# VICTORIAN BAR NEWS

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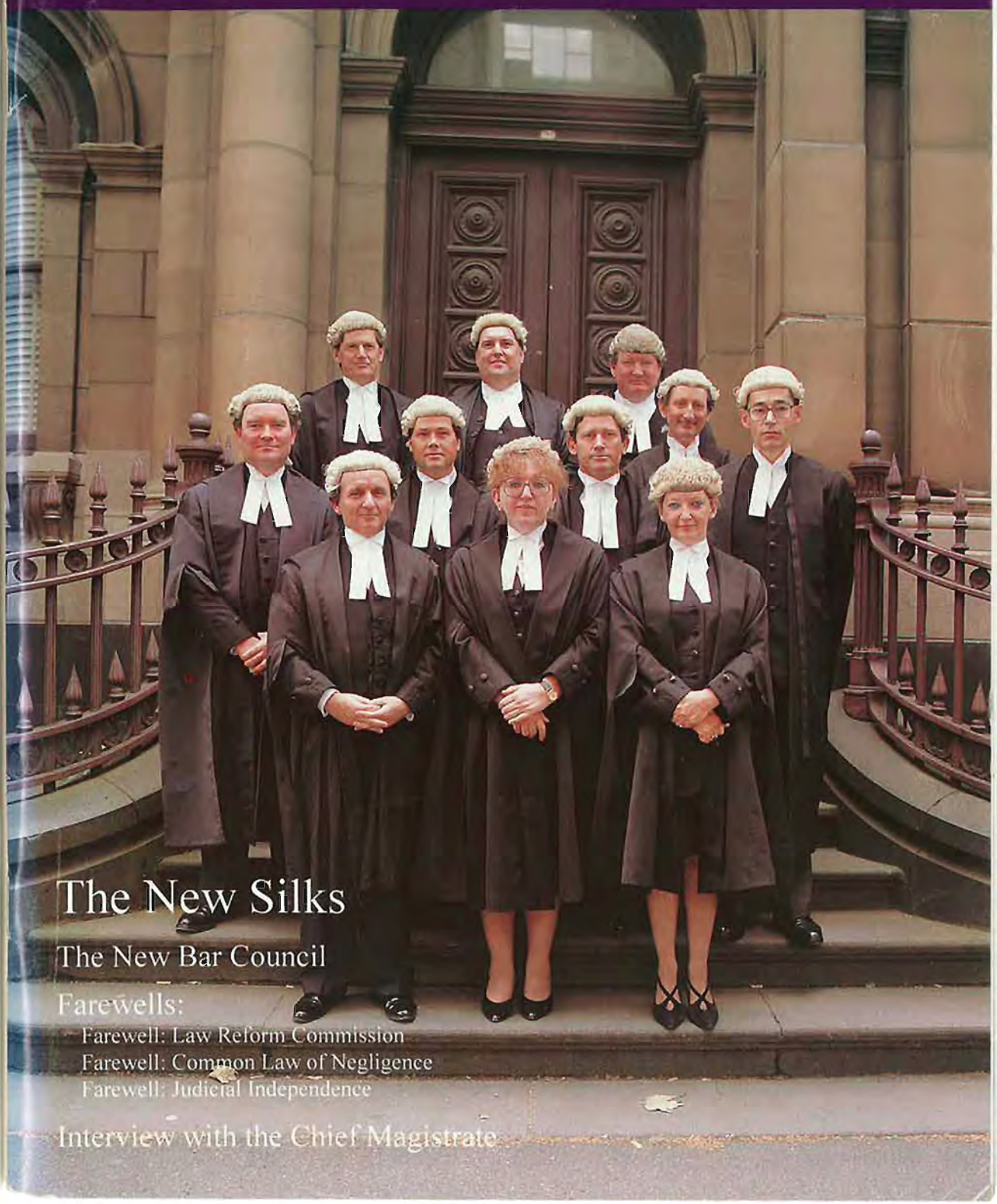

## The New Silks

## The New Bar Council

## Farewells:

- Farewell: Law Reform Commission
- Farewell: Common Law of Negligence
- Farewell: Judicial Independence

## Interview with the Chief Magistrate

# VICTORIAN BAR NEWS

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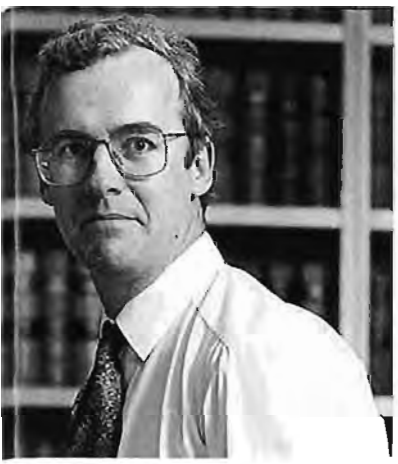
## CONTENTS



