VICTORIAN BAR NEWS

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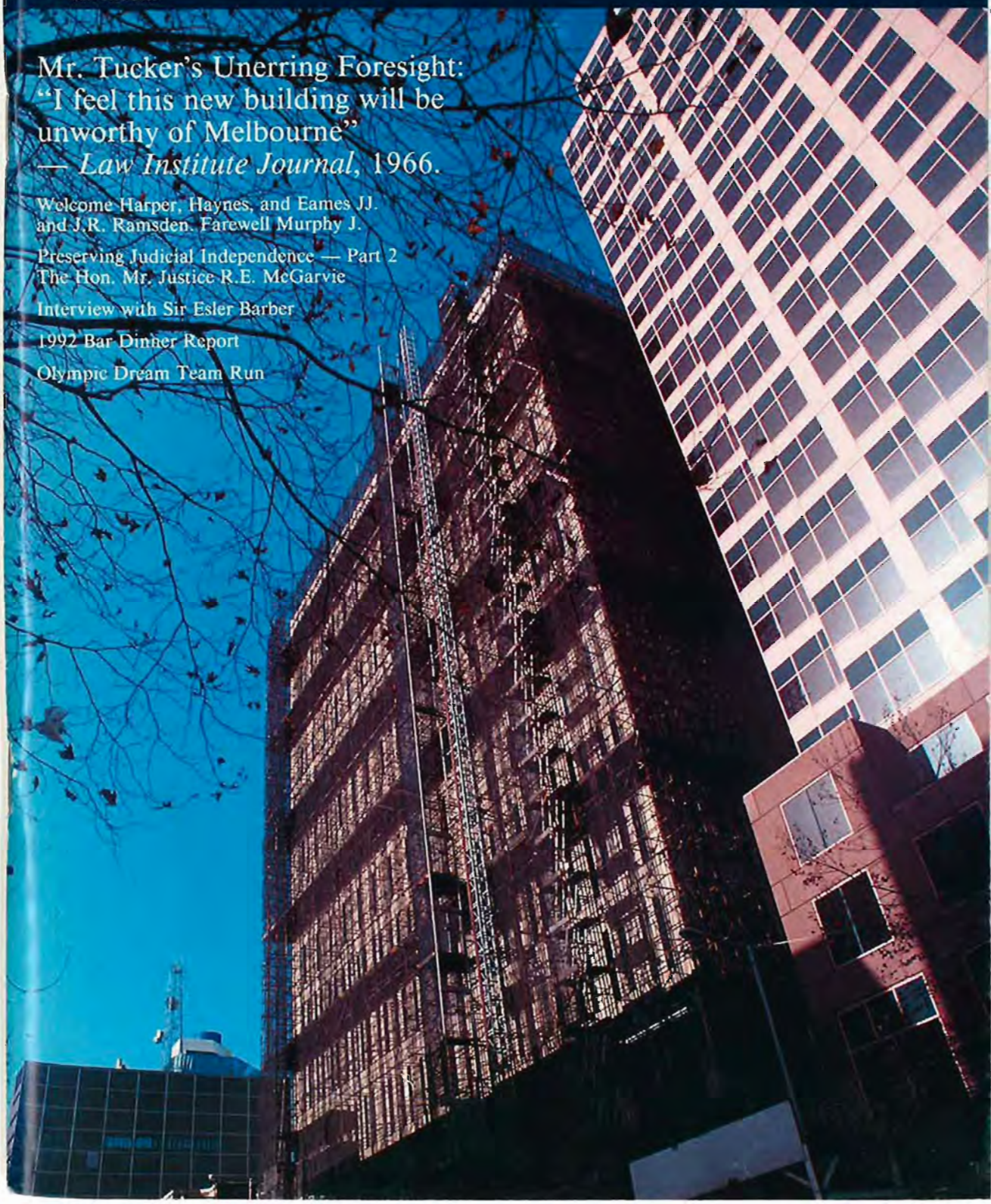

Mr. Tucker's Unerring Foresight:
"I feel this new building will be unworthy of Melbourne"
— *Law Institute Journal*, 1966.

Welcome Harper, Haynes, and Eames JJ. and J.R. Ramsden. Farewell Murphy J.

Preserving Judicial Independence — Part 2
The Hon. Mr. Justice R.E. McGarvie

Interview with Sir Esler Barber

1992 Bar Dinner Report

Olympic Dream Team Run

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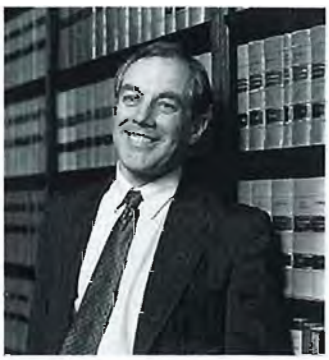
Front cover
Mr. Tucker's Unerring Foresight (page 78). Comments by Mr. Frank Tucker, supervisor of civil jury pools at the Bourke Street Courts, 1966, less than a fortnight after the first excavation was dug for the 12-storey court building then under construction at the corner of William and Lonsdale Streets, as reported in the Law Institute Journal, *1966.*



The Supreme Court welcomes Harper, Haynes, and Eame

J., page 22 and following.

BAR NEWS

Editors:
Gerard Nash Q.C. and Paul Elliott
Editorial Board:
Bernard Bongiorno Q.C., Graeme Thompson, Graham Devries
Editorial Consultant:
David Wilken
Editorial Committee:
Tony Pagone and Peter Lithgow (book reviews), Ron Clark (artwork), Richard Brear (editorial assistant), Gillianne Tedder and Rick de Carteret (photography), Elizabeth Curtain, Chris Sexton, Tina Giannoukos.

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LETTERS

Dear Sirs,

I was agreeably surprised to firstly learn of and later read the article about me appearing in the current edition of the Victorian *Bar News* under the heading "Farewells". I am indeed grateful to the author for the quite undeserved praise lavished upon me.

However, there are two matters that call for comment.

First, the article conveyed to me and to others who have read it that I have retired. That is not correct. I have not retired and I do not intend to do so until I reach the statutory retiring age of seventy in approximately three years time in April 1995. I would appreciate an appropriate correction, particularly as I am presently sitting as a Reserve Judge, which I have been doing from time to time since I elected to become one at the end of April 1990.

Second, I have never been a member of the R.A.A.F. nor have I ever worked as a meteorologist.

Yours truly

His Honour Judge J.F.B. Howse

[The editors apologise to Judge Howse and for the precipitate way in which they have hurried him into retirement. We are still seeking to ascertain precisely how the author of the farewell obtained for Judge Howse his R.A.A.F. experience and his skills as a meteorologist.]

Dear Sirs,

As always I read the latest number of the *Bar News* (Autumn 1992) with the greatest of interest and pleasure. However I noted with some surprise a para. on p. 15 — in the article on Mr. Justice McGarvie — which read as follows: "... In 1962 the first of four editions of *Cases and Materials on Contract*, which he co-authored with Pannam and Hocker, was published; thereafter generations of law students have been brought up on it".

I say "with some surprise" because I am looking at a Law Book Company publication dated 1962, and entitled *Cases and Materials on Contract*. The authors of this publication are listed as R.E. McGarvie and F.P. Donovan.

For the record let me say that shortly after appointment as the first Professor of Commercial Law at Melbourne in 1952 I introduced the case-book method in teaching Contract (one of the subjects for which I was responsible). Students were issued with a roneoed form of the framework on which the lecturing and case-book material was based. From these beginnings the much improved book version emerged.

The Contract classes had become so large that it had been decided to divide them into two groups. I was indeed happy, because of my great respect for his ability, to have Mr. McGarvie (as he then was) as Independent Lecturer in Contract from 1957 on. As the Preface to the 1962 edition (signed by both authors) states: "This collection of cases and materials is the result of a number of years' collaboration between the authors in teaching the Principles of Contract to separate classes in the University of Melbourne ... As a result of experience in class we have revised the collection several times ..."

In 1961 I resigned my Chair to take up a Government appointment overseas. Arrangements for the publication by the Law Book Company of *Cases and Materials on Contract* were already well in hand. Mr. McGarvie kindly agreed to shoulder most of the detailed (and arduous) work connected with actual publication. Because of this, and because he would be continuing practice in Melbourne, it was agreed that in the book form his name should be listed first.

Subsequent editions, of course, were the responsibility of Mr. McGarvie and the other co-authors.

Yours sincerely,

P. Donovan

P.S. I am now residing in Paris where, on the nomination of the Australian Council, I have been appointed Member of the International Court of Arbitration of the I.C.C.

[The editors apologise to Mr. Donovan. In defence they can only plead that the lapse of 30 years had dimmed their memories. The relatively gentle form of Mr. Donovan's rebuke merely accentuates our concern at the error.]

Dear Sir,

"THE MEN IN THE PHOTO"

Might I make a small contribution to the references in the Spring and Summer 1991 issues to the year in which the photograph of the Law School was taken.

The years 1913 and 1917 have been suggested,

Menzies (fourth from left in second front row) at the University of Melbourne, 1915. The author is in the second back row, fifth from left.

Mr. Peter Balmford preferring the earlier year.

The identical photo appears in the late Sir Percy Joske's short biography of Sir Robert Menzies and shows the date as 1915.

I have spoken to Mr. Justice Rod Joske who has been unable to locate his father's copy of the photo; all he can add is that his father was generally very accurate as to dates.

I enclose photocopies of the cover of and photograph in the book.

Yours truly,

(Judge G.H. Spence)

Mr. Editors,

Thank you for the calculated misspelling of my name in the caption appearing on p. 84 of the Autumn 1992 Victoria *Bar News*. It will at once constitute an aggravating circumstance and provide the evidence of malice which will negative any defence of fair comment you might otherwise have in the defamation action I propose to commence shortly. Accordingly I would be grateful if you would refrain from publishing any effete "We Were Wrong" in the imperious style of *The Age* (see *ibid.*, p.5).

I should only add that I expect the damages to be enormous.

Yours faithfully,

Bryan Mueller

[The editors apologise for the misspelling. Our photographer will ensure that no future problem arises with such a caption.]

Dear Sir,

I was saddened to read the letter from Mr. H.D. Muir in your last issue. His intemperate and inaccurate comments reflect little credit on one who served the Bar so well over a long period.

The instigators of List A did not "scour the Bar to recruit high profile and high earning counsel". On the contrary, the list was viewed with the same suspicion as every other new list, and it was necessary for the Bar Council to entreat members of the Bar generally to consider joining the new list. Shortly prior to commencing operation the new list had fewer then twenty-five members.

What happened is that about six months after starting List A was flooded with applications to join. The applications were instigated not by an active recruiting programme, but by a general perception of the success of the list. The success of the list is attributable in large measure to its small size, and accordingly the list was simply unable to accommodate all those who sought to join.

The "elitist" tag referred to by Mr. Muir surprises me. The seniority of the list is in fact evenly balanced, and members of the list practise in widely diverse areas. If the label is intended in its ancient and proper sense we gratefully accept the accolade. However, the pejorative sense I suspect is intended is totally unjustified.

Yours sincerely,

Michael Wright
Chairman List A

EDITORS' BACKSHEET

NEW SUPREME COURT APPOINTMENTS

In the Editors' Backsheet of the autumn issue we mentioned with pleasure the appointment of David Harper to the Supreme Court Bench. Since that Editors' Backsheet was written there have been two further appointments to the Supreme Court. Ken Hayne took up an appointment some two or three weeks after David Harper; and, more recently, Geoff Eames has been appointed.

Eames J. is less well known than the other two recent appointees. He commented at his welcome that he had been tempted to wear a name tag. We assure our readers that he is not associated with the World Health Organisation, despite the letters WHO which were inserted after his name on the Notice of his Welcome which appeared in the Owen Dixon lifts. *Bar News* is delighted at the appointments.

Welcomes to Their Honours appear elsewhere in this issue.

LAW REFORM COMMISSION REPORT

The Victorian Law Reform Commission has now brought out its Report No. 47 on "*Access To The Law: Restrictions on Legal Practice*". It contains no surprises.

Perhaps the most significant aspect of the Report is the method of publication. The Chairman of the Law Reform Commission released the Report "in accordance with my normal practice, to a selected number of journalists", apparently before the Report had been submitted to the Attorney-General and certainly before it had been tabled in Parliament.

This action by the Law Reform Commission was the subject of comment by the Shadow Attorney-General. The relevant extract from Hansard is set out below.

"LAW REFORM COMMISSION VICTORIA

Mrs WADE (Kew) — In the absence of the Attorney-General, I direct to the attention of the Minister at the table the behaviour of the Law Reform Commission Victoria in relation to the release of its report on the legal profession and the cost of justice. I ask the Attorney-General to take action about this behaviour.

The Law Reform Commission has completed its report on the subject and it was due to be submitted to the Attorney-General today. Of course, it has yet to be tabled in both Houses of Parliament in accordance with the Law Reform Commission Act, yet apparently the report was circulated last week to a number of journalists.

I should also mention that I received a copy of the report last Thursday. It was delivered to me at Parliament House rather unexpectedly. I also received from the commission last Friday a briefing on the report. I assumed that the Attorney-General was aware of the delivery of the report and the briefing, and I assumed that both were provided on the basis that I would be informed of the contents of the report so I could comment sensibly on it when it was released.

I am now interested to know whether the Attorney-General did know about it. I also assumed that other people affected by the report, particularly legal profession organisations, would have been provided with copies of it, yet apparently the Law Institute of Victoria and the Victorian Bar Council, which is particularly affected, have not been provided with a copy of the report.

It is a gross discourtesy to Parliament and to its members for the report to have been released widely to journalists before being tabled in the House. I am also concerned that the Victorian Bar Council has not been provided with the report, and I am concerned about correspondence that passed between the Victorian Bar Council and the Law Reform Commission last Friday.

Apparently last Friday the Vice-Chairman of the Victorian Bar Council was approached by journalists with copies of the report and was asked for the Bar Council's comments on it. Of course, the Bar Council does not have a copy of the report and was very upset that that was the case. The vice-chairman, Mr Hartley Hansen, wrote to the Chairman of the Victorian Law Reform Commission complaining about the Bar Council finding itself:

> . . . again compelled to complain to you about your conduct in this matter. Rather than conduct this matter in an impartial reasoned way you have sought to politicise the important issues involved as though you were a party to a cause.

This is obviously inappropriate. He went on to suggest to the Chairman of the Law Reform Commission that it was quite improper to say that he needed the approval of the Attorney-General to give a copy of the report to the bar, but he did not need the approval of the Attorney-

General to give a report to the press. He reminded the chairman of the commission that his obligation was to report to the Attorney-General and not to the media.

The response of the Chairman of the Law Reform Commission speaks for itself. He says:

Dear Mr. Hansen . . . the report has not been given under embargo to the media "generally". It has been given, in accordance with my normal practice, to a selected number of journalists.

I will release an embargoed copy to you when the Attorney-General authorises me to do so. Thank you, too, for your advice concerning my obligation to report to the Attorney-General. Do you often send coals to Newcastle?

That is a totally inappropriate way for the Chairman of the Law Reform Commission to reply to the Vice-Chairman of the Victorian Bar Council. It is disgraceful. I ask that the Attorney-General reprimand the chairman of the commission for that behaviour, and I also ask that he be reprimanded for releasing the report to journalists before it was tabled in the House.

When he does table it, he should report on how many copies have been circulated and exactly who received them. He should also ensure that this sort of thing does not happen in the future and that the Chairman of the Law Reform Commission is counselled as to the proper way to deal with reports and with Victorian organisations and individuals affected by reports.

If the Attorney-General does not take the appropriate action I am sure that with the change of government there will be no problem in doing so."

INSTITUTE OF ARBITRATORS' EXAMINATIONS

The results of the February 1992 Grading Examination have just come to hand. In all, 112 candidates (57 Victorian) sat the examination. Of these 43 (24 Victorian) passed and 10 (7 Victorian) gained "credit" passes (i.e. 60–75%). Credit passes were obtained, *inter alia*, by Messrs. Hansen Q.C., Golombek, Foxcroft, Devries, Berglund and Burchardt.

WE WERE WRONG

In the Summer edition of the *Bar News* we introduced a title "We Were Wrong". That has opened the flood gates. Our errors have now multiplied, as illustrated by the correspondence from His Honour Judge Howse, Mr. P.E. Donovan of the International Court of Arbitration (formerly a professor at Melbourne Law School) and Bryan Mueller. To all of these the editors apologise, in two cases somewhat sheepishly, in the other somewhat Muellishly.

THE CHAIRMAN'S CUPBOARD

THIS WILL BE MY LAST CHAIRMAN'S Cupboard.

Perhaps the most significant thing that has occurred since I wrote the last one is that the Trade Practices Commission has commenced an inquiry into the legal profession in Australia.

Because of the work done in responding to the Law Reform Commission discussion papers, this Bar is well placed to respond to this inquiry, which appears likely to be conducted in a constructive and thoughtful manner.

The Bar Council has set up a Trade Practices Committee and counsulted with a number of specialists in connection with its responses to the inquiry.

I believe there is reason for confidence, that the Bar's practices designed to promote high standards in both work and ethics will find acceptance by the Trade Practices Commission.

On the issue of legal aid, the Council sought unsuccessfully to alter the nature of the proposed amendments to section 32 of the *Legal Aid Commission Act* which as amended will give the Legal Aid Commission the power to set fees without reference to the level of prevailing scales or accepted fees in use by the legal profession from time to time. Since then a letter signed by the Chairman of the Legal Aid Commission, the President of the Law Institute of Victoria and myself on behalf of the Bar Council, has been sent to the State Government seeking an injection of Government funding to the Legal Aid Commission, sufficient to bring the number of grants and rates of professional fees back to their former levels.

Throughout this time a working party comprised of representatives of the Legal Aid Commission, the Law Institute of Victoria and the Bar Council has been working together in an effort to find appropriate solutions to the Commission's present difficulties.

The Bar Council has continued to scrutinise the Bar rules in the context of the proposed Australian Bar Association rules standardisation project with particular reference to the rules concerning both advertising and counsel visiting solicitors' offices.

The Council has written to the Attorney-General in respect of two Bills being "Collingwood Land (Victoria Park) Bill" and "The Royal Melbourne Hospital Re-development Bill" expressing the Council's concerns about legislation which effectively removes particular bodies' rights to litigate in the Supreme Court. No response has so far been received to either letter.

After a joint meeting between the Bar Council and Barristers' Chambers Limited, it was agreed that the Four Courts building be purchased and a circular has already been sent to members of the Bar giving details of such purchase. The directors of BCL are to be congratulated for organising the purchase which will become a significant asset of the Bar in the years to come. Whilst on the subject of Barristers' Chambers Limited, I record with regret but with gratitude the resignation of Peter O'Callaghan Q.C. from the Board. He has worked long and hard over many years in the Bar's interests and I am pleased to record the Bar Council's appreciation of that work.

The Bar Council has also been active in the Federal sphere making a significant number of representations in connection with the Mutual Recognition (State) Bill 1991 and the *Migration Agents Act* 1991 in furtherance of the Bar's interests.

Moreover, the Council has responded to all of the Senate Costs of Justice Inquiry discussion papers relevant to this Bar. In this regard, the Council has been greatly assisted by information generously and promptly supplied by the English Bar and by a lot of hard work done by Michael Crennan.

I regard it as an honour to have been the Bar's Chairman particularly in a time of some turbulence and strife.

An an institution I regard it as well worth fighting to preserve. I have been warmed by the support received from many members of the Bar and from the Bar Council as a whole. Particularly I thank the Vice-Chairmen, without whose support and assistance the Chairman's job would have been nigh impossible, and the staff who, though small in number, have responded valiantly and well to the exacting demands placed on them from time to time.

The theme chosen for the 1992 Australian Bar Association conference, "per ardua ad mm", which has been interpreted as "through struggle to the year 2000", probably describes this Bar's course over the next few years. To those charged with doing the struggling and to those who assist them in the struggle, go all my good wishes for the future.

Andrew Kirkham

ATTORNEY-GENERAL'S COLUMN

JUNE 1992

THE AUTUMN SESSION OF PARLIAment saw a number of the Government's law reform Bills being passed.

CULPABLE DRIVING

Legislation increasing the penalty for culpable driving to 15 years — the same maximum penalty for manslaughter — has been passed. The degree of fault required for culpable driving is substantially the same as for manslaughter. To be consistent, the penalties should be the same.

This legislation has removed the prohibition on proceeding on a dangerous driving charge against a person who has previously been prosecuted and acquitted for culpable driving. This will allow police to have recourse to a serious, but lesser, alternative offence when the degree of fault is substantial, but falls short of culpable driving. The maximum penalty for dangerous driving will also be increased from three months to two years. This follows the Victorian Law Reform Commission's recommendation that the current maximum of three months is too low given the seriousness of the offence.

CRIMES AND JURIES (AMENDMENT) BILL

The first purpose of this legislation was to abolish grand juries. Grand juries have been abolished in all the other States of Australia and were abolished in England 40 years ago. The procedure has been used only ten times in the past 100 years. The Grand Jury procedure has been criticised in a succession of judicial pronouncements. In 1986, the Full Court described it as "quite inappropriate". The Victorian Police Association has also urged that the procedure be abolished. The provisions abolishing grand juries were defeated in the Legislative Council.

The same Bill amends the *Juries Act* so that the court's power to continue trials despite the fact that the jury has been reduced in number is extended to a case where jurors have been excused for "good and sufficient reason". The current Act only allows continuation of the trial if jurors have been excused for reasons of death or illness of the juror or serious illness of a near relative of

the juror. There may be other reasons why a juror is unable to continue. For example a key witness who is known to a juror may be called late in the trial. This change will further minimise the likelihood of long trials being aborted.

LEGAL AID COMMISSION ACT

Amendments to the *Legal Aid Commission Act* will improve the Commission's financial effectiveness in difficult economic times. The key amendment is to section 32 which will allow the Commission, in consultation with the profession, to determine the payments it makes to the profession. This will give the Commission the flexibility to pitch its rates to the market for legal services. The Commission will also have the power to contract out of the determined rates where a practitioner agrees to a different rate. It is anticipated that the power will be useful in long-running trials and for practices seeking a guaranteed volume of legal aid work.

Other reforms allow the Commission to charge interest on unpaid contributions as an incentive for payment and to register charges over an assisted person's land in respect of unpaid contributions.

The Commission will also have the power to contract out of the determined rates where a practitioner agrees to a different rate. It is anticipated that the power will be useful in long-running trials and for practices seeking a guaranteed volume of legal aid work.

FAMILY VIOLENCE

The *Crimes (Family Violence) (Further Amendment) Act* has the following main provisions:

(1) To provide for portability of protective orders between States and Territories.

Protective orders from other States and Territories will be registered and enforced in Victoria under the principal Act.

(2) To provide for emergency intervention orders by telephone or facsimile.

Police will be able to apply for interim orders by telephone or facsimile in emergency cases where a magistrate is not readily available. This will include orders restricting access by the defendant to the family home.

(3) To clarify and extend police powers of entry.

Powers of police to enter premises in situations of family violence are set out and extended to include a power to enter where the police have reasonable grounds to believe that a person has assaulted or threatened to assault a family member or that a person is on premises in breach of an order.

(4) To provide for mandatory confiscation of firearms by police attending family violence situations.

The discretionary power in the Act will become mandatory.

(5) To strengthen procedures concerning intervention orders affecting firearms and firearms licences.

PARTNERSHIP (LIMITED PARTNERSHIPS) ACT 1992

The *Partnership (Limited Partnerships) Act* 1992 amends the Partnership Act 1958 by inserting a new Part 3 to provide for the formation of limited liability partnerships in Victoria.

The Act is modelled on the New South Wales legislation. A limited partnership must consist of at least one general partner and at least one limited partner and provided this exists a limited partnership may be formed upon registration.

The Act provides for the recognition of limited partnerships formed in other jurisdictions in the same way as does the New South Wales legislation.

FINANCIAL INSTITUTIONS (VICTORIA) ACT 1992

In November, 1991 Premiers and Chief Ministers signed the Financial Institutions Agreement requiring all States and Territories to apply template legislation passed by the Queensland Parliament for the establishment of the Australian Financial Institutions Commission ("AFIC") and the supervision of building societies and credit unions. The Act does a number of things:

- ☐ applies the Financial Institutions Code and the Australian Financial Institutions Commission Code in Victoria with modifications particularly in the areas of building society primary objects, building society liquidity support arrangements, and the depositor/member requirement for building societies.

The *Building Societies Act* 1986 is largely repealed and the *Co-Operative Act* 1981 is amended to exclude credit unions and their representative bodies;

- ☐ merges the Building Societies, Friendly Societies and Credit Co-Operative Reserve Boards to form the Victorian Financial Institutions Commission;

The new Act is consistent with the Australian Law Reform Commission's 1991 recommendation that the possession of child pornography should be an offence and the United Nations' Convention on the Rights of the Child which makes particular mention of protecting children from all forms of sexual exploitation and sexual abuse.

- ☐ amends the *Friendly Societies Act* to provide for friendly societies to be supervised by the Commission and contribute to the supervision fund established under the Financial Institutions Code. The Bill established an advisory committee for friendly societies in exactly the same form as the Building Societies and Credit Co-Operative Advisory Committees (i.e. no Government representatives);
- ☐ amends the *Co-Operative Housing Societies Act* to bring co-operative housing societies under the authority of the Commission, to set up the Co-Operative Housing Societies Advisory Committee, to provide for voluntary and directed mergers of the co-operative housing societies and to increase the Treasurer's guarantee to $1 billion;
- ☐ amends the *Industrial and Provident Societies Act* to bring these societies under the authority of the Commission.

CLASSIFICATION OF FILMS AND PUBLICATIONS (AMENDMENT) ACT 1992

The Act prohibits the possession of pornographic material related to children.

The new Act creates an offence of knowingly possessing a film or photograph of a child who is under 16, or apparently under 16, and who is engaged in a sexual activity or is depicted in an indecent sexual manner. The offence is limited to films, photographs and reproductions of photographs and carries a maximum penalty of 120 penalty units or 12 months imprisonment. It is a defence to a charge to provide that:

- ☐ at the time of the alleged offence, the material had received a classification from the Chief Censor;
- ☐ the material possesses artistic merit (unless the prosecution proves the child is in fact under 16) or is for a genuine medical, legal, scientific or educational purpose;
- ☐ the defendant believed on reasonable grounds that the child was over the age of 16, or was married to the defendant; or
- ☐ the possessor of the photograph was not more than two years older than the subject.

The new Act is consistent with the Australian Law Reform Commission's 1991 recommendation that the possession of child pornography should be an offence and the United Nations' Convention on the Rights of the Child which makes particular mention of protecting children from all forms of sexual exploitation and sexual abuse.

The Government has also introduced legislation which will lie over until the next session of Parliament. The Crimes (Forensic Procedures) Bill, outlined in the last edition of *Bar News*, will be passed to deal with a number of situations where people are subjected to harmful conduct because of their race or religion. The Racial and Religious Vilification Bill is based on the recommendations of the report of the Committee to Advise the Attorney-General on Racial Vilification, which was published in March 1992.

The Bill creates criminal offences for specified conduct, such as threatening to harm people or their property on the ground of race or religion, and a civil action to deal with racial or religious harassment, for example between neighbours.

The ambit of the legislation is specific and narrow. It does not prohibit speech simply because it is offensive (e.g. racial jokes) or wrong, or restrict the right to express opinions about sensitive subjects such as the composition of Australia's immigration programme.

Jim Kennan
Attorney-General

IT'S YOUR BAR COUNCIL

IN THE LAST QUARTER THE ACTIVITIES of the Bar Council have included:

DECISIONS OF THE BAR COUNCIL

1. Not to assist the Australian Law Students' Society with respect to the ALSA Conference 1992.
2. To circularise the Bar with a chronology of the pro bono scheme and issues.
3. Proposed New Rules of Conduct.
4. To amend the previous ruling on collection of fees directly from lay clients and to circularise the Bar with the revised ruling.
5. Allocation of Chamber at 555 Lonsdale St be by seniority but with priority to those of six years and under standing and that group applications be allowed for those under six years standing.
6. Not to shift the Bar Readers' Course to 555 Lonsdale Street.
7. A new Clerking list be created.
8. To fund an Advocacy Workshop for the Legal Training Institute of PNG.
9. To purchase a portrait of Sir Reginald Smithers.
10. To continue the production of quarterly issues of the *Bar News* in its current size and format.
11. To support certain resolutions of the Criminal Bar Association concerning Legal Aid fees.

MATTERS CONSIDERED BY THE BAR COUNCIL

1. A Report of the Human Rights Committee in relation to the Community Protection (Violent Offenders) Bill and the pending trials of East Timorese in the wake of the Dili massacre.
2. Constitution of the Demographics Committee.
3. Copyright for the Bar Logo.
4. The "cab rank principle".
5. The Publication of a Bar Directory.
6. The Crimes (Family Violence) (Amendment) Bill 1992.
7. Criteria for granting leave of absence.
8. Commonwealth Evidence Bill 1991.
9. Commonwealth Corporate Law Reform Bill 1992.
10. Crimes (Fraud) Bill.
11. Partnership (Limited Partnerships) Bill.
12. Responses to the Senate Costs of Justice Inquiry.
13. The Trade Practices Commission Study of the Legal Profession.
14. Mutual Recognition Legislation.
15. Access to Legal Services: The Role of Market Forces.
16. Redecoration of the Foyer of ODCE.

LAW COUNCIL REPORT

MIGRATION WORK AND LAWYERS

THE LAW COUNCIL, SUPPORTED BY constituent bodies, has continued to oppose strongly the Government's plan to require lawyers to register as migration agents if they help clients with migration applications.

The Government has agreed that lawyers who only give general migration advice will not have to register, but it is insisting that lawyers who help with applications must register. This appears to be the first time lawyers have been required to register with the Government before being eligible to provide legal services in a particular area of the law.

The new scheme was supposed to start on 1 July, but the Law Council has been advised that the legislation establishing the scheme will not be dealt with by Parliament until the Budget sittings.

The LCA maintains its firm opposition to registration of lawyers. When the legislation for the scheme becomes available the LCA will consider whether there are grounds for challenging the constitutional validity of the legislation.

MANY QUESTIONS ON COST OF JUSTICE

The Law Council and its constituent bodies have now been working in connection with the Senate inquiry into the cost of legal services for several years. The Senate committee's report is expected to be out by the middle of the year.

The Law Council made a major initial submission in 1989. Later it made several more written submissions on particular issues, and proposed the introduction of a uniform mediation system in all Australian courts.

Representatives of the Law Council (and of the constituent bodies) gave evidence at public hearings held by the committee some time ago. A few weeks ago there were more public hearings in Canberra, when the LCA President David Miles and the President of the Law Society of New South Wales, John Marsden, appeared and gave evidence.

Subsequently, David Miles received a request from the committee that he provide written answers to 42 questions — most of them dealing with major issues — which the committee had not dealt with when he gave evidence.

In the meantime, work has been proceeding on the preparation of responses to the substantial range of discussion papers issued by the committee. The detailed work on these responses has largely been done by the constituent bodies, with the Law Council bringing all the material together for presentation to the committee. There will also be a final general written submission summarising the Council's views as to the issues on which the Senate committee should concentrate in its report.

The Government is insisting that lawyers who help with applications must register. This appears to be the first time lawyers have been required to register with the Government before being eligible to provide legal services in a particular area of the law.

ADVOCACY INSTITUTE SWAMPED WITH APPLICANTS

The Australian Advocacy Institute established by the Law Council has been swamped with applications from lawyers wanting to undertake its courses.

At the first workship on basic advocacy skills, held in Adelaide, 62 took part. Another 30 were unable to be accepted because of lack of space.

Mention of the Institute in a newsletter recently sent to LCA members has brought a flood of inquiries and applications. The Institute will hold further workshops (they have already been held in Brisbane, Hobart, Melbourne and Adelaide) as follows:

Melbourne	July 25–26
Perth	August 15–16
Townsville	September 26–27
Sydney	October 17–18
Brisbane	November 7–8
Melbourne	November 21–22.

For information, please contact Anne Craig, Australian Advocacy Institute, Law Council of Australia, PO Box 1989 Canberra ACT 2601, or DX 5719 Canberra. Tel. (06) 2473 788. Fax (06) 2480 639.

The Institute's Chairman is Mr. Justice George Hampel of the Supreme Court of Victoria.

LEGAL PROFESSIONAL PRIVILEGE FIGHT

The Law Council is engaged in a debate with the accounting profession over legal professional privilege.

The accountants have vowed to fight to have legal professional privilege apply to communications between them and their clients on taxation matters.

LCA President David Miles says it is shallow and dangerous to see legal professional privilege simply as something that gives lawyers a competitive edge over accountants. He says the proper functioning of the legal system depends on legal professional privilege, and that is its sole but extremely powerful justification and the reason why it does not apply to communications between clients and other advisors, such as accountants.

THE TPC TURNS TO LAWYERS

The Trade Practices Commission announced at the COJI hearing in Canberra (see above) that it will next turn its sights on to the legal profession in its current study of competition in the professions.

Much of the debate on legal professional privilege was stimulated by the TPC's study of the accountancy profession, and the accountants' claims in the area.

The Law Council will be heavily involved in assisting the TPC with its study and in commenting on its findings.

AUSTRALIA-WIDE ADMISSION AT LAST

The thorny question of national or reciprocal admission to legal practice is coming to a head and is likely to be implemented on New Year's Day next year.

This will happen as part of the government "mutual recognition" plan that will mean that all professions and trades in Australia will be subject to a new principle: that a person "registered" (meaning, for lawyers, admitted to practice and holding a practising certificate) in one State or Territory is entitled to "registration" in any State or Territory.

