshing, in an age of increasing specialisation of knowledge, to be reminded that knowledge has no fixed boundaries; that a medical or legal subject can be as aptly illustrated by reference to Gray's "Elegy" as Gray's "Anatomy".

(The next meeting of the Medico-Legal Society of Victoria will be held on Saturday, 13 October at 8.30 p.m. The subject is "Blood Stains, Finger Prints and DNA — Medical and Legal Problems in Identifying Suspects".)

J.W.K. Burnside

MOCK COURTS FOR SCHOOLS

The Bar Council's Executive Officer has received the following letter from The Law Institute.

DURING 1989, THE LAW INSTITUTE CONducted a mock court competition involving 32 Victorian schools. Funded by the Victoria Law Foundation, the mock court competition was a pilot project and proved to be an extremely rewarding experience for both teachers and students. In the course of the competition, solicitors and barristers participated by either coaching school teams or acting as magistrates at the mock hearings.

Despite its success, the mock court competition was abandoned this year. Regrettably, we lack the funds and resources to continue administering the competition.

As a consequence and to assist in meeting the long-term objective of educating the young about the law, the Law Institute's Marketing and Communications department has produced a mock court kit specifically designed for Victorian Legal Studies students.

The kit includes an instruction manual, sets of case materials for both the defence and prosecution, a demonstration video and materials to assist in the running of the hearing.

The kit is an excellent education aid and allows students to gain a practical insight into the way in which court cases are prepared and presented.

Members of the legal profession are encouraged to purchase the kit and introduce it to a local school (or their old school or child's school). Alternatively, schools that purchase the kit will undoubtedly approach a legal practitioner to act as magistrate or coach. Involvement with a school affords an excellent opportunity for the legal profession to promote themselves to the community.

The mock court kit is for sale from the Law Institute Bookshop to Victorian schools and members of the legal profession for a cost of $55.

We are seeking the support of the Victorian Bar Council for this project. We are keen to invite barristers to purchase the kit and act as coaches or magistrates. It is hoped that members may also gain personal fulfilment and enjoyment from volunteering their services to what the Institute hopes to be one of their most successful community education-related initiatives. It may be an appropriate venture for junior members of the Bar, or people currently reading for the Bar. We would very much appreciate it if you would draw this matter to the attention of your members.

I look forward to hearing from you soon and please do not hesitate to contact me if you have any queries.

Yours sincerely,

Belinda M. Holt
Speakers' Bureau Co-ordinator

THE FAIRY TALE CONTINUED

NOW GATHER AROUND ME MY DEARS whilst I tell you more of the VicBees.

You asked me to finish the story about the new hive-to-be that was a big hole in the ground. It is still a big hole in the ground. I would like to be able to tell you more about its future. There are many VicBees who also would like to know more about it. There are many theories about the prolonged silence regarding the future of the hole in the ground. The first theory is that the site has had a Preservation Order placed upon it as a unique example of "Melbourne Bombsite Circa 1960s". In keeping with much of Melbourne of the 1960s there was a desire to copy England of earlier days — this time London of the early to mid-'40s. The second theory is that there has

There are many theories about the prolonged silence regarding the future of the hole in the ground. The first theory is that the site has had a Preservation Order placed upon it as a unique example of "Melbourne Bombsite Circa 1960s".

been no decision made. Decisions are so hard to make, especially for VicBees. The third theory — and the most popular — is that a decision has been made but that it will be so unpopular that it has not been announced. Just because VicBees always find all decisions made for them to be unpalatable does not necessarily mean that the proponents of this theory are paranoid. The fourth theory is that a decision has been made. The decision-makers were so impressed and overwhelmed by their ability to make decisions that they forgot to tell anyone about it. The proponents of this theory are cynics and do not believe that the decision will be a good one and even if it were it would be unpopular. Why are all decision-makers' decisions always unpopular you ask? Well, you see all VicBees have their own ideas about the best way to do things and the decision-makers' decision never coincides with the ideas of each or indeed any individual VicBees. The last theory is that the decision-makers expect a Middle East war and are saving Saddam Hussein the trouble of flattening the site.