*Front Cover:*
*The new Silks for 1992, photographed on 30 November 1992, at the west door of the Banco Court. See Report on pages 34–36. Michael Adams was not present for this photograph.*

*Mrs Jan Wade, Attorney-General, page 10*

*Chris Jessup, Chairman, page 6.*



*David Beach, page 20*

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# EDITORS' BACKSHEET

A NEW BAR COUNCIL AND A NEW STATE GOVERNMENT

Since the Spring issue of *Bar News* went to press there have been political changes within and outside the Bar.

We have a new Chairman, Chris Jessup, and two new Vice-Chairmen, Sue Crennan and David Habersberger.

The Bar Council chaired by Andrew Kirkham successfully weathered the onslaughts of the Law Reform Commission and the Tasman Institute. It will be for the new Bar Council to cope with the Trade Practices Inquiry and the Senate Committee Inquiry into the Cost of Justice.

At a State level we have a new government and a new Attorney-General, Jan Wade. Unfortunately pressure of Parliamentary business has prevented the publication in this issue of the Attorney-General's Column. The spring issue contained no Attorney-General's Column because the State election occurred between the deadline for manuscript and publication of the Spring issue. The Editors look forward to the re-introduction of the Attorney-General's Column under Mrs. Wade's authorship in the Autumn issue.

*The new Chairman in action*

DOOM AND GLOOM

The coming year does not look too rosy for the Victorian Bar. The State Government has passed the WorkCover Act which has radically reduced the common law rights of injured workers. The original bill proposed to retrospectively remove the rights of the thousands of Plaintiffs who are awaiting trial in the various courts. Mercifully the draconian nature of such legislation was eventually acknowledged (after much arguing) and the offending sections removed.

However the effects of the Act on the Common Law Bar will be profound. Having suffered a dramatic reduction in transport accident cases, under the Transport Accident Act, similar shrinkage of work will occur in industrial injuries cases.

There is a deliberate policy to remove industrial injuries proceedings from the courts, and concentrate on the forcing of settlements. The effect, under the new Act on Plaintiffs will be radical. Unless they recover 20% more than an offer of compromise made by the Accident Compensation Commission they will pay all costs from the date of the offer. Talk about bludgeoning Plaintiffs into settlement! David Beach examines the full implications of the Act in an article in this issue.

The legislation also abolishes the Accident Compensation Tribunal and revokes the appointments of its judges. This is a frightening precedent for judicial independence. The ramifications are examined elsewhere in this issue.

Couple this together with the fact that the budget of the Legal Aid Commission has been

slashed by 2.1 million dollars, and you wouldn't be advising your children (or anyone else for that matter) to enter into the practice of jury trials whether criminal or civil.

On a lighter note for those readers who in the current depressed climate need to keep their Rolls Royce for a second or third year or whose valuable old books need rejuvenating, the Editors recommend the services provided by Leather Life, an operation run by one Gary James, Telephone: 870 0851. We understand that Arthur Robinson recently employed Leather Life to protect and renourish some 2000 volumes. They, apparently, are very pleased with the result.

WE WERE WRONG

The Editors apologise to the Honourable Mr. Justice Crockett who must have been alarmed on reading the Spring issue of the *Bar News* to discover that he was already past retirement age and had for some five years between 1969 and 1974 collected his judicial salary under false pretences.

A similar but less significant error was made in respect of the Honourable Mr. Justice Hayne to whom *Bar News* gave an additional day in office.

We also apologise to the Chief Judge of the County Court who, as a result of a typesetting error lost all but five of his judges.

To those judges of the County Court, ranging in seniority from Judge Spence to Judge G.D. Lewis, who may have treated their elevation to the Supreme Court by *Bar News* as an official announcement, we also apologise.

WE WERE RIGHT

*In the Winter 1992 issue of* Bar News we quoted Mrs. Wade as saying:

> "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".

Seems she is a person of her word and we republish her speech on the second reading of the Law Reform Commission (Repeal) Bill in this issue.

Copies of the final Reportof the Commission, rejected by the Government,are available for historical interest.

The Editors

## Apologies to Mrs. Justice Byrne

In the last issue of the *Bar News* we failed to report that job sharing has at last impacted upon the warm caring and sharing environment of the Supreme Court. As reported in the Law List of the *Age* newspaper *Mrs.* Justice Byrne has been presiding in the Supreme Court. Members of the bench congratulated *Mr.* Justice Byrne on his spreading the heavy work load of the court to include his wife. His Honour was apparently at home recovering from his "gnawed elbows" (see Spring Issue p. 7) caused by a combination of David Drake and the Editors. Her Honour evidently cleaned up her list in no time.