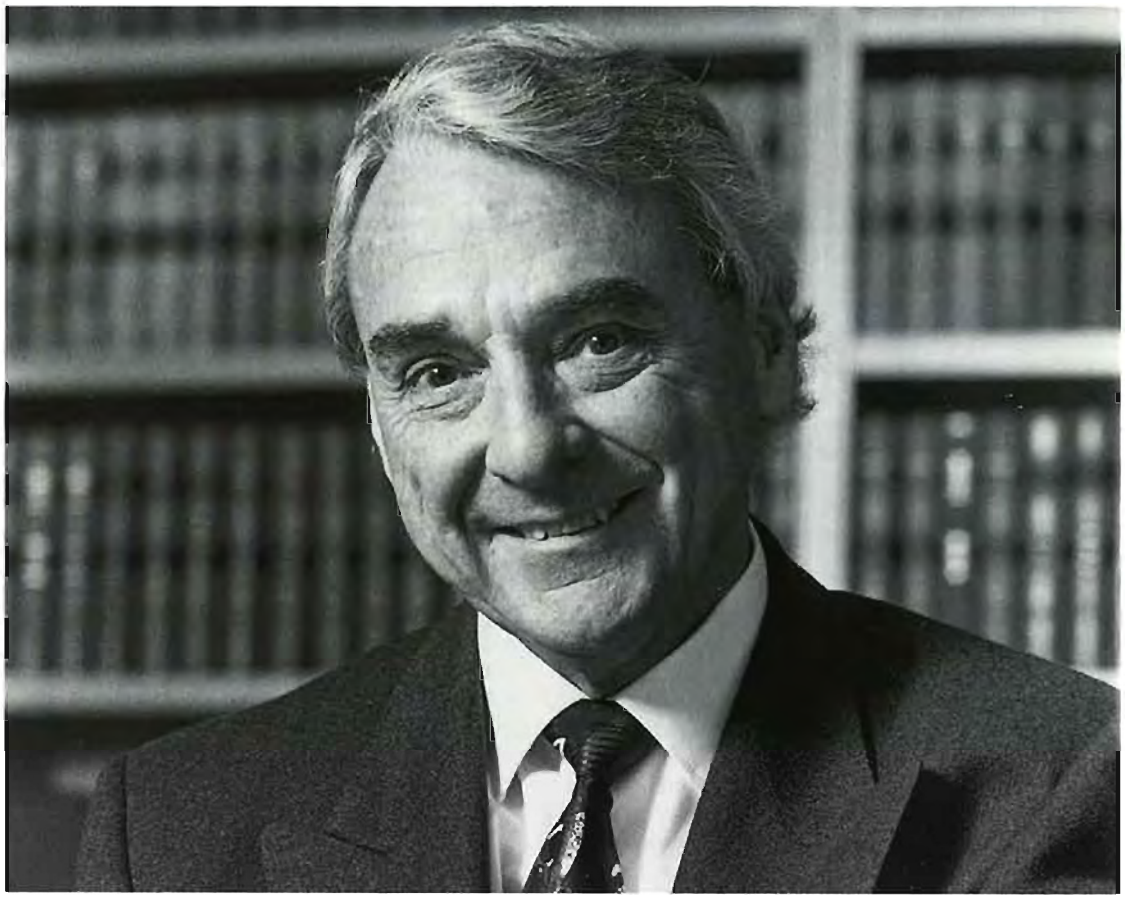
This is the gist of the "mutual recognition" legislation which the Commonwealth Government will bring into the Australian Parliament, acting for all Governments. The Law Council has been working for some time to devise suitable practical arrangements for a new regime, having taken the initiative early in 1991.

The LCA is now pressing for some changes in the proposals to ensure that State and Territory Supreme Courts deal with appeals from decisions of local registration bodies (courts, admission boards, Law Societies or Bars) and that those bodies have the opportunity to scrutinise applications before the applicant is able to practise in the local jurisdiction.

The LCA has sought clarification as to how the mutual recognition principle is to operate in relation to jurisdictions with separate branches of the legal profession and those with fused professions.

The LCA President has asked all constituent bodies to consult urgently with the admitting authorities in their jurisdictions to discuss admission arrangements and to settle what post-admission academic and practical requirements might be needed.

REPORT OF THE COMMON LAW BAR ASSOCIATION



David Kendall.

THE COMMON LAW BAR ASSOCIATION (CLBA) was formed in the mid-1980s. After some early activity involving case listing and the encroachment on common law rights in the fields of industrial and motor vehicle accidents, the Association has more recently maintained a fairly low profile.

With the present activities of the Victorian Law Reform Commission, the Senate Committee inquiring into Judicial Administration and the investigation being carried out by the Trade Practices Commission, the Bar in general, and the Common Law Bar in particular, is being subjected to very close public scrutiny.

Further the ongoing amendments being made to the *Accident Compensation Act* (and to a lesser extent the *Transport Accident Act*) are continuing to erode the rights of the people we represent. Simultaneously restrictions on funding to the Legal Aid Commission are making it very difficult for many to access their remaining common law rights. The Commission is also making many unilateral decisions affecting the traditional bases by which barristers are retained.

The Federal Minister for Health, Housing and Community Affairs has appointed a panel to review compensation and professional indemnity in health care. One of the terms of reference is to examine and report on "Current Experience with Compensation for Medical Misadventure". The panel issued a Discussion Paper in February 1992 outlining many options directed towards improving, and possibly extending, compensation in the field of health care misadventure.

As to the modification of the common law compensation system the panel says —

"(It) may involve: reforms to contain costs, to improve access and reduce delays in Court proceedings, address evidentiary issues and issues which arise from the settlement of compensation claims. The more significant options in this area include legislation: to limit the amount of compensation paid to injured claimants; to require the arbitration of claims; to use medical panels to resolve factual questions; to provide pre-trial access to medical records; and to require the use of structured settlements which may involve periodic reviews of the needs of the injured claimant.

"Reforms which involve no more than the modification of current arrangements are likely to continue the separation of the indemnity, quality assurance and compensation processes. Reforms which have as their objective an integrated and comprehensive system of prevention, rehabilitation and compensation will invariably involve fundamental changes to the current arrangements."

At present these options have only been raised for discussion purposes. What the ultimate recommendations will be remain to be seen. However another common law right is at risk. In the event that the right to sue one's medical treater is taken away, one must be concerned that government intervention will occur in other relationships leading to further deprivation of common law rights.

The Committee of the CLBA is monitoring the progress of this review. It has formulated a position, which has been adopted by the Bar Council, and this in turn has been conveyed to the Law Council of Australia, which is placing a submission before the Review.

Listing of personal injury cases in the Supreme Court has become a critical issue, as has the rate of disposal of appeals by the Full Court. These are matters of the utmost concern to the Association, and steps are being taken to gain representation on the bodies attempting to resolve these problems.

There are very significant issues to be addressed by common law practitioners, issues of vital importance to those who are meant to be served by the law. The failure by governments to provide and fund adequately a system of justice is leading to many so-called remedial measures being taken, measures almost all of which are encroaching upon very long-standing rights of citizens.

A number of experienced members of the Bar, concerned about the present critical situation involving common law rights, have joined the Committee of the CLBA in an endeavour to assist the Association handle the challenges which currently have to be addressed. It is essential that the Association becomes more actively involved in these areas.

Members of the Bar who are faced with problems associated with the administration of common law justice are asked to make them known to the Committee.

At the Annual General Meeting of the Association held on 21 May 1992 the following office-bearers and committee members were elected:

Chairman:	D. Kendall Q.C.
Vice-Chairman:	A. Adams
Treasurer:	J.H.L. Forrest
Secretary:	T. Wodak
Committee Members:	M. Shannon Q.C.
	M. Kellam Q.C.
	R. Stanley Q.C.
	J. Keenan Q.C.
	P. Galbally Q.C.
	C. Francis Q.C.
	D. Martin
	D. Beach
	D. Curtain
	J. Rush
	P. Elliott
	T. Monti.

REPORT TO THE BAR

Barristers' Chambers Limited

Garth Buckner.

New Chambers, 555 Lonsdale Street.

1. PURCHASE OF FOUR COURTS CHAMBERS:

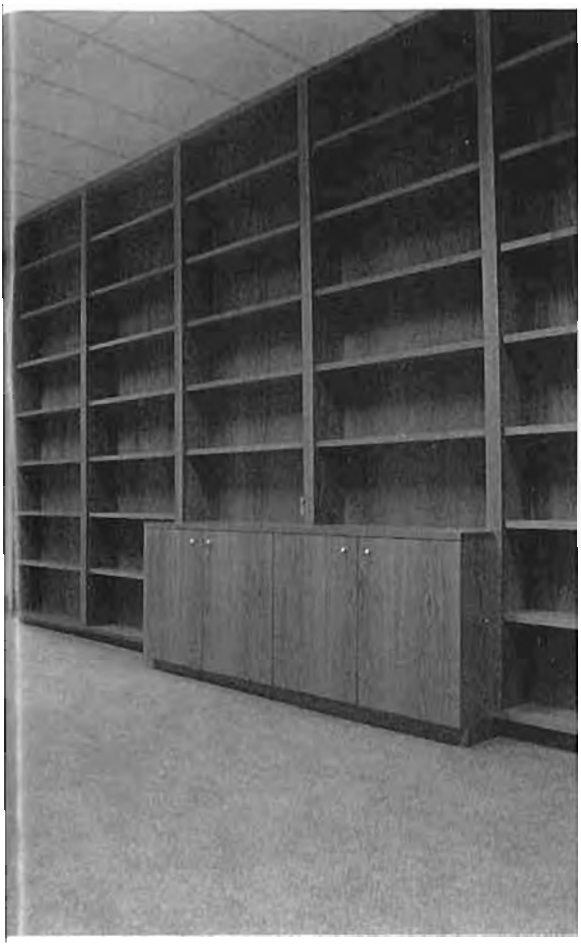
1.1 After very protracted negotiations, Barristers' Chambers Limited on behalf of the Bar has purchased Four Courts Chambers for $6m, to be paid by $60,000 from BCL's own funds, and the balance of $5.94m will be financed by ANZ Bank for 5 years secured by a first mortgage over the property. Important terms of the borrowing are that it contains a once only establishment fee of $15,000, with principal reductions of $50,000 per quarter over the first 4 years, and of $175,000 per quarter in the fifth year. The facility contains both a fixed rate and variable discount rate option. The directors have decided, in the current economic and political climate, to borrow on the fixed rate of 6.98% plus a line fee of 1.75%, and review the position then. At present, contracts have been exchanged and settlement should take place on 1st June 1992.

1.2 The ninth floor which is presently subject to a lease to Binnie and Co., will become vacant in early July next and will then be available for fit-out for occupancy by barrister tenants.

1.3 The Board also proposes to investigate a refurbishment scheme of Four Courts Chambers. As soon as practicable, that investigation will be carried out and tenants in Four Courts Chambers will then be notified about it.

2. 555 LONSDALE STREET:

As is now known, BCL has entered into a 10-year lease for floors 8, 9, and half of floor 11. These chambers are to become available on 1 July next. The Board obtained the permission of the Bar Council to give priority to applications for these chambers from counsel with standing of 6 years and under, and then to apply the ordinary rule of seniority between those applicants, at the same time not allowing any group applications, a move which was specifically designed to address the problem of providing accommodation for very junior counsel. From the response received to the recent circular calling for applications for



accommodation in these chambers, all chambers will be fully occupied.

3. ODCE LIFTS:

The Board is very well aware that the standard of these lifts is below what is desirable. It has investigated numerous possibilities to correct the situation. The problem is simply that the cost of even attempting an improved standard (much less achieving an appropriate standard) is prohibitive. Accordingly, all that can sensibly be done is carry out cosmetic improvements, and that step will be taken in the near future.

4. MICROWAVE LINK INSTALLATION:

Currently BCL pays Telecom Australian $15,180 quarterly (i.e. $60,720 per annum) to use four underground link lines which connect telephones from ODCE and ODCW to Four Courts Chambers, Latham Chambers, Aickin Chambers, and Equity Chambers. Despite extensive negotiations with Telecom, BCL was unable to reduce that quarterly payment. As an alternative means to reduce that cost, BCL has contracted with L.M. Ericsson (Aust.) Pty. Ltd. for it to supply microwave radio link equipment to all chambers (except Equity Chambers due to its low height). The capital cost of the equipment is $171,040 which will financed by a three-year lease with a financial institution at a yearly rental of $60,000. (As the lease has not yet been finalised and interest rates have dropped it is hoped to reduce that rental.) The lease payments will be charged back to Counsel (via their clerks) in the same way as the Telecom cost has been charged back since 1985. But, at the end of the lease period, the residual of 20% (of $34,208) will be paid and save for any amount needed to be paid for a link line to Equity Chambers, telephone charges to the Bar as a whole are estimated to reduce by $45,500 p.a.

Garth Buckner
Chairman of Directors
Barristers' Chambers Limited

26 May 1992

PRACTICE NOTES

THE ATTENTION OF COUNSEL IS DRAWN to the following practice notes, published at the request of the Federal Court and the Accident Compensation Tribunal respectively, and to the Notice from the Prothonotary of the Supreme Court of the proposed special sitting in November 1992.

Judiciary Act 1903

Part VIIIA — Legal Practitioners

Practitioners are reminded that only those Solicitors and Barristers whose names have been entered on the *Register of Practitioners* kept by the *High Court of Australia* are entitled to practise in Federal Courts.

P.J. SECCOMBE
District Registrar

24 March 1992

Practice Note No. 11 Sitting Times

The Judges of the Tribunal are concerned that frequently there is no appearance on behalf of either or both parties to matters in the mention list.

It is recognised that due to the volume of matters dealt with by the Tribunal there may be rare occasions where it is not possible to ensure an appearance at a mention. In such cases the Judge's Associate and the opposing party's practitioner must be advised in advance of this fact.

In order to assist practitioners in this regard, as from June 1 next, Judges Just, Croyle, McCarthy, Macleod, Mulvany and Arnold will sit at 10.00 am. All other Judges will continue to take the bench at 10.15 am.

PRESIDENT
9 April 1992

Special Sitting of the Supreme Court — Civil List

1. After consultation with the Victorian Bar and the Law Institute, the Judges of the Supreme Court have decided that there shall be a special sitting involving the majority of the judges of the Court to deal with both causes and jury actions in the Civil List. *It is envisaged the special sitting will take place in November 1992 and is likely to involve approximately twenty judges taking relevant cases.*
2. Before such sittings commence, however, there will be a special call-over of all cases in the Lists that have not already been fixed for trial. *That call-over will be Court-controlled and be conducted by the Judges over an approximate two-week period in the first two weeks of September 1992.*
3. The special call-over will be linked to a mediation procedure. *Cases called over which are likely to be fixed for trial by the Court in November, may be sent for mediation forthwith.*
4. There will be a panel of approximately 40 mediators, drawn equally from the Bar and Solicitors.
5. *It will be an absolute requirement that solicitors attend with their clients at the call-over and be prepared for mediation.*
6. Reasonable time will be given for mediation, but cases not resolved by mediation are likely to be fixed for hearing in November and must be ready.

This is a preliminary notice only. Further details will be supplied in due course and Mediation Rules will be published well before September.

B.D.A. McLean
PROTHONOTARY
4 JUNE 1992

WELCOME

Mr. Justice Harper

ON FRIDAY, 13 MARCH 1992 MEMBERS of the legal profession crowded into the Banco Court to welcome the Honourable Mr. Justice Harper on his appointment to the Supreme Court of Victoria. It was no surprise that so many barristers should attend, for His Honour had been for many years one of the most popular and hardworking members of the Bar Council. He was equally respected by solicitors.

David Lindsey Harper was born on 29 June 1943. He was educated at Melbourne Grammar School and in his final year was appointed Captain of the School. His Honour's great love of cricket was nurtured in his school days, although those who visited his chambers and noted the unusual photograph of a small dog urinating on the stumps may have wondered what His Honour found attractive about the great game.

His Honour attended the University of Melbourne and graduated B.A.(Hons.) in 1965 and LL.B. in 1967. His Honour resided at Trinity College and once again his qualities of leadership were recognised when he was elected Senior Student in 1965.

Following his year of articles with Arthur Robinson & Co. (as it then was), His Honour was admitted to practice in 1969. He signed the Bar Roll on 1 October 1970 and read with Peter Brusey and James Gobbo. Thus, Sir James Gobbo has the distinction of having one-and-a-half former readers (Mr. Justice Byrne and Mr. Justice Harper) join him as members of the same Court. (Other pairs are Mr. Justice Crockett and Mr. Justice McDonald, Mr. Justice Beach and Mr. Justice Ashley and Mr. Justice J.D. Phillips and Mr. Justice Hayne.)

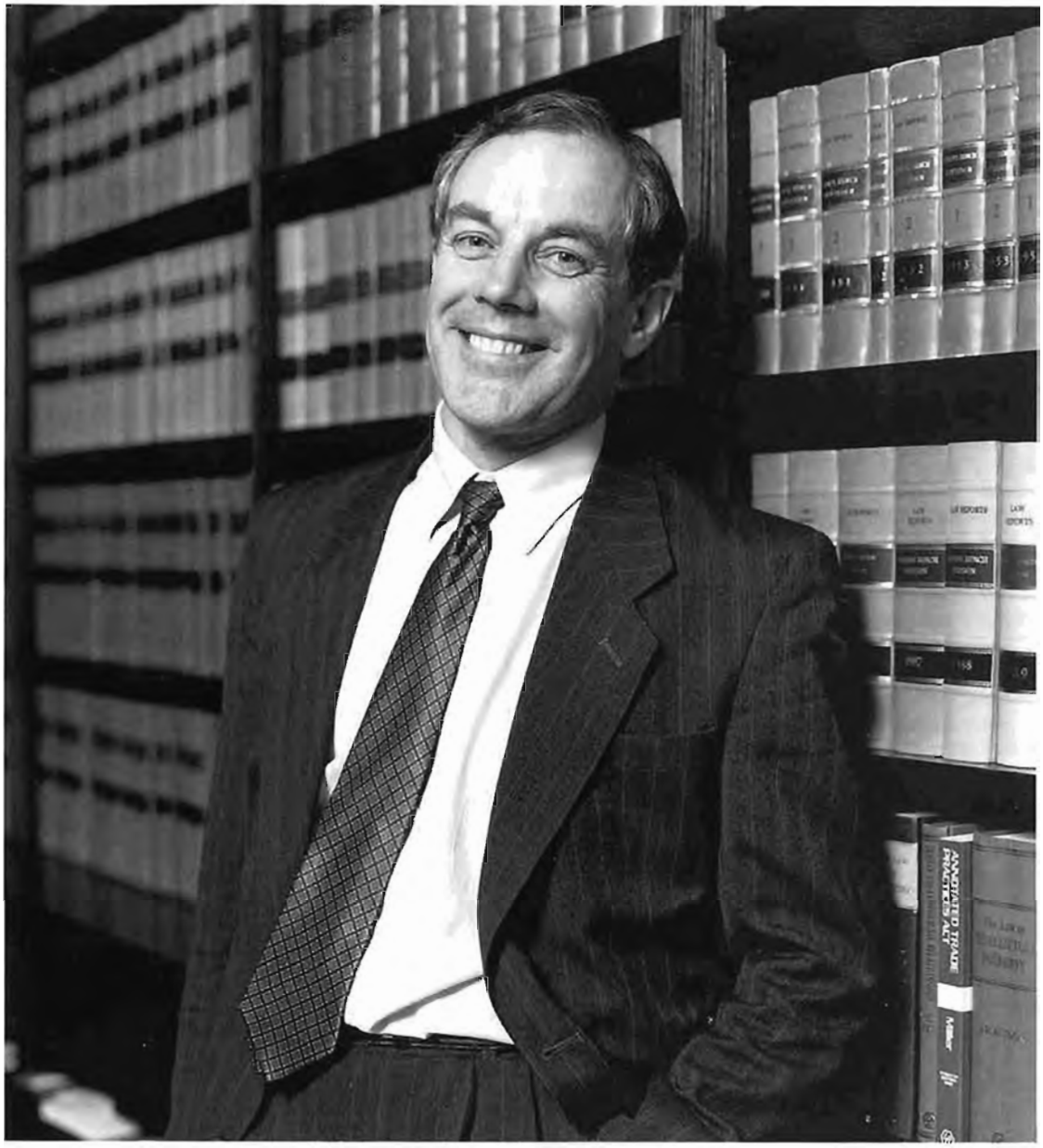
His Honour established a wide and varied practice as a junior. Commercial law, commercial crime, administrative law and other cases were all handled with the same degree of skill and application. A highlight of the early days was His Honour's appearance as junior to Cummins Q.C. (now Mr. Justice Cummins) for one of several accused, charged with the murder of a member of the Bar.

His Honour had seven readers: Hargrave, Gilbert, Shepherd, O'Bryan, Caine, Robertson and Hardingham.

His Honour took silk in 1986 and quickly established himself as a much-sought-after leading counsel. The variety of His Honour's practice finally caught up with him in 1990 when His Honour had to decline the offer of the brief as Senior Counsel assisting the Tricontinental Royal Commission because of a potential embarrassment as a result of appearing some time before at a committal hearing for a gentleman who, it was thought, would be involved in the Commission's proceedings.

His Honour made a great contribution to the corporate life of the Bar. He was appointed the Honorary Secretary of the Bar Council in 1980 and held that position for two years. In 1983 His Honour was elected to the Bar Council and remained a member of that body for another eight years. His Honour was elected Assistant Honorary Treasurer in 1983, Honorary Treasurer in 1984, Vice-Chairman in 1988 and finally on 1 April 1990 as Chairman of the Bar Council. His Honour's work on the Bar Council was characterised by quiet efficiency and loads of common sense. During his eighteen months as Chairman His Honour showed all the required qualities — the ability to work hard, to listen to other points of view, firm leadership when necessary, good humour and unfailing politeness no matter how sorely tried. As the President of the Law Institute said at His Honour's welcome, His Honour was "an excellent ambassador for the Bar" during his time as Chairman. His Honour was for a number of years a Director of Barristers' Chambers Ltd. and a Trustee of the Bar Superannuation Fund. Space does not permit reference to all of the committees on which His Honour served.

Despite these heavy commitments, His Honour also found time to serve as Treasurer of the Australian Bar Association from 1985 to 1989. His Honour made a significant contribution to the A.B.A. and the legal profession in general by drafting the A.B.A.'s statement on "The Independence of the Judiciary" in 1991. No doubt His Honour put to good use the writing skills he had acquired from co-authoring the Bar's publication — *The Victorian Bar — Its Work and Organisation*, the fifth edition of *Paul's Police Offences* and the Bar's Response to the Attorney-General's Working Paper on the Higher Court System in Victoria.



Mr. Justice Harper.

No article on His Honour would be complete without a further mention of the game of cricket. His Honour represented the Bar in virtually every match against the Law Institute over the last twenty years. Reports of these encounters in the *Bar News* regularly mention Harper bowling economically and picking up 2 or 3 wickets. Not once, however, is Harper referred to in the list of those who made runs. His Honour explains that this is due to a totally unjustifiable refusal by Bill Gillard Q.C. to promote him from the number eleven spot in the batting order — if only he had had the time to build an innings the runs would have flowed.

His Honour's family has played an extremely important part in his life. His wife Margaret, a daughter of Sir George Lush, is a practising psychiatrist. Despite the demands of two busy professional lives they have managed to produce and rear three children. His Honour has recently developed the habit of forcing his children to work in England for a year after leaving school in order that their presence overseas may be used as an excuse for His Honour and the rest of the

family to visit. Sadly, His Honour's father, John Harper, a former senior partner of Arthur Robinson & Co., died shortly after His Honour's appointment. There would be no doubt, however, that Mr. Harper was a justifiably proud observer at his son's welcome.

The Bar is confident that His Honour will bring to the Bench the same modesty, charm, compassion and courtesy he has shown throughout his life. The Bar wishes him well on his appointment and trusts that he will have a long and satisfying judicial career.

Mr. Justice Hayne

KENNETH MADISON HAYNE WAS BORN on 5 June 1945 in Queensland, the son of a Commonwealth Bank manager. The family descended upon Victoria, one generation to acquire the local bank, the other to take a leading position in the law of the State. Upon completing his secondary education at Scotch College, His Honour completed Arts and Law degree courses at the University of Melbourne littered with honours, culminating in the Supreme Court Prize. Pausing to complete articles with Grant & Co., he went to Oxford as a Rhodes Scholar. So it must be legally presumed that His Honour combined physical athleticism with mental agility.

Returning to Melbourne with the Degree of Bachelor of Civil Law and a wife, he signed the Bar Roll in 1971 and read with John D. Phillips, now Mr. Justice Phillips. His career proceeded upon lines which in hindsight appear to have been pre-ordained. His Honour quickly developed a practice in equity, befitting a pupil of a pupil of Newton J. When equity disappeared, at the same time as tuneful popular music and Holdens recognisable as Australian cars, he emerged as a sought-after commercial barrister, appearing in many heavy company, insurance and tax cases. When he took silk in 1984, the cases became even more important. His Honour developed a circuit practice centred upon Bermuda and London rather than Sale and Bendigo and concerned the commercial and tax ramifications of producing oil rather than the consequences of collisions between vehicles driven by that substance.

His Honour had seven readers: McNamara, Fraser, Nettle, Richards, McCarthy, Horton and Cosgrove, who speak highly of his continued interest and advice, a view echoed by the junior barristers fortunate to have chambers near His Honour.

The discipline, sacrifice and feeling of duty to the community that a judicial career demands are qualities that His Honour demonstrated in many fields before he took office. He was a long serving member of Barristers Nominees Pty. Ltd., and a trustee of the Victorian Bar Superannuation Fund. He represented the Bar on the rules committee of the Supreme Court. He was an active lay member of the Anglican Church, and a member of the Council of the Corowa Anglican Girls School.

Mr. Justice Hayne.

A polite manner, correctly conservative dress and formidable intellectual attainments mask a dry wit, which a generous nature prevents turning mordant save when sorely pressed. His Honour's qualities lead the Bar to look forward to a judge who will add to the distinction of the bench he joins, and to wish him well in his new career.

Mr. Justice Eames

GEOFFREY EAMES BRINGS TO THE Supreme Court a range of skills and diversity of interests which reflect the 23 years he has practised as a member of the Northern Territory, South Australian and Victorian Bars.

His Honour was born on 26 November 1945. After completing his secondary education at St Bernard's Christian Brothers College in Essendon he attended the University of Melbourne and graduated in 1968 as a Bachelor of Laws.

Articles were served with Mr. Geoffrey Llewellyn Jones of Slater and Gordon. His Honour was admitted to practice on 3 March 1969 and signed the Bar Roll on 13 March 1969. Such was the impression created by the young Eames at the firm he began a very lucrative personal injuries/criminal practice. Those who followed as articled clerks were left in no doubt that if they were half as good as etc.

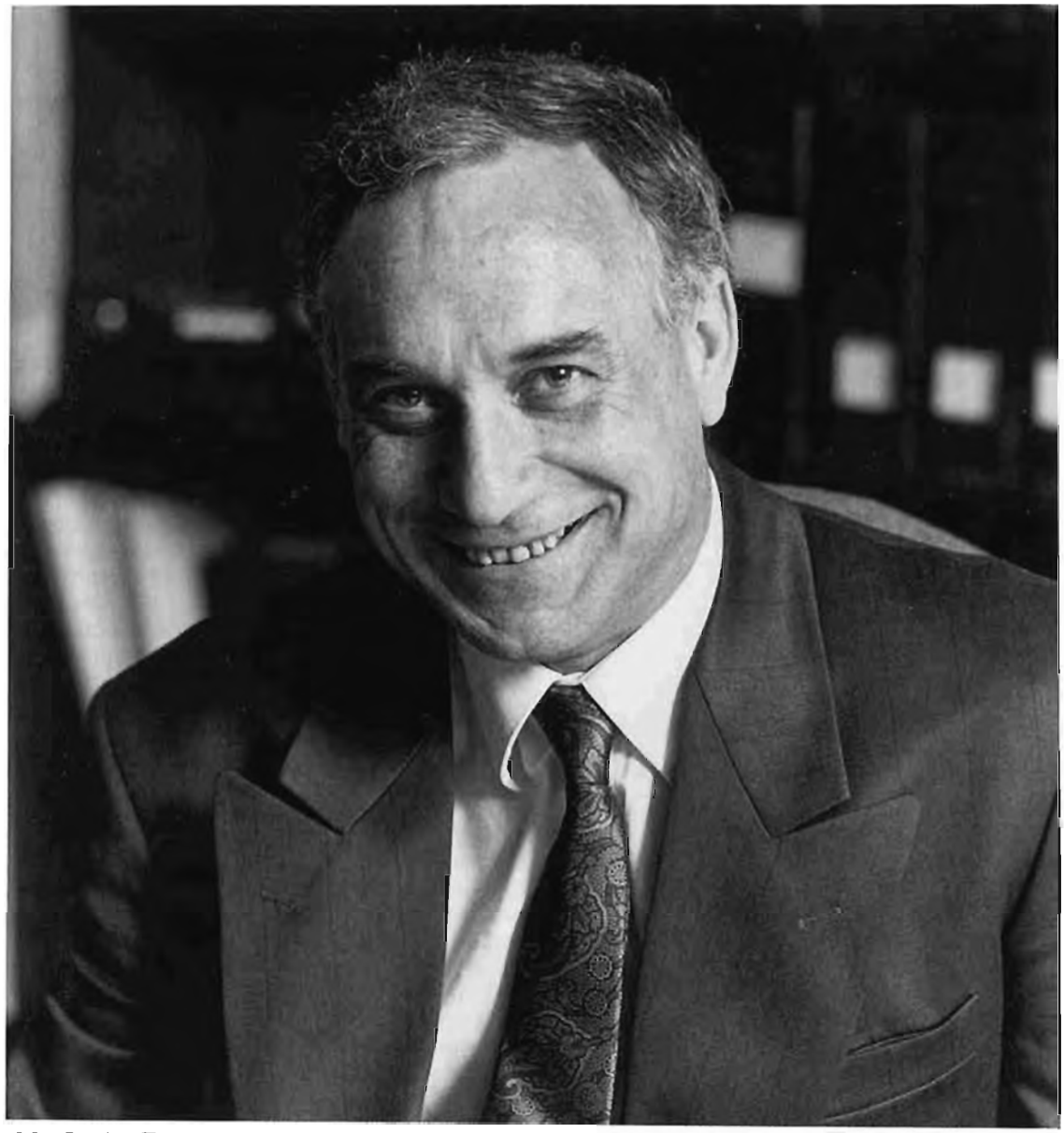
In a time of great social change for most Australians His Honour soon found his niche defending draft resisters, protesting capital punishment and being one of the founding members of the Fitzroy Legal Service.

In 1974 His Honour (and another) answered a call for help from the Aboriginal Legal Service in Alice Springs. A surfeit of riches was resolved quickly — the local Aboriginal football team needed a ruckman — Miles was definitely a rover — Eames responded with appropriate aggression and height and the Pioneers won the flag.

It was in this context, as a players' advocate, that some of his most important work was done. In five years none of those he represented before the tribunal were seen to play football again. One of the more memorable cases was a plea made on behalf of a player who had struck not only the available umpires but also most of the opposition team. The tribunal were much impressed and prefaced their sentence with the remark that they had decided to be lenient before suspending the player for 16 years. The players comment to Eames was eloquently terse. "Christ, if that was one of your good days, I'd hate to have you act for me on a bad day."

Thus began a temporary exile from the bosom of the Melbourne Bar for 16 years. Although it must be pointed out His Honour was always regarded in those different places as a Melbourne barrister and depending on the context, it was usually a complimentary reference.

His Honour was senior solicitor at the Aboriginal Legal Service in Alice Springs before becoming the senior solicitor (indeed the only



Mr. Justice Eames.

solicitor) at the Central Land Council. His potential clientele numbered some thousands — the actual clientele was a little less. His Honour was instrumental in assisting and fostering the aims of those Aboriginal persons who sought land rights at the time. He appeared in many of the notable land claims for both the Central and Northern Land Councils, appearing in some with the late Ted Laurie Q.C.

From Alice Springs His Honour moved to Darwin in 1978. He was employed as the senior solicitor at the Aboriginal Legal Service and then joined the Bar. His practice was infinitely varied as one might expect in a small town with a Bar of five.

His Honour appeared as counsel in the celebrated "fart in the face case" as a result of which a Territory jury gave new and very extended meaning to the cooling period relevant to provocation. His Honour was actively involved in all aspects of Darwin life and with Barker Q.C. formed a lively legal duo both in and out of court.

There was one failure however; boating. His Honour bought a small runabout in order to have a hobby. Subsequent events caused many to

speculate just how he ever got his licence. Notwithstanding His Honour's experience gained in matters nautical during the Blythe Star inquiry it was clear to those near the water at the time of launching that His Honour had no comprehension of what constituted port and starboard — his lack of understanding was clearly complicated by the fact that a local boat repairer wired the steering so that a turn to the right made the boat go left.

Happily His Honour was able to retain contact during these years with the many members of the Melbourne Bar who regularly came to the Territory. With Eames joining Vincent and Coldrey JJ. on the Court a large slice of the Territory's recent legal history will be firmly resident in William Street.

Rather than leave Darwin and return direct to Melbourne His Honour was inveigled into becoming senior counsel and then Director of the South Australian Legal Aid Commission. He served in both positions with distinction and regularly appeared before the superior courts of that State in both civil and criminal appeals and trials.

He introduced the first legal service for prisoners which led to a series of test cases in which he acted as counsel challenging such matters as the visiting justice system. As junior counsel to Elliott Johnson Q.C., he appeared before the High Court in Cleland's case.