Last time I told you about the KingBees and their crude likenesses that appeared one Monday morning at the base of one of the larger hives. It seems that they have turned out to be somewhat more permanent than expected although the most colourful of all appeared for a while to take on the more black and white tones of its fellow likenesses. It is thought that the black and white period may have coincided with the time when the Colliwobblebees were the top SportsBees and ended when the Bomberbees regained the eminent position.

I thought I would tell you this time a little about a small group of Beelike creatures that were allowed to enter the hives and take up positions there. Some entomologists thought they may have been a form of Cuckoo Wasp. Whatever they may have been they soon developed a veneration normally reserved for older and very senior WorkerBees. This group came to be called ClerkerBees. The relationship of ClerkerBee to WorkerBees is undoubtedly a symbiotic one. It is equally clear this relationship is advantageous and necessary to each group, although from time to time both ClerkerBees and WorkerBees have been heard to muse about the advantageousness of the relationship and to seek to change its nature. Despite a prolonged and deep study of this somewhat unique relationship there are many aspects that remain unknown to the researchers. Learned observers are still to determine which group controls the relationship. Members of each group certainly go through a never ending ritual of deferring to the other group whilst showing a distinct lack of commitment to its preeminence.

More recently there appears to have been a new strain of ClerkerBee introduced to the Colony. This ClerkABee has managed a symbiotic relationship with a much smaller group of WorkerBees and appears to defer to only a small proportion of those with whom it has a relationship. No WorkerBees defer to it. Whether it is to be the new dominant strain or is a mere temporary aggressive strain only time will tell. Although the researchers have so far discovered these two types of ClerkerBee they have yet to identify a female ClerkerBee. As I said to you last time changes are slow coming to the Colony.

More recently there appears to have been a new strain of ClerkerBee introduced to the Colony. This ClerkABee has managed a symbiotic relationship with a much smaller group of WorkerBees

There is another type of WorkerBee that I will tell you about next time. This VicBee was once a member of the Colony but left for another sort of Colony. Since leaving the shelter of the Colony he has undergone many metamorphoses. He has been a GreenBee, a TrainBee and twice an AgeeBee. Whilst an AgeeBee he has repeatedly tried to change the way the WorkerBees go about their work. He has sought to limit the amount of pollen they can collect from each flower and even to reduce the range of flowers from which they can collect pollen. It seems that he may have been somewhat successful. More about that next time for it grows late.

I will continue this story another time. Sleep well my dears.

Graham Devries

MOVEMENT AT THE BAR

(From 1 September 1989 to 31 August 1990)