TODAY'S LAW LIST

FRIDAY, 23 OCTOBER, 1992
SUPREME COURT
Appeal Division

(1st Court, The Chief Justice, Mr Justice Crockett and Mr Justice Nathan, 10.15). — R v. Ian Leith Douglas Carlyon, Maurice James Watson and David Charles Mitchell (for judgment); R v. Manjit Singh Serhon (for judgment) (1st Court, The Chief Justice, Mr Justice Hamel and Mr Justice Vincent, 10.30). — Criminal Appeals: R v. Trevor Darryl Doherty; R v. Adrian Maxwell Carter. (13th Court, Justice Crockett and Mrs Justice Byrne, 10.30). — Applications on summons.

Causes

(5th Court, Mr Justice Smith, 10.15) — Fade v. Vogiazopoulos ... Justice

FEDERAL COURT
450 Little Bourke Street

(Court 2, Justice Northrop, 10.15.) — Part heard: Franklin Mint Pty Ltd v. Commissioner of Taxation. (Court 3, Justice Keely, 10.00.) — Part heard: Gary Dean Forrester v. Accident Compensation Commission.

451 Little Bourke Street

(Court 7, Justice Ryan, 10.15.) — Part heard: Western Mining Corporation Ltd v. Commonwealth of Australia.

450 Little Bourke Street

(Court ?, Justice Heerey, 10.15.) — Directions List: Reserve Bank of Australia v. Litton Industrial Automation Systems Inc.; Neville Masterton Hall and another v. National Australia Bank Ltd; Sun Health Foods Pty Ltd v. Sentosa Health Foods Pty Ltd and others; Mich

# CHAIRMAN'S CUPBOARD

THE FIRST DAY OF OCTOBER 1992 WAS not the best day to accede to the office which I now hold on behalf of the Bar. Only a couple of days later a different election result was announced and thereby there was wheeled onto the launching pad a legislative missile of considerable force. Virtually from the outset, the Bar Council has been preoccupied with a program of legislative and Government policy change which has been as weighty as it has been fast-moving. Something like a combination of Dean Lukin and Carl Lewis.

Take the Accident Compensation (WorkCover) Bill (presumably, by the time you read this — if you read this — Act). This measure made enormous inroads into the rights of persons injured at the workplace to recover common law damages, and did so, at first, retrospectively. The subsequent mitigation of the severity of this change ought not be permitted to obscure the radical nature of what went through the legislature in any event. The same Bill contained (and the Act contains) a provision which must surely have come close to giving the Governor writer's cramp when the Royal Assent was required to be given: "the office of member of the Accident Compensation Tribunal is abolished and the appointments and commissions of members are revoked".

Just when we thought it was safe to go back to court, there was the introduction of majority verdicts and the abolition of unsworn statements and evidence. Even these measures, however, must have left some time for the legislature to do other things, because in the same Parliamentary session the Law Reform Commission was abolished, a controversial move in which it has been implied in some quarters (completely without foundation) that the Bar Council was in some unspecified way involved.

It is not as though the Bar Council would otherwise have been without anything to do. Although we are experiencing a kind of lull in the never-ending succession of inquiries and studies into the profession, there are two major such projects which are very much on foot. The Senate Cost of Justice Inquiry will report before long, and a response will

*Chris Jessup Q.C., Chairman*

*Sue Crennan Q.C., Senior Vice Chairman*

*David Habersberger Q.C., Junior Vice Chairman*

doubtless be required from the Bar. The Trade Practices Commission Study into the legal profession is in possession of our main submission, but further consultations are likely to be sought in the near future, by ourselves if not by the Commission. We must, of course, make no assumption that the former Law Reform Commission's Report into the so-called "Restrictions on Legal Practice" will be assigned to a dusty pigeon-hole, however much we may think it deserves that fate. As I write this, the State Attorney-General has not yet been able to accord the Bar Council a general consultation, but this is expected soon. Many things may then become clear.

The ABA has virtually completed its preparation of a set of uniform rules of conduct and practice for all Australian Bars. These rules should be ready to come into operation in the near future.

Another matter which has been of concern to the ABA has been the Mutual Recognition Bill, a proposal to be enacted by way of uniform legislation. The short title is benign in appearance, but the reality is that this measure has the potential to change the face of legal practice in Australia. It is intended that a person who is registered, certified etc to carry on an occupation in one State or Territory should automatically be entitled to be registered, certified etc to do so anywhere else. This is simple enough for plumbers and the like, but problems arise when some States register for a dual occupation (e.g. barrister and solicitor) whereas other States register for each separately. This may be more of a problem for NSW than it is here, but the limited recognition given to the Bar by the Legal Profession Practice Act has caused us many an ambiguous moment. The matter is to be considered by the Law Council, and the Bar will be informed of any important developments.