In September 1984 His Honour was appointed counsel for all Aboriginals' interests before the Royal Commission into the British nuclear tests in Australia and continued in that position until 1986. His Honour then returned to the Bar in Victoria, but very soon thereafter was appointed counsel assisting the Royal Commission into Aboriginal Deaths in Custody. He remained in that role until March 1991 and was co-ordinator of the legal and research programme involved in the production of the National Report. His Honour worked tirelessly over many years with hundreds of staff from all walks of life all of whom were trying to grapple with an extremely complicated problem.

His Honour was appointed Queen's Counsel in South Australia in October 1989, and in Victoria in 1990. At the time of his appointment to the Bench he was engaged in yet another inquiry concerning the losses suffered by the State Bank of South Australia.

His Honour's passions are roused by unfair treatment of persons in positions of unequal strength. His determination to resist the oppression of the disadvantaged has not, however, always been well advised. It is said (by those present) that His Honour led a team of lawyers and anthropologists involved in the Ayers Rock Land Claim out of the motel in which they were staying, protesting discrimination against Aboriginal persons by the then management. The loyal entourage were assembled outside with their luggage when a member of the outraged party was churlish enough to say to His Honour "Great stuff, brilliant, but where the hell can we stay — the other motel is booked out."

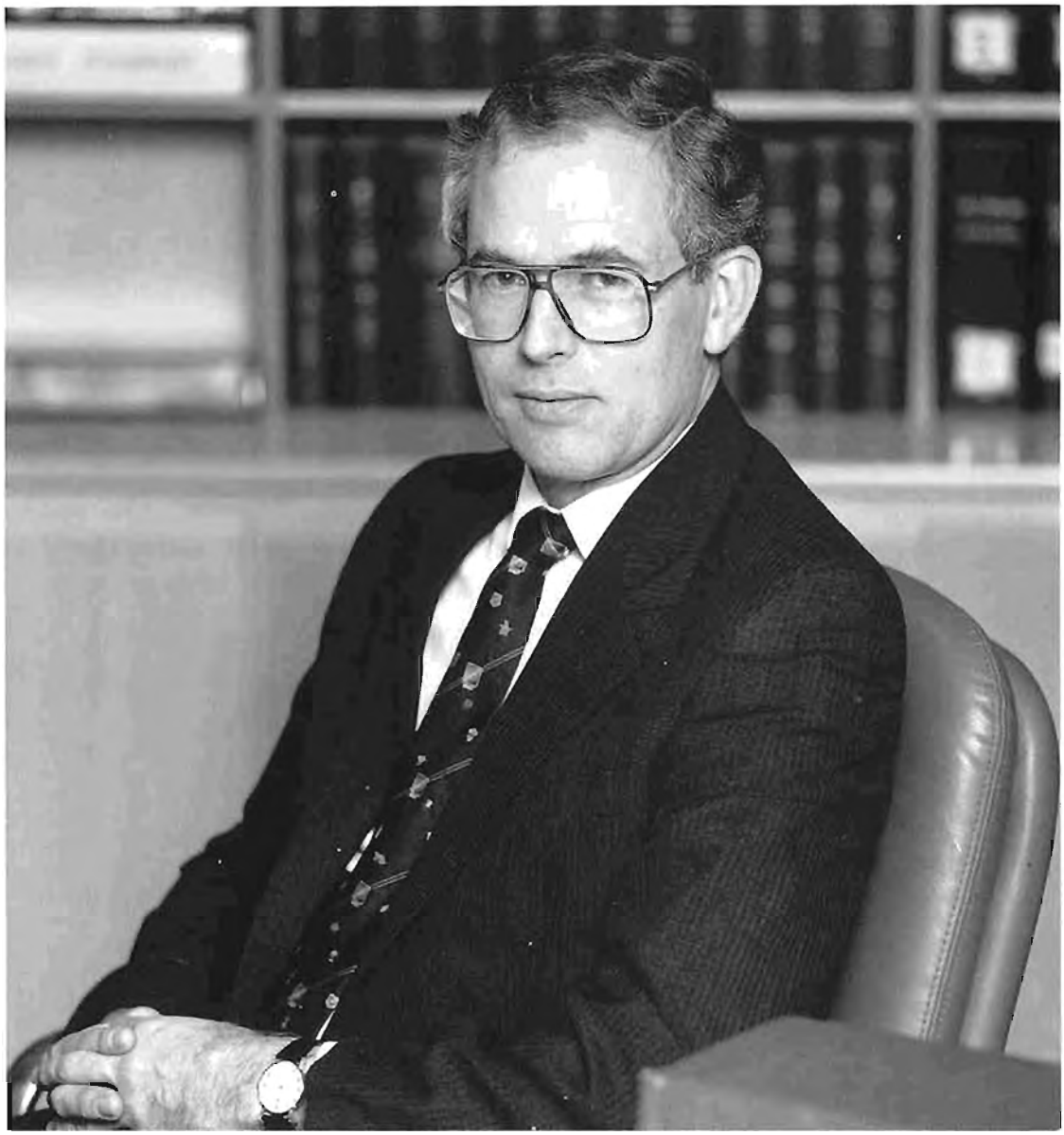
Notwithstanding His Honour's experience gained in matters nautical during the Blythe Star inquiry it was clear to those near the water at the time of launching that His Honour had no comprehension of what constituted port and starboard.

His Honour is a kindly, compassionate man who will grace the Court of which he has become a member for many years. The Bar welcomes his appointment and looks forward to his company at the high table in the coffee room on the 13th floor, where in company with Vincent and Coldrey JJ., many near factual tales will be shared.

Judicial Registrar Ramsden

ON 27 APRIL 1992 THE LEGAL PROfession assembled in the Family Court Melbourne to welcome the appointment of Judicial Registrar Ramsden. With the initials J.R., it was obvious he was pre-ordained to appointment as a Judicial Registrar. John Ramsden was born on 9 June 1944 and educated at Melbourne Grammar School. He graduated from the University of Melbourne in 1968, served articles with Aitken Walker & Strachan and signed the Roll of Counsel in March 1970. He read with John Barnard Q.C. As a barrister he quickly developed a wide practice.

The Judicial Registrar's passion for rugby is well known. He played for Melbourne Grammar



Judicial Registrar Ramsden.

School, the University of Melbourne (playing in its 1964 premiership win) and for Melbourne Rugby Club. He survived those bonejarring crunches as utility back and even a knee reconstruction. However, more importantly he survived the beer-swilling, ballad-rendering, post-match soirees around the seemingly endless 18-gallon keg. It was this latter education that grounded him so ably for post-case festivities on circuit ranging from as far away as Warrnambool and Albury. His colleagues from circuit long remember his taste for Spanish sherry, strong red wine and green chartreuse. In 1978 the Judicial Registrar retired from active sporting competition. Since then he has held various positions in administration including that of Vice-President of the Victorian Rugby Union.

As an advocate J.R. Ramsden's reputation is well known. He took with him to the courtroom a thorough preparation of his case, a quick sense of humour and an enviable command of the language often accompanied by a turn of phrase that others would wish to claim as their own. In the stressful jurisdiction of family law cases, he was renowned for his perception of the goals of the case, was tolerant and unassuming to opposing counsel and always a gentleman. Characteristics such as those and more have earned him a deser-

vedly high reputation. As a barrister the Judicial Registrar's quick wit has been used with purpose and to the advantage of his client's case. Some years ago when cross-examining a mother in a custody case, her consumption of alcohol provided fertile background. It included an allegation that she had poured a pot of beer over the head of the husband at an hotel where she had indulged extensively to say the least. When touching upon the reasons for her curious behaviour, and with appropriate vocal inclination for which the Judicial's Registrar is well known, he cast the question: "Madam, were you concerned that he was about to burst into flames?"

With the elevation to Judicial Registrar, John Ramsden brings to the bench of the Family Court of Australia all those qualities of which he was seized as a member of the Victorian Bar. His reputation is clear and unassailed. As a practitioner he was scrupulously fair. He brought a commonsense approach to the disposition of cases during the important process of negotiation and settlement. In the arena of contest he was direct, fought hard and by style bore the reputation of a formidable opponent. As a senior and an experienced member of the Family Law Bar he will be greatly missed. It is trite but true to say that his loss is a gain to the Family Court. He takes with him to the Bench all the necessary qualities of compassion and understanding that are needed in judicial office.

The Victorian Bar warmly congratulates Judicial Registrar Ramsden upon his appointment and wishes him a long and happy life on the Bench.

FAREWELL TO MURPHY J.

THE HONOURABLE PETER MURPHY RETIRED as an active Justice of the Supreme Court at Easter. The good news is that he will continue, as a Reserve Justice, when called upon.

This tribute is not a complete and measured evaluation of his sustained contribution to the work of the Supreme Court. It is a brief recognition of a distinguished career as barrister and Justice in Victoria.

He was an outstanding counsel practising at common law and in wider fields. As Silk he appeared in all jurisdictions. He was counsel in many public inquiries including the Voyager Royal Commission and the Westgate Bridge Royal Commission. He conducted the Inquiry into the Korman Group of Companies in all States.

But the Supreme Court was the ideal forum for the exposition of his powerful intellect, considerable scholarship and understanding of human behaviour.

He was appointed to the Supreme Court in 1973. To the Bench he brought a splendid array of skills ideal for his role. A sound Jesuit education in the rational process, a veteran RAAF navigator on many bombing raids over Europe in World War II, widely read, and the sportsman's understanding of commitment and the pursuit of excellence (he was the captain of the University Blacks and the All Australian Universities Football Team). He has a lively appreciation of both the pleasures and pain of the real world as well as a love and mastery of the law.

He has been a cornerstone of the Supreme Court, sound in principle and commonsense at all levels, clearly one of the finest judges of the last twenty years. In more recent times, his judgments in the Full Court and Court of Criminal Appeal in a period of change have been scholarly and balanced. He has been an understanding advisor to many a new judge seeking guidance.

His Honour was a source of encouragement and a figure of warmth to all the Bar. A regular attender at lunch at Owen Dixon, he has, as much as any judge, maintained such links with the Bar, senior and junior, that have continued undiminished his attractive human qualities and enabled him to keep in touch with the realities of daily practice. He never missed a Bar Dinner.

A man of the law, but much else besides, his retirement will not be idle as he has a wide range of interests particularly connected with the land, and the flora and fauna of Australia. Many a wily brown trout in Lake Eucumbene has been lured to its doom by a Murphy Woolly Pup or Mrs. Simpson, laid with exquisite but treacherous gentility, on those broad waters.

We all wish Peter, and his wife Mimi, health and happiness in his retirement.

OBITUARIES

His Honour Judge J.G. Gorman Q.C. 4 January 1918–15 May 1992

THE DEATH OCCURRED ON 15 MAY 1992 of His Honour Judge James Galvin Gorman Q.C. He was 74.

Judge Gorman was the son of James Augustine and Mary Gorman of Essendon. His father was an estate agent and Justice of the Peace who sat at the Moonee Ponds Court of Petty Sessions. He was educated by the Christian Brothers at C.B.C. Victoria Parade and St. Kevins. He graduated LL.B. and served his articles with Mr. John J. Carroll, a sole practitioner in the city. On admission to practice he was employed by Messrs. Arthur Robinson and Company, largely on the conveyancing side.

In 1943 Jim Gorman signed the Roll of Counsel and read in the chambers of Mr. Joseph Mulvaney. He began his career in Equity Chambers and retained a life-long affection for those chambers and their inhabitants.

In common with many other young barristers at the time Jim Gorman's practice in his early years included much landlord and tenant, crime and civil debt recovery in Courts of Petty Sessions. The proliferation of motor car litigation in the 1950s saw him take up civil jury work where he soon became a much-sought-after advocate for injured plaintiffs, widows and orphans. He took silk in 1962 and, as leading counsel, appeared in many important cases. He was a member of the Bar Council from 1965 to 1971 and served the Bar in various other capacities with great generosity.

In 1971 Jim Gorman was appointed to the County Court Bench where he served with distinction until his retirement in December 1989. Even after his retirement he retained a judicial position as a Chairman of the Solicitors' Board established under the *Legal Profession Practice Act*; a position which he filled with wisdom and sound judgment until very shortly before his death.

Both as counsel and judge His Honour was a very friendly, likeable man who never said anything unkind or nasty. He saw good in everyone — even those brought before him accused of the most villainous crimes. His cheery disposition was well known to members of the Bar and instructing solicitors: his common greeting of "Hello boys" could be heard addressed to any group of barristers of whatever age — usually on his way back to court from the Celtic Club.

Jim Gorman's death will be a great loss to the Bar. He was a gentle man. He will be sadly missed.

Judge Gorman is survived by his wife Tess (nee Campbell), whom he married in April 1944, and his three children Elizabeth, Sheridan and Peter. Requiescat in pace.

Bernard Bongiorno

Max Bradshaw

FREDERICK MAXWELL BRADSHAW (always known as Max) died after a short illness on 11 May 1992. He had long been the senior junior of the Victorian Bar. He came from a line of Scottish and particularly Northern Irish ancestors. Indeed his great-grandfather fought at Waterloo in 1815. Throughout his life he demonstrated many of the attributes traditionally associated with a Northern Irish Presbyterian. These included a great love of his family and his religion. In particular they included a great determination that what he conceived to be his rights would not be lightly trampled on. He was a direct descendant of Bradshaw C.J. who signed the death warrant of King Charles I.

Max came to the Bar in 1936 after obtaining the degrees of LL.M. and M.A. at the University of Melbourne. He had served articles with Krcrouse Oldham and Darvall.

At the Bar he read with Mr. R. R. Sholl (as he then was) and had as his clerk Muir. When Muir was succeeded by Foley a close relationship came about between Max and Jim and later Kevin Foley which continued until Max's death.

I first met Max in or about 1950 in which year I

was admitted. We soon became firm friends. Thereafter we were closely associated. Until very recent years we frequently had afternoon tea together. Our talk on such occasions was often about history, the law and, even on occasions, how we might thwart the Bar Council in the pursuit of objectives which it, but not we, considered desirable. Although Max had substantial business interests he rarely talked of them.

I was often asked how Max and I came to be such close friends, having regard to the different people we were. Admittedly there were a great number of differences between us. However, these did not matter. The similarities were more important. We shared an ancestry from the border area of Northern Ireland and a great love of legal and other history.

Max was an authority on the history of the legal profession in Victoria and particularly the Bar. He had known many lawyers admitted in the late 19th and early 20th Century. The first solicitor he met was Sir George Turner (1851–1916) who was Premier of Victoria from 1894 to 1899 (after the collapse of the land boom) and first Federal Treasurer who lived next door. Max used to describe him as an elderly gentleman who was devoted to the cultivation of his vegetable garden and was particularly proud of his cabbages. The first barrister he knew was Mr. Owen Dixon, as he then was. The Dixons and the Bradshaws were long-term friends from Hawthorn. They used to both holiday at a guest house at Frankston. Mr. Dixon would work during the week but would travel to Frankston and stay there at weekends. Max used to relate how the future Sir Owen would discuss his cases using crockery, cutlery, silver etc. on the dinner table by way of illustration.

When Selborne Chambers, to which we were both devoted, was left by the Bar in 1961, we obtained a lease of Brougham Chambers on the south side of Little Collins Street (or, as Max persuaded the City Council, Chancery Lane, as it had formerly been known). Notwithstanding the prognostications of various people we both enjoyed extremely good practices at this address. We were fortunate that we had obtained such a lease. When both Brougham Chambers and the former Weigall and Crowther building next door were sold to an English developer our lease had only a few months to run. This was in 1967. One of my fondest memories of Max was when the real estate agent for the developer came to see us. Having pointed out that we were the only two people left in the combined buildings, which were not being serviced and that, in all the circumstances, it would be sensible and prudent for us to vacate on payment of our removal expenses, Max took over. With a flourish of his arm towards the window on to Chancery Lane he said "But, don't you see, I like the view here". When I say that the large window of Max's room was on the Chancery Lane property line and had not been cleaned for perhaps 10–20 years so that pedestrians outside were barely visible except as shadows, the stunned look on the agent's face becomes understandable. At all events after the developer had sent a special envoy to Australia to discuss the matter with us, we secured a highly satisfactory settlement. Before leaving the matter of Selborne Chambers I should say that in 1962 Max wrote "Selborne Chambers Memories".

Max and I went from Brougham Chambers to the third floor of Equity Chambers, then, and for some time later, the suzerainty of Sir Eugene Gorman Q.C. Our rooms, which we have retained to the present day, were substantially opposite each other, and we met frequently. Indeed, according to a shopkeeper when on our frequent expeditions to afternoon tea, we were one of the noteworthy sights of the area.

Max's great interest was in Equity and particularly in Charitable Trusts. He frequently appeared in such cases. He was the author of *The Law of Charitable Trusts in Australia* (1983) and, at the time of his death, was engaged in writing the section on Charitable Trusts for the *Laws of Australia.*

Apart from his family, to which he was devoted, and the law, Max's other great interest was in the Presbyterian Church. When the union of the Presbyterian, Methodist and Congregational Churches took place to form the Uniting Church he led the opposition which resulted in the continuation of the Presbyterian Church as a separate entity. He had been procurator of the Presbyterian Church for many years prior to the union and he continued in such office in relation to the Presbyterian Church which continued after the union.

In regard to such office and attitude he was no stranger to personal litigation in relation to his membership of the Commission set up to divide the assets of the Presbyterian Church between those who united and those who remained and also in relation to the ownership and control of Scotch College and P.L.C. He was successful in the first piece of litigation and the second resulted in a negotiated settlement which continues to govern the affairs of both schools.

After his death, Max was envaulted in his family vault in Boroondara Cemetery. Typical of the man there was no public ceremony associated with this.

We extend our sympathy to Max's widow Jillian and their daughter Rachel.

Russell Barton

THE WAYS AVAILABLE TO THE JUDICIAL ARM OF GOVERNMENT TO PRESERVE JUDICIAL INDEPENDENCE (PART 2)

His Excellency, the Honourable R.E. McGarvie

[The first part of this definitive statement on Judicial Independence was printed in the Autumn issue of the *Bar News*.]

JUDICIAL SYSTEM LEVEL

Given the wide acceptance that the protection of judicial independence today requires that a court control its own premises, facilities, staff and funds, how is it practicable for a court to do so?

The High Court, which administers its own affairs, holds and manages its land, buildings and other property, engages and controls its own staff and administers the funds appropriated to it by Parliament in a one line appropriation.[90] That system, most suitable for a court of the function, size and location of the High Court, would be inappropriate to apply, for example, to each court of a State. That would involve difficulty, duplication and waste.

A project initiated in 1991 by the then Chief Justice of Victoria, Sir John Young, with the support of the Attorney-General, is investigating a feasible way of having the administrative resources required by courts, provided from within the judicial rather than the executive arm of government.

In 1984 the Civil Justice Committee recommended that the courts in Victoria should be run in partnership by the judiciary and executive. That model was adopted and appeared to have real potential. It has now been concluded that it has not worked effectively. There were shortcomings on both sides but I think the basic reason was that the system was organisationally unwieldy and encouraged each side to blame the other for failures in performance. It also left the courts dependent on the executive in their own administration.

The present project, funded by the Victoria Law Foundation, has proceeded under a Steering Group. The Steering Group is chaired by the Chief Justice, with three judges of the Supreme Court, the Chief Judge and two judges of the County Court, the Chief Magistrate and two magistrates, the Secretary to the Attorney-General's Department, the Chairman of the Bar and the President of the Law Institute as members.

There have been tentative decisions that the Victorian Judicial Council should be incorporated by legislation entrenched in the Victorian Constitution. At this early stage the thinking of the Steering Group is that the controlling body of the Council would have a majority of judges or judicial officers.

The Steering Group and its researchers are investigating whether there is a feasible system by which the administrative resources of the courts could be provided on a basis consistent with judicial independence. Without presuming to anticipate its conclusions, it may appear to be feasible for the land, buildings, facilities and staff of each court to be controlled by the Council of Judges (or Magistrates) of each court, but for the land, buildings and facilities to be owned and the staff to be employed by the Victorian Judicial Council.

The Personnel Sub-Group has had discussions with the President and Speaker of the Victorian Parliament about the operation of the parliamentary service under the *Parliamentary Officers Act* 1975. Under that Act members of the public service may transfer to the parliamentary service and, after a period, rejoin the public service without loss of career prospects. Employees of the Victorian Judicial Council might be given similar rights.

The idea of a Judicial Council of this type is not a novel one. In 1978 the inaugural lecture of Professor Ian Scott, Barber Professor of Law in the University of Birmingham and Director of the Institute of Judicial Administration, was entitled *Court Administration: the Case for a Judicial Council.*[91]

There would be general agreement with the statement by Sir John Young in his recent lecture, "Who Should Run the Courts":

"It would be important . . . that the Victorian Judicial Council should recognize and support the complete authority of the Councils of Judges or Magistrates, as the case may be, in their own Courts. The Judicial Council ought not to do anything to interfere with the

way in which the Court Councils conduct the affairs of the Court although the central body would necessarily have to determine the resources available to each Court."[92]

That passage shows that what is being contemplated in Victoria at present is a species of federal arrangement between the Judicial Council and the courts rather than the more unitary model outlined by Professor Scott in his inaugural lecture.[93] Much work and thought need to be devoted to the allocation of power, responsibility and accountability between the Judicial Council and the courts.

One possibility has been raised. This is to have funding requests and the like from the Judicial Council go to the Government after they had been put to and considered by an all-party committee of the Parliament.

Many other items for determination are raised in Sir John's lecture.

One of the great successes of the judicial arm of government in Australia has been the Australian Institute of Judicial Administration Incorporated. The brainchild of Mr. Justice Fox, its initial support and momentum came from this Conference in 1973.

Although I regard something along the lines of the proposed Victorian Judicial Council as the most feasible way of providing administrative cohesion, in a manner consistent with judicial independence, I do not imply that there are no other ways worth considering. There is a great storehouse of useful information, ideas and comment on various methods used in Australia in Church and Sallmann, *Governing Australia's Courts*.[94]

NATIONAL LEVEL

I consider that it is high time that there be in this country an organisation which would do, for the whole Australian judiciary, broadly what the Standing Committee of Attorneys-General does for the governments of Commonwealth, States and Territories: the Law Council does for the legal profession; and the Australian Bar Association does for the Bars.

I suggest there is a need for an organisation with two parts. The first is an Australian courts committee operating as a continuing committee and performing for the courts similar functions to those performed by the Australian Vice-Chancellors' Committee for the universities. The second is an Australian judicial conference with some of the features of the Canadian Judges Conference.

One of the great successes of the judicial arm of government in Australia has been the Australian Institute of Judicial Administration Incorporated. The brainchild of Mr. Justice Fox, its initial support and momentum came from this Conference in 1973. It is essentially a research and educative institute, concentrating on judicial administration and including a strong component directed to the improvement of practical judicial skills.

In keeping with its nature and composition, the AIJA directs its energies to the generation, recording and transmission of knowledge about judicial administration. Apart from the broadest and most widely supported of policies such as the promotion of efficiency, economy, judicial independence and high standards of justice, the Institute does not advance particular policies. Rather, like a university, the Institute is prepared to research and provide information about any feasible way of achieving the broad objectives mentioned above.

There are many organisations of continuing legal education which concentrate on improving knowledge of the principles and rules of law and their practical application. Over the years that has been the area to which the Conferences of the Supreme Court and Federal Court Judges have mainly directed attention.

The committee and conference that I propose would not be concerned with research and education in judicial administration or continuing legal education. They would be involved in the policy concerns of the judicial arm of government.

At all levels the judicial arm of government is inescapably involved with numerous policy issues in the non-adjudicative area. For example all the ways of preserving judicial independence proposed in this paper raise policy issues. All the subjects mentioned below as falling within the purview or operations of the Judicial Conference of the United States or the Canadian Judges Conference raise policy issues. It is as much a policy decision to decide to do nothing as to decide to do something. The decisions of a Council of Judges or of a body such as the proposed Victorian Judicial Council are policy decisions.

If judicial independence is to be preserved, it is vital that all components of the judicial arm of government consider and discuss the best means of preserving it. What is suggested is not an elaborate structure. It follows the lines of what have been considered appropriate in the modern common law world. It would allow members of the judicial arm of government to inform themselves and each other on basic issues. It would give it a voice which it could use privately or publicly or not at all as was desired. Governments through the Standing Committee of Attorneys-General, universities and the organisations of the legal profession have long had such a voice. So have judiciaries in overseas common law countries.

If representatives and members of the various courts met together for the discussion of policy issues impinging on the courts, it would build, in the weakest arm of government, confidence that there are ways of preserving judicial independence and a resolve to pursue them.

It is remarkable that as we approach a century of federation there is no representative body of the whole Australian judiciary capable of being consulted by or bringing influence to bear on the Commonwealth Government. The need for a representative body is illustrated by the experience of the federal sentencing legislation which commenced in July 1990. With a playfulness of spirit which is also evident in many parts of the Act, its progenitors appear to have persuaded the Minister that he could fairly tell the Senate that it was not expected to cause any significant increase in costs.[95] The legislation has not been a success. The difficulty of federal sentencing and appeals has increased dramatically, as has the time taken and the cost.

On reflection, it is realised that, as federal sentencing and appeals are the work of the courts of the States and Territories, there was no representative body of judges with a strong claim to be consulted by the federal authors of the Act. It seems unlikely that there was any such consultation. In no State or Territory would such extensive amendments to sentencing legislation be made without the fullest consultation with the judges of the State or Territory versed in the practical realities of sentencing.

The experience with the recent federal sentencing legislation is a graphic illustration of a real disadvantage. This is, the lack of a body to make representations to the Commonwealth Government, on proposed legislation that will be applied by State and Territorial courts rather than, or as well as, federal courts.

Corporate law is another subject on which the whole judiciary should have a means of putting a view or being consulted by the Commonwealth.

My organisational suggestions are of the most general kind, as my proposal is that this be the subject of investigation.

AUSTRALIAN COURTS COMMITTEE

The Australian Vice-Chancellors' Committee (AVCC) is a company incorporated in the Australian Capital Territory. Its members are the Vice-Chancellors (or equivalents) of the institutions of higher education, large and small, State, Territory, Commonwealth or private which belong to the Unified National System. Its main object is to enable the institutions to take counsel together on matters of mutual concern, to formulate advice to their governing bodies and to take other appropriate action whenever it believes this to be useful. It has a small secretariat. In fact, it acts as the voice of the combined institutions on many issues concerning the Commonwealth or all governments, or having Australia-wide implications.

It is remarkable that as we approach a century of federation there is no representative body of the whole Australian judiciary capable of being consulted by or bringing influence to bear on the Commonwealth Government. The need for a representative body is illustrated by the experience of the federal sentencing legislation which commenced in July 1990.

The Chief Justices' Conference might be capable of modification in its composition and operation so as to perform the functions I propose for an Australian courts committee. Its area and

operation are not well known to those who do not attend it.

I contemplate that members of the courts would have an opportunity of raising within their court, and expressing views on, items to be considered by the committee. The committee should elect its presiding officer, make decisions and recommendations and take action in much the same way as the AVCC does. The Chief Justice or whoever attends should report to the court on proceedings, as Vice-Chancellors do to University Councils. The head of each court, and perhaps another member of the court, would be members of the committee. There should be a permanent secretariat. Its work could perhaps be performed as part of the duties of an administrative officer in one of the courts.

I suggest that the Australian courts committee would operate broadly along the lines of the AVCC and the Judicial Conference of the United States, mentioned below.

AUSTRALIAN JUDICIAL CONFERENCE

In North America there are numerous conferences of judges whether called by that or some other name and whether voluntary or constituted by statute. Because of the differences in the context of the legal institutions within which these conferences exist there is little advantage in seeking to derive features from their models.

My proposal draws some features from the Canadian Judges Conference. This is because its basic structure and objects point to a type of conference which seems to have potential for Australia. Formed in 1979, the Conference is an incorporated association whose membership is open to judges appointed by the federal Government. In Canada the federal Government appoints the judges to all federal courts and to the most important of the provincial courts. The Conference was set up to serve the interests of all federally appointed judges. There are about 850 of them and 90–95% belong to the Canadian Judges Conference. Its finance comes from an annual membership fee currently $75. Its first mandate is:

"to be constantly vigilant and committed to assuring the preservation of a strong and independent judiciary."

It puts forward the point of view of its members and makes recommendations to governments.[96]

I suggest for Australia a similarly constituted and financed conference with similar objects. I make a proposal below for its membership, the kind of subjects it would consider and its relationship with the proposed Australian courts committee.

RELATIONSHIP BETWEEN COMMITTEE AND CONFERENCE

It is suggested that the committee and the conference should be concerned with the same kinds of subjects. It would be open to the conference to do no more than consider and express its opinion on a subject. It would only be the committee which could take action on a subject and, while not bound by an opinion of the conference, it would take it into account. Only the committee could make a representation to a government, parliament or other body, make recommendations to courts or other components of the judicial arm of government, or issue a press release.

Of course the committee would be expected to show good judgment and discretion in deciding whether to take any action. It would bear in mind that it represented a number of individual and independent courts. The AVCC has to act on the basis that it represents a number of individual and independent universities and other institutions.

SUBJECTS

I give an indication of the kind of subjects which I suggest it would be appropriate for the committee and conference to consider. To do so I give some examples of subjects considered and acted on by the Judicial Conference of the United States and of subjects within the objects of the Canadian Judges Conference.

The Judicial Conference of the United States was created by legislation in 1922 and given its present name in 1948. It consists of its presiding officer, the Chief Justice of the United States, the Chief Judge of each federal judicial circuit, the Chief Judge of the Court of International Trade and a district judge from each regional judicial circuit elected for a term of three years by the district judges of the circuit.

"As in 1922, the fundamental purpose of the Judicial Conference today is to make policy with regard to the administration of the United States Courts."[97]

The Chief Justice is required to submit to Congress an annual report of the proceedings of the Conference and its recommendations for legislation.

The Conference also supervises the Director of the Administrative Office of the United States in performance of the duties as the administrator of the courts of the United States.

An idea of the kinds of subjects with which the Conference concerns itself is given by the main decisions of its biannual meeting in March 1991. It decided to recommend to Congress that a national legislative scheme be considered to provide compensation without litigation for asbes-

tos victims, whose cases were reported to be taking excessive time in federal and state courts; approved the extension of a budget decentralization pilot program to all federal courts over a period of three years; as required by legislation, designated the 10 courts to commence pilot programs in civil expense and delay reduction plans during 1991; approved standards for the space required for court accommodation; received the report of its committee on the use of cameras in the courtroom; and agreed to seek amendments to legislation to increase the proportion of government contributions to a system making financial provision for surviving spouses of deceased judges.[98]

I give an indication of the kind of subjects which I suggest it would be appropriate for the committee and conference to consider. To do so I give some examples of subjects considered and acted on by the Judicial Conference of the United States and of subjects within the objects of the Canadian Judges Conference.

During 1991, the Judicial Conference of the United States took the following actions. It sought legislative restoration of federal judges' sole right to administer the oath of allegiance to new citizens, which was lost by legislation in 1990; opposed proposed legislation providing for prosecution in federal instead of state courts where a firearm used for homicide crossed a state border; supported proposed legislation that would require each congressional committee to include a judicial impact statement with each Bill; opposed legislation altering procedures in federal courts; opposed legislation that would require the imposition of restitution for certain offences without regard to the defendant's ability to pay; supported legislation that would provide for the consolidation of mass-accident litigation in a single federal forum; proposed to Congress amendments to legislation to increase the proportion of government contribution to the system making provision for spouses of deceased judges; supported legislation to create 14 new judgeships in bankruptcy; approved guidelines for the allocation of federal funds and the appointment of advisory groups for the new civil expense and delay reduction program; and sought from Congress a budget of $2.5 billion for the federal courts for financial year 1992.[99]

The following subjects fall within the objects of the Canadian Judges Conference: matters relevant to judicial independence; legislation and procedures pertaining to complaints and inquiries concerning the conduct of judges; provision of guidelines and assistance to its members regarding judicial conduct; determination of policy for the continuing education of judges; seeking to achieve a better public understanding of the role of the judiciary in the administration of justice; monitoring and, where appropriate, seeking enhancement of the level of support services made available to the judiciary; recommending to government the level of judicial salaries and the terms of pensions.

MEMBERSHIP

The numbers within the Australian judiciary vary almost daily but recent figures showed a total of 765 judges and magistrates in the main courts. There were 7 High Court justices, 130 Supreme Court judges, 32 Federal Court judges, 53 Family Court judges, 170 District or County Court judges and 373 magistrates.[100]

I suggest that an Australian courts committee and an Australian judicial conference should be widely representative of the judicial arm of government. I make this suggestion looking forward to what these two bodies could do for the judicial arm of government and judicial independence. For some time I have held the view that it is desirable that a consensus evolve which would lead members of the various courts to identify themselves as part of an Australian judiciary and court system.[101] The membership of the Australian judiciary is so relatively small in numbers that, for present purposes, the luxury of subdivision into components would jeopardise the strength, confidence and economy which would be produced by the closer association of all concerned in the judicial arm of government. Australian courts are part of the one system in a way that the courts of the United States are not. Directly or indirectly there are appeals from all to the High Court. There is also the effect of cross-vesting.

The membership mix of the AIJA has been an outstanding success envied by more than one

organisation overseas. The AIJA includes in its membership and on its Council, judges, magistrates, practising, academic and government lawyers, court administrators and others with an interest in judicial administration. Three factors have contributed to a greater readiness for those from different areas to work together. The lingering doubt which some judges of higher courts had that they may lose standing if they mixed with those from lower courts has virtually evaporated. With the changes that have taken place in the magistracy almost all judicial officers now have a similar professional background. The AIJA has organised mixed membership of seminars which have been a great success. It is to be remembered that most Australians receive their justice according to law in cases decided at the lower levels.

I suggest that all the courts whose members are included in the figures given above should be represented on the Australian courts committee. There would be much value in the Australian judicial conference drawing its membership from those courts and also from the other areas from which AIJA membership comes.