Members who have signed the Roll of Counsel

Name	Master	Clerk	Name
David H. GREENWELL (SA)	-	-	Mark G. HEBBLEWHITE
David H. BLOOM (NSW Q.C.)	-	-	James W. KEWLEY
Jeremy C. CURTHOYS (WA)	-	-	James J. SPIGELMAN (NSW)
Thomas F. PERCY (WA)	-	-	Ronald E. BIRMINGHAM (WA)
Robert W. HUNT (NSW)	-	-	Frank G. LEVER (NSW)
Emma L. WILLIAMSON	N.J. Young	F	David ARONSON (re-signed)
Anthony P. RODBARD-BEAN	J.W.K. Burnside	F	Mary J. URQUHART
John GOUSSIS	P.W. Murley	M	Jennifer DAVIES (re-signed)
Penelope J. VAN DEN BERG	H. Jolson	H	Gregory R. JAMES (NSW Q.C.)
Justin L. BOURKE	I.G. Sutherland	H	Dennis A.WHEELAHAN (NSW Q.C.)
Elias RALLIS	J.J. Zahara	H	Stuart N. DIAMOND (NSW)
Antony E. BROWN	P.B. Murdoch	H	Abraham HERZBERG
Kristine P. HANSCOMBE	G.J. Maguire & B.J. Bourke	D	Solomon A. ROSENZWEIG David G.T. NOCK (NSW)
Maryanne B. LOUGHNAN	P.J. Bick	B	Clyde E. CROFT (re-signed)
Ann R. SHORTEN	O.M. Kiernan	M	Ormond B. GREEN (re-signed)
Amanda GLAISTER	M.G. Perry	R	Kenneth G. HORLER (NSW Q.C.)
Daniel P. FLYNN	R.J. Johnston	F	Phillip A. TRIBE (re-signed)
Timothy J. WALKER	J.H. Karkar	H	Anthony J. BARTLEY (NSW)
James H. MIGHELL	J.H.L. Forrest	D	George INATEY (NSW)
James D. ELLWOOD	J.W. Rapke	B	John J. GRAVES (NSW)
Robert N. CAMERON	G.R. Ritter	P	Philip H. GREENWOOD (NSW)
Stephen T. RUSSELL	W.H. Morgan-Payler	B	Michael D. FARRAR (NSW)
Peter H. CLARKE	E.N. Magee	B	Kerrie E. LEOTTA (NSW)
Ross P. HUTCHINS	D.J. Brown	H	Dennis A. COWDROY (NSW)
Stephen J. WINTER	P.F. McDermott	M	Mary A. GRIEVE (NSW)
Michael W. BRIGHT	P.N. Rose	W	David J. HIGGS (NSW)
Mary-Lyn L. SMALLWOOD	D.E. Curtain	B	Richard F. EDMONDS (NSW)
Ann B. McMAHON	R.P. Gorton	P	Michael CASHION (NSW)
Alan H. SWANWICK	H. Reicher	D	Elizabeth M. OLSSON (NSW)
Murray McD. CARN	A.M. North	B	Jeremy S.P. KINROSS (NSW)
Michael W. BRUGMAN	B. Kayser	W	Bruce C. OSLINGTON (NSW)
John K. ARTHUR	D.L. Brustman	S	Grahame RICHARDSON (NSW)
Sarah F. THOMAS	G.R. Flatman	D	Alex RADOJEV (NSW)
David K. FANNING	P. Goldberg	W	Colin E. O'CONNOR (NSW)
Mervyn R. SCHAMROTH	I.J. Beder	P	Mark L. WILLIAMS (NSW)
Jennesse S. BLAKIE	A.J. Crozier-Durham	P	Matthew WALTON (NSW)
Kevin J. BURGESS	T.C.L. Morris	B	Christopher T. BARRY (NSW)
Christopher S. SMALE	R.S. Osborn	F	John N. WEST (NSW)
Anthony V. SHELLEY	P.A. Dunn	H	Samuel Y. REUBEN (NSW)
Sandra HOROVITZ	R.I. Rosenberg	S	Rodney M. SMITH (NSW)
Michael F. QUINLAN	R.G. Weil	M	Jeremy P. GORMLY (NSW)
Stephen J. MARTIN	P.C. Dane	M	David S. WILKINS (NSW)
Christine H. GILES	P.A. Coghlan	W	Malcolm R. GRACIE (NSW)
Mario R. LOMBARDI	J.V. Kaufman	P	Terrence P. MURPHY (re-signed)
Frank TALLARIDA	R. Wild	P	Steven R. PICA
Luisa R. BAZZANI	M.V. McInnis	H	Donna BAKOS
Klaus D. MUELLER	T.J. Casey	F	