All in all, it looks like being an interesting year, as they say, and one in which the Bar will, as hitherto, depend heavily its many committees. The Bar is an association, not a business, but it must often act, react etc with the timeliness and professionalism of the best-run business. This places considerable demands upon the voluntary commitment of its members. But we do have one advantage: because of our internal heterogeneity, we can find experts in most things within our 1200 or so members. I expect that the committees of the Bar will be increasingly involved in advising the Bar Council on a range of important issues in the period ahead.

Chris Jessup

# IT'S YOUR BAR COUNCIL

In the last quarter, activities of the Bar Council have included:

DECISIONS OF THE BAR COUNCIL

1. To advise the LACV inter alia that its decision of late June not to pass on a 3.3% increase in barristers' fees recommended by the Costs Co-ordination Committee was totally unacceptable and placed on the Bar a financial burden the LACV was unwilling to share by reducing its costs and staff.

2. To advise the LACV that it was unacceptable for Counsel employed by the LACV for Supreme Court work to remain on the Roll and thus create a departure from the "Cab rank principle".

3. To provide certain initial establishment assistance to List "L".

4. To oppose alterations to the powers of the Small Claims Tribunal envisaged in the Small Claims Tribunals (Jurisdiction) Bill 1992.

5. To oppose the establishment of a Building Disputes Tribunal.

6. To approve renovation of the Chairman's Room and Bar Council Chamber.

7. Appointment of committees.

8. To establish a Victorian Bar Mediation Centre as soon as practicable.

9. To adopt a response to the Issues Paper of the Trade Practices Commission Study of the Professional — Legal Profession which had been prepared for the Bar and to make same available for perusal by members of the Bar.

10. To increase Annual Bar Subscriptions by 7.5%.

11. To circulate a regular Bulletin entitled "In Brief" to members of the Bar to inform them of activities of the Bar Council and the Bar generally.

12. To request the LACV to restore the 10% reduction introduced in March 1992.

13. To appoint a Bar Constitution Committee.

MATTERS CONSIDERED BY THE BAR COUNCIL

1. Submissions to the "Cooney Inquiry".
2. The image of the legal profession.
3. The Racial and Religious Vilification Bill.
4. Automatic suspension for members of the Bar who fail to take out appropriate professional indemnity insurance.
5. Performance bonuses for prosecutors for the Queen.
6. Admissions to practice in other States.
7. Liability of Directors of BCL.
8. The WorkCare Bill.
9. Refurbishment of Four Courts Chambers.
10. Life Membership of the Victorian Bar.
11. Review of Barristers' Benevolent Association Trust Deed.
12. The County Court Bill (Draft No 10).
13. Final draft of ABA proposed uniform rules of conduct.
14. Retention of the obligation to keep Chambers.
15. The Crimes (Forensic Procedures) Bill.

Comments on matters decided or not decided upon and considered or not considered by the Bar Council are eagerly sought by *Bar News.*

# THE NEW BAR COUNCIL — 1992–1993


BAR COUNCIL 1992–1992

*Seated: Left to right: Brind Zichy-Woinarski Q.C., Susan Crennan Q.C. (Senior Vice-Chairman), Chris Jessup Q.C. (Chairman), David Habersberger Q.C. (Junior Vice Chairman), Murray Kellam Q.C. (Honorary Treasurer), Graeme Uren Q.C.*

*Standing: Left to right: Christopher Sexton (Assistant Honorary Secretary), David Beach, Jeanette Richards (Honorary Secretary), Phillip Dunn, Ross Ray, Andrew McIntosh, Paul Elliott, Richard Pithouse, Ross Gillies Q.C., Robert Kent Q.C., Justin O'Bryan, Robin Brett, Joseph Tsalanidis.*

*Absent: John Middleton Q.C., Cathryn McMillan, Tony Pagone, Stewart Anderson.*

# REPORT OF COMMON LAW BAR ASSOCIATION

THE ACCIDENT COMPENSATION (WORK-Cover) Bill has continued to consume the Committee of the C.L.B.A. Before the Bill was tabled an extensive lobbying program was conducted. This campaign was continued subsequently and has been successful to the extent that the Bar has gained access to the Government. Two Commentaries on relevant aspects of the Bill have been submitted to the Government, one before the second reading speech and one subsequently. These Commentaries (or Submissions) were prepared by David Beach and submitted to the Government by the Bar Council. David is to be complemented for his tireless efforts.