Three factors have contributed to a greater readiness for those from different areas to work together. The lingering doubt which some judges of higher courts had that they may lose standing if they mixed with those from lower courts has virtually evaporated.

INITIATING ACTION

In 1973 Mr. Justice Fox presented to this Conference a short paper on the need for an institute of judicial administration in this country. He obtained its approval and support to continue to explore the proposal. A sub-committee consisting of Mr. Justice Fox, Chief Justice Burbury and Mr. Justice Kerr joined in this. In 1974 Mr. Justice Fox presented a longer and more detailed paper to this Conference.[102] Approval was given to proceed to set up an institute. Other judges who were also active in support and in the work which led to its formation included Justices Meares, Mitchell, Campbell, Neasey and Blackburn. Many others contributed work, support and encouragement.[103] The Australian Institute of Judicial Administration Incorporated was incorporated in the Australian Capital Territory in 1976. It commenced active operation in 1982 and has flourished since. Most of the leadership in planning and bringing to fruition the AIJA was that of judges who attended and acted in accordance with the decisions of these Conferences.

The standing of the Institute has been greatly enhanced by the fact that it has had the involvement of the leaders of the judicial arm of government. The Chief Justices of Australia, first Sir Harry Gibbs and now Sir Anthony Mason, have each been the Patron and a strong supporter of the Institute.

I suggest that the part played by this Conference and its members, in bringing into existence, and continuing an involvement with, the AIJA, has been one of the most influential contributions that has been made to the well-being of the Australian judicial system.

I would propose that this Conference set up a committee to investigate and report to the 1993 Conference upon the feasibility of setting up an Australian courts committee and an Australian judicial conference along the lines I have suggested or along other lines or the setting up of another organisational structure to perform functions such as I have mentioned.

The fragility of judicial independence is such that there is a pressing need to start thinking of ourselves as members of the Australian judicial arm of government. We need to provide a means for some corporate thought, expression and action by that arm. It is also important that, as soon as possible, all governments in Australia become aware that there is regular scrutiny of the health of judicial independence and the judicial systems of this country by organisations representative of these systems. It should become known that no longer will legislation which infringes judicial independence fail to receive comment from those most aware of its implications, the Australian judiciary. In my view the extensive time between initiation and commencement in operation of the AIJA is not an available option.

TRANSNATIONAL LEVEL

The support available from standards laid down by international bodies for principles and practices which preserve judicial independence should not be overlooked. Any impression of novelty in the principles and practices for the

preservation of judicial independence, for which this paper seeks means of implementation, will to a large extent be dispelled by reading *The Independence of Judges and Lawyers: A Compilation of International Standards*. It was published in 1990 by the Centre for the Independence of Judges and Lawyers, established by the International Commission of Jurists.

The fragility of judicial independence is such that there is a pressing need to start thinking of ourselves as members of the Australian judicial arm of government. We need to provide a means for some corporate thought, expression and action by that arm. It is also important that, as soon as possible, all governments in Australia become aware that there is regular scrutiny of the health of judicial independence and the judicial systems of this country by organisations representative of these systems.

In my opinion Australian judges and others with an interest in the judicial arm of government should not only have regard for those international standards, but be active in the international organisations which propound and promote them.

JUDGES EXERCISING NON-ADJUDICATIVE FUNCTIONS

ADMINISTRATION

Professor Harold Laski wrote:

"[M]en think differently who live differently ... [R]eligious men always over-estimate the influence of faith upon morals; learned men attach undue importance to the relation of scholarship to wisdom. We are prisoners of our experience; and since the main item of our experience is gained in the effort to make our living, the way in which that living is earned is that which most profoundly shapes our notions of what is desirable."[104]

The way in which a living is earned in the career of a typical judge does not build the approaches and attributes of a good manager and administrator. A barrister's staff experience is usually limited to the supervision, or shared supervision, of a secretary. Barristers work in buildings which house a colony of barristers. They do not share premises with the diverse occupations of the community. The barrister's occupational efforts are directed to the success of various single forensic exercises in which he or she is the central figure. The sole and proper objective is by all proper means to win the client's case within the bounds of known rules, procedures and principles.

From appointment as judges, we are in court accorded great deference and respect and treated as having superior wisdom. That makes for the satisfactory operation of the judicial system.[105] It does not matter that realistically we should be aware that we are humans endeavouring to meet Sir Samuel Griffith's standard: "Sufficient if conspicuously better than average"[106]; so long as we do not believe our own curial theatre. We play a relatively passive part in the litigious process and finally pronounce which case succeeds. In reaching our decisions we take total personal responsibility and rely solely on our own views and reasoning. Our decisions are deemed, subject to any appeal, to be correct in fact and law. On appeal the decision of the higher court is treated as correct. Within a court, the judicial opinions of the most senior and experienced judges are treated as having great weight.

Judges can and do become good managers and administrators, but only if they realise that a quite different set of skills from those of the adjudicative function is needed, and take the trouble to acquire them. Some, from administrative experience on Bar Council positions or otherwise, bring some skills with them. In management and administration, team work is necessary; neither judicial status nor service confer particular or superior skills of themselves; input into a project can not be deferred and exercised as a veto at the end; the irrefutable logic of later events often shows that a decision was wrong and, above all, there must be considerable delegation of the decision-making function and acceptance of delegated decisions.

Sir John Young observed with regard to judges:

A letter from the Managing Editor of CCH Australia Limited

At the Salon of 1865 the artist Edouard Manet wryly asked "Who is this Monet whose name sounds just like mine and who is taking advantage of my notoriety?"

That anecdote sprang to mind when reading the most recent report to our ***Australian Industrial & Intellectual Property*** service where we refer to a case[1] in which it was held that a trade mark including a rare surname may be deceptively similar to another trade mark which includes the same surname but with another first name. The names involved in the case illustrate the point. The existing trade mark *Claude Renoir* was registered in respect of watches; the owners of that trade mark objected successfully to the name *Pierre Renoir* being registered in respect of the same class of goods.

A family name so out of the ordinary and associated with a person of great renown is more likely to be remembered because of that name itself. It's unlikely that the different first names will make a ready enough differentiation. There'd be confusion, it was thought, and therefore the second application was rejected.

When he was asked how he achieved such lifelike flesh tones in his nudes, Pierre Auguste Renoir is reported to have replied "I just keep painting till I feel like pinching. Then I know it's right".

Although one is instructed to "avoid clichés like the plague" it's difficult to express the concept that *the world is shrinking under the impact of technology* without using exactly that now somewhat hackneyed phrase.

One of the consequences of this shrinking globe is that the movement of individuals between countries is accelerating ... and in many cases these aren't your old style economic and political refugees but rather executive transfers from one branch of an organisation to another and the migration of wealthy individuals.

And as the authors[2] aptly put it at the beginning of our new service ***International Tax Planning — Expatriates & Migrants***, "Without a doubt one of the most harrowing and treacherous issues confronting such individuals when they relocate abroad is the tax treatment they will be accorded upon leaving their home country and commencing life under an unfamiliar tax regime."

It's at this problem of relocation across international borders that the service is directed. It achieves it by setting out the general principles of international tax planning for expatriates and migrants, and then provides an alphabetical, country-by-country[3] analysis of the relevant tax laws in a series of countries. The general principles are divided into two parts.

Part A covers the general tax principles relating to the inbound executive and immigrant. Topics include: • commencement of tax residence; • tax treatment of residents and non-residents; and • inbound tax planning.

Part B discusses the principles that apply to outbound executives and emigrants. This includes these topics: • cessation of tax residence and its consequences; and • tax treatment of residents working abroad.

Reference to migrants and expats recalls that snippet from the Goon Show that went:

> Sellers: In South America.
> Secombe: That's abroad, isn't it?
> Sellers: It all depends where you're standing.

"The US is loaded with lawyers" proclaimed a recent article in *International Business Week* which illustrated the point with statistics. Lawyers per 100,000 of the population number 12.1 in Japan,[4] 82 in Germany, 102.7 in the UK, but a massive 307.4 in the US.[5]

The IBW article then contained this interesting snippet:

> "The hallmarks of the US legal system — jury trials, contingency fees, and punitive damages — encourage the 'I'll sue' mentality. Dow Chemical gets hit with some 2,000 new product-liability claims in the US every year, but only about 20 such claims are filed against it in the rest of the world."

But yet another reason for the US being tagged "Sue City" is their product liability legislation ... an area of the law currently being introduced here.

The point of difference, however, is that "our" legislation in contrast to "theirs" is that we have more followed the European model; our law owes more to the European Directive than to the US statute.

This probably means that the explosion of litigation expected here by some will not eventuate, but it doesn't mean that the local law isn't of great concern to all lawyers and their clients.

Indeed businesses have been told to analyse how it will impact on their functioning — as importers or manufacturers or retailers; they've been warned to minimise their exposure. They will obviously be turning to their lawyers ... and so, conscious of the need to keep practitioners, and their clients, alert to the impact of this new legislation, we're (a) publishing a book ***A Practical Guide to Australian Product Liability*** and (b) adding a new division to our ***Australian Trade Practices Reporter*** on products liability law.

An interesting aspect of that book is that it's by Australian lawyer Jocelyn Kellam, who has studied this area of law in Germany. That's important in this context because, for reasons noted above, an understanding of how the equivalent laws have developed in Europe will be helpful in assessing how they'll develop here.

Having said that our laws are more akin to those of Europe than the US, it's a trifle inconsistent to add that we[6] publish a two-volume ***US Product Liability Reports*** with which are available five transfer binders of decisions on product liability law since September 1985.

For those practitioners seriously into this law, our US service would seem to offer a lot of help.

With the US presidency race increasing in tempo, the Clarence Darrow quote for the month should relate to that topic. He said "When I was a boy I was told that anybody could become President; I'm beginning to believe it."

Some developments of this thought have occurred since then. In 1952 Adlai Stevenson said "In America any boy may become President and I suppose it's just one of the risks he takes." But in 1980 we have Gore Vidal expressing the thought that "Any American who is prepared to run for President should automatically, by definition, be disqualified from ever doing so".

1. *Elias (trading as Digimatic Watch Co) v Morris Watch Co Pty Limited* (1992) AIPC ¶90-889.
2. Horwath International — a network of independent accounting firms.
3. On publication, the Manual included these countries: Argentina, Australia, Denmark, Hong Kong, Indonesia, Japan, Malaysia, Mexico, New Zealand, Philippines, Singapore, Switzerland, United Kingdom, United States of America; and others will follow in subsequent reports.
4. This figure is probably misleading in that Japanese *bengoshi* are more akin to our barristers and represent only a very small part of the legal profession.
5. The Australian figure is believed to be 180 per 100,000.
6. Commerce Clearing House Inc, in Chicago, that is.

"Most of them have no experience of administration. Their training is wholly opposed to administration, it is to concentrate on the minutiae of the case in front of them, to take full personal responsibility for it and to get it right. Virtually no responsibility can be delegated. But it is not uncommon for judges to think that they are good administrators and in fact to administer something by attending to the administrative minutiae themselves . . . [I]t must be recognised that administration does generally involve a mass of trivia. The questions always are who is going to deal with the trivia and what power is to be delegated? It may be all very well for the judges to attend to the administrative minutiae themselves if the thing to be administered is small enough . . . If authority is delegated then there will be times when things go wrong or are not done in the way that some members of the governing body might wish and yet the action of a subordinate may have to be condoned and even supported."[107]

Two things follow. It is essential that a court have its staff of skilled court administrators to do the great bulk of the administration and to advise the judges. The judges must be prepared usually to accept and act on the advice. Judges can learn a good deal about administration from working closely with their administrators if they are prepared to learn. In the United States there is a widespread recognition within the judiciary of the need for judicial education in court administration. Many conferences and short training courses on the subject are available to judges as well as non-judicial officers.[108] The AIJA and other educational bodies have been involved in similar developments here.

COMMUNICATION

As Sir Guy Green concluded in his important paper, "The Rationale and Some Aspects of Judicial Independence", the judiciary may communicate with other arms of government, with any person or institution or with the public on any appropriate occasion in any appropriate way.[109]

There is a great paradox in the Australian judicial scene today. While opinion is unanimous that the judicial system must have the confidence of the community and that its real, as distinct from its formal, authority comes from that confidence, practically nothing is done to provide the public with the information from which that confidence would grow.

Russell Wheeler shows that it was recognised in the United States two centuries ago that one of the powerful influences holding a community to its system of government is the fair administration of criminal and civil justice under that system. It has been described as the great cement of society.[110]

These days very few spectators attend court hearings. Compared with the extensive reporting of court cases in the press in the early part of this century, very little is reported in the news media now. One reason is that the public now have much more to interest and entertain them than watching court cases or receiving detailed accounts of them through the media. Another is that, in the more complex society of today, cases are more complex and longer, and there are more of them. The media just cannot afford to have a reporter sit throughout trials to report them. Much of what occurs does not warrant reporting. The courts do practically nothing to assist the media in reporting on the courts' work.

The media frequently publish reports or comments which are critical of a decision, a sentence, an applied principle or a deficiency or failure in operation of a court. It is in the interests of the health of democracy that the media have and exercise the right to do this. . . . The disturbing thing for anyone who considers the attitudinal underpinnings of democracy, is that practically no balancing information is placed before the public to explain the position of the courts, or to show that there is a justification for what has been done, as there usually is.

The media frequently publish reports or comments which are critical of a decision, a sentence, an applied principle or a deficiency or failure in operation of a court. It is in the interests of the health of democracy that the media have and

exercise the right to do this. It is true that as human beings we have an interest in learning from the media that which shocks us and that the media is well aware of that. It is also true that there are some media presenters who have made an art form of presenting the courts as villains of the community.

All these things occur in a free society and it is pointless wishing that they did not. The disturbing thing for anyone who considers the attitudinal underpinnings of democracy, is that practically no balancing information is placed before the public to explain the position of the courts, or to show that there is a justification for what has been done, as there usually is. Members of the public, saturated with uncontradicted news that creates the impression that the courts are incessantly operating unfairly, unwisely and inefficiently, are absorbing a view that can only diminish their confidence in the judiciary.

There is reason for thinking that community confidence in, and concern for the position of, the judicial system is at a low ebb.[111] I think the primary causes are restricted access through cost, inefficiencies in operation and the "bad press" the system commonly receives from the media.

There is reason for thinking that community confidence in, and concern for the position of, the judicial system is at a low ebb. I think the primary causes are restricted access through cost, inefficiencies in operation and the "bad press" the system commonly receives from the media.

It is no use blaming the media. We are all part of human society. It is also no use persuading ourselves that if the balancing information was supplied the media would not use it. It is my experience that those most cynical about the media are those who have had least contact with it. In capacities other than as a judge I have had quite a bit to do with the media. I have concluded that if one places reliable information of public interest before reporters of the mainstream media, in a way which facilitates its prompt publication, there is a good prospect that, in essence, it will be published.

Again, in accordance with the needs of a parliamentary democracy, the media publish reports and comment critical of the executive government. That experienced arm of government does not regard it as a waste of time to supply the media with information favourable to its position. The *Sunday Observer* of 20 September 1987 reported a statement by the Premier of Victoria that the Government's Media Unit had 14 press secretaries.[112] That did not include the unit's back-up staff. Nor, of course, did it include the press secretaries and media officers working for public service departments or statutory authorities.

It is easy to count the press secretaries explaining the position of the judicial arm of government of the State of Victoria. There are none. I think the score would be almost the same if one looked at the judicial arm of government for the whole of Australia. The Family Court of Australia has a Media Liaison Officer but I do not know of any other.

A Steering Committee, which I chaired as the holder of the Staff portfolio on the Executive Committee of the Supreme Court of Victoria, recommended in 1986 that an experienced journalist be appointed as the Media Liaison Officer of the Court. It was contemplated that the officer work under the close supervision of the Chief Executive Officer. Duties would include drawing journalists' attention to important or significant cases; explaining to them the significance of issues in particular cases; explaining the context and the reasons given for the decision; releasing press statements and news items in respect of the Court; and correcting inaccurate reports. Another responsibility would be keeping the media informed as to who was being, or about to be, tried, so as to minimise the risk of media references leading to the abortion of criminal trials. The officer would make information regarding the Court available to secondary students, their teachers and the writers of their texts.[113]

The Victorian Sentencing Committee, headed by Sir John Starke, in its Report in 1988 drew attention to the fact that people believe crime rates to be higher and sentences to be lower than they are. It pointed out that the sentences reported are mostly those perceived to be sufficiently lenient to make them newsworthy. It commented that the public is left with nothing but the impression that cases where courts go wrong represent the norm of the sentencing process. It was recognised that the media give an

immediate presentation of information and often there is no opportunity to research a case before publication. It observed that the media obtain stories by press releases, by being told about the immediate happening or by a reporter being present. Usually a sentence is reported only if a reporter is present.

The Committee agreed with overseas research results showing that some 95% of people get their information on sentencing from the media. It took the view that, in order to give effect to aims of sentencing such as deterrence, and to ensure public confidence in what is going on, it was vital that accurate information about sentencing reach the public. It recommended that there be a Media Liaison Officer for the Victorian courts to prepare releases for the media each day in consultation with the sentencing judge or magistrate. These should direct attention to relevant features of those sentences given that day which should be reported in the public interest.[114]

There is every reason to ensure that members of the community get a reasonably representative impression of what the courts do, and how and why they do it. This requires concentration on the main modern sources of information: education and the media.[115] To enable the media to do this one must remember their commodity is news. The passage of time depletes the value of news by almost a geometrical regression. The court system should make information about its main work, decisions, available in a concise and easily comprehensible way, suitable for prompt reporting.[116]

PERSUASION OF THE OTHER ARMS OF GOVERNMENT

The well-being of the judicial arm of government does not only depend on its component organisations being able to make prompt and well-informed decisions. It depends also on an ability to implement them.

"Much that it needs can be attained only by persuading other arms of government. Its only objective can be the achievement of the efficient, effective and impartial administration of justice according to law. It must limit itself to methods proper for judges to use. Yet in this limited way in this circumscribed area it must be an active, initiating arm effectively exerting its influence."[117]

"It is clear that if the leaders of a branch of government do not take effective steps to ensure that their branch has the necessary organisation and secures in public competition the necessary resources for its preservation and improvement, it will wither.

"As the leaders of a branch of government, judges owe it to their branch and their community to make themselves familiar with those aspects of public affairs which impinge upon the courts. While judges must sedulously avoid any involvement in party politics, they need to be able and willing to take realistic steps to preserve and improve the judicial branch. They must be capable of using with strength the civilised levers of persuasion and influence which are available to them. For judges to say that they cannot cope with the public issues which bear upon courts is like sea captains saying they cannot cope with the sea. The quality of the common law and the standing and functions of the judiciary owe much to the leadership given in a civilised judicial way by Chief Justice Sir Edward Coke and his judges in seventeenth century England and by Chief Justice John Marshall and his judges in early nineteenth century America."[118]

It is beyond argument that judges must meticulously avoid any approach which allies them, or appears to involve them, with one political party or grouping. It has been reported that by failing to observe that principle the Italian judiciary sustained a diminution in public confidence.[119]

An inchoate feeling has long permeated judicial culture that some other authority, be it Attorney-General or Parliament or some other entity, should act as a champion and promote the judicial interest with the other arms of government.

The judicial arm of government will regularly have to persuade the executive and legislature to provide needed resources. On occasions, its persuasion will be directed to the provision of legislation to improve the judicial system, or for the abandonment or amendment of proposed legislation which would damage it.[120] How then, in practice, does the judicial arm influence the other two? The questions are: What are the civilised levers of persuasion and influence available to it? When are they to be used and how?

The essence of this paper is that those within the judicial arm of government have a responsibility, not to their own interest, but to the interest of their democracy, to take the steps necessary to preserve judicial independence. It has been put that one step towards that end is to have the courts operate with efficiency and fairness. In seeking to persuade the other arms of

government in these areas, judges should be aware that they are moved by a much deeper interest than their own.

It is my opinion that, until recently, an unfortunate characteristic of the judicial arm of government this century has been its lack of appreciation of what judicial independence requires to give it strength today, an inability to make corporate decisions and a lack of assertiveness. There has been a surfeit of complacency and a shortage of confidence.

From the aspect of the judges' personal interest in the short term, the easiest thing is for them to do nothing to preserve judicial independence, except continue as they are. It is from the long-term view of the interest of the community that judges are motivated to give leadership in taking the difficult steps now necessary to preserve judicial independence.

In deciding how to persuade the other arms of government, it is first necessary to comprehend the realities of public life in the modern community. An inchoate feeling has long permeated judicial culture that some other authority, be it Attorney-General or Parliament or some other entity, should act as a champion and promote the judicial interest with the other arms of government. There has also been an underlying conviction that things should change and revert to the conditions of earlier generations, where the situation of the judiciary is seen as having been better. Undoubtedly the ill-fated king of France, mentioned above, hoped that someone would come to move his chair or that the fire would die down. Those who have been observant in recent decades have noticed that no such champions have emerged, and no tendencies to revert to happier days have been evident. There is no reason to think that either of those things is likely to occur to make the future judicial path easier. Attention needs to be directed away from the distraction of what is thought should happen, to the reality of what does and will happen. Wishful thinking is not an option for the preservation of judicial independence.

There are different grades of action which may be taken by the judicial arm of government and its components to persuade the other arms.

Experience shows that much can be achieved by the head of a court, or of another component of the judicial arm, putting to the Attorney-General, Minister for Justice or Departmental Head, a well prepared and persuasive case for what is wanted. As mentioned earlier, those who constitute the executive branch usually support judicial independence as a general principle. The case will often be supported by private communications from the organisations of the legal profession.

If the issue is one of importance and private communications have not secured the agreement of those influential in the other arms, what is the judicial arm to do?

To identify the available levers we must be aware of the mechanics of our democratic society. University administrators have found it necessary to become aware of those mechanics. There are, today, many similarities between the positions of courts and universities, and many of the challenges and many of the solutions apply to both.[121]

Professor David Penington, Vice-Chancellor of the University of Melbourne, told an interviewer that former federal Minister, Dr. Moss Cass gave him what he described as:

> "'the best advice I was ever given on public issues.'
> "'You people just don't understand politics', Dr. Cass told Professor Penington at a 1983 meeting of the National Health and Medical Research Council. 'If you want to influence a minister you do not argue with him about the logic of the case. What you have got to do is mobilise public opinion. Ministers seldom lead. They go where they think the public want them to go, and if you think the minister's got it wrong, go out and sell it to the public and the minister will change.'"[122]

Some readers may shudder on seeing the reference, in the quotation, to understanding politics. However, ministers are politicians and governments political units. If universities or courts are to influence them, they must understand what moves them. To know that, judges must look beyond the law reports. It may be that the failure to use the machinery provided by the *Judicature Acts* to advance the legitimate interests of courts and judicial independence is a consequence of the fact that, this century, few who had served in parliament have later served on the bench.

I consider that there are instances where, in a modern parliamentary democracy, it is appropriate for the judiciary, acting corporately, to take deliberate action to influence the other arms of government by mobilising public opinion.

Whether that is ever appropriate has been raised with regard to the actions of the Lord President of Malaysia, Tun Salleh Abas, who was removed from office in 1988. His actions have been criticised by Mr. P.A. Williams Q.C. in the book *Judicial Misconduct*.[123]

The Prime Minister of Malaysia had made statements, inside and outside Parliament, critical of the judges and some of their decisions. The Lord President, who headed the Malaysian judiciary, responded to that. His first responses were made when he received an Honorary Doctorate at the University of Malaya, and when he launched a book dealing with the judiciary. Then a meeting of all the Supreme Court and High Court judges in Kuala Lumpur decided a letter,

expressing their concern, should be sent to the "King" of Malaysia. A letter drafted with the assistance of a committee of judges was sent by the Lord President to the King with a copy to all the judges. The Lord President was suspended. He then made a statement at a press conference and gave an interview to the British Broadcasting Commission. Based primarily on these responses the Lord President was removed. Two other judges of the Supreme Court were also removed for related actions.[124]

The view advanced in *Judicial Misconduct* is that:

"It is axiomatic for Judges not to be involved in public controversies. If Judges want to involve themselves in public controversies and political debate, they are, as citizens of the country, quite entitled to do so but they must first remove themselves from being Judicial Officers by resigning their judgeship."[125]

The author unequivocally advances the view that what the Lord President did was an impermissible involvement in public controversies and political debate. In his view, this amounted to misbehaviour as a judge and amply justified his removal.

I entirely agree with the view of Chief Justice King of South Australia, that the three senior members of the Malaysian judiciary:

"were dismissed for doing no more than what most Australian judges would consider to be their plain duty."[126]

The suggestion that the head of the judiciary could not respond to attacks by the Prime Minister on the judiciary without first resigning, seems to me to be a doctrine of ineffective despair. The resultant judicial impotence would place the rule of law in the gravest peril.

A number of ways of taking action to mobilise public opinion are open to the judiciary.

A court which makes an annual report, which is tabled in Parliament, has an invaluable means of placing its position and its needs before the public. Since about 1984, the Supreme Court of Victoria has referred to its important unmet needs, and explained why they are needed, in its annual reports to the Governor which are tabled in Parliament.

The Victorian Attorney-General has encouraged such reporting. He has said:

"I consider that it is essential that the judges have the capacity to report independently and at least yearly to the Parliament and the public as to the state of the courts in terms of delays in the courts, new measures taken in the courts and the need for further development."

He considered that such a reporting mechanism is necessary to enable the judiciary to report publicly, to keep the Parliament and public informed, and to ensure that the administration of justice receives a place on the political agenda of the community in accordance with its importance. He added:

"Therefore, the mechanism of an annual report to Parliament with a reasonably detailed exposition of the state of the courts requiring Ministerial reply and probably provoking some parliamentary and press questions is the best method to ensure that proper attention is given by the Government of the day and the Parliament to this fundamental question."[127]

Any court which lacks the statutory machinery enjoyed by the Victorian courts, of making an annual report which is in fact tabled in Parliament, would be wise to seek it. I would expect a body such as the proposed Victorian Judicial Council to have such a facility.

While an annual report is most valuable for bringing continuing needs or situations to the attention of Parliament and the community, often issues will arise at other times.

If the leaders of the legal profession are made aware of the position of the judiciary, they may make public comment in support.[128] A heartening aspect of the removal of the Malaysian judges was the strong and resolute support given to judicial independence by the legal profession of Malaysia. In recent years, the Australian Bar Association and other organisations of the legal profession have spoken strongly in support of judicial independence.

A course such as that taken by the Lord President of Malaysia might be followed. He spoke out when receiving an Honorary Doctorate and when launching a book dealing with the judiciary.

The most serious course which the judiciary might take involves the issue of a press release. Generally, it would be justified only when the issue is very important and less dramatic courses had been tried without success. Moreover it would only be used where there was good reason to be confident that the public would support the position taken by the judiciary.

I think it undesirable that the statement be disseminated by the Chief Justice sitting in court. That tends to blur the distinction between the exercise of the adjudicative and the non-adjudicative functions.

The direct statement to the media should be used with great reserve and discretion because it reveals an underlying conflict between judiciary and (usually) executive. The revelation of that could be regarded by the public as indicating a want of impartiality when cases involving the executive came before court.

In my opinion, all action to arouse public opinion, so as to influence the other arms of government, should be done in a representative capacity — by the Chief Justice, Council of

Judges or Judicial Council. Its importance justifies that. Also, nothing that I put is intended to detract from the received wisdom that it is undesirable for an individual judge to seek publicity or express views in the media or to make a public response to personal criticism.

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COURT REVITALISATION

I return to what I have described as the concomitant of judicial independence: the requirement that the judicial function should usually be performed by the judiciary. I consider there are three ways in which those in the judicial branch can reduce the number of cases heard by tribunals whose members lack judicial independence.

First, steps mentioned above can be taken to promote an understanding at the various educational levels, and in the community through the media, of the risks to impartiality if cases are heard by those without judicial independence.

Secondly, there are the measures which are being taken by those involved with the judicial arm, which lead to efficiency, economy and effectiveness in hearing cases. I refer to that as "court revitalisation".[129]

Thirdly, there is the essential need to reduce the cost of representation before courts. That must be regarded as an integral part of court revitalisation. The problem was dramatically brought home by Mr. Justice De Jersey when he commented to those at the AIJA Annual Seminar in 1990, that there was not a judge present who could afford to be represented before his or her own court.

The community, on whose confidence judicial independence so depends, is impressed by applied justice not theoretical justice. A perfect system of justice is of limited advantage if many members of the community cannot use it. In my opinion the judges can not stand aloof from the requirement that people be able to obtain justice from an independent judiciary at a cost within their means. I do not pretend to know the answers, but I do know that the health of democracy requires that they must be found. I suggest that any investigation of it:

"would need to consider the idea conveyed by the title of the recent paper by Justice Gordon Samuels 'The Vehicles of Justice: Rolls Royce or Kingswood?'[130] Have the lawyers, unlike the engineers, forgotten (or never learnt) that if one aims for a standard too close to perfection the price is unjustifiably high? Perhaps quite dramatic steps should be taken to shorten and simplify proceedings with full consciousness of the diminution in the standard of justice that would involve. Should at least some aspects of the adversary system be eliminated? Should judges take more control of litigation? Should some practices, including charging practices, of the legal profession be altered? Should greater responsibility be given to special referees, arbitrators, conciliators and mediators? Should there be changes to legal aid and to the means of litigants privately financing their litigation? Should para-legals replace lawyers in some of their functions?"[131]

If the court systems are revitalised, litigants would prefer their cases to be heard there. There would be less incentive for legislation to provide for legal disputes to be determined by tribunal members who do not have judicial independence.

ACCOUNTABILITY

It is a good organisational principle that responsibility, power and accountability reside in the same place. I have put it that the judges have the inescapable responsibility to give leadership in the preservation of judicial independence. I have also put it, as fundamental to contemporary judicial independence, that judges exercise responsibility for the well-being of their court and for controlling its operation and administration. They must have an effective internal system of government and administration which enables them to do so. The exercise of that responsibility must carry with it the power to enable it to be exercised. In a good democracy, power is never exercised without accountability for it. If judges perform these non-adjudicative functions poorly, if they make mistakes or if their court

system does not work well, they will be liable to public criticism. That is how it ought to be.

Any conventionally adopted image of judges being (subject to appeal) all-wise and infallible has no place beyond their adjudicative functions — their conduct and determination of court cases. As part of the price for the power to exercise the non-adjudicative responsibilities, judges have to accept that in their exercise they will be seen as sharing the fallibilities of other administrators and will be subject to similar criticisms for default or error. While that has to be faced, it is in my view a price well worth paying. There will be a staff of dedicated court administrators to rely on. Many American judges have done this well and gained rather than lost standing through doing it.

There is another area of accountability which needs attention. The often simplistic push for increased accountability of judges in respect of adjudicative functions, which has proliferated in the United States, reached Australia in 1986. The way in which serious judicial misbehaviour, capable of warranting a judge's removal, should be dealt with, is clear enough.[132] Occasionally, however, instances occur when there is undesirable conduct by a judge which would not warrant removal but which is serious enough to diminish significantly the public respect for the judge and the judge's court. Instances, of the relatively minor gravity which I have mentioned, should be prevented from re-occurring if possible. The judges of a court should look ahead and adopt recognised procedures for dealing, within the court, with complaints or information which they may receive regarding undesirable conduct, so as to minimise the likelihood of its recurrence. The way to convey such complaints or information to the court should be made known to the legal profession. Its members are most likely to become aware of the conduct one way or another. If courts do not themselves grasp the nettle and institute agreed procedures for dealing with this problem there will be pressures on governments to introduce legislation to deal with such instances. There is a high risk that it would operate in a manner inimical to judicial independence.[133]

JUDICIAL WORKLOAD

During 1991 the fortnightly standard hours appeared on the pay slips of all those within the Supreme Court of Victoria. The stated standard hours for the judges, 76 hours a fortnight, produced gales of laughter, some mirthful, some cynical. Typically, a judge's fortnightly hours of work would be in the region of 50% above that. It produced the reflection that if judges started working a 40-hour week the Court could not get through anything like the work it now does.

There is little to be said in favour of such a workload. It is not in the interests of a fresh and widely-informed judicial mind, of work satisfaction, family life or recruitment to the bench. It has come about because we have tended to answer the problems of the court system by adoption of the personal motto "I will work harder!". George Orwell has told us that that was precisely the solution adopted by Boxer, the cart-horse, for the problems of Animal Farm. Judges who in the criminal jurisdiction are alert to avoid imposing a crushing sentence constantly impose one on themselves.

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The heavy workload has, no doubt, contributed to judges in the past keeping their heads down hearing and deciding cases and not finding the time to raise their eyes and look around them at the developing conditions threatening judicial independence. The time was not found to identify the problems and consider solutions. Nor was the time found to consider the problem of work overload. When I was admitted to practice in 1951 the judges of this Court worked under nothing like the pressure that now obtains. The change in workload has not been due to any corporate decision made. It is the result of the responses of individual judges to the current workload which has greatly increased in quantity and difficulty.