Master	Clerk	Name	Master	Clerk
J.F. Bleechmore	S	Patrick R.C. SOUTHEY	W.R. Ray	M
J.E. Middleton	R	James D. ELLIOTT	P.J. Bick	S
-	-	Maree E. KENNEDY	S.W. Kaye	F
-	-	Darren A. MORT	H.T. Mason	W
-	-	Michael G. O'CONNELL	R.F. Punshon	M
-	-	Christopher L. CONEY	P.C. Dane	R
-	P	Michele S. LASKY	N. Mushin	P
-	D	Peter G. SEST	D.S. Levin	W
-	-	Robyn A. HINES	H.B. Carter	S
-	-	John E. MAZURKIEWICZ	C. Gunst	F
-	-	John J. LAVERY	W.H. Morgan-Payler	W
R.A. Brett	W	Andrew J. MARYNIAK	J.E. Middleton	F
L. Lieder	W	Timothy C. LINDSEY	J.R.P. Lewishon & N.J. Young	R
-	-		S.G.S. Collins	M
-	A	George A. GEORGIOU	A.L. Cavanough	M
-	S	Dennis I. MEADOWS	T.J. Ginnane	H
-	-	Nicholas B. BATTEN	M.T. Bevan-John	P
-	F	Michale D. WYLES	P.B. Murdoch	S
-	-	Alister R. McNAB	J.G. Digby	B
-	-	B.A. Toby SHNOOKAL	D.M.B. Derham	S
-	-	Mark A. CARRAZZO	A.J. Crozier-Durham	A
-	-	Barbara M. PHELAN	J. Gullaci	W
-	-	Mara S. CATALANO	P.N. Vickery	B
-	-	Terry E. JOHANSSON	J.R. Champion	A
-	-	Daniel P. DWYER	E.N. Magee	P
-	-	Margaret A. PAVEY	L. Kaufman	M
-	-	Frank PARRY	D.F. Hore-Lacy	B
-	-	Mary AGRESTA	D. Shavin	H
-	-	Noel A. RUSSELL	R.A.R. Lewis	M
-	-	George M. IRVING	S.K. Wilson	S
-	-	Augustine J. PARNELL	R.A. Elston	A
-	-	Mark J. RIDGEWAY	P.J. Kennon	W
-	-	Heather J. KING	P.D. Elliott	H
-	-	Gerard L. MEEHAN	R.R. Boaden	M
-	-	Rick C. WELLS	R.S. Osborne	A
-	-	Arnold E. DIX	G.J. Thomas	P
-	-	Kevin F. MAGUIRE	-	B
-	-	Andre MILSHON (re-signed)	-	M
-	-	Neil J. ADAMS	-	P
-	-	Ross FRAZZETTO (re-signed)	-	D
-	-	Maitland A. LINCOLN (re-signed)	-	M
-	-	Bryan M. DWYER	-	D
-	-	John W. WILKINSON (re-signed)	-	S
-	-	Alan J. McDONALD (re-signed)	-	S
-	A	Alan J. SHAW (re-signed)	-	-
P.A. Dunn	D	Diana M. FAGAN (re-signed)	-	-
M.A. Tovey	W	Christopher C. BRANSON (NSW Q.C.)	-	-
		Peter Paul STRASSER (NSW)	-	-

Members whose names have been removed from the Roll of Counsel

E. ANGELA KOMINOS
KIM McG. HENDERSON
ALVIN W. HOPPER (ACT)
ABBEY V.K. DALY
GARRY STURGESS
BARRY G. HEPWORTH
MELVYN BLOOM (NSW)
MAITLAND A. LINCOLN
BRUCE G. LEE
MICHAEL KILDEA
P.E. KING (NSW)
FIONA STEWART
ANDRE MILSHON
JOHN R.B. NORRIS Q.C.
JOHN A. SULLIVAN
JERZY J. GAJEWICZ
ROSLYN F. GARFIELD
GEORGE C. ANDREWS
JOHN FRANKCOM
COSMAS MOISIDIS
DANIEL P. O'DWYER
PETER WRAY-McCANN
WANDA BROWNE

Obituary

THE HON. SIR JOHN MINOGUE Q.C. (19/9/1989)
E.A.H. LAURIE Q.C. (29/10/1989)
HIS HONOUR JUDGE LECKIE (16/4/1990)
THE HON. SIR JOHN NORRIS Q.C. (25/5/1990)
THE HON. J.W. GALBALLY C.B.E., Q.C. (8/7/1990)