Amongst other things these Commentaries have been directed to:

(a) Retrospectivity in the proposed method of limiting rights to bring common law actions;

(b) The non-employer Defendant in actions arising out of injury in the work place;

(c) The disparity in the damages which may be awarded in an action brought in relation to a transport accident on the one hand and a work place accident on the other;

(d) Limitations imposed on claims for loss of earning capacity;

(e) The definition of "serious injury";

(f) The position of the Judges of the Accident Compensation Tribunal.

A number of suggested amendments initiated by the Bar have been considered by the Government. At the time of writing it is not possible to say how successful we have been.

After the hiatus created by the Bar Council elections in September the new Council has been most supportive, and the Chairman, Jessup Q.C., who quickly appreciated the ramifications of the Bill has been active in the debate. Winneke Q.C. was appointed official Bar spokesman on these issues, and his efforts in talking to Members of the Ministry are greatly appreciated.

The Rules Committee has requested the C.L.B.A. to report on its attitude to an amendment to the Rules of Court which would permit the administration of interrogatories only by leave. Having considered the question it was concluded that in the case of injury actions it was desirable that the parties should be able to interrogate as of right.

The Spring Offensive is now almost completed. There have been a number of statements reported in the Press which suggest that it has been most successful. The Committee proposes to review the results of this campaign once it has been concluded.

David Kendall

# FAREWELLS

## Farewell: The Law Reform Commission

THE LAW REFORM COMMISSION HAS BEEN abolished by statute. There has been some suggestion that "the legal establishment" and, in particular, the Victorian Bar was responsible for its demise. Such a view, however, is not consistent with the reasons given by the Attorney-General in introducing the *Law Reform Commission (Repeal) Bill* on 6 November 1992.

### THE REASONS FOR ABOLITION

In introducing the *Law Reform Commission (Repeal) Bill* the Attorney-General said (Parliamentary Debates, House of Assembly 6 November 1992 p.18):

"It is widely acknowledged that the Law Reform Commission has been, in general terms, a failure. In fact it is another of the former government's grandiose and expensive experiments that has failed to deliver the goods, while absorbing a great many scarce resources. There have been two chief failures on the part of the Commission.

"The first is that it has not maintained its independence from government and, indeed, has shown no real interest in doing so. It must be remembered that one of the chief functions of the Law Reform Commission is not merely to make sensible suggestions for legal reform, but to do so as an independent voice, at arms length from government. Governments are perfectly capable of thinking up changes to the law without a Law Reform Commission: what makes such a body potentially valuable is its theoretical capacity to introduce a separate and critical note in debates over legislative reform.

"Regrettably, however, the Victorian Law Reform Commission has too often operated less as an independent statutory authority than as a loyal branch of the Attorney-General's office . . .

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"Since the government's intention to abolish the Commission was made public it has been suggested in the media that the Commission's wasteful practises may in some way be excused by the fact that the Commission is not funded by 'public money'. This shows a queer perception of what public money is. Ultimately, the Law Reform Commission is funded out of the Solicitors' Guarantee Fund, from the interest earned on the monies of ordinary Victorians deposited in solicitors' trust funds. If that is not public money, I do not know what is. Moreover, the monies spent by the Commission come from the same source as that used to finance legal aid, a cause presumably close to the hearts of the honourable members opposite . . .

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"Secondly, one should not exaggerate the degree of success achieved by the Commission. Honourable members will be aware that, just as some of its reports have been well received, others have been widely criticised. Just one example is the Commission's 1986 Report on Mental Illness, which was tragically rejected by many informed observers. Indeed, the Honourable Member for Preston opposite had this to say of the approach adopted in the Commission's Report:

> "The LRC in so acting, did so in haste and without regard to modern psychiatric opinion and practice. The LRC did not understand the consequence of what it was recommending. Potentially it was dragging into the mental health system up to 40 per cent of the prison population, who are estimated to have an anti-social personality disorder. Of equal concern is that the LRC did not understand that mental illness is transient and episodic in nature and as such patients are regularly reviewed and dis-charged. To achieve its aims, the LRC would have had to also seek the amendment of the various discharge provisions of the *Mental Health Act* 1986 thereby threatening the indefinite detention of patients for whom discharge was not appropriate. What the LRC set out to do was achieve preventative detention through the back door".

This is hardly a ringing endorsement of the Commission's research methodology.

Indeed, for a body that has consumed millions of dollars of public money, the Commission has an unimpressive record when it comes to implementation of its recommendations. Only a comparatively small number of the Commission's proposals have ever resulted in legislative action".