The theme of this paper is that the judges have an unsought, but fundamental, obligation to their democracy to take the necessary steps to give leadership in the preservation of judicial

independence. Only they can take them. That involves exercising responsibility for the well-being, administration and operation of their court, judicial system and arm of government. To do that they must free themselves from inhibition and explain and insist that they need the appropriate resources to enable them to do so. It is beyond argument that additional resources must be involved. They must free themselves also from that deeply embedded fiction of judicial culture that the only work worthy of a judge is sitting in court with a wig on during the court day and writing judgments afterwards. Time properly spent in thinking, planning and implementation for the benefit of the court system is just as worthy.[134]

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[90] See references in n.72.
[91] *Op. cit.*, n.29.
[92] (1991) 79 Vic. B.N. 36 at 40.
[93] *Op. cit.*, n.29, 17–19.
[94] *Op. cit.*, n.12.
[95] Federal Offenders: Sentencing Legislation and Materials (Attorney-General's Department, Canberra, 1990), Annex C, 11.
[96] The information in this paper regarding the Canadian Judges Conference comes from a letter of 8 October 1991 from its President, Mr. Justice G.E. Noble, Court of Queen's Bench, Saskatchewan, to Ms Tabitha Ponnambalam who did research for the paper.
[97] *Judicial Conference of the United States* (Washington, 1988) 3. This booklet is issued by the Conference. I mention that Mr. Peter Ford suggested that, based on the North American example, a council or regular conference be established in Australia. His proposal was limited to federal judges. *Judges as Managers: Some Recent Developments in Judicial Administration in the U.S.A. and Canada*, Report on SES Fellowship August-November 1989 (Attorney-General's Department, Canberra), 4 and 22.
[98] *The Third Branch*, Newsletter of the Federal Courts, Vol. 23, No. 4, April 1991, 1 and 12.
[99] This information is taken from various parts of *The Third Branch*, Vol. 23, 1991.
[100] The figures were kindly supplied by the AIJA.
[101] Australian Judicial System Advisory Committee, *Report to the Constitutional Commission*, (Canberra Publishing and Printing Co., 1987), 40–42.
[102] "An Institute of Judicial Administration" published in Mr. Justice Blackburn (ed.), *Judicial Essays* (Law Foundation of N.S.W. and Victoria Law Foundation, 1975), 75.
[103] The information on the origin of the AIJA comes from Notes which Mr. Justice Fox provided at my request on 21 August 1984.
[104] *An Introduction to Politics* (Allen and Unwin, London), 22.
[105] This may be regarded as a species of what Plato treated as a needful falsehood: *The Penguin Book of Lies*, Philip Kerr (ed.) (Penguin, London, 1991), 19.
[106] Roger B. Joyce, *Samuel Walker Griffith* (Univ. of Qld. Press, 1984), 227.
[107] *Op. cit.*, n.92, 39–40.
[108] Peter Ford, *op. cit.*, n.97, 62.
[109] *Op. cit.*, n.14, 142–3.
[110] *Op. cit.*, n.44, 1–2.
[111] Chief Justice King, *op. cit.*, n.34.
[112] Tony Wells, "Prue stalks waste with a vengeance".
[113] *Report of Steering Committee Recommending the Restructure of the Administrative Staff of the Supreme Court of Victoria*, 6 November 1986, 70–73.
[114] *Sentencing*, Victorian Sentencing Committee Report 1988 (Vic. Attorney-General's Department, Melbourne, 1988), Vol. 2, 609–617.
[115] R.E. McGarvie, "Legal Education: Pulling Its Weight in the Nineteen Nineties and Beyond", *op. cit.*, n.41; Sir Francis Burt, former Chief Justice of Western Australia, The Executive and the Judiciary; a paper presented to the Supreme Court and Federal Court Judges' Conference, Perth, 1989, unpublished.
[116] "Principles Governing Relations Between the Judiciary and the News Media — Canadian Judicial Council, 1990", *Canadian Judicial Centre Bulletin*, Vol. 3, No. 2, 1990, 1; "Our courts obfuscated by the unsaid and esoteric", Rod Campbell, *The Canberra Times*, 24 October 1991, 9; Elliot E. Slotnick, "Media coverage of Supreme Court decision making: problems and prospects", *Judicature*, Vol. 75, 1991, 128.
[117] R.E. McGarvie, *op. cit.*, n.14, 22.
[118] R.E. McGarvie, *op. cit.*, n.15, 82–83.
[119] Mary L. Volcansek, "The judicial role in Italy: independence, impartiality and legitimacy", *Judicature*, Vol. 73, 1990, 322.
[120] Sir Guy Green, *op. cit.*, n.14, 142.
[121] R.E. McGarvie, "The Courts and the Universities", *The Australian Universities' Review*, Vol. 33, Nos. 1 and 2, 1990, 51.
[122] Geoffrey Barker, "For the love of learning", *The Age*, 9 October 1991, 9.
[123] (Penanduk Publications, Malaysia, 1990).
[124] See the references in n.24.
[125] *Op. cit.*, 16.
[126] *Op. cit.*, n.34, 12.
[127] The Hon. Jim Kennan Q.C., "Opening Address", 9 at 11, in Moloney and Fraser (eds.), *op. cit.*, n.17.
[128] Compare: Sir Daryl Dawson, "Judges and the Media" (1987) 10 U.N.S.W.L.J. 17 at 27–28; R.E. McGarvie, *op. cit.*, n.14, 34–35.
[129] R.E. McGarvie, *op. cit.*, n.22, 39.
[130] The Julius and Reca Stone Oration, 2 December 1990.
[131] R.E. McGarvie, "The Function of a Degree: Core Subjects", *op. cit.*, n.41. See also Chief Justice King, *op. cit.*, n.34; Peter Ford, *op. cit.*, n.97, 7–8 and 85–103; Civil Justice Committee, *Preliminary Study*, *op. cit.*, n.22, 288; Mr. Justice Gordon J. Samuels, "The Economics of Justice" (1991) 1 J.J.A. 114.
[132] Australian Judicial System Advisory Committee, *op. cit.*, n.101, 76–85 and 91–92; Constitutional Commission, *Final Report* (1988), Vol. 1, 402–413; R.E. McGarvie, "The Operation of the New Proposals in Australia" in *The Accountability of the Australian Judiciary: Procedures for Dealing with Complaints Concerning Judicial Officers*, (AIJA, Melbourne, 1989), 18–22; R.E. McGarvie, *op. cit.*, n.14, 11–15.
[133] Australian Judicial System Advisory Committee, *op. cit.*, n.101, 85–91; R.E. McGarvie, "The Operation of the New Proposals in Australia", *op. cit.*, n.132, 22–38; Mr. Justice M.H. McLelland, "Disciplining Australian Judges" (1990) 64 A.L.J. 388.
[134] In this paper when I desired to say the same thing as I said in the text of the parts of the paper, "Securing the Independence of the Judiciary in Modern Democracy", *op. cit.*, n.12, which have not been published, I have on occasions used that text. I express my appreciation to Ms Tabitha Ponnambalam, Research Officer, Supreme Court Library of Victoria, for research done for this paper.

THE IRVINE MEMORANDUM

IN THE SUMMER ISSUE OF THE *BAR News* there was a stinging attack by an unidentified Supreme Court judge upon the practice of serving or even retired judges conducting Royal Commissions.[1] It was prompted by the report of William Carter Q.C.[2] into the attempted bribery of a Tasmanian M.P. and, in particular, the comments made in that report about the involvement of former premier Robin Gray. By coincidence in the same issue amongst the biographical sketches of Victoria's Chief Justices there was a reference to Sir William Irvine being "perhaps best remembered" for his famous 1923 memorandum which deals with the same subject.

The last serving member of the Supreme Court of Victoria to preside over a Royal Commission was Mr. Justice Barber. He was appointed in October 1970 to chair the Commission into the collapse of the West Gate Bridge. From Sir Redmond Barry's Royal Commission on the Fine Arts in 1863 until 1970 our Supreme Court judges have only been involved in a total of some 13 Royal Commissions.[3] The received wisdom of both our Bench and Bar is that such appointments are undesirable and should not be accepted. It is not a view which I share; at least not without considerable qualification.

The subject has attracted a considerable body of literature. The Victorian view is by no means the generally accepted one. For example in the United Kingdom a survey published in 1975 showed that High Court judges had chaired 118 out of the previous 358 Royal Commissions.[4] In New South Wales it has been common for Supreme Court Justices to act as Royal Commissioners. The purpose of this brief paper is not to chart the literature; to deal with the circumstances of particular Commissions or Inquiries; or, to examine the experience in other jurisdictions. That has been admirably done by Sir Murray McInerney Q.C. and others.[5] It is proposed instead to identify the competing arguments and to attempt some evaluation of them.

The starting point must be what is known as the Irvine Memorandum. In 1923 allegations were made in State Parliament about a contractor offering bribes in order to secure contracts for work at the Warrnambool Harbour. The Premier of the day responded by instructing the Attorney-General to write to the Chief Justice, Sir William Irvine, requesting that a judge be made available to act as a Royal Commissioner to inquire into the allegations. In a letter dated 14 August 1923 Sir William refused the Attorney's request and set out his reasons as follows:

"... The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between the King and the subject, or between subject and subject, presented in a form enabling judgment to be passed upon them, and when passed to be enforced by process of law. There begins and ends the function of the judiciary. It is mainly due to the fact that, in modern times, at least, the Judges in all British Communities have, except in rare cases, confined themselves to this function, that they have attained, and still retain, the confidence of the people. Parliament, supported by a wise public opinion, has jealously guarded the Bench from the danger of being drawn into the region of political controversy. Nor is this salutary tradition confined to matters of an actual or direct political character, but it extends to informal inquiries, which though presenting on their face some features of a judicial character, result in no enforceable judgment, but only in findings of fact which are not conclusive and expressions of opinion which are likely to become the subject of political debate.

"The subject-matter of the commission proposed in this case involves charges both of departmental inefficiency and of corruption in the Public Service. The inquiry must, in its very nature, extend beyond the investigation of any particular charge of bribery against any named person or persons. If it could be limited to such a charge it might be the subject of judicial determination in a Criminal Court; until it is so limited it cannot strictly become the subject of judicial determination at all. Even assuming that the Judges might, where public necessity demands it, be asked to deal with questions of fact of a purely non-political colour, it seems to me impossible to find any Commission which could in this case disentangle such issues from subjects of parliamentary controversy, whether such controversy turned upon suspicions of corruption or allegations of administrative incapacity ...".

This view was affirmed by a meeting of the judges of the Supreme Court on 20 October 1952.[6] A resolution was passed that:

"In the unanimous opinion of all the Judges of this Court, there is no obligation on any Judge of the Court to undertake the duties of a Royal Commissioner and except in the matter of national importance arising in times of national emergencies it is undesirable that any such Judge should accept nomination as a Royal Commissioner."

In May 1954 the Victorian Bar Council issued a statement supporting the decision of the judges of the Supreme Court to refuse a request that one of their number should become a member of the Petrov Royal Commission.

"The complete public confidence in the impartiality of Judges is the reason for the Commonwealth Govern-

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ment's request. That confidence can continue only so long as nothing is done to impair it.

"Judges must accordingly be entirely independent of the executive on whose actions they from time to time must sit in judgment.

"They must also avoid being in any way concerned with matters which may subsequently come before them for judicial determination. The function of the Royal Commission belongs not to the judicial but to the executive sphere.

"That function is one of investigating and ascertaining for the information of the executive facts on which appropriate action is to be taken.

"Such action may well involve proceedings in the courts of a civil or criminal nature against individuals whose conduct has been investigated by the Commission. The undesirability of members of those courts as Royal Commissioners being required to pronounce upon the very matters to be subsequently litigated in the same courts is obvious.

"Moreover, like all executive action, the proceedings and findings of Royal Commissions may properly be, and frequently are, the subject of public controversy.

"Judges are not exempt from criticism, but it is most undesirable that they should intrude into areas where their conduct, not as judges, but as persons performing an administrative function, may give rise to reflections upon them.

"It is not easy for the public to remember that such reflections are not upon them in their judicial capacity and the reputation of the courts must inevitably suffer."

It is trite that the establishment of a Royal Commission or a Board or Committee of Inquiry into any subject matter is an exercise of the executive or administrative function of government. The task of such a body is to inquire into some occurrence, allegation or activity and then to report such findings and make recommendations to the executive government as may be required by the terms of reference. It is obvious that in most cases the subject matter will have a significant political flavour. The government of the day will be seeking to deflect political issues by setting up an impartial tribunal staffed by members of unquestioned integrity who will be capable of conducting a fair hearing and sifting through the available evidence with a view to establishing what has happened and why and to recommend what should be done by the Government. Of course there are other types of Commission which have no political overtones. For present purposes however it is useful to take the establishment of a Commission or Inquiry in the circumstances postulated as the paradigm.

On the face of it the appointment of a Justice of the Supreme Court to constitute or head a Royal Commission or Inquiry would appear to satisfy all relevant interests. Such a person is detached from the political system and enjoys a tenure of office which tends to dispel any suspicion of influence or favour. By nature of training and experience a judge is familiar with the leading and evaluation of evidence and fair and efficient hearing procedures. Furthermore because such a person holds high judicial office there is almost a guarantee of the required ability, integrity and dedication to carry out the task and to make a fair and balanced report paying proper regard to the legal interests and rights of any persons who may be affected by it. Then again the nature of the subject matter might be such that the public would not be satisfied by the appointment of a person other than a judge to carry out the inquiry.

The reasons therefore must be weighty indeed if the view that judges should be disqualified from engaging in such activity is well founded.

The central point made in the Irvine Memorandum is that the sole function of the judiciary is to hear and determine properly formulated disputed questions of fact and law which result in enforceable judgments. The reasoning is that once members of the judiciary engage in other activities which involve mere expressions of opinion and findings of a non-conclusive character then judges open themselves to political con-

troversy with resultant loss of public confidence in the curial process. Because of the fundamental difference between the conduct of an executive inquiry and the performance of the duties attaching to judicial office the fear is that there would be a blurring of the separation of executive and judicial power with a resultant loss of judicial independence. This reasoning also appears to be at the heart of the Bar Council's statement of May 1954.

It may be conceded at once that there are some executive or administrative tasks which a great many people would regard as completely inconsistent with judicial office. This is not the occasion to rekindle the debate in relation to holding both judicial office and the chairmanship of the National Crime Authority but it may be one such example.[7] The reason is that the functions are so dramatically different. On the other hand the conduct of say the Tricontinental Royal Commission is not so very different from many aspects of the traditional judicial function as to attract the same criticism. Despite the obvious political aspects of some of the issues before that Commission it might be thought that the complexities of the factual and legal issues and the importance of its subject matter and the protection of the rights of the individuals involved more than justify the presence of the distinguished senior Federal Court judge who is its chairman.

The reasoning is that once members of the judiciary engage in other activities which involve mere expressions of opinion and findings of a non-conclusive character then judges open themselves to political controversy with resultant loss of public confidence in the curial process.

In my view there is no *a priori* reason which disqualifies judges from the task of conducting Commissions or Inquiries for the Executive government. It makes little sense to simply assert the only proper business of judges is judging. To draw attention to the difference between the two functions does not provide a reason why it is inappropriate for a judge to accept an appointment as a Commissioner. The proper question as it seems to me is whether there is some feature of a judge's involvement in a particular inquiry which makes it inappropriate for the task to be carried out by a judicial officer. Mr. Justice Brennan, when he was a member of the Federal Court, with characteristic felicity, put it this way:

"The institutions of social regulation are not now as simple as they were some years ago. Decisions which affect the interests of citizens are taken by a plethora of councils, boards, tribunals, committees and individual administrators in government instrumentalities and by company boards and officials in the private sector. The area of social regulation which is left to the courts is proportionately reducing. The inhibitions of costs and procedural complexities further limit the use of judicial skills in social regulation. If the skills be in scarce supply and if the mechanisms of social regulation are increasingly non-curial, it is reasonable to seek the services of judges to perform the new duties. Law Reform Commissions, Royal Commissions, Committees of Inquiry, and Tribunals and Commissions of differing kinds are part, and an important part, of the pattern of social regulation. Judicial skills are required to make them work efficiently. Judicial skills should not be denied to them unless their jurisdiction or procedure require the judge to depart so substantially from the traditional judicial function that the departure carries an unacceptable risk of loss of confidence.

"A distinction is to be made between the instrumentality in which the judge would be required to abandon his remote indifference to the results of his decisions and to adopt the role of an administrator or entrepreneur, and an instrumentality where that indifference is the very quality which is required. Controversy may ensue, but the alternative may be a gracious decline in relevance to the needs of the community.[8] . . .

"The judiciary will continue to discharge the traditional functions described by Kitto J. The traditional functions are both the nursery of judicial skills and the explanation of public confidence. Where the resolution of disputes requires the exercise of judicial skills, and the traditional functions of the courts do not extend to solving the problem in an appropriate way, judges may reasonably and prudently be asked, and may reasonably and prudently agree, to undertake the resolution of disputes if the risk of loss of confidence in the judiciary is small and the need to use judicial skills is great.

"The risk of loss of confidence in the judiciary is proportionate to the disparity between the functions proposed for performance by the judge and the functions traditionally performed by the courts. The risk is greatest when the proposed function would ordinarily involve advisings to the executive on the exercise of executive power, the adoption of procedures inconsistent with the rules of natural justice, and the enunciation and application of new rules which ought properly be enunciated by the legislature or by the executive. The risk is not substantial merely because judicial advice without adversary litigation is sought,

or because the judiciary is asked to develop new rules to solve problems of a kind which the legislature or the executive wish the judiciary to solve, provided they are problems which may be solved by the acquisition of the necessary knowledge and the exercise of an impartial judgment.

"Where the function proposed is significantly different from the traditional function, the risk can be justified, but can only be justified, by the urgency of the community's need to use the judge's skills. A very special kind of national interest, and perhaps the unique fitness of a particular judge, must there be prayed in aid.

"In the end, therefore, the question remains one of prudence in judgment. Sir William Irvine is right as to the way in which the court may be protected from controversy, but his views would confine the judiciary in too narrow an area of activity. Caution is needed in moving into the non-traditional area, measuring the risks by the yard-stick of traditional function, and there will be some unwished-for controversies on the way. But the risks must be run, or the institution of the judiciary may lose its relevance or, at the least, fall short of discharging fully the functions which the community would commit to it."[9]

It should be observed that the Irvine Memorandum admitted a possible exception in cases "where public necessity" demanded the appointment of a judge to a Commission. So too the judge's resolution of 20 October 1952 excepted matters of "national importance arising in times of national emergencies". Sir Murray McInerney and Mr. Maloney conclude their elaborate and fascinating paper arguing the case against such appointments by saving "exceptional cases of national importance".[10] Some such limitations were probably compelled in face of the fact that two of the Court's most distinguished members — Sir Leo Cussen (twice) and Sir Charles Lowe (four times) — saw no difficulty about heading particular Royal Commissions. So the question is not whether judges of the Supreme Court should or should not accept such appointments as a matter of abstract theory. It is rather to identify the nature of the appropriate circumstances in which such appointments may be accepted.

In May 1928 Sir John Latham, then Commonwealth Attorney-General, wrote a tart reply to a letter from Sir Adrian Knox, the Chief Justice of the High Court, in which Sir Adrian had refused to make a High Court judge available to preside at an inquiry into the circumstances surrounding the retirement of a member of the House of Representatives. Sir John referred to the Irvine Memorandum and said:

"In my opinion, there are occasions properly described by Sir William Irvine as rare cases, in which a Judge can properly not only render, but be glad to be in a position to render, other services to the community than that of deciding matters which come before him in the ordinary routine of the Courts. These occasions arise when the public interest, properly conceived, requires that an investigation should be made by a Tribunal the competence, impartiality and fearlessness of which cannot be questioned. In the cases to which I refer the issues are much more important than those which arise merely between individual litigants. It is because the Judges of British communities have justly attained an unrivalled reputation for competence, impartiality and fearlessness that on so many occasions they have been entrusted with such enquiries.

"I am unable to accept the view expressed by Sir William Irvine that they have acquired this reputation by abstention from investigations of this character. It is sufficient for me, in justification of this opinion, to refer to a few outstanding examples . . . [Sir John referred to five examples and continued:]

"In several of the cases which I have mentioned, the subject matter of the enquiry was not unlikely to become the subject of legal proceedings. This circumstance has not involved any embarrassment in the past, and in view of the number of Judges available for dealing with litigation there is no reason to suppose that it would involve embarrassment in the future.

"I would also venture to suggest that the definition of the function of the judiciary set out in the statement of Sir William Irvine which you embodied in your letter, to the following effect — 'The function of the Judiciary begins and ends with Judgments given between litigants' — is too narrow a view of the services which Judges can properly render to the community. If all Judges had acted upon this inflexible rule, the Commonwealth and States generally would have been deprived of their services as Lieutenant-Governors; the State of Victoria would not have had the benefit of the invaluable work which Sir Leo Cussen has been and is doing in consolidating the Statutes of the State; and the Commonwealth, even in your own case, would have been deprived of the benefit of your assistance as a member of the National Debt Commission . . . I have no hesitation in saying that a judicial enquiry by an impartial and competent person commends itself to Parliament as the best means of achieving that end in the present case. It is obvious that a satisfactory solution of the problem, which is purely a question of fact susceptible of judicial determination, could not be attained by the ordinary methods of Parliamentary debate, or by the appointment of a Select Committee or Royal Commission consisting either of members or of supporters of the political parties in the Commonwealth. There is no question other than the question of fact whether any and what persons made offers of money to certain Members of Parliament in consideration of the Member approached resigning his seat, in order to make it available for another person. Evidence would be taken on oath, and witnesses would be subject to cross examination by counsel.

"For the reasons which I have set out, I am unable to agree with your opinion that the investigation ought not to be made by a Judge. In my view, it is eminently a matter which, by reason of its character and of its undeniable public importance, is a fit subject for a judicial investigation, preferably by a Commonwealth Judge.

"I recognize that the decision in this matter rests entirely with you and your colleagues, and I am sure you will appreciate that the Executive would not in any

way attempt to dictate to the Judiciary what course of action it should pursue. I feel, however, so strongly that there is a wider and greater service that the Judiciary can render to the community than is possible under the definition of the judicial function laid down by Sir William Irvine and endorsed by you, that I have felt compelled to write to you at some length and to set out the reasons which led me to invite you to undertake the present enquiry, and to announce to the public that I intended to do so."[11]

I have set out the views of Mr. Justice Brennan and Sir John Latham at length because in my opinion they point in the right direction. What they both draw attention to is that there are appropriate issues and subject matters which are eminently suitable for investigation and report by judges acting as Royal Commissioners and Boards of Inquiry. As Sir John put it on another occasion "there ought to be no hard and fast rules".[12]

I have set out the views of Mr. Justice Brennan and Sir John Latham at length because in my opinion they point in the right direction. What they both draw attention to is that there are appropriate issues and subject matters which are eminently suitable for investigation and report by judges acting as Royal Commissioners and Boards of Inquiry.

Two ends of the spectrum may be identified. At one end is a case where the proposed inquiry concerns broad questions of government policy — for example the control and licensing of the liquor industry or the regulation of the milk or grain industry. The subject matter is too far removed from the normal judicial function to make the appointment of a judge an acceptable choice. At the other end is an inquiry into the substance of a specific allegation where the proceeding would be assisted by the skills and techniques to say nothing of the associated impartiality and integrity of a judicial officer. To put it another way the closer the nature of the task involved in a particular inquiry approaches the use of the skills and experience of a judge the less reason there is for a refusal to accept an appointment.

Some arguments which are used to provide support for the view expressed in the Irvine Memorandum may be quickly put aside.

(a) **The Effect on the Workload of the Court.**[13] It is argued that the appointment of a judge to a Commission or Inquiry would impose an unfair burden on the Court of which he is a member. This is no argument at all. If the effect of the appointment would produce such a result then that is a perfectly good reason for a refusal. On the other hand if such an appointment can be made without significant disruption then it is an irrelevant consideration.

(b) **Executive Resort to the Experience and Prestige of the Judiciary.**[14] The point here is that the Executive should not be permitted to avoid political embarrassment by the technique of appointing a judge to conduct an inquiry. But why? Provided the subject matter of the inquiry is an appropriate one the interests of all concerned — and the Executive and its political problems represent only one set of interests — may be best served by having a judicial officer carry out the task.

(c) **Debasing Judicial Currency.**[15] It is said that the appointment of a judge as a Royal Commissioner blurs the distinction of the honour and title due to a judge as a judge and that due to him when engaging in non-judicial duties. The point has no substance at all. If the inquiry is an appropriate one to be undertaken by a judge then there is no difference.

(d) **Dealing with the Same Subject as a Judge.**[16] Because the subject matter of a Commission report may become before the Court in civil or criminal proceedings it is said that there is a risk of embarrassment because the judge as Judge may have to deal with the matter he dealt with as Commissioner. This is fanciful. No judge would entertain hearing a case in such circumstances.

(e) **Judges should not Act because Senior Barristers and Retired Judges are Available.** Almost every commentator who supports the view expressed in the Irvine Memorandum makes this point. It is a curious one. Both a senior barrister who has the qualifications to be appointed a judge and a person who has been a judge are said to be eminently qualified for appointment to a Royal Commission but not a serving judge. The arguments seem to admit that the very experience and skills shared by judicial officers are proper criteria for appointment! At best the argument is but a variant on the judges should confine themselves to judging proposition.

On the face of it a more substantial argument than any of these is the observation made in the

Irvine Memorandum itself that judges should not become involved in political controversy because this saps public confidence in the Court. Upon analysis however the superficial attractiveness of the argument tends to disappear. First of all it is difficult if not impossible to make the argument good by reference to the history of Royal Commissions and Inquiries involving judges. Sir Murray McInerney and Mr. Maloney set out in Appendices 1 and 2 to their paper details of all of the Australian and New Zealand Commissions which have involved judges. Very few of them appear to have ever attracted political criticism of the judges. One is elevated to centre stage — Mr. Justice Mahon's Mount Erebus Royal Commission. It is said to highlight "in the starkest possible terms one of the unwanted consequences involved in judges acting as Royal Commissioners to inquire into politically and socially sensitive matters".[17] What happened as a result of that Commission is too well known to repeat here. My view is that if Mr. Justice Mahon's natural justice error is put to one side (and it was a legal error) his report shows how necessary were his judicial skills and experience in unravelling the murky story of what caused the crash of the Air New Zealand DC 10 in Antarctica.

Second the proposition that judges should be free of political controversy does not seem to reflect the fact that in relation to their judicial functions they are not and should not be free of criticism or comment on social — i.e. political — grounds. In recent times there has been a good deal of public controversy about particular decisions of our Courts. In a democratic society there is nothing wrong with that.

Third the proposition that public confidence in the Courts is enhanced because of the anonymity usually involved in judicial decisions should not be allowed to carry much weight. In our society the mysticism which used to surround the judicial system and its process is a thing of the past. Particular judgments just as particular Commission or Inquiry reports can and should properly be the subject of general public discussion; hopefully informed discussions. There is nothing about the judicial function that should insulate it from controversy if controversy is justified.

Fourth the mere fact that a particular judicial officer conducting a Royal Commission is responsible for something in a report that is thought to be improper and unfair is no reason for concluding that all judicial officers should not be involved in any Commission or Inquiry. All that it means is that the Commissioner just as the Judge is legally and socially accountable for his actions.

But that is where this paper began. If it be assumed that every criticism made of Mr. William Carter Q.C.'s report in the last *Bar News* was well taken, and if it be further assumed that he was a serving and not a retired judge, then it simply does not follow that those matters lead to the conclusion that "Judges Should Say No" to all such appointments. What would follow is that the criticisms were deserved and the suggested procedures should have been followed. Whether or not a serving judge should accept an appointment to such an obviously political Royal Commission is an entirely different matter.

The thesis here advanced is that the position taken in the Irvine Memorandum, and subsequently confirmed by Bench and Bar in Victoria, is too narrow. Judges of our Supreme Court should be able to serve on Royal Commissions or Boards of Inquiry where the nature of the task identified by the terms of reference is appropriate for the application of their skills and standing in the community. The concept of an appropriate subject matter involves an evaluation of whether or not the inquiry is sufficiently analogous to the judicial function involved in ordinary criminal and civil trials.

Cliff Pannam

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1. Trial by Executive: Why Judges Should Say No, 79 Victorian *Bar News* (1991) at p.62.
2. Formerly Mr. Justice Carter of the Supreme Court of Queensland.
3. For the details see: McInerney and Maloney, Judges As Royal Commissioners And Chairman of Non Judicial Tribunals: The Case Against. (1985 Australian Institute of Judicial Administration) Appendix 1, B.
4. Cartwright, Royal Commissions and Departmental Enquiries in Britain (1975).
5. See for example: McInerney, The Appointment of Judges to Commissions of Inquiry and Other Extra Activities (1978) 52 A.L.J. 540; McInerney and Maloney, *op. cit.*, n. 3; Holmes, Royal Commissions (1955) 29 A.L.J. 253; Brennan, Limits On The Uses Of Judges (1978) 9 Federal L. Rev. 1; and, Winterton, Judges As Royal Commissioners (1987) 10 U.N.S.W.L.J. 108.
6. See also the letter of Sir Frederick Mann C.J. to the Premier (Mr. Dunstan) dated 26 August 1942. It is published in 52 ALJ at p.543.
7. The saga of the appointment of Mr. Justice Stewart to that position is told in detail by McInerney and Maloney, *op. cit.*, n. 3 at pp.20–30.
8. Brennan, *op. cit.*, n. 5 at pp.11–12.
9. Brennan, *op. cit.*, n. 5 at pp.13–14.
10. *Op. cit.*, n. 3 at p.59.
11. Rosenthal, Sir Charles Lowe — A Biographical Memoir at pp.93–94. Sir John sent a copy of this letter to Sir Charles Lowe when he accepted an appointment as Royal Commissioner into the affairs of the Communist Party in 1941.
12. (1955) 29 ALJ at p.268.
13. E.g. McInerney and Maloney *op. cit.*, at pp.51–52.
14. E.g. McInerney and Maloney *op. cit.*, at pp.52–53.
15. E.g. McInerney and Maloney *op. cit.*, at p.53.
16. E.g. May 1954 Bar Council Statement.
17. *Op. cit.*, no. 3 at pp.42–43.

LAW IN VANUATU

The Honourable Justice Peter Heerey

Early this year Justice Peter Heerey of the Federal Court spent some time as an Acting Judge of the Supreme Court of Vanuatu

THROUGH THE OPEN DOOR OF THE judge's chambers in Port Vila you can look across the broad upstairs verandah of the courthouse and down to the blue and turquoise waters of Vila harbour. The view is framed by casuarinas and Christmas trees, which are very like a jacaranda, only the flowers are flame red.

Legally the setting is just as exotic. Prior to independence in 1980, Vanuatu was a Condominium governed by Britain and France. Under this system, probably unique in the history of European colonialism, there were two administrations, two hospital services, two school systems, two police forces and of course two legal systems. There was a French Court and a British Court but also a Joint Court. The latter consisted of a British judge, a French judge and a Spanish judge. The Convention of 1906 between Britain and France under which the Condominium was established provided for the appointment of the President of the Court by the King of Spain.

The Joint Court handled principally breaches of the Convention such as illegal recruitment of, or the selling of liquor or firearms to, natives and also land title disputes. In the judge's chambers today there is a photograph of the Joint Court in 1912 with each member in the judicial regalia of his country. The President was the Count of Buena Esperanza. The present courthouse was his home.

Probably the best known description of life in the New Hebrides at this time comes in *Isles of Illusion*, a collection of letters first published in 1923 and now available in the paperback Century Travellers series published by Century Hutchinson. The author, writing under the *nom de plume* "Asterisk", was Robert Fletcher. He spent some time working as an interpreter for the Joint Court. The following scene comes from the year in which the photograph was taken.

"I made my first appearance in Court on Friday last. It was a bit of an ordeal. Every word spoken by Judges, Counsel, witnesses or prosecutors has to be interpreted in a loud voice by me. The Court consists of a French judge, an English judge, and the president, who is Spanish. The Public Prosecutor is a Spaniard. The Native Advocate is a Dutchman. The witnesses are chiefly natives who speak Biche-la-mar (pidgin). The accused are mostly French traders. Can you imagine the babel?"

The members of the Joint Court were separated by issues of delicacy as well as language. Asterisk describes how 'brother' could simply mean friend. But:

"when it used to fall to my lot to cross-examine witnesses in Biche-la-mar in the Joint Court I had often some knotty problems to solve. If you want to know whether Jack and Tom are brothers in the native sense or otherwise, you ask: 'One mamma e bin carry you two feller more Jack?' Then, if it is necessary to find out whether the twain are full brothers, the language has to be more explicit still. There is one word and only one word which is understood in Biche-la-mar to express procreation, and that is the word you dislike so. And so does Mr Justice Roseby dislike it too. 'Erm, Mr Fletcher, can't you teach them a more polite word than that?' The fat old president and the French judge who understood the word — and a very few other words of English or Biche-la-mar used to chuckle aloud every time I had to say it. I strongly suspected the President of deliberately laying traps for me."

The British Judge Mr. Justice T.E. Roseby, in his own memoirs *After Court Hours*, gives an insight into the workings of the Joint Court.

"The stay at home Englishman, accustomed to see justice administered without fear or favour and a true verdict given according to the evidence, is not at first prepared for the international prejudices which seem to creep into international courts. The French, in particular, seemed to regard any criticism of the conduct of a French colonist as an attack on *La Belle France*. Consequently, when various ruffianly French recruiters who had engaged in the most outrageous kidnapping and other exploits appeared before the court, I was at first somewhat amazed to note that the French judge betrayed an inclination to cast his cloak of protection around them. It was our custom at the conclusion of the evidence to file out of court '*pour délibération*'.

"It was then I discovered that my task was less a judicial than a diplomatic one. Proceedings would start comparatively mildly with the lighting of cigarettes and a cursory examination of the evidence. Then the president, the old Spanish nobleman, would get down to business and, with much pointing of the fingers and shaking of the head, mercilessly draw a conclusion completely unfavourable to the French colonist on trial. The French judge, having listened impatiently to this exposition, would suddenly throw his half- smoked cigarette over the verandah and, bending down his head until his nose almost touched that of the president, would launch out into an impassioned address accompanied by much shrugging of the shoulders and waving of the hands. The battle was now

Supreme Court of Vanuatu.

fairly joined. Forthwith the president would cast away the remains of his cigarette and throw himself into the fray, still keeping his nose *in situ*. In a tornado of French and Spanish French the two Latin gentlemen appeared almost about to come to grips. Little did I know the Latin character. Suddenly the storm would abate. The British Judge, seizing his chance, would interpolate a mild joke. '*Ah, mon cher collègue*,' the Frenchman would exclaim, swivelling round with bewildering rapidity from indignant remonstrance to smiling acquiescence. Cigarettes would be lighted anew and in a short time the members of the court, refreshed by their '*délibération*' would solemnly file back to the bench again."

When Vanuatu became independent its constitution provided that the British and French laws in force immediately before independence should continue to apply "to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and whenever possible taking due account of custom." Probably broadly similar provisions would apply in most countries that have emerged from colonial rule, but the unique feature here is that there were two systems of colonial law. Prior to independence that duality seems to have worked, albeit in a rather creaky and complicated way. French and British nationals were governed by their respective laws. Others could opt to be governed by French or British law, although whether it was possible to opt out or even back in again, depending on which system offered the most attractive solution for the problems of the moment, nobody I have met seems able to say.

Since independence there is only one court system and one national identity. People are either citizens of Vanuatu or foreign residents or visitors. Two systems of law theoretically apply, with infinite potential for conflict, but no criteria such as nationality or personal choice for resolving conflicts in any given situation.

But as a result of a combination of factors, French law now hovers like a disembodied spirit outside most operations of day-to-day life.

Until very recently there has been something of a French disengagement. Many French planters and businessmen, especially from the northern island of Espiritu Santo, saw independence as inimical to their interests and moved to New Caledonia. Others were deported after a brief rebellion in 1980 in which some on Santo sought to detach that island from the new nation.

Subsequently the UMP, the political party supported by most franchophones (about 30% of the population), boycotted elections and as a result largely excluded themselves from the parliamentary and governmental life of the country.

However the UMP contested the elections held in December 1991 with considerable success and its leader M. Maxime Carlot is now Prime Minister at the head of a coalition government in which the National United Party, led by the former Prime Minister Fr Walter Lini, is the

junior member. It is thought that French language and culture are likely to become much more visible in the life of the country.

But the legal system likely to remain Anglo. The legal profession is comprised almost entirely of Australians or New Zealanders. The judiciary (a Chief Justice and one puisne judge) is British since the court system happens to fall within the sector of government funded by British aid.

Without people who know it and apply it day by day, any system of law will remain just words in books. That presently seems to be the fate of French law in Vanuatu. Indeed sometimes where there are francophone parties on both sides of a dispute they will arrange to have their case conducted in New Caledonia.

Still, one occasionally comes across a Gallic touch which enlivens an otherwise routine case.

The Banque Credit Moderne in Noumea had made loans to a company in Port Vila, the borrower defaulted and the usual exchange of acrimonious correspondence ensued. The borrower's lawyer protested that:

"*ses methodes d'intimidation et ses menaces sont indignes d'une representative d'une banque telle que le Credit Moderne.*"

Not to be outdone, the bank pointed out that:

"*Nous avons fait preuve de beaucoup de patience et de bonne volonté afin de regulariser ce dossier. Pour le moment, votre client tienne ses cartes . . . une fois les dèjétes . . .*"

The enigmatic dots appear in the original. The borrower is being told for the moment he holds the cards, but once the die is cast . . .

But with the indispensable courtly flourish the letter concludes that:

"*Nous restons néanmoins à votre disposition et vous prie d'agrèer, Cher Maitre, nos sincères et respectueuses salutations.*"

The translation of the court file render all this as a banal "Yours sincerely".

RECENT DEVELOPMENTS

Since the above was written, a new Chief Justice of Vanuatu has been appointed. He is Mr. Charles Vaudin who has practised at the English Bar for 20 years. Mr. Vaudin grew up in Mauritius and therefore is equally at home in French and English.

The first Ni-Vanuatan (indigenous) lawyer to attend the Victorian Bar Readers' Course has successfully completed the course. He is Mr. Stephen Joel, who works in the Public Solicitor's Office in Port Vila. His attendance at the course was made possible through the assistance of the Commonwealth agency AIDAB.

INTERVIEW WITH SIR ESLER BARBER

SIR ESLER BARBER, WHO SIGNED THE Victorian Bar Roll on 8 June 1929, died on 1 December 1991. An obituary appeared in the Autumn issue of the Victorian Bar News. *Jon Faine interviewed Sir Esler some 18 months earlier for the purposes of "The Law Report". It was one of a compilation of interviews of this type with 34 lawyers who had been in the law since before the Second World War. Jon presents* 'The Law Report" *on Radio National each Tuesday at 8.30 a.m. and the program is repeated at 7.15 p.m. the same evening.*

Jon has made available to Victorian Bar News *the transcript of the interview.*

Barber: My family had no background in the law. I had some notion at one stage of doing medicine, but my father suggested to me that the law was more likely to be what I would find interesting and useful. So, after leaving Scotch College I did a year at the university, and then went into an office in 1925 and did four years articles, in an office of Oakley, Thomson and Davies, as it then was, in April 1925. The first year I was paid nothing, the second year ten shillings a week, the third year a pound a week and the fourth year two pounds a week, which was really a considerable benefit. You used to supplement your income by the odd serving of a summons or something for half a crown, or sometimes five shillings, and that was the way it went.

Faine: Can you remember when you first went to the office, what your impressions were?

Barber: Yes, the office in those days was in an old building at 450 Collins Street. We were on the fourth floor, with a very rickety sort of a lift and a very crowded office, and I remember my first seat was a bit of a bench in the outer office. I was certainly a bit confused to begin with, but you soon got into the swing of things. Eventually I found myself going to court, taking briefs over to barristers in Selborne Chambers and doing the work of litigation.

I got the notion that I would prefer to go to the Bar than be a solicitor. The result was that at the end of my four years of articles I was admitted to practice on 4 June 1929 and signed the Bar roll the same day, and went to read in the Chambers of Edward Hudson, later Sir Edward, who became a Supreme Court judge eventually.

That time he was a very busy junior, and Selborne Chambers was crowded. Selborne Chambers had two floors. At the end of a very windy, narrow staircase Ted Hudson had the smallest of rooms. I had a little desk shoved into the corner of the room, and there wasn't room for anything else.

I can't recall anybody's chambers having a carpet, although I remember there was quite a scandal when P.D. Philips actually had curtains put up in his chambers. There was linoleum on the floor and the walls were mostly covered with bookcases and law reports. I am told by my seniors that there was no telephone in the building, except in the clerks' rooms, until 1922 or 1923. By the time I got there, each barrister had his own phone, but there were no secretaries. Everything was pretty much done by hand; it wasn't until well into the '20s that they had a secretary who was available to people to dictate to, just the one.

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Of course later on, it got to the stage of either having a secretary or sharing a secretary, but in those days, there was the sort of public typist who typed for everybody. Well, the briefs were often handwritten, and they were a darn sight shorter than the briefs that were available after typing and other mechanical things became available.

Oh, it was a funny old building. There were wine cellars in the basement and you could smell the wine. Everybody smoked, and there was a great smell of tobacco and the smell of old leather-bound volumes, which altogether made an unusual odour that anybody who is still alive from those days would instantly recognise. As Kipling says "smells are clearer than sights or sounds to make your heartstrings throb", and I'm sure that the smell of Selborne Chambers was something quite unique.

Faine: Were there any women studying when you were?

Barber: Very few. I was just thinking that one of the differences between the Bar of today and the Bar then, was the number of women. When I first went to the Bar there was only one woman there, a lady called Dixie McKay, who became Mrs Reid, George Reid's wife. Joan Rosenove had been at the Bar, but left the Bar, practised as a solicitor for many years and then came back again in the very late '60s I think. But they were the only two women about the place, at the Bar. I suppose there might have been eight or ten in the whole law school at that time, I think.

Faine: What sort of work did you get when you started off as a junior barrister?

Barber: Very little. The very first brief I ever got was given to me by Oakley Thompson, with great trust in their articled clerk, to go up to Ouyen, of all places, which was still a County Court town, and fight a case where somebody was suing a deceased estate. When I got there, to my horror, P.D. Philips, who was then a very-well-thought-of junior, was against me, and the case came on before Judge McIndoe. To my great delight Judge McIndoe wasn't very fond of P.D. Philips, and had even less regard for unreasonable claims against deceased estates, and the judge and I won that one.

One of the difficulties in my day, I was there in June 1929, was that the Crown used to give very junior counsel the odd small brief, but the rule still held, and rightly so, that returned soldiers had to be briefed. 1929 was a long while after the war had ended, but there were still plenty of returned soldiers about who were very happy to take those briefs, which meant that the juniors who had been thirteen or fourteen years old when the war ended, and could hardly be blamed for not being returned soldiers, didn't get the sort of briefs they might normally have expected. Then of course they set up legal aid, which is a great standby for juniors. I got the first brief from C.M.S. Power, the public defender who applied to the Practice Court for leave to sue *in forma pauperis* and for counsel to be appointed, and the judge at the time said "I'll appoint the most junior counsel at the Bar", who happened to be me. So I got the brief, and it was unpaid, I might add.

Later on they did introduce paying one guinea at a time but at that point they were unpaid briefs.

Some very good fellows had to leave the Bar during the Depression because they just couldn't get enough work. It was harder for men who'd been there five or six years, really, than for us very juniors. I was, for instance, unmarried, living at home, and I could survive. But if you had a wife and kids, it was a different situation. We survived. We didn't earn much, but on the other hand living was cheap. I remember you could get an excellent three-course meal at a *cafe* in Bourke Street for eighteen pence. It wasn't elegant, but very filling.

Faine: You said before that the Bar was fairly small.

Barber: Oh yes. I would say there was something like a hundred and forty to a hundred and fifty barristers in actual practice, so that everybody knew everybody. It's not like today, where it's an enormous Bar by comparison. It was close-knit, a collegiate sort of thing. The seniors were always ready to drop their work to advise and help a junior if he was in trouble, and although it was a cut-throat profession in some ways, they were very good.

Faine: What happened to your practice when the Second World War came along?

Barber: I personally didn't go and fight, but I went to a war job in the Defence Division of Treasury where I spent four years, occasionally visiting Selborne Chambers, and the place was nearly empty. The vast majority of the Bar went off to some war job or other, so Selborne Chambers was just a ghost building for most of the war.

Faine: I'm told the Sydney Bar had a scheme whereby solicitors could send a brief to a barrister who was away at the war, and somebody else would do the job and split the fee between the named barrister and the one that appeared.

Barber: I didn't leave the Bar until May 1942, and I think in those first years there was some procedure of that nature. When I came back to the Bar without a brief on the table, several barristers, one in particular, who received briefs from my solicitors while I was away, very loyally said "Well, Barber's back, you've got to go back to him", which I was very pleased with, of course. But I don't really think that the Sydney scheme lasted very long, as far as I can recall.

Faine: Who were the "lions of the Bar" back then?

Barber: Well, of course in those early days, there were people at the Bar like Charles Low, Wilfred Fullagar, Norman O'Brien, Ted Hudson himself, Leo Cussen, that's Leo B. Cussen, not the judge. He had an enormous practice and was a very notable barrister, and of course the great Eugene Gorman, who was the famous advocate and cross-examiner, probably the greatest that I ever heard. R.G. Menzies, and George Maxwell, the blind barrister, who was a notable figure in those days, had a marvellous Scottish accent, which is always a great help. He had a great facility for believing in his client's innocence, which I found difficult to do in some cases, and he used to make the most impassioned pleas. I can remember him on one occasion making a plea for some fellow who'd shot another boy in the leg, and he asked the jury not to "brand this young fellow with the state of criminality, standing as he is on the threshold of his life". Red Nolan, the prosecutor, punctured that one by saying, "Imagine the other boy, standing on the threshold of life *on one leg*". But George . . . some of his addresses to juries were absolutely fantastic. I never heard anything like them.

Faine: Do you think the standard of advocacy's dropped over the years?

Barber: I would think it had. The old theatrical advocates were in full swing in my day, with terrific addresses to juries. Everything was done with a jury in those days and there was a lot of flamboyancy, which I don't think would suit modern times at all. There were a lot of very colourful characters around and they were in many ways a different breed to what you find now.

Faine: Tell me about some of them.

Barber: There was a defrocked solicitor who fell on very hard times. He always had a three-day growth of beard and his pants were held up by a bit of rope.

He used to wander into Selborne Chambers, cadging the odd shilling, and once he stood beside Robert Menzies who was looking at the daily list one day, and observed the other characters of Selborne Chambers moving back and forth, and said, "Menzies, does it every occur to you that the inhabitants of these chambers are a lot of bloody caricatures?"

There were one or two who wore somewhat Dickensian clothing, but it all added to the colour of the place at the time.

Faine: Trials these days are long and complicated affairs. Were they like that back then?

Barber: We used to start a case in 10.30 in the morning, and you'd usually get your jury out by 3.30 and start the next case before the day was over. In other words we were knocking off four or five cases a week. Nowadays, it seems to me that they appear to take a week to do one case. What the explanation is, I don't quite know, but I doubt whether justice was any worse served then than it is now.

I think counsel tend to cross-examine longer, judges don't interfere so much perhaps. If you cross-examined lengthily and boringly, the judge'd be apt to wack you and say "that's

enough thanks, we've heard enough of that rot."

I always recall with amusement a case in which Allen's, the sweets manufacturers, were suing some gentleman who was obviously infringing their copyrights or patents or whatever, having started to manufacture a thing he called "Allen's Irish Moss", and they sued. A number of examples of Irish Moss were produced in the course of the case, and at one stage counsel picked up one of these things, saying "If Your Honour will look at exhibit three" and Judge Wasley said "Would somebody pass me more exhibit three, I've eaten all of mine".

It was the only time I knew when a judge ate the exhibits.

Faine: Did you do matrimonial cases? What about adultery cases?

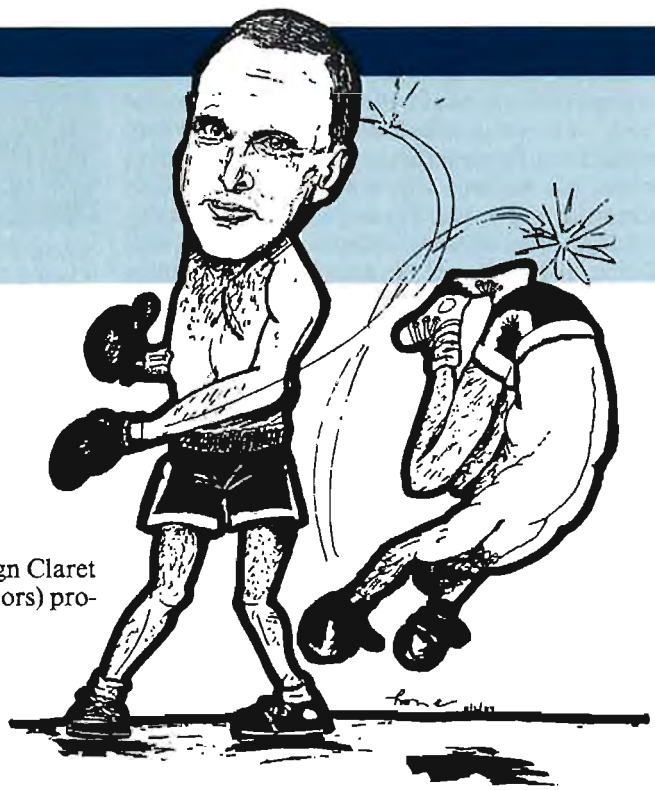
Barber: There were a quite a number of cases where the husband sued for damages, sued the co-respondent for damages for adultery. It would always be a husband, wives couldn't sue for damages at that stage, and the husband would say, "he's taken my wife and she was a very good wife, and she was worth so much and I want compensation". Those cases were, believe it or not, heard by a jury. Some of the rules of condonation and revival led to some terrible injustices.

Faine: What were the rules about revival?

Barber: Oh, that was a dreadful thing. If you forgave your wife, and took her back, that was condonation, the adultery couldn't then be sued opon. But if many years later she committed another matrimonial offence, you could revive that old adultery. The rules required you to serve the alleged adulterer with a notice, and sometimes the awful situation arose that some fellow who'd been on with a married woman, whose husband had taken her back and all was forgiven, went around rejoicing and thinking "I'm out of that", and then ten or twenty years later he might suddenly be served with a notice that he was a co-respondent in a divorce case, for an adultery that had occurred twenty years before.

That was an outrageous state of affairs. All coming from the old ecclesiastical courts of course, and all on the basis, as I said earlier, that divorce was a prize to be won, by virtue and good behaviour. It was only very many years later that people began to think in terms of, well, if the marriage had broken down, why shouldn't it dissolve, and what the law is now aimed at doing is really a salvage operation to try and save something out of the wreck. The wreck is there, whether there's divorce law or not. Divorce law doesn't *create* divorce; marriages break up whether there's a divorce law or not. The thing is to have a sensible divorce law, and whatever the faults may be in the *Family Law Act*, it's an enormous improvement on the old stuff.

COMPETITION



The Editors will award a bottle of Essoign Claret to the best caption (as judged by the editors) provided for this cartoon shown here.

THE BAR DINNER

Social Notes

IT WAS A NIGHT OF WHITE ELEPHANTS. The dinner was at the World Congress Centre. White tuxedoed elephants careered about the cavernous hall. Many ball gowns had been purchased at a White Elephant stall. Indeed, if the Law Reform Commission and some junior minds are to be believed, the Bar itself is a White Elephant.

But the elephant still has tusks. Coombs Q.C., Senior Vice-President of the Australian Bar Association, gave a rousing oration on behalf of the Bars of Australia (despite being a Sydney-sider). His speech is printed elsewhere in this publication.

Even "Mr. Junior", Stuart Morris Q.C., seems to have changed his spots. He cracked a joke about Premier Joan Kirner! He then went on to toast the long line of honoured guests with aplomb. Again the text is printed in pages elsewhere.

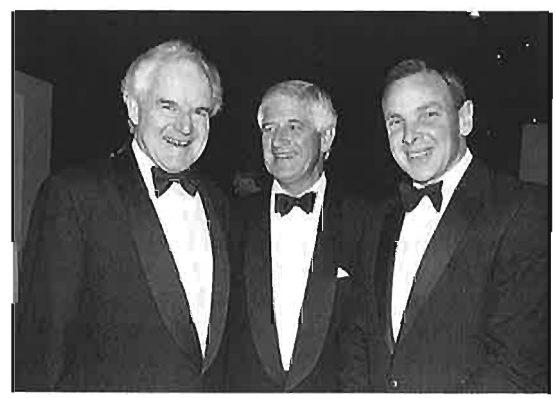
Between speeches (and even during) there was a heated debate about the meaning of "formal dress". Do white tuxedos come within the definition? His Honour Judge Kelly strongly advocated that he was the only properly dressed person in the room. Formal dress means tails, tails, and more tails with a touch of the white ties! White tuxedos were a hideous Americanism worn only by band leaders and head waiters. Of course it was pointed out, by one Simon Kemp Wilson, that Sir John Young looked very elegant at his farewell dinner in a white tuxedo. (See *Bar News* Autumn edition pages 27–29, 1992.) There is no doubt that there will be many more white tuxedos at next year's dinner.

The venue for the dinner was a very large place. Confusion abounded. What is the World Trade Centre? Was it the World Congress Centre? Was it Eden on the Yarra, or whatever that is called now? A short kilometre walk from the car park(s) (for those silly enough to drive) led to a maze of caverns. Many looking for the pre-dinner drinkies stumbled into an unused thousand seater theatre, others burst into the Austro-Canadian Sociologists' convention teaming with fresh-faced men, hairy-legged women and no alcohol. Others found a snug bar aptly named Ye Olde White Elephant.

The food was produced by the cook-chill method similar to that to be found at the M.C.C. and various hospitals. The entree was rumoured to be salmon, followed by a sparkling duo of breast of spachcock and fillet of youngish veal (not white elephant as quipped by various humourists). All this was followed by much walking about the cavern and insufficient cognac and port. The wines were well chosen.

Of those wearing dresses undoubtedly Duffy was the most admired. He looked startling in a short hem line obviously designed in the very northern reaches of the British Isles. Evidently he has taken to wearing skirts at various functions. All agreed that this amounts to a very wide definition of formal wear. Photos of him litter the pages of this issue. Next year he wants to bring a bag to blow upon. We all look forward to this.

Chris Jessup, Kerry Copley, President Queensland Bar.



The Governor, Doug Williamson, Andrew Kirkham.

As to the more recognisable designs present, the little black dress still reigns supreme. A few Louis Ferauds, the odd Trent Nathan, the ever present Chanel, and even a Dior or two could be spotted. But fashion was very much down on last year. Some remarked that Home Made was the most popular brand of the night. Former Junior Silk Sue Crennan said that she had eschewed wearing Studebaker Hawkes and had opted for a very Irish-looking crushed black velvet gown, picked up for a song, in Belfast, on her last visit. All agreed that it would have looked good at the ceremony for her admission to the Irish Bar.

Magistrates were very much in evidence. Chief Sally Brown was looking very continental in a short black. Linda Dessau M. had adorned her black piece with lots of gold, very much in the Barbara Streisand mode. Husband Tony was a radiant host of the Dessau table which included many senior and notable members of the Bench and Bar together with Michael McInerney.

John Coombs, Vice-President ABA.

Raymond Lopez, Mara Catalano, Boris Kaiser.

John Coombs, Harper J. and Susan Crennan.

Michael (somewhat later in the evening) informed all that he had been responsible for obtaining all the liquor licences in Melbourne, including the Rechabites Hall.

It was a pleasure to listen to a speech of the Governor the Honourable Richard McGarvie. Victoria will be well served by a Governor who has appeared in most circuits in Victoria.

Mr. Justice Hayne gave a witty and erudite oration. As it was late in the evening some believed it was in Latin, others argued for old Greek. It was good to see that Merralls and Batt Q.C.s enjoyed the humour.

And so another dinner came to a close. The day after was a day for reflection by many. Had they said the wrong thing? Had they insulted too many judges? Had they said one sexist thing too many? Why had they kicked on at Silvers (yet again)? Why had they consumed that just one or two too many?

Many resolved not to do it again. But they will. For many years to come. For no amount of bureaucrats, economists, journalists and other para-thinkers can put an end to the Victorian Bar. *They* will all be white elephants come next year when we all toast the Queen and the health of the Bar.

THE AUSTRALIAN BAR

John Coombs Q.C., Chairman of the New South Wales Bar, gave the toast to the Australian Bar. In doing so, he summed up succinctly the vital need for an Independent Bar. His short speech is printed below.

MR CHAIRMAN, YOUR EXCELLENCY, your Honours, Colleagues—

When I was first asked to attend an Australian Bar Association Council meeting I guess 6 or 7 years ago, I said to myself, "Now then Coombsie, not too starry-eyed — remember Francis Bacon." You will of course all remember that Sir Francis was the very first Queen's Counsel, appointed by Queen Elizabeth the First. He was the same Sir Francis Bacon who, when charged with bribery as a judge, said "Of course I took the plaintiff's bribe, but I took an exactly equal bribe from the defendant and my impartiality was quite unimpaired."

In all my professional life I have found nothing quite so comforting as my involvement with the Australian Bar Association. I have found at its Council the leaders of the independent Bars of all the States and Territories each with a passionate commitment to four things:

The Integrity of Barristers
Competence of Barristers
Independence of Barristers
and the Accessibility of Barristers

We have spent months and years on a search, nearly complete, for common National Rules for barristers. We exchange notes, lectures, videos and ideas for our reading and pupillage programmes in a drive for increasing competence and the maintenance of standards. We are willing to fight for independence from Government, from multinationals, from partners, from shareholders, and from the mega-firms of solicitors.

We are determinded to remain accessible — servants of all yet of none, or to be trite Mrs. Parramatta's solicitor can brief Tom Hughes for her.

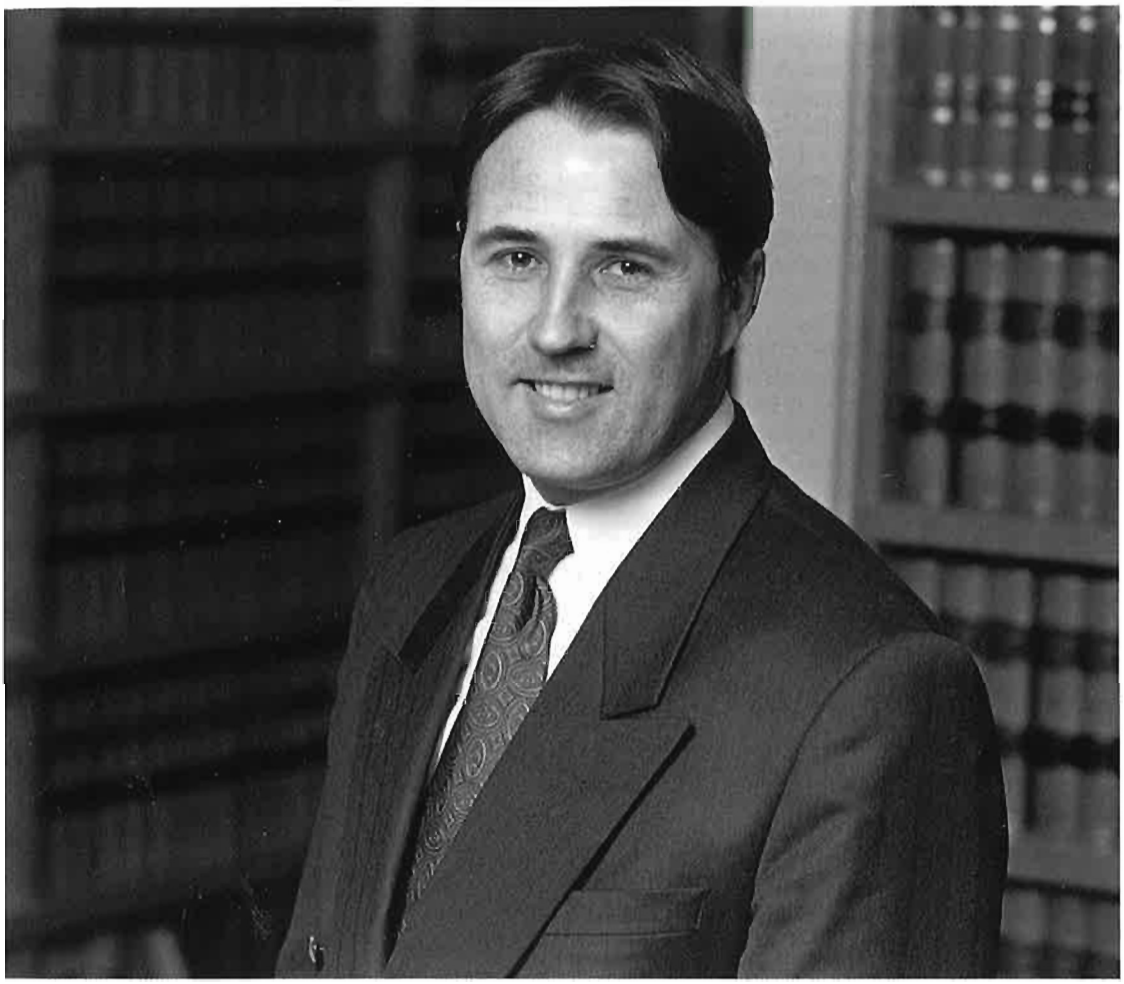
The Victorian Bar has played a leading role in all this. I am very proud to be with you tonight to propose this toast, which is a toast to the integrity, competence, independence and accessibility of the Australian Bar.

Carmel Morfuni, Ray Lopez and Barbara Walsh.

Rosemary Carlin, Daryl Williams and Samantha Kirwan-Hamilton.

MR. JUNIOR SILK

Stuart Morris Q.C.



Stuart Morris Q.C.

MR. CHAIRMAN, YOUR EXCELLENCY, Distinguished Guests, fellow members of the Bar:

The last time I made a speech in front of such a large gathering I was Chairman of the Local Government Commission. After addressing a rowdy meeting near Bendigo on the virtues of municipal reform, I retired to the toilets and observed an electric hand drying machine on the wall. Someone had written on it: *press this button for a 20 second speech by Stuart Morris!*

Our honoured guests tonight are all men of integrity, honour, patience and courtesy. They will all carry their new offices with great dignity and responsibility.

THE HONOURABLE
RICHARD E. McGARVIE

For example, we can be confident that our first guest tonight, His Excellency the Governor of Victoria, will **not** open the next session of the parliament with the words:

What is the difference between a rottweiler and Joan Kirner?

Let alone responding by saying: *The lipstick.*

By nature, His Excellency is a peacemaker. Once he was confronted with a heated dispute in the Practice Court, with allegations of bad faith being made in all directions. He summed up the situation by saying:

Gentlemen, I shall proceed on the assumption that each party is thoroughly outraged by everybody else's conduct.

However even the peacemakers are judged by the company they keep. Many years ago, when His Excellency was a leading junior in both civil and criminal cases, he was travelling to his circuit court by train. He was in a first-class cabin, with an impeccably-dressed gentleman opposite, when a former client came by and said:

How are you, mate. We done well on that trial. We would have got 5 years if we got convicted.

When he was Chairman of the Bar, His Excellency tried to get to know all the young barristers. He was on first-name terms with many, and often knew nicknames as well. At one Bar dinner the amplification equipment broke down and His Excellency was looking for the repairman. His Excellency saw a young barrister called Colin Lovitt, who distinguished himself by wearing a bright blue dinner jacket, and asked: *Are you the mechanic?*

In October 1990 His Excellency was faced with a junior who failed to attend the previous day. The junior's excuse was that he had been celebrating Collingwood's premiership, had too much to drink and been violently ill. His Excellently commented, with great perspicacity:

Well I suppose you'd say that if you only fail to attend when Collingwood wins a Grand Final, it won't affect you very often.

Sir Charles Lowe once faced a similar situation when a man appeared before him intent on being excused from jury service. In those days people who had done jury service before had a good chance of being excused. The man said:

I work at night, and my wife works in the daytime, and we've arranged to take our holidays, and we want to have a baby, and these things take some organising.

There was a silence from Sir Charles for a second or two; then he asked:

Witness, how often have you served?

There is precedent for a newly-appointed silk to be nervous in the presence of the Governor. Shortly after Sir Henry Winneke was appointed Governor a slap-up dinner was held at Warrnambool. A newly appointed Queen's Council was sitting next to Lady Winneke. He said to her: *Would you like another Winneke, Lady Cointreau? No thanks,* came the reply, *I've had two already, and that's quite enough.*

Your Excellency, you have served your nation, in both war and peace, you have served your profession and now you continue to serve your State; all with great distinction. It is a great honour for you to be with us tonight.

PHILLIPS C.J.

It is a great honour for the Bar to have as its guest tonight the Chief Justice of the Supreme Court of Victoria, the Honourable John Harber Phillips. His Honour has enjoyed a wonderful career. He was appointed DPP in 1983 and has since been a puisne judge of the Supreme Court, Chairman of the National Crime Authority, a justice of the Federal Court of Australia and now Chief Justice.

These are outstanding achievements for someone about whom it is said that he has difficulty in holding down a job.

It is well known that His Honour was a highly skilled criminal advocate, with a measured, but deadly, style of cross-examination; and that he acted in many major criminal cases, including the Beach Inquiry into police conduct and the Chamberlain case.

One of His Honour's less renowned cases is said to have occurred at South Melbourne Petty Sessions. His Honour was acting for a man charged with assault. The court business was heavy and His Honour adjourned himself outside for a quiet smoke. Inside his client was convicted and fined.

Upon learning of this travesty, His Honour reminded the Court of his appearance and demanded a rehearing. The application was granted, the case reheard. The justices then convicted the man a second time and doubled the penalty.

We wish His Honour well in his new and important role as Chief Justice of the Supreme Court.

BYRNE J.

Like so many of our guests, Mr. Justice Byrne has made an enormous contribution to the Bar. He was an editor of *Bar News*, he was involved in the construction of Owen Dixon West, he served on the Bar Council. He is an innovator with tremendous energy and enthusiasm.

His Honour also organised the *Silk's Tapestries* which hang in the foyer of Owen Dixon West. It was no small task to extract $1000 from each of 86 silks.

We can only wait to see the possible changes to the Supreme Court which follow in His Honour's wake. Will we see the re-introduction of law French as the language of the courts? Will we see judgments delivered in iambic pentameter? Will we see the Banco Court adorned with the Judge's Tapestries?

Of course we know that His Honour's enthusi-

asm is tempered by sound judgment. It is unlikely that he will support the proposed renaming of the Supreme Court as the Office of the Judicial Ombudsman!

The Bar wishes Mr. Justice Byrne well in his new office as a justice of the Supreme Court.

HARPER J.

Our next guest, Mr. Justice Harper, is yet another former Chairman of the Bar. He is not a man of pretensions. When he first checked in as a Supreme Court judge, the Chief's associate asked him a few routine questions:

Place of residence? *Heathmont.*

Well, that's a first. I'll try another. Type of car? *Nimbus.*

Well, that's a first. I'll try one more. Hobbies? *Fast bowling and bee keeping.*

Actually His Honour still dons the creams from time to time. At a recent match the commentary went something like this:

When he first checked in as a Supreme Court judge, the Chief's associate asked him a few routine questions: Place of residence? *Heathmont.* Well, that's a first. I'll try another. Type of car? *Nimbus.* Well, that's a first. I'll try one more. Hobbies? *Fast bowling and bee keeping.*

Now Harper comes into bowl a new over from the southern end. This must be his short run, Ritchie, he has actually started inside the sight screen. Here he comes, legs and arms pumping, the head heaving, his giant will surging him forward. He's half way to the wicket now and he's really starting to generate his rhythm, why his whole body is actually throbbing with aggression. There he goes, up to the wicket now, his left arm is raised high, his right arm goes up, then it goes round, then down, and now it goes through — like a sling-shot — oh, and what a ball. Now we see the batsman, he decides to come forward, in fact he's dancing down the wicket, he's waiting for the ball to arrive, the ball will arrive soon, and here it is and what a beautiful cover drive for four.