### THE NEW ALTERNATIVES

In introducing the Bill the Attorney-General pointed out that "the abolition of the Commission is intended only as a clearing of the ground for new initiatives. Once the superseded structures of the Commission have been removed, the government will be able to proceed with its detailed plans for the creation of the efficient and independent system of law reform deserved by Victoria".

Mrs. Wade explained the proposals for a new system of law reform as follows:

*Mrs Jan Wade, Attorney-General*

"The government proposes to replace the failed Law Reform Commission with a system that will not only be far more economical, but which will embody the crucial value of independence in law reform.

"In the first place, the government proposes to make extended use of the newly established Law Reform and Scrutiny of Acts Committees of the Parliament. Law reform is fundamentally a matter of the first importance to Parliament and one of the best forums in which proposals may be formulated for consideration by the government and the legislature is within a widely respected all-party committee. The predecessor body to these two committees, the Legal and Constitutional Committee, not only had a reputation for being fiercely independent of the government but also had an impressive record in the conduct of complicated inquiries and the undertaking of legal research. Of course, the enhanced role of committees may necessitate some further funding but this funding would build upon the existing infrastructure of the committee system, so ensuring that the public gets maximum value for its law reform dollar.

"Secondly, further use will be made of theVictoria Law Foundation, a distinguished body of legal professionals, presided over by Victoria's Chief Justice, with an established track record in the area of law reform. The activities of the foundation have been hampered in recent years by the burden of having to financially support the Law Reform Commission, and the abolition of the commission will allow the foundation to play a greater role in the process of law reform.

"Thirdly, the government will put in place a scheme whereby acknowledged experts in particular fields of law can be designated as temporary Law Reform Commissioners and commissioned to conduct a particular inquiry which falls within the scope of their expertise. No legislation will be needed for this purpose. Such a scheme will ensure that we do not have, as at present, a class of professional "law reformers" who confidently assert that they can reform any area of law, even if they know nothing about it before they start. Instead, government funds will be devoted to hiring the best person for the job. Moreover, these Law Reform Commissioners will be allocated resources on an individual needs basis, thus eliminating the requirement to maintain the expensive infrastructure of the Law Reform Commission with its offices, support staff, extensive equipment allocations and so on. Again, the choice of the best experts around Australia will ensure not only the independence but also the quality of the law reform process. The proposed system offers a real opportunity to provide a considerably superior service at a vastly reduced cost

"Government policy will be formulated openly by the Attorney-General's department and will not masquerade, as at present, as the recommendations of a supposedly independent Law Reform Commission."

"Finally, the government will set up a law reform advisory council to advise the Attorney-General on all matters of law reform, including the identification of areas of the law requiring attention and the type of body or person who should conduct the inquiry. The council will comprise members of the government, the judiciary, the community groups, the legal profession and academics.

"The government makes it clear that, in addition to these independent sources of law reform, it will engage in its own vigorous program to reform the law. Such government policy will be formulated openly by the Attorney-General's department and will not masquerade, as at present, as the recommendations of a supposedly independent Law Reform Commission".

# Farewell: The Common Law of Negligence

ALTHOUGH THE TORT OF NEGLIGENCE AS we know it is a "modern tort", the action on the case had by the early 16th century developed to the stage where certain artificers, the apothecary, the surgeon and the attorney, the ferryman, the farrier, the sheriff, the gaoler and arguably the barber were liable for a breach of duty of care: see Winfield "*The Law of Torts*", 5th ed., p. 404.

## RAILWAYS, ROADS AND INDUSTRIAL MACHINERY

In the 19th century, the indiscriminate injury caused by industrial machinery and railway trains expanded the action on the case in negligence. Winfield says that in the 19th century "the development of the conception of negligence as an independent tort is comparatively rapid . . . Perhaps one

of the chief agencies in the growth of the idea is industrial machinery. Early railway trains, in particular, were notable neither for speed nor for safety. They killed any object from a Minister of State to a wandering cow, and this naturally reacted on the law".

The early emphasis was on compensation by the wrongdoer for physical injury caused by him or her either wilfully or by negligence. If there was no proximity likely to cause physical injury, there was no duty of care.

It was for this reason that, in *Le Lievre* v. *Gould* [1893] 1 Q.B. 491 it was held that a surveyor giving progress certificates in respect of the construction of a building owed no duty to the mortgagees of the property to exercise care in giving his certificates and could not be sued by the mortgagees in negligence.

In *Le Lievre* v. *Gould*, Lord Esher said that *Heaven v. Pender* (1883) 11 Q.B.D. 503 —

"established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. The illustration his Lordship chose to give was that of a man driving along a road.