The Bar welcomes His Honour's appointment and looks forward to a long innings at the judicial crease.

HAYNE J.

Our next honoured guest, Mr. Justice Hayne, is a great man with words and a great joker. Some years ago he even tried to convince us that he had been appointed a judicial registrar of the Family Court.

During the Occidental litigation, when His Honour was acting for the Bank of Melbourne, he presented a number of complex charts showing who was suing whom, who was cross-suing, who was counter-claiming and who was claiming contribution. He commenced his explanation of these complex charts by saying:

Gentlemen, we have our first mission over the Rhine.

On another occasion His Honour was about to advise a number of German clients when he said to his junior, in a parody of John Clease, *don't mention the war!*

His Honour's fascination with words once led him to write an article in the *Bar News*, in which he discussed *the real point* of a case. His Honour said:

In the Magistrates' Court it is the point ignored by the prosecuting sergeant. In the County Court it is the point that your opponent forgot. In the Supreme Court it is the point that the judge raises during addresses. And in the High Court it is the point that was not raised at all.

When His Honour sits in the Practice Court he will no doubt be told that the case only involves a *short point.* His Honour will do well to remember the reply given by Rupert Balfe, when asked how long his case would take: *It is a short point, Your Honour, but it may take some time to get to it.*

For many years His Honour has had a fond interest in vituperative judgments and has often filed away the best examples for future reference. His favourite judges are said to be Lord Templeman — sometimes known as *Sid Vicious* — and the acid-tongued Mr. Justice Roddy Meagher of the New South Wales Court of Appeal. It was Mr. Justice Meagher who said:

This appeal should succeed, despite the arguments advanced on behalf of the appellant.

And . . .

Mr. Justice Cripps was correct in his judgment, although, having regard to His Honour's reasons, possibly unwittingly so.

With His Honour's great command of the English language and his mastery of wit, we look forward to reading his judgments.

EAMES J.

Our next guest, Mr. Justice Eames, has certainly been the talk of the Bar over the last few days. But before I sing the praises of His Honour, let me dispel one myth. It is **not** true that Mr. Justice Eames is Campbell McComas in disguise.

Although His Honour has spent much of his professional life practising in South Australia and the Northern Territory, he is a Victorian by birth and training. But with his experience in the Supreme Courts of South Australia and the Northern Territory, as well as in federal courts, His Honour is the first justice of the Supreme Court of Victoria who could be described as something of a cross-vestite.

Recently His Honour acted for an alleged Nazi charged with murder. His Honour's client was big, tough, uncouth and covered with swastika symbols and other tattoos. One of these tattoos consisted of two words permanently affixed to the bottom lip. I couldn't possibly repeat the words, at least not in this company, but Lord Denning has described the expression as a more emphatic version of *be off with you.*

One day, after a particularly vile outburst from his client, His Honour is said to have observed that his client's tattoo gave new meaning to George Bush's expression *just read my lips.*

The Bar wishes His Honour well and looks forward to appearing before his court.

NICHOLSON C.J.

We welcome tonight the Chief Justice of the Family Court of Australia, Mr. Justice Nicholson, who has been made an Officer of the Order of Australia for his services to the armed forces. His Honour is a former Supreme Court justice and has served as the first Judge Advocate General of the Australian Defence Force with great distinction. It comes as no surprise that His Honour has been an outstanding judge. When he was first appointed to the bench he was described as having all-round legal ability, human understanding and fierce desire for truth and impartiality.

Mr. Justice Nicholson taught me a great deal about legal proceedings, including how to walk out of them. At the time I was his junior in a hearing before the Australian Broadcasting Tribunal concerning the takeover of Channel 10 by Rupert Murdoch. We were opposed by New South Wales imports, Roddy Meagher and Tom Hughes, and they convinced the tribunal that cross-examination of Murdoch should be limited to half-an-hour; and that if Murdoch chose not to answer a question it could be answered by any one of his underlings. The High Court later described this as a version of the the game *twenty questions.*

Before we went into the hearing on the second day His Honour, who had developed just a slight reddish tinge on his face, said: *If the chairman keeps up these stupid rulings, I'm going to take him on.*

I started to get nervous. I wasn't sure what to do. My mind went back to a famous incident involving Judge Stretton. Once as a young barrister in City Court, Stretton became extremely aggressive and the magistrate threatened him with contempt. Stretton is said to have replied:

There are two reasons why Your Worship won't do that. The first is that you don't know how; and the second is that you haven't the guts.

I cautioned His Honour against anything too rash; and he replied:

Don't worry, but if I walk out on the bastards just make sure you follow me.

Sure enough, after 10 minutes of further argument, His Honour did walk out. I followed my leader, pausing only to ensure that the television camera captured His Honour's preferred profile.

As matters transpired His Honour stitched up the tribunal so skilfully that the High Court overturned the tribunal's decision to approve Murdoch's acquisition. Moreover the High Court commented that an advocate, placed in His Honour's position, was acting quite properly in withdrawing from the proceedings.

Actually I knew things were going to be tough before the Broadcasting Tribunal when I overheard a conversation the previous day, in the men's toilet, between Roddy Meagher and Tom Hughes. It is amazing what you can pick up in toilets. I heard Roddy say to Tom:

This socialist Victorian, Nicholson, doesn't like it when we play the man, Tom, I think I'll give him another spray this afternoon.

Then he added: *But don't worry, Tom, I won't attack you.*

At this point Tom Hughes finished his business at the urinal and,in his imperious way, said: *That's a relief.*

We wish Mr. Justice Nicholson well and congratulate him on his honour.

FOGARTY J.

Mr. Justice Fogarty is honoured tonight as a new Member of the Order of Australia, a richly deserved recognition of His Honour's work for the proper maintenance of children in need.

Before being appointed to the bench His Hon-

our had a distinguished career at the Bar. He was editor of the Victorian Reports, appeared for Bluey Adam in the notorious police abortion trial, argued for Aboriginal land rights and even had a string of wins against our own Neil McPhee.

But a witness sometimes gets the better of even the most outstanding advocate. On one occasion when His Honour was prosecuting a man charged with drink driving, he was confronted by a defendant who had refused to prove his sobriety by picking up three pennies from the police station floor. His Honour asked the accused:

I suggest to you that the only reason why you refused to pick up the three pennies was that you were drunk.

To which the accused replied: *Even if I hadn't had a single drink I would never, under any circumstances, pick up any coppers from the floor.*

Of course, the demands of the Family Court require judges of great common sense and an uncanny ability to identify the truth. His Honour has this skill in abundance. On one occasion before His Honour, Jack Hedigan (now Mr. Justice Hedigan) was acting as counsel for a husband. He was cross-examining the wife with great vigour when His Honour intervened.

Why are you asking these questions?

They go to credit, Your Honour.

What do you mean, "credit"?

Well, the truthfulness of the witness, counsel replied.

His Honour then said: *You don't have to worry about that, Mr Hedigan, they all tell lies down here.*

Family law judges have always had great skill in dealing with witnesses. For example, before Sir John Norris was appointed to the Supreme Court bench, he was given an acting appointment to dispose of undefended divorces, a jurisdiction in which he had not practised to any extent at the Bar. He was not at all pleased when a man appeared in the witness box with his hands in his pockets and chewing gum. *Witness*, he said, *will you please stop masticating?* The witness immediately took his hands out of his pockets and went on chewing.

We congratulate His Honour on his honour; and wish him well in the future.

ROZENES DPP

Our final honoured guest this evening is Mr Michael Rozenes, who has been appointed the Director of Public Prosecutions for the Commonwealth of Australia. Michael is said to be the first silk to be educated at Monash University. He is certainly the first of the *Hamplettes* to be appointed to office.

No doubt, the next generation will be known as *Michael Rozenes* and the *Rosettes.*

Michael had a thriving practice at the Bar, but seemed to be able to actually avoid appearing in court. In a sense he was the Criminal Bar's answer to Sammy Spry.

Even when Michael managed to make it to court he liked to keep a low profile. On one occasion his client was asked who was representing him and the client replied *the one that looks like Sammy Davis junior.*

Michael is perfectly suited to his new role as Director of Public Prosecutions. He is an eminently fair man — when defending a man or when prosecuting a man; or when defending *and* then prosecuting a man. In a moment, we'll drink to that.

The job of DPP is a difficult one. All sorts of problems must arise, such as proper identification and the mental state of the accused. I know it's late at night to get involved in the niceties of the criminal law, but let me give two illustrations.

The first relates to identification. In Michael's first murder trial he was representing one of the heavies of a criminal gang. At one stage during the hearing Michael's young solicitor observed a woman entering the court and said to Michael: *Look around now and you'll see a gangster's woman.* Michael looked around and then said: *Yes, that's my wife.*

Now an illustration of the problems the DPP must have in relation to the mental state of the accused. This comes from a case heard before Lord Justice Denning (as he then was) where the accused was charged with an act of bestiality with a duck. The defence called a Viennese psychiatrist who said:

I have known the prisoner, my Lord, for a long time and for many years he has been a patient of mine, but now he is responding to treatment and is showing a marked improvement.

His Lordship said: *By showing a marked improvement, Doctor, are you suggesting that he is about to graduate up through the animal and bird kingdom, until he gets to little boys and little girls?*

Oh, no my Lord, said the psychiatrist, *he'll always stick to ducks.*

The Bar congratulates Michael Rozenes on his appointment and wishes him well in the future.

CONCLUSION

Mr. Chairman, the Bar extends its congratulations and best wishes to all of our honoured guests.

I now ask you to charge your glasses, and be upstanding, for the toast.

Our honoured guests.

PRESERVING OUR HERITAGE

IN THE INTERESTS OF EFFICIENCY AND as part of the "modernisation" of our judicial system many country and suburban courthouses have been closed. This has had two unfortunate results: it has rendered the administration of justice more remote from the local community; it has almost certainly led to the loss of significant historical documents.

When a courthouse is closed there appears to be no planned retrieval or preservation of the local records. It may be that the old Petty Sessions Registers and the Watch House Charge Books are stored somewhere for a short time. But it is unlikely in this age of economy and efficiency that they are subjected to any proper archival treatment or adequately protected from silverfish and damp.

In this context the editors were delighted to discover this extract from the Avoca & District Historical Society Inc.

Perhaps it would be appropriate for the Bar to take active steps at an official level to assist in the protection of old records of this kind.

EXTRACT FROM AVOCA & DISTRICT HISTORICAL SOCIETY INC.

At the general meeting which was held prior to the working bee [on 18 August 1991], the President told the story of the return of the Courthouse furniture — a tale many members were very keen to hear. It is a story of amazing good luck and of asking the right question of the right person who just happened to be in the right place at the right time. After so many years, it can only be called a fluke!

It came about this way. One of our members was visiting the Clerk of Courts at Maryborough one day, on behalf of the Society, inquiring as to the whereabouts of the old records like the Petty Sessions Registers, Watch House Charge Books and Occurrence Books pre-1880, relating to the Avoca area. Sadly for us, they could not be found. But all was not lost. In the course of conversation, our member mentioned the missing Courthouse furniture. It has to be understood, of course, that this lady has a better knowledge than most of the Avoca Courthouse and its furniture and fittings for, in years gone by, it was she who kept the Courthouse in order and everything spick and span.

Now, it happened that the Clerk of Courts was about to retire, so his time at Maryborough was fast coming to a close. It also happened that he was just the right man to speak to about the furniture, as he had actually been present at Avoca on that day, back in the 1970s, when it was removed from the Courthouse and taken to the Ministry of Housing storage depot at Port Melbourne. He suggested that the Society should write to the Ministry enquiring as to the present whereabouts of these fittings.

Word was passed along the line within the Society and a member of the executive, who has never been known to let the grass grow under her feet, wrote a letter immediately. A reply was duly received stating that the furniture was still held in storage. A short time later, an urgent phone call was received notifying the Society that the furniture was to be auctioned early the next week!

In the interests of efficiency and as part of the "modernisation" of our judicial system many country and suburban courthouses have been closed.

The call went out, "Action stations"! On the Thursday, our lady who was so familiar with the Courthouse fittings headed for Melbourne from Ballarat, despite the fact that she was not very well, to positively identify the pieces for us. On the following Monday, the day before the auction, our President and two members went down from Avoca, retrieved the precious items at Port Melbourne, and returned them to their rightful home at the Courthouse. The furniture and fittings comprised three cedar tables, the bench, the dock, two cupboards, the fire surround, screen and three fenders, and a set of pigeon holes.

An amazing set of circumstances, you must agree. The Society is indeed fortunate to have such dedicated people among its members and grateful thanks was conveyed to all those concerned in this exciting episode of the Society's activities.

We are still seeking the Petty Sessions Registers, Watch House Charge Books and Occurrence Books, pre-1880 . . .

THE 1992 FAMILY LAW BAR ASSOCIATION ANNUAL DINNER

CONSIDERABLE ANTICIPATION ACcompanied responses to the invitation to attend the 1992 F.L.B.A. Annual Dinner at the Savage Club on Friday, 12 June.

What were the forthcoming changes to Family Law that the Honourable Justice Frederico was to talk about? Would this year's guest speaker be as notable as last year's? Would the Savage Club look after attendees as well as last year? What would Paul Guest's choice of wines be like this year? How would the numbers hold up?

No-one was disappointed! Once more the Savage Club served the guests and members well. The carefully selected cuisine was excellent — especially compared to that provided at the annual Bar Dinner — and the service remained at a high level. (It appears, however, that some members of the Savage Club at a private function in another room on the same floor felt compelled to make a public issue of perceived preference in service to Club guests.)

Although some of the members may have been disappointed that Justice Frederico chose to depart from his advertised topic, overall everyone enjoyed a highly entertaining speech based on the similarities between current attacks on the profession and those made by an 1897 Royal Commission in the Colony of Victoria. All who attended were gratified to hear that the good relations and mutual respect between the Family Law Bench and Bar continued to be maintained at its high level.

Perhaps a reflection of the good relations between Bench and Bar was the high number of guests (14) from the Melbourne, Dandenong and Hobart registries, the Victorian Magistracy and members who braved the cold Melbourne winter. Notwithstanding the scythe-like effects of the current influenza strain and the chill winds of the current economic climate, just over 60 members out of a total F.L.B.A. membership of approximately 80 attended the dinner.

Whilst, of course, wine and food had their role in the ambience of the evening, the 1992 dinner could not pass without comment about the choice of wines for which both Elizabeth Davis and Paul Guest sought recognition. One wine which was described as: *". . . made from Shiraz, Cabernet and Merlot (but) a lighter style than the Seppelt although it is in fact higher in alcohol. Forget the funny label get up and just enjoy the wine"* excited great interest. It wasn't because of that description or because it was made by Peter Lehmann but rather because of the prescience shown by the wine maker and the wine selectors alike, for it was listed in the menu as a: *"1998 Clancy Gold Preference"*. From the rave reviews it received there can be no doubt that 1998 will be a great year for South Australian wines. On the basis of the past few years there can be no doubt that 1998 and the years preceding it will also be great years for the F.L.B.A. at its annual dinners.

Duffy's Progress.

MOUTHPIECE

Time: Mid-afternoon
Day: Pay day
Location: A Chinese restaurant (licensed and BYO).
A group of 15 males have just completed a lengthy lunch to celebrate the twenty-fifth birthday of one of their number. They all work for Barristers' Clerks. They lunch together quite often — but only on pay days. The bill arrived about 10 minutes earlier.

Gordon: "Have you checked the bill yet?"
George: "It seems to be a bit high but the addition is OK."
Gerald: "You had better check that nothing has been included that wasn't ordered."
Gareth: "Don't forget to carefully check the booze."
George: "How many bottles of wine did we get?"
Gerald: "I dunno."
Gareth: "Couldn't have been more than half a dozen bottles."
George: "They have billed us for eight."
Gordon: "The cheats! They've robbed us blind."
Gerald: "We did go through a few before the meal arrived and we have been here a while."
Gilbert: "Eight might be right you know."
George: "I reckon so."
Graeme: "What is the damage? I really do have to go soon."
George: "Let me see. $200 divided by seventeen. Oops that's just for the grog. I don't know why they don't add up both bills together. Ummmm. $200 and . . ."
Gordon: "$200 for grog! They must be joking!"
George: "No. The six Moselles were $12.50 each. That makes — I wish I had a calculator. Did anyone bring a calculator? — $75 for the moselle. The two chardonnay came to $35. Then there were some beers — another $40."
Gordon: "Gilbert's bloody "cleansing ales"."
George: "Give me a break! Soft drink and the two gin and tonics were $15. The ports $22. Twelve coffees and one tea another $13. That comes to $200, I think."
Graeme: "Will you get on with it? I have to go."
Griff: "I have to go too. George, can you pay for me and I'll fix you up in the morning?"
Gilbert: "Don't do it George! Getting money out of him is like pulling teeth. He still owes me from last time."
Graeme: "For crying out loud. Just get on with it."
George: "$200 for the drinks and $265 for the food — that makes $465. Divided by 17, lets make it $27 and that leaves $24 for the tip."
Gordon: "Tip! $24! The service was lousy. Why tip them?"
George: "I thought they were pretty good all things considered. Anyway, that's $27 each."
Graeme: "Hey wait a minute. I came late and missed the prawn toasts and spring rolls."
Griff: "I didn't have the soup, remember?"
Gordon: "I certainly didn't drink as much as any of you."
Glenn: "And I only had soft drink."
Gareth: "I didn't eat the prawns, I am allergic to them."
Gus: "I didn't have any tea or coffee either."
Gordon: "I didn't have any beer, or the gins, or even a port. I reckon I should only pay $19.25, tops."
George: "You had more than your fair share of wine and you had Gareth's prawns too."
Graeme: "I make my share $24."
Gareth: "If that is the case I should only have to pay $23."
Gus: "But you had two ports and an extra beer."
Gareth: "I only had the extra port because Glen didn't want his."
George: "Wouldn't it be easier just to divide it equally?"
Graeme: "And a hell of a lot quicker."
Grant: "But it wouldn't be fair if I had to pay as much as Gordon. He ate lots more than I did."
Gordon: "Rubbish! You had an extra bowl of special fried rice. I saw you. And you must've had at least two extra glasses of the Moselle."
Graeme: "The time. Get on with it."

Griff: "Me too. George, can I fix you up tomorrow?"
Gilbert: "Don't let him. I warned you earlier."
Garth: "I still don't see why we non-drinkers should subsidise the drinkers."
Gordon: "Cos your soft drink costs heaps more that's why! And you are a piker anyway."
Garth: "Who are you calling a piker?"
George: "If I am stuck with sorting this out it'll be $27 each and that is that."
Gerald: "Hey wait a minute, there are only 15 of us!"
George: "15? 15! Of course! I forgot that Garth and Gene pulled out at the last moment, again. That makes the division a lot easier. 31 bucks a head and *no* tip."
Gordon: "I still reckon that I shouldn't have to pay that much."
[There was further toing and froing about the equities of an equal division of the bill but George eventually won the day. His victory was short-lived. They then haggled over the change and who should have got which change. Somehow, poor George ended up having to put in an extra $12. No one owned up to an underpayment. Two weeks later they went to a different restaurant — a pasta place — and the debate was much the same. This time Gordon had to find the extra money. But they are all good mates, aren't they?]

A FAIRY TALE (continued)

NOW GATHER AROUND ME MY DEARS whilst I continue the tale of the VicBees. For some time the VicBees had become somewhat bored and frustrated about the lack of any action over the expansion of their hives. The younger and newer VicBees were most frustrated especially as there appeared to be insufficient room in the hives for them.

In order to distract the VicBees from thinking about their lack of hives the senior VicBees decided to hold an election. That was such a great success they repeated the exercise a couple of weeks later.

Even elections wear off quickly so the senior VicBees, not being able to rustle up a circus to entertain the VicBees, decided to have a massive Hive paintathon. Each area of the biggest hive was allowed to select its own colour. It appears that there was an unwritten law that no area could select a colour previously chosen by another area. It also appears that prizes were awarded to those areas which could most prolong their decision-making and which could generate most dissension in their decision-making process.

Like the election the paintathon was a great success. The main hive is like a gigantic rainbow. As one travels from level to level one can only marvel at the contrasts, the imagination and the flair that went into it all. I believe the area which took out the major prize was the one that couldn't come to a unanimous decision and opted for a two-tone contrasting approach with two incompatible colours meeting in the middle of one young VicBee's cell. Perhaps that area's crowning achievement was the re-repainting of a part of that area when a very large very silky VicBee returned from a very long trip away. All the VicBees in that area of sudden changes now say they are very happy with the end result.

But all good things must come to an end. When the frivolities of elections and paintathons ceased the VicBees were still faced with the stark reality of a lack of space in their hives. After many years of thinking a lot about many options and putting off decision-making as one option after another cropped up the VicBees finally made a decision — in fact, they made lots and lots of decisions. They astounded themselves!

They decided to talk to the OwnerBees of one of their hives and then to some BankerBees. They ended up buying that hive with a little of their own money and with a loan of lots and lots of BankerBee honey. However, they decided to defer for a year tough decisions about how they were precisely to return the BakerBee's honey. One thing is for sure! Like all people who deal with VicBees and their hives the BankerBees are going to end up with lots and lots of VicBee honey! You also can be quite sure that the BankerBees will not relend much of that honey to individual VicBees.

Now that hive belongs to the VicBees — or sort of belongs — they have decided to evict non-VicBee occupants so that more VicBees can live there. When that is done the VicBees plan another big paintathon. To add to the great success of the most recent paintathon the VicBees in that Hive will not only be allowed to choose their own colours but also precisely where their walls will be and so on.

Encouraged by their sudden found ability to make decisions the more senior VicBees decided to try out making a few more decisions. They decided to borrow a bit of someone else's hive for a little while. Although they will be able to use those part hives for only 10 years they decided to use up lots and lots of honey to make them look like a "hive away from hive". It appears that this has been another success story!

But as you know the Gods get angry when mere mortals tempt fate to such a degree. The VicBees had done too well! The Gods caused a great flood to fall from the sky onto one part of one of their hives. It did great damage and caused much anguish and gnashing of feelers. "That will teach them to make decisions" said the Gods.

But the Gods were wrong for the VicBees had failed to make one very important decision — what do they do with their multi-facetted, multi-purpose vacant site? It is most inconvenient. It just won't go away.

There is so much more I could tell you about the doings of the VicBees but time has caught up with us and the rest of the story must await another time. Sleep well my dears.

(To be continued)

VERBATIM

Supreme Court Practice Court

Coram: Gray J.
May 1992
Gallaher v. Gallaher

A testatrix had died at 101 years. Her son, a beneficiary of her estate, could not be located.
Stougiannis for executor: "The missing son would, of course, if he is alive, now be of great age. He was born in 1926."
Gray J.: "He'd be as lively as a spring chicken. I was born in 1926 as were Marilyn Monroe and the Queen."

County Court of Victoria

Coram: Judge Villeneuve-Smith
Doyle v. State of Victoria
15 April 1992

Giving judgment on an application for leave to issue out of time pursuant to s.23A of the *Limitation of Actions Act* 1958 His Honour found himself faced with a conflict of superior court authority.
His Honour: "It has been said that when elephants thunder in dispute the prudent mouse takes himself to a position of safety. Despite the inherent prudence of that saying, for a judge in the lowly hierarchical position that I am in, I am compelled by the hand of circumstances to elect a preference between the competing views of high authority."

County Court of Victoria

Coram: Judge Kelly
R. v. Beljajer & Pinhassovitch
25 April 1992

Judge Kelly: "I am sorry for delaying you. I have been attempting to re-organise legal aid, mainly by abolishing it."

Supreme Court of Victoria

Coram: Byrne J.
R. v. Matthews & Dodd

Byrne J. summing up to jury: "Some years ago I was sitting on the banks of the Yarra and over by a rubbish bin there was a broken bag of prawns. There were a number of seagulls slowly advancing towards those prawns. There was a toddling girl three years old, four years old, looking at the seagulls with arms outstretched and in the background there was the father watching the toddler to see that she didn't fall off into the Yarra and all the while the prawns' eyes seemed to watch everything. Well, without meaning to offend you all, it's a bit like that in this case. The witnesses are called and they direct their attention to you. The barristers, the defence and prosecution, watch the antics of the witnesses sometimes with arms outstretched. The judge sits up high; he watches the barristers to see that they don't go over the edge. You, until now, have sat and watched everything. But unlike those prawns, you've got a bit more to do than simply watch and listen. You need a framework to understand what you're going to do in the case. It is my impression that you haven't been properly told what the framework is."

Alpine Resorts Commission

Coram: Dr. Hore — Delegate of the Chief Executive of the Alpine Resorts Commission

Mr. R. Smith, Solicitor representing himself
Mr. Smith: "So you don't accept a statutory declaration from a barrister and solicitor as being a valid document?"
Witness: "No. Not all barristers and solicitors are suppositories of the truth!"

Paragraphs from amended particulars of claim served in a recent Magistrates' Court proceeding at Kyneton

6. Further or alternatively fraudulently and either knowing that they were false and untrue or recklessly not caring whether they were true or false the Defendant advised the Plaintiffs that the house needed restumping.
7. Further or in the alternative the Defendant advised the Plaintiffs that the house needed restumping negligently.

Set out below is a Letter to the Sheriff from an Irate Juror:

"Dear Sir,

About 18 months ago I was called for jury service — as now and I had occasion to sit on a jury when they paraded in a malingering 'specimen' who showed us his 'scars' which you would never have seen if someone hadn't pointed them out and was suffered to have a 'bad back'. After spending the morning on the jury the bastard was paid $180,000 for nothing settled out of court. The judge thanked us very much and said 'we might be lucky enough to get an another jury this afternoon'. When I got called out again in the afternoon I stood up in court and told the Parasite lawyers and the judge what I thought of his court and the Farce which they go through in rubber stamping the Rip-Off of insurance companies, workers' compensation or whoever else they are suing. This caused me and all the other people who had been called to be thrown out of the court and they had to apparently call a new lot for the new Rip-Off. I spent ten years paying money for nothing to mongrels like we had in there that day (like one bloke I had who worked light duties during the Winter and then was always on full W/Comp. during the good weather while he did his Summer private work). Then I find the courts are just legalised Rip-Offs for Lawyers & Judges to make fortunes out of. They even advertise these days I see — 'if you have stubbed your toes or heard a loud noise 16 years ago we can guarantee to make you a fortune'. It stinks. While I'm at it you might as well have some more. There was some chest beating the other day about the crime rate. We will never do any good while we have such pitiful sentences which are reduced to nothing almost by the automatic reductions, good behaviour or the prison governor's birthday or some such bulldust. One thing we should have is an automatic ten year sentence for the use of a weapon in a crime (be it a club, knife or a gun). Then consider the crime itself. It is unlikely we will ever do any good and get justice for the victim — like the old people who get bashed etc. — because the Lawyer & Judge can make fortunes for themselves by keeping the jail doors revolving and processing the crooks again and again. If they gave proper sentences half the Judges & Lawyers might have to get proper jobs.

I am not really interested in having anything to do with your juries."

THE FLOOD AT LATHAM CHAMBERS

"A Tide in the Affairs of Tenants"

ON 19 MAY 1992, WHILE THE SKIES WERE pouring their chalices on to the streets of Melbourne with rain, the roofs of Latham Chambers were deluging their tenants with torrents of water that seemed to equal in velocity the outpourings of Niagara Falls!

At 12.30 p.m. the main cold water supply pipe for the whole building blew out and released tonnes of cold water on to the inhabitants of the 12th Floor. The water flooded through the ceiling in the main passageways causing it to collapse. Streams of water flowed into the lift-wells causing a shut-down in the operation of all lifts and the termination of the power supply.

It was an afternoon off for secretaries as word processors ground to a halt. It darkened the Chambers of barristers and put an end to conferences for clients. The water flowed in rivers along the corridors of the 12th floor and through the core of the building on the 11th, 10th and 9th floors causing reducing levels of chaos as it descended. The damage to the 12th floor was extensive. The carpet and underfelt in the corridors was soaked, ceiling tiles collapsed in some areas bringing with it the lighting, the walls were stained and watermarked, the security doors ceased to operate and the bathrooms and kitchens became odorous from water running up from blocked overflow pipes that could not take the increased capacity. Fortunately the water only entered the reception areas of Chambers on the east side of the 12th floor and was otherwise confined to the central lobby and corridor areas of each floor. It was a day the tenants of Latham Chambers will long remember.

Unfortunately the flood comes in the middle of a long and unhappy time for the residents of Latham Chambers. They have suffered a serious and ongoing interference with tenancy rights over the past two years while the Bank has refurbished floors 12 and 11 with the tenants in occupation. The continual interference with their rights of quiet enjoyment has led the tenants of the 12th floor to recently pass a resolution that unless Barristers' Chambers by 30 June 1992:

- ☐ offers proper and adequate compensation for all past and future interferences with the quiet enjoyment of their Chambers (which interference so far has continued for over two years) by rent reduction or otherwise;
- ☐ satisfactorily demonstrates to them that future interferences of the quiet enjoyment of their Chambers will not be likely to occur;
- ☐ forthwith causes the completion of all rectification and maintenance work;

the the tenants of the floor propose to give notice that they will:

(i) no longer pay rent for their Chambers;
(ii) seek damages for all losses suffered;
(iii) vacate their Chambers once they have obtained alternative accommodation.

Unfortunately the flood comes in the middle of a long and unhappy time for the residents of Latham Chambers. They have suffered a serious and ongoing interference with tenancy rights over the past two years while the Bank has refurbished floors 12 and 11 with the tenants in occupation.

Barristers' Chambers has met with delegates from Latham Chambers in an endeavour to resolve the dispute. It is to be hoped that Barristers' Chambers, on behalf of the tenants, take a strong stand in protecting the rights of barristers who pay ever increasing rents while the central business district offers so much alternative accommodation at far cheaper rates. Rent reductions of 50% to Barristers' Chambers have not been passed on to benefit barristers in Latham Chambers.

The flood was just a drop in the ocean to the problems encountered by the tenants of Latham Chambers. The flood gates are about to open on Barristers' Chambers.

Graeme P. Thompson

MR. TUCKER'S UNERRING FORESIGHT

SOME 26 YEARS AGO THE *LAW INSTITUTE Journal* published the following item.

OLDEST

Mr. Frank Tucker, supervisor of civil jury pools at the Bourke Street courts, who retired last month was the oldest inhabitant of the Law Courts. He had been there for 16 years.

He caused some embarrassment at his farewell when he predicted traffic jams in the lifts of the 12-storey court building under construction at the corner of William and Lonsdale Streets.

However, Law Department officials are confident from various analyses that the lifts — one for judges, two for prisoners and three for the public — will be adequate.

The building will eventually house 20 courtrooms for General Sessions and the County Court, and Mr. Tucker's remarks were made less than a fortnight after the first excavation was dug.

Like his father and grandmother. Mr. Tucker was born in the heart of Melbourne. His great-grandparents arrived in the 1830s. So Melbourne and the Law Courts are very dear to him.

He has seen many of the finest court buildings in Britain, America and Europe and says that few, if any, match the Supreme Court building for dignity and beauty of architecture.

"I feel this new building will be unworthy of Melbourne", he said.

He would have liked to see it next to the Supreme Court building on the site of the Crown Law offices and High Court.

County Court.

County Court.

ON BOTH SIDES OF THE RECORD

It is accepted law that a person cannot appear as plaintiff and defendant in the same proceedings. Our wandering reporter, Mal Park, however, has discovered that even apparently trite law is not of universal application. Sheriffs and even lawyers, like pop stars, *may* sometimes appear on both sides of the record.

IN 1958 HOLMES J. OF THE SOUTH AFRIcan Supreme Court (Natal Provincial District) decided "a whimsical case about a deputy sheriff who served a summons upon himself as defendant". The plaintiff Dreyer issued a summons against the deputy sheriff Naidoo at Estcourt claiming £2,000 damages. When the plaintiff's solicitors forwarded the summons to the deputy sheriff for service, he raised the question whether it would be regular for him (the deputy sheriff) to serve it on himself (the defendant). The solicitors' response was that such service would not be irregular and that if he did not effect service without delay, the plaintiff would view the delay as irregular. Consequently the deputy sheriff served himself with the summons and charged the plaintiff's solicitors a fee of 10s. 7d. for so doing. Thereafter the defendant took issue with the mode of service and sought to have it set aside as irregular: 1958(2) SA 628. Holmes J. refused to set service aside and declined to make any order for costs on the basis that both sides were responsible for the irregularity complained of. The judgment is reprinted in Blom-Cooper's *The Language of the Law* (1965) at p.350 and also Megarry's *Second Miscellany-at-Law* (1973) at p.20 under the heading of "The Ambidextrous Sheriff".

In *Dreyer v. Naidoo* at least the parties were distinct and separately represented by different firms of solicitors and counsel (Harcourt Q.C. was briefed to argue the applicant deputy sheriff's case). Consider now the Californian landholder Oreste Lodi who harboured some doubts about the validity of his title. To resolve the issue, he filed suit on his own behalf and named himself as defendant. There is also a suggestion that Mr. Lodi believed he would secure an income tax advantage from the litigation but the reason for this is not clear.

The complaint was duly served by the plaintiff Lodi upon himself as the defendant. How Mr. Lodi accomplished this dexterous feat is not described and we can only presume that he permitted his left hand to know what his right hand was doing.

In his capacity as defendant Mr. Lodi failed to enter an appearance and in his capacity as plaintiff Mr. Lodi sought to enter judgment in default. The Californian Supreme Court (Lund J.) wouldn't have a bar of these shenanigans and dismissed his application to enter judgment. At the time Lund J. denied Lodi's request to enter judgment and dismissed his complaint he did suggest to the plaintiff that he seek the assistance of legal counsel. Fortunately for the profession Mr. Lodi did not take up this suggestion which would have surely resulted in schizophrenia as legal counsel sought to erect "Chinese walls" to protect the separate interests of the single client (qv *Mallesons v. KPMG Peat Marwick* (1990) 4 W.A.R. 357 and *David Lee v. Coward Chance* [1991] Ch. 259).

Mr. Lodi appealed against the court's refusal to permit him to enter judgment in default and, to fully appraise the Californian Court of Appeal, Third District of all relevant law and argument, *filed briefs on both sides*. Moreover, in oral argument before the Court of Appeal in October 1985 the published reports notes the following appearances:

Oreste Lodi, in pro. per., for plaintiff and appellant.
Oreste Lodi, in pro. per., for defendant and respondent.

The Court of Appeal (173 Cal. App. 3d 628, 219 Cal. Rptr. 116 (1985)) *per* Sims J. (Acting Presiding Justice Regan and Carr J. concurring) gave the following judgment:

"The complaint was properly dismissed. In the cir-

cumstances this result cannot be unfair to Mr. Lodi. Although it is true that as plaintiff and appellant he loses, it is equally true that as defendant and respondent, he wins! It is hard to imagine a more even-handed application of justice. Truly it would appear that Oreste Lodi is that rare litigant who is assured of both victory and defeat regardless of which side triumphs."

This Solomon-like judgment of the Californian Court of Appeal belies the claim of Voltaire:

"I was never ruined but twice; once when I lost a lawsuit, and once when I won one."

On the other hand, perhaps Mr. Lodi could lay claim to being ruined twice in his life — when he both lost and won the one lawsuit.

Although generally American courts do not award costs to the successful party they do retain a discretion to award costs against a party (and in extreme cases against a party's lawyer) for outrageous or frivolous applications. The Court of Appeal described Mr. Lodi's as "a slam-dunk frivolous compalint". However, in this case it is difficult to imagine how this ultimate sanction of a costs award could be effectively implemented against Mr. Lodi and the Court concluded:

"We have considered whether respondent-defendant should be awarded his costs of suit on appeal, which he could thereafter recover from himself. However, we believe the equities are better served by requiring each party to bear his own costs on appeal."

READERS' DINNER

ON 29 MAY 1992, THE MARCH INTAKE OF readers signed the Bar Roll. The March intake included men and women. The new members of counsel celebrated that evening with a dinner at which they were formally welcomed by the Chairman of the Bar Council, Andrew Kirkham Q.C.

In his address of welcome the Chairman drew attention to the importance of the independent Bar to the efficient provision of legal services. He said that the Bar would survive *"because, with its depth of knowledge, experience, expertise, professionalism and integrity, it is a positive force for good in this community . . . Efficiency in litigation will not be achieved without a body of skilled advocates practised in the operation of litigation by reason of their being involved in that activity full-time. This is the Bar's greatest strength."*

The photos here show a representative sample of euphoric but apparently uninebriated readers — presumably during the pre-drinks stage of the dinner.

DINNER OF A DECADE

FRIDAY, THE 23rd DAY OF MAY 1992 SAW 16 members of Counsel gather at Vlados. They were there to celebrate a decade at the Victorian Bar and to review the previous 10 years.

At the beginning there were 31 — three females and 28 males (*vide*: Victorian *Bar News* Autumn 1982). Now only 23 remained and of those only one female (Davis) — at her insistence "a rose amongst a forrest of thorns". Of the absentees two (Fleming and Wilson) had suffered the ignominy of being left off the invitation list by Bristow. The others (Friedman, Sullivan, Griffin, Havin, Howie, Kovacs, Squirrell and Waugh) are having their alibi statements scrutinised.

Throughout the evening there was much reflection on how things had changed — Speed, Traczyk, Combes, Devries and Forrest sported grey hair not evident 10 years previously; Bristow displayed less hair and Marantelli was quieter. Davis had undergone a number of name changes and Denton had gone and come back. Tracey had taken silk and about 33% had repro-

10th Anniversary dinner — Vlados.

duced, some repeatedly. Above all else over a 1,000 readers had followed them. In fact, the wheel had come full circle and a number had readers of their own.

Most noticeable was the lack of change. Green was as avuncular, Denton as ebullient, Bristow as up to date on gossip, Traczyk as one-eyed a Magpie supporter, Devries as long-winded, Smith, Almond and Combes as concerned about the future, Berglund and Tracey as studious, and Davis and Walters were just the same as in 1982.

> Throughout the evening there was much reflection on how things had changed — Speed, Traczyk, Combes, Devries and Forrest sported grey hair not evident 10 years previously; Bristow displayed less hair and Marantelli was quieter.

As each participant rose to speak briefly — to the amazement of other diners there to pay homage to the mighty oxen — the recurring theme was the depth of camaraderie that permeated the entire group in 1982 and had remained unaltered in 1992. Whilst each of them had welcomed the opportunity to do battle against a fellow reader, and hopefully to win, none of them had experienced — or wished to experience — the intense and personalised competitiveness that had marked more recent readers' courses.

Notwithstanding, his failure to invite all of the eligible members of the March 1982 intake, and his decision to invite one (Denton) who arguably did not qualify due to a significantly long absence trying alternative careers, Bristow was charged with the task of organising a similar reunion at the same venue a further decade hence. It is not entirely clear why it was decided to wait a further ten years: was it because there was only a certain amount of schmaltz that could be consumed in any one ten-year period? Was it because they could only face each other en masse in limited dosages? Or was it because it was considered that the "magic" of the night could only be rekindled after 10 years? Watch this space in the Autumn 2002 Edition of *Bar News*!

OLYMPIC DREAM TEAM RUN

14–15 March 1992

WHAT WERE A SUPREME COURT JUDGE, eight barristers and an employee of Barristers Chambers Ltd. doing outside VFA House in Jolimont at 6.30 a.m. on a cool March Saturday morning? While other members of the Victorian Bar were sleeping or perhaps sleeping off a hard Friday night, these ten intrepid legal athletes were steeling their bodies and minds for the 1992 Olympic Dream Team Run, due to commence at 7.30 a.m. that morning.

This was the event's second staging, following the successful inaugural team run in 1988. On that occasion, the Victorian Bar team, featuring athletic legends John Higham, Andrew Ramsey, Marcus Clarke and Tom Danos, performed brilliantly to finish 16th and vanquish all other legal teams in the competition. This would be a hard act to follow.

Tom Danos and Joseph Tsalanidis selected this year's team based on expressions of interest and form displayed in the Legal Fun Run held last December. For various reasons, neither of the selectors appeared in the proposed line-up. Danos was "running" an endless trial and Tsalanidis was nursing an achilles tendon injury. However, as the result of a last minute withdrawal by an ailing Clarke, Tsalanidis and his bodgie achilles tendon were put to the test.

Although there were only ten runners in each team, both days of the event featured eleven legs of approximately ten kilometres. The rules therefore required one runner to run twice on Saturday and a different runner twice on Sunday. Team management nominated Greg Barns to bite the bullet on the first day — some say it was penance for his past indiscretions. Skipper Mark Purvis would run twice on the second day.

Followed by manager Alison Sutherland and masseur Robert Henderson in a support car, Barns led off the team from the M.C.G. over the Westgate Bridge to Williamstown. This was a "glamour" leg, with many of Victoria's top athletes contesting it. A solid run by Barns found the Bar team in 21st place in the field of 99 teams

They're off.

Results

Day 1

Stage	Runner	Distance (km)	Time	Per km	Runner's Place on Leg
1.	G. Barns	10.0	35.23	3.32	21
2.	J. Tsalanidis	10.0	41.22	4.08	65
3.	L. Caulfield	10.3	40.36	3.57	28
4.	R. Manly	10.0	41.54	4.11	44
5.	M. Stiffe	10.1	42.02	4.10	36
6.	R. Deckker	10.5	41.17	3.56	26
7.	F. Vincent	9.1	38.19	4.15	32
8.	J. Sutherland	8.2	35.11	4.17	31
9.	G. Barns	10.5	37.23	3.34	12
10.	M. Purvis	10.0	33.08	3.19	5
11.	A. Schlicht	11.5	43.09	3.45	38
		108.2	7:09.44	3.54	17

Day 2

12.	M. Purvis	10.0	31.36	3.10	9
13.	R. Manly	10.0	42.43	4.16	51
14.	J. Tsalanidis	9.5	38.40	4.04	28
15.	A. Schlicht	10.1	39.27	3.54	38
16.	M. Stiffe	10.1	42.11	4.11	37
17.	F. Vincent	7.4	29.26	3.59	37
18.	G. Barns	9.0	32.02	3.34	13
19.	L. Caulfield	9.0	34.24	3.49	16
20.	R. Deckker	9.0	35.08	3.54	37
21.	J. Sutherland	10.0	40.52	4.05	58
22.	M. Purvis	9.5	29.51	3.09	6
		211.18	13:46:04	3.52	16

L to R: Back — Purves, Vincent J., Robert Henderson (masseur), Stiffe, Sutherland, Tsalanidis. Front — Deckker, Laurie Caulfield, Alison Sutherland.

and just ahead of its main rival, Minter Ellison.

Legs two to seven followed Geelong Road and were relatively flat, but hardly very inspiring. Tsalanidis, Caulfield, Manly, Stiffe, Deckker and Vincent all ran consistently and, after John Sutherland successfully negotiated the hills around Corio Bay, the team found itself in 26th place at lunch on the first day. The bad news was the unexpectedly strong showing of Minter Ellison, which was nine minutes ahead in 16th place. The Phillip Morris team was also ahead, but it was hard to believe that all its runners were smokers!

In a tactical masterstroke, the Bar team management had selected its fastest three runners to tackle the afternoon legs from Geelong to Queenscliff. Barns, in his second hit-out, gained significant ground, as did Purvis with a strong run over some significant hills. Tony Schlicht, a reader, worked hard into Queenscliff and suddenly the team had jumped to 17th place, while Minter Ellison had slipped to 24th.

After a pleasant sea cruise across to Portsea, the team re-assembled in the Portsea Pub. Mr. Justice Vincent entertained his fellow runners with various tales from the bench over a congenial meal and some well-earned refreshments. He also confessed, in regretful tones: "I'd love to be able to go for a run at lunchtime but nobody at the Supreme Court would understand!"

Most of the team then adjourned to accommodation at Sorrento kindly provided by Rosemary Carlin.

Day two dawned cool and cloudy, not good beach weather, but perfect for running. Purvis took advantage of the conditions and opened proceedings with a slashing 31:36 for the first 10 kilometres out of Portsea. Manly and Tsalanidis both finished satisfied, if not somewhat damp — it was bucketing during their respective legs. Schlicht (over the tough Mt Martha section), Stiffe and Vincent maintained the team's momentum and by lunch at Frankston the Victorian Bar had maintained its overnight 17th placing.

The bad weather passed after lunch — Vincent J.'s run into Frankston must have impressed someone up above — and Barns and Caulfield enjoyed an assisting breeze between Frankston and Beaumaris. Then came the warm sunshine which proved to be a little more testing for Deckker, Sutherland and Purvis over the final three legs. All ran strongly and Purvis ran across the finish line at Olympic Park in 16th place, coincidentally the same result as in 1988.

For the record the Bar team bested the following opposition teams:

KPMG Peat Marwick (17th)
Minter Ellison (22nd)
Victoria Police — Protective Security Group (29th)

Olympic Tyre/Broadmeadows Police (34th)
Price Waterhouse (46th)
Toongabbie Football Club (65th) ("the Animals")
Victoria Police — Fraud Squad (67th)

The afternoon closed with an Olympics-style parade and some interminable speeches over yelling by Toongabbie footballers that the singer of the national anthem show us her upper torso. It was noted by all that the Channel 10 team were fitted out in new Nike attire and shoes while the Victoria Police — Fraud Squad were sponsored by "Grollo" and had flash New Balance shoes. When pressed about the shoes, their team manager responded "they fell off the back of a truck".

Everyone agreed that they had been part of a worthwhile and most enjoyable event. Around $500,000 was raised to support Australia's Olympic athletes at Barcelona in 1992 with the contribution of the Victorian Bar going to DOXA.

The brilliant performance of the Bar team was only possible because of the generous support of the Victorian Bar Council and the contributions of individual barristers. A warm thank you is extended to you all.

Purvis — Tsalandis

Member of the NSW Bar models the new "multi-purpose" jabot while leaving court with his client. Also available — left-handed and ambidextrous styles.

Also: for the less modest "The touter's special" (a shorter-style jabot).

Photo: Warren KIRBY, The Australian 29/5/92 p.19 "Mr John Lyons leaves court yesterday."

LAWYERS' BOOKSHELF

Pith Without Thubtanth

Judicial salaries being what they are (and I say no more on this topic since the learned readers of this magazine are not interested in small talk), you can imagine my delight when I was invited to review Columb Brennan's book *Pith Without Thubtanth*, since it ensured that I received a complimentary copy.

The second bonus was that I was invited to the launching of the book by Campbell McComas at the Law Institute. I do enjoy these functions. It doesn't matter if they lack thubtanth, I go there for the free pith. In the circumstances my disappointment was immense when I arrived for the function a day late. I pondered bitterly, as I went to console myself with a tumbler of Byrne J.'s cask scotch, what is it about being a Supreme Court judge that automatically ensures that a man is behind the times?

Many years ago I was asked to review a book entitled *The Lawyer who Laughed*. At that time I wrote: "If the *Readers Digest* is correct, and 'Laughter is the Best Medicine', judicial jokes must qualify as the mogodons of mirth". I confess that the onset of maturity has caused me to repudiate this superficial observation.

Columb Brennan has, for many years, been one of our foremost legal journalists. For some three decades he was leader of the Law Courts staff of the Herald and Weekly Times Ltd. and his abilities in informing the community of the operation of the courts were recognised by the profession. When I commenced practice as a barrister, the phrase "a great friend of the Bar" was invariably used when his name was mentioned in legal circles. Columb Brennan's work ensured that he was ideally placed to amass a store of legal anecdotes, and *Pith Without Thubtanth*, which contains stories contributed over the years to the *Law Institute Journal*, provides something for everyone.

I am an inveterate collector of anecdotes and, in my view, this book contains more genuinely amusing stories than are found in most works of this type (or most oeuvres of this genre as we reviewers are wont to remark).

There is a real skill in re-telling anecdotes and it involves not only the ability to find the apposite word but also the ability to write taut prose. Not surprisingly Columb Brennan possesses these skills.

One of the most interesting features of this book is that it provides an historical perspective in a collection of stories about past legal luminaries such as Justices Barry Barber and Lowe and such counsel as E.E. (Woods) Lloyd Q.C., Don Campbell Q.C., Red Nolan and Grattan Gunson.

In short I think this is a publication that ought to find a place on any lawyer's book-shelf if only to provide a balance to those big thick hardcover black letter books.

I contemplated providing readers with an appropriate anecdotal extract from this 113-page volume but, on reflection, it occurred to me that the author would probably prefer you to buy the book.

However, as a topical item for Columb Brennan's next publication I offer this little story reproduced with the kind permission of Mr. Justice Eames.

"There was a time when Mr. Justice Eames (great advocate though he was) almost had his faith in the jury system shattered. He was appearing for a woman who had dispatched her sleeping husband with an axe. In the first trial the Judge refused to allow the jury to consider the defence of provocation. The client was duly convicted of murder. The South Australian Court of Criminal Appeal reversed this decision to the considerable plaudits of justifiably outraged feminists.

"In the second trial Mr. Justice Eames pleaded long and earnestly with the jury to take provocation into account and to convict his client of manslaughter. Alas, all his eloquence and persuasive skills were utilised in vain. The jury refused to accede to his submission and duly acquitted his client both of murder and manslaughter.

"It is not known whether His Honour still charged a fee for his services. I understand, however, that he is a leading proponent of the view that the defence of provocation should be abolished."

John Coldrey

Combating Commercial Crime

Edited by Rae Weston
The Law Book Company Limited 1987, pp. v–ix, 1–176

This book is a compilation of 11 articles on different aspects of white collar crime.

In the introduction, Rae Weston summarises each of the articles in a few pages.

The first article by Roger Pitchforth deals with losses through the deception of suppliers by ex-

tended credit and gives accounts of two particular cases which are in themselves interesting stories. The article then discusses the possibility of legislation in this area and the restrictions on its effectiveness and concludes that managerial controls are the most effective way of combating this type of white collar crime.

The next article by John Managh entitled "Combating Insolvency Frauds" traces the history of a company and the actions taken to perpetrate the fraud as well as what was subsequently discovered in respect of the company's history. Remedies suggested are to actually know the client being supplied and include visiting their premises occasionally and using investigative accountants to conduct regular reviews of the company which is being supplied.

"Corporate Offences: The Kepone Affair" by Brent Fisse and John Braithwaite details a case involving offences against the environment and the sanctions against such companies. American Government policy is also reviewed. The article also deals with a case involving hygienic warehousing.

"Manco: A Case Study in Computer Crime" by Richard Hayward and Elizabeth Kemp traces the history of the many problems that a computer company can have, including employees using various schemes to extract money and tampering with company records. The article is a good indication of the types of fraud which may take place.

The article by John Lenart entitled "Computer Fraud: Legal Aspects of Prevention, Detection and Punishment" commences with an analysis of the concept of computer fraud and then looks at a case study of *United States v. Rifkin* and examines the proceedings brought against him.

Rae Weston in the next article discusses "Preventing Credit Card Crime" and he details the types of fraud which may be committed with respect to credit cards. A number of control measures are then discussed and a useful bibliography is provided at the end of the article.

The next article by Gregory Tucker is entitled "Consumer Protection and Automatic Teller Machines". The article discusses unauthorised transactions and some cases in relation to same. The disclosure of personal identification numbers is also examined and the powerful position of banks. A set of guidelines which have been adopted in Australia is also discussed, which is relevant in view of the growth of computer technology in the banking area.

Donal Curtin's article on "Letters of Credit" concludes that most fraud in this area takes place as a result of greed and people not following normal commercial prudence.

The article by Rae Weston entitled "International Trade Frauds: Keeping the Criminals at Sea" is an interesting dissertation on the different types of frauds relating to the carriage of goods by sea.

The particular Australian content of the book is contained in the article by Gordon Walker and Shannon O'Neil entitled "Future Frauds: An Australian Perspective". The article looks at the different types of futures frauds and compares the types of frauds in Australia with those of the United States. There is also a discussion of exchange fraud and market manipulation as well as a number of other frauds which are defined in market terminology.

The final paper by Rae Weston and David Schaffner entitled "Silvergate and Others: Manipulation and Cornering in Futures Markets" is an expansion of the previous futures article and also details a number of case studies in this area.

This book is useful in that it identifies the different types of fraud and makes some helpful comments in suggestions in how to prevent same.

Leslie M. Schwarz

Law of Evidence in Australia

P. Gillies
2nd Edition — Legal Books, Sydney 1991, pp. vi–cxxv, 3–714

This comprehensive book is essentially divided into six parts. Each part contains a number of chapters relating to particular areas of the law of evidence. The chapters are broken up into clear sub-headings for easy reference.

The first part introduces the law of evidence and its history, the role and sources of the law of evidence and clarifies terms used in the classification of evidence, including hearsay, circumstantial evidence, real evidence, best evidence and documentary evidence. The author in the introduction correctly points out that he could not adopt a thematic approach to the analysis of this area of law; however, he has organised chapters in a most helpful way for a reader to find the particular area of the law required. The introductory part also briefly summarises the types of evidence, the burden and standard of proof, presumptions, judicial notice and the like.

The second part commences with an overview of the presentation of evidence, including examination-in-chief, cross-examination and re-examination and re-opening a party's case. The next few chapters discuss the various matters as-

sociated with a witness giving evidence, including prior consistent and inconsistent statements, the types of testimony (including that of the accused), refreshing memory, the competence and compellability of witnesses, no case and related submissions and the voir dire.

The third part contains a lengthy discussion of the hearsay rule and its application together with the common law and statutory exceptions. There are also chapters on opinion evidence, propensity evidence and privilege (both general and occupational).

The fourth part is rather brief and deals with the distinct subject of the *res gestae* doctrine and the fifth part deals with both civil and criminal admissions and the exclusion of confessional statements.

The final part deals with a number of miscellaneous and discrete topics such as documentary evidence, corroboration, character, identification evidence, the failure to lead evidence and the effect of same. The final chapter has a short discussion of the evidential effect of prior convictions in later proceedings.

This book not only provides a very good explanation of the relevant principles of the law of evidence, but also has a very extensive analysis of many of the cases referred to, and further provides examples which assist in one's understanding of the law of evidence.

Accordingly, this book is highly recommended as a reference text.

Leslie M. Schwarz

The Property Law Act Victoria: two views

S. Robinson
The Law Book Company Limited, 1992, pp. i–lxxviii, 1–616, Hard Cover $149.50

This book is absolutely essential for the library of any commercial or family law practitioner. Both the *Transfer of Land Act* 1958 and the *Property Law Act* 1958 (and their predecessors) have been the source of a great deal of litigation in Victoria for more than 100 years. The reasons for this plethora of litigious activity involving land law are twofold; the inherent difficulty of the subject matter and the fact that both Acts seem to have been drafted by Sir Edward Coke or one of his friends. This book by Stanley Robinson from the Queensland University annotates the *Property Law Act* 1958 in the same way that Fox and now Hockley have annotated the *Transfer of Land Act* 1958. It provides extensive references to case law both in Australia and England dating from pre-*Judicature Act* up to the present day. The magnitude of the work is shown by the extensive definitions provided by the author to make sense of this antiquated legislation.

It is fallacious to think that as most land in Victoria is now under the Registration system the *Property Law Act* 1958 is of little use. The law of mortgages, leases and substantial parts of the Registration system rely on the General law provisions of the *Property Law Act*. Further, the recent legislative amendments dealing with Real Property of De Facto Partners finds more than 50 pages of detailed analysis in this work.

The first edition of Fox's annotation of the *Transfer of Land Act* 1958 had a useful shelf life of more than 20 years; Robinson's work should have a similar life expectancy. I recommend it to all practitioners.

S.R. Horgan

S. Robinson
The Law Book Company Limited, 1992, pp. i–lxxviii, 1–616, Hard Cover $149.50

Professor Robinson's new work, *The Property Law Act Victoria*, is an annotated text of the Victorian *Property Law Act* 1958. The book is in many senses the companion text to Professor Robinson's earlier work *Transfer of Land in Victoria*.

As the author alludes to in his Preface, the *Property Law Act* covers a wide range of "old", "contemporary" and "new" law. The "old" law includes provision on inheritance and estate tails (see for instance ss.248–265).

Much of the Act is, of course relevant to contemporary legal practice. The Act is entwined with the *Transfer of Land Act*. For instance, Part II Division 5 of the *Property Law Act* deals with leases and tenancies and is of equal application to property falling within the Torrens system as to land outside that system.

Insofar as the *Property Law Act* covers "new" law, Part IX deals with the division of real property belonging to former de facto partners. This part was incorporated into the *Property Law Act* by a 1987 amendment. The annotations to this part of necessity refer to many decisions under the *Family Law Act* 1975 and the New South Wales *Defacto Relationships Act* 1984 as the Victorian Courts have thus far had little chance to interpret these new sections. Clearly though these new sections draw on the New South Wales and *Family Law Act* experience.

This text is easy to use, with the section under discussion being displayed at the top of each

page. The footnotes to each section take the reader to the relevant portion of the annotated text that is placed immediately after the text of each section. There are ample case references, with the cases not being confined to just Victorian cases. References to relevant related or corresponding Acts and texts are also included.

There is a comprehensive index and the Schedules to the Act are reproduced and annotated in this work.

This is a work that is sure to become regarded as a classic in its field, of use not only to practitioners and students in Victoria, but also of relevance to those working in the general field of property law throughout Australia.

P.W. Lithgow

Contemporary Issues in Product Liability Law

Edited by Dr. Ellen Beerworth
The Federation Press, 1991, pp. v–xix, 1–122

This soft cover book is a collection of four papers presented by Dr. Ellen Beerworth, Mr. Allan Asher, Professor John Goldring and Dr. Peter Cashman at two conferences on product liability in 1990.

The introduction by Dr. Beerworth traces the development of product liability law in Australia and comments upon some proposals for its reform.

The first paper given at the conference by Dr. Beerworth discusses manufacturers' liability both at common law and statute and distinguishes various aspects of liability with respect to this area of the law. Practical matters such as the standard of proof, duration of liability, duties to warn, liability for pure economic loss and punitive damages are all briefly mentioned with the relevant cases noted. The rest of the paper deals with liability for representations made by the manufacturer and proposals for reform of the *Trade Practices Act* 1974 (C'th). A summary of the comparisons between the common law and statute are also presented in appendix form at the end of the paper.

The paper by Allan Asher deals with the role of government intervention in product safety and the statutory provisions which regulate the government's role.

The government's philosophy with respect to product safety is also discussed as are product information standards, compulsory product recall and voluntary recalls by manufacturers.

The third paper is by John Goldring and is entitled "Australia and the World of Product Liability". The American culture and product liability policy in the courts are examined as well as the role of the jury and the legal profession. There is also a short dissertation on the area of damages and the impact of tort law. The paper also summarises product liability laws in other countries and discusses proposals for new laws in the area.

The final paper entitled "Toxic Torts and Mass Disasters: The Bottom Line — How Corporate Counsel Condemn Consumers and Create New Forms of Forensic Farce for Litigation Lawyers" is by Dr. Peter Cashman. The paper points out the enormous amount of legal resources which can go into a trial involving the question of passive smoking. It also discusses the role of a cigarette or pharmaceutical company in recalling products believed to be defective and the giving of warnings. The company's position is then linked to the awarding of punitive damages if the company is found to have known of the danger to the public but failed to warn or recall the product.

Lawyers' strategies are also discussed with respect to product liability law and an appendix at the end of the paper lists the stages of strategic legal intervention which need to be analysed with respect to litigation and also sets out several commandments in the conduct of such litigation.

The book concludes with a "panel discussion" regarding disclaimers in labelling, the future of the legal profession with respect to product law, the role of government intervention and government policy. There is also a selected bibliography and index at the back of the book.

The papers are easy to read and have the advantage of discussing current issues in this area.

Leslie M. Schwarz

The Elements of Legal Style

Bryan A. Garner
Oxford University Press 1991, pp. i–xii, 1–236, Hard Cover $35.00

Americans are strange people. All those years on psychiatrists' couches have made them want to analyse every aspect of life on earth. Whilst it was acceptable and useful for Fowler to produce his *Dictionary of Modern English Usage*, it is more difficult to see the usefulness of an incisive inquiry into modern American legal verbiage.

This book is set out as a text book or dictionary to show how to use words in a legal context so as to maximise style. The models used as examples

are more often than not the great American Judges; Cardozo, Jackson, Holmes and the interestingly entitled Judge Learned Hand. A great deal of praise is also heaped on Lord Denning, referred to in the book as "probably the greatest judicial stylist in Great Britain".

I found the book to be very well written and to provide some wonderful entertainment. Chapter headings such as:

"Write in English, not in Latin or Norman French", "Mind The Cadence Of Your Prose", and "Root Out Sexist Language"

left me wondering whether or not the book was written tongue-in-cheek. Nonetheless I found the book very interesting and it may provide the same interest or even some use to those of us who aspire to some measure of judicial style.

S.R. Horgan

Listed Company Handbook — Winter 1991

Published by Stafford McWilliams Pty Ltd and distributed by Tower Books
Soft cover Price $24.95

This handbook is a compilation of information relating to the top 500 companies listed on the Australian Stock Exchange. Although this information is freely available in company annual reports and through the Stock Exchange this handbook is an up to date compilation of this information. Further, the handbook is to be updated every six months.

For each of the 500 companies there is an extract from the current Chairman's report together with balance sheet information relating to the past four years' performance. There are also statistics relating to earnings, nett tangible assets and dividends over the same four-year period.

A graphical presentation of the company's share price together with the volume of trading over the past four years is included together with the yearly high and low share price.

Additional information provided includes the address of the head office, principal office and principal share registry together with a list of company officers, auditors, bankers and solicitors where known, and some limited information regarding shareholdings.

Although this book will not take the place of a company search, it no doubt will provide valuable information for those involved in commercial practice or who like to keep an eye on the stock market.

Peter Lithgow

CONFERENCES

THE ELEVENTH ANNUAL A.I.J.A. CONference will be held in **Brisbane** on 22–23 August 1992. The conference will be opened by the Premier, the Honourable Wayne Goss. Topics will include the work of the new Queensland Litigation Reform Commission; Judicial Education; The Role of the Judiciary and Legal Practitioners in the Era of Managerial Judging; Reform of the Procedures for Conducting Complex Criminal Trials; The Impact of Sentencing Reforms on Judicial Administration and Court Management Information. Conference programmes and registration forms are available from the Secretariat Office (03) 247 6815/18, fax (03) 347 2980.

The International Bar Association will hold its 24th Biennial Conference in **Cannes**, France from 20–25 September 1992. Programmes and registration forms are available from the International Bar Association, 2 Harewood Place, Hanover Square, London, W1R 9HB, England.

The Law Society of Western Australia will hold its Winter Conference at **Queenstown**, New Zealand for 26 September 1992 to 2 October 1992. Copies of the conference brochure can be obtained from the Conference Co-Ordinator, Judy Jones, telephone (09) 221 3222, fax (09) 221 2430.

The conference will canvass amongst other topics the following:
"Limitation of Professional Liability — The Need for Legislative Reform"; "Process of Crime — Forfeiture of Profits and Property"; "Harmonisation of Insolvency Law"; "Defamation Law — The Need for Reform"; "The Impact of Goods and Services Tax on the Professions"; "Juvenile Justice and the Rights of the Child"; "Corporate Opportunities Between Australia and New Zealand"; "Corporate Regulation and Future Directions".

Registrations close on 24 July 1992.

The General Council of the Bar of England and Wales will hold its Conference on 26–27 September 1992. It will include workshops on "Lawyers in Peril"; "Employment Law: Employment for Lawyers"; "Competition Law — the E.C. and U.K. Systems. Where are we Heading?" Perhaps more significantly for Australian practitioners it will include a plenary session on "*The Future of the Bar — an Expensive Anachronism*

or the Cornerstone of Liberty" and a workshop on "Serious Fraud: Justice, Efficiency and the Threat to Civil Liberties". There will be a major debate on the question of a Bill of Rights. The conference is to take place in the New Connaught Rooms, **London**.

The Fourth Greek/Australian International Legal and Medical Conference will take place at in **Rhodes** from 23–28 May 1993. The Conference Secretary, Malcolm Howell, is seeking papers for presentation at that conference. Queries can be telephoned to him at the Solicitors' Board 670 4799.

On 29–30 August 1992 at Bond University the Asia Pacific Law Institute at Bond University will present a workshop on "**Cross Cultural Communication for Professionals: How Better to Serve Foreign Clients**". The workshop is described as being intended "specifically to train lawyers in communication skills and cultural sensitivity". It is concerned with learning to interact with foreign clients in a culturally appropriate and effective way and tailoring one's services to meet broader expectations which such clients may have of the role of professional advisor. Details are available from Vicki Beyer on (075) 95 2019 or Ross Buckley on (075) 95 2256.

The Third LawAsia Labour Conference will be held at the Hotel Equatorial, *Kuala Lumpur* on 20–22 August 1992. The theme of the conference will be "Security of Tenure in Employment and Privatisation". The deadline for registration is 30 July 1992. Inquiries should be addressed to the LawAsia Secretariat (619) 221 2303, fax (619) 221 5914.

The Australian Institute of Criminology will conduct a national conference on **Juvenile Justice** at the Terrace Hotel, **Adelaide** from 22–24 September 1992. The topics to be canvassed include "Social Factors Influencing Juvenile Offending such as Unemployment, Drugs and Alcohol"; the Police and Young Offenders; the Role of the Courts and Alternative Procedures; Early Intervention Strategies for Juveniles; Young Aboriginal Offenders; Correctional Options for Young Offenders other than Detention; Parental Responsibility and Accountability. The Institute is calling for papers and expressions of interest. Information about the conference can be obtained from Sally-Anne Gerull on (06) 274 0230.

The Australian Institute of Criminology will conduct a conference on *Measurement and Research Design in Criminal Justice* at **Griffith University** from 3–5 August 1992. The seminar will be concerned basically with Measurement and Evaluation in Criminal Justice and the Use and Analysis of Statistical Data.

RULES FOR BICYCLE COURIERS ENTERING BCL PREMISES

Before entering BCL premises Bicycle Couriers **MUST**

1. Ensure their bicycles are left blocking entrances;
2. Ensure that their walkie talkie radios are turned to full volume;
3. Be prepared to barge into lifts pushing aside those who have been waiting some time, especially if they are women or children;
4. Push the lift door close button immediately they enter the lift irrespective of whether there are other people waiting;
5. Complain loudly if more than two destination buttons are pressed in the lift or someone is slow entering or exiting the lift;
6. Be impolite to Secretaries to whom documents are delivered and persons of whom directions are requested;
7. Ensure they have not used deodorant or washed under armpits for at least 72 hours prior to entering such premises;
8. Ride away from the premises on the wrong side of the road or preferably on the footpath;
9. Pass through at least two red lights within the CBD;
10. Pass through at least one tram safety zone in the CBD;
11. Fail to give way to pedestrians when making turns on all such occasions;
12. Ensure that at least two blocks are traversed by riding the wrong way down a one-way carriageway;
13. Deliver their documents not earlier than 2½ hours after the agreed time for such delivery.