If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property. For instance, if a man is driving along a road, it is his duty not to do that which may injure another person whom he meets on the road, or to his horse or his carriage. In the same way it is the duty of a man not to do that which will injure the house of another to which he is near. If a man is driving on Salsbury Plain, and not other person is near him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage. So, too, if a man is driving along a street in a town, a similar duty not to drive carelessly arises out of contiguity or neighbourhood".

In 1875 a pedestrian who was knocked down by the defendant's horses on the highway sued for negligence on the case and in trespass but, the jury having found that there was no negligence, the plaintiff failed. Bramwell B. said:

"For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid. I think the present action not to be maintainable".

He also said:

"If the act that does an injury is an act of direct force vi et armis, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful".

Even where the action was brought in trespass, there appears to have been a need, in the case of accidents on the highway, to establish that the trespass was wilful or negligent.

In *Gayler & Pope Ltd.* v. *Davies & Son Ltd.* [1924] 2 K.B. 75 the plaintiffs, who were drapers occupying premises in Marylebone, brought an action in trespass and negligence. They claimed damages arising out of an incident in which the defendant's pony and milk van, then being used for the purpose of milk supply to the defendant's customers, dashed through the plaintiff's shop window and damaged a large quantity of goods in the shop. No driver or other servant of the defendant was in sight at the time.

The tort of negligence is, as Lord Atkin said in *Donoghue v. Stevenson:* "Based upon a general public sentiment of moral wrongdoing for which the offender must pay". The moral wrongdoing stems from a failure to take care not to injure one's neighbour.

It was found that the pony and milk van had been left unattended by the defendant's servants, the pony had bolted and caused the damage. McHardie J. held that the action in trespass could not succeed in the absence of proof of negligence. He found, however, that there was in fact negligence because to the knowledge of the plaintiff's servants the pony was "of such a character as to require careful watching lest it should bolt", and they were negligent in leaving it unattended.

The tort of negligence is, as Lord Atkin said in *Donoghue* v. *Stevenson:*

"Based upon a general public sentiment of moral wrongdoing for which the offender must pay".

The moral wrongdoing stems from a failure to take care not to injure one's neighbour. His Lordship defined the neighbour and the standard of care as follows:

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so

affected when I am directing my mind to the acts or omissions which are called in question".

In its origins negligence was concerned with physical injury to property or person. It has been extended to economic loss in the last thirty years. But physical injury remains its raison d'être. The growth of the common law remedy in the 19th century stemmed very much from the need to protect the individual from negligence on the roads, on the rails and in the workplace.

## LEGISLATION TO STRENGTHEN THE COMMON LAW RIGHT

When compulsory third party insurance was introduced in Victoria it was introduced to ensure that persons who have an action in negligence against the careless driver of a motor vehicle were able to recover. Its purpose was stated by Mr. Bailey (the Chief Secretary) in introducing the Bill (Victorian Parliamentary Debates, Assembly, 12 July 1939, p. 228) as being "to ensure compensation for the victims of accidents".

It is clear from *Hansard* that, although there was a limit on the amount of compulsory cover which was required, the intention of the legislation was not to limit the common law right to damages but merely to ensure that a certain (minimal) level of damages could be recovered if negligence and damage could be established.

The introduction of compulsory third party insurance was to ensure that common law claims could be met, not to change the common law right to a right to a pension. It was not intended to discriminate against persons injured by negligence on the roads, but to legislate in their favour — to make sure that any one who drove a motor vehicle negligently would be in a position (directly or indirectly) to compensate his victim (at least to a statutory limit) for any loss suffered.

The victim was not limited to the statutory amount. He was entitled to a judgment for the full amount of his damages, the legislation merely made sure that he recovered at least part of that loss.

The compulsory insurance cover and the loss distribution system which stemmed from it, proved to be too expensive. That this might happen was at least suggested by the then Government Statist (see Victorian Parliamentary Debates, Assembly, 12 July 1939, p. 240):

"During 1937, the experience of New Zealand and South Australia in third party insurance was examined by the Government Statist, Mr. O. Gawler, in an effort to arrive at some estimate of rates which might be chargeable in Victoria in the event of compulsory third party insurance being enacted.

Mr. Gawler was handicapped in his investigation owing to the lack of availability of reliable statistics for this State; nor was the volume of experience of third party insurance in South Australia or the information he was able to obtain from the Accident Underwriters Association in respect of such insurance in Victoria sufficiently great to express any definite opinion on this question.

From information furnished by the Accident Underwriters' Association Union, it seems that the claims paid under policies in Victoria were generally for lower sums than in New Zealand and South Australia, and the Government Statist suggests that a possible explanation may be that voluntary insurances would be effected by persons of more careful temperament than the average. Thus, if this opinion be correct, the experience of business under compulsory conditions would be less favourable than past experience here".

It is well to remember that in 1939 Parliament certainly had no idea of compensating people for their own negligent driving or in circumstances where no other person was at fault. As Mr Michaelis (the Member for St. Kilda pointed out)

"Many people have the impression that if this Bill becomes law it will only be necessary for a person who has been knocked down by a motor car to go to the insurance company and collect whatever he thinks can be extracted from the company. That will not be so. As the Chief Secretary has pointed out, the legislation applies to enforcing Court judgments. It will still be necessary to prove negligence, as before, with certain exceptions that are mentioned in the Bill, to deal with hit-and-run drivers, and certain other cases".

When compulsory third party insurance was introduced in Victoria it was introduced to ensure that persons who have an action in negligence against the careless driver of a motor vehicle were able to recover . . . the intention of the legislation was not to limit the common law right to damages but merely to ensure that a certain (minimal) level of damages could be recovered if negligence and damage could be established.

## THE EMPLOYEE'S RIGHTS

In 1963 Fridmann ("The Modern Law of Employment") stated the employee's right to recover damages at common law as follows:

"When an employee has been injured in the course of his employment, he may sue the employer for negligence

at common law, if the employee's injury has been caused as a result of a breach by the employer of his common law duty to take reasonable care for the safety of his employees".

When workers' compensation legislation was introduced towards the close of the 19th century, compensation could be recovered in certain circumstances even where there was no negligence. The employee, however, retained his common law right to damages.

When the concept of workers' compensation developed in the Germany of Bismark, it was adopted in the United Kingdom and in Austr·lia. It was designed not to provide damages but to provide set benefits in the form of weekly payments and compensation for loss of limbs or of faculties and compensation for medical or hospital or the like expenses incurred as a result of injuries having the necessary statutory connection with work. It was in addition to and not in lieu of the common law rights of the worker.

THE REASON FOR ABOLITION

The common law right of workers and road users to sue the wrongdoer has now been abolished, not because the evil to which the remedy was directed has disappeared, but because the evil is so prevalent. Their right to sue has been abolished not because their claims are not morally justified, not because they have not suffered injury, but because their claims are too justified and they have suffered too much injury.

The anomaly is that the tort of negligence has been all but abolished in the two areas in which its original growth was so strong. It has been abolished because it is in these areas that a remedy for the injured worker, pedestrian or motorist is most required. The cost of adequate compensation under the loss distribution system we have created is too expensive, and, for this reason, the wrongdoer who has the means to compensate his victim is not required to do so.

If a keen tennis player loses the first joint of the thumb of his right hand by reason of the negligence of his multi-millionaire employer, he is entitled to statutory compensation. He cannot sue the wrongdoer. He cannot recover his loss from a person well able to meet that loss, not because of any defect in the common law of negligence but because the loss distribution system — a system which is irrelevant to his capacity to recover damages — has been found unsatisfactory.

The cost of adequate compensation under the loss distribution system we have created is too expensive, and, for this reason, the wrongdoer who has the means to compensate his victim is not required to do so.

It is ironic that at a time when the courts and the legislature are expanding the liability of individuals (be they auditors or company directors) and of corporations in respect of economic loss caused by negligence, personal injury, which lies so firmly at the base of the tort of negligence, is not to be compensated in the two areas where its impact is most felt.

Perhaps we are back (at least in Victoria) to the time of Bracton, of which Winfield (*The History of Negligence and the Law of Torts*, (1926) 42 LQR 184) said:

"It must be recollected that the age was a rough one, stricken with poverty, that it had a hard task in wrestling with the intentional evil-doer and that mere negligence, even if it inflicted bodily injury, was not much accounted unless it resulted in death."

# Farewell: Judicial Independence

EVEN MORE SIGNIFICANT THAN THE abolition of some basic common law rights is the potential effect on judicial independence flowing from the decision to terminate the appointment of the Judges of the Accident Compensation Tribunal.

In the Winter 1991 issue of *Bar News* the Editors said:

"Basic to the independence of the judiciary, of course, is that a member of the Bench should not be removable at the whim of the executive, or at all, except in circumstances which justify impeachment. Anything less than this security of tenure is absolutely inimical to the rule of law. It is to be hoped that the statements which the Sunday press recently attributed to the leader of the State Opposition on this point were totally inaccurate".

Unfortunately, it appears that the hope was not justified.

ABOLITION OF JUDICIAL OFFICE

The legislature has abolished the Accident Compensation Tribunal, has abolished the office of member of the Accident Compensation Tribunal and has

abolished the office of Judge of the Accident Compensation Tribunal.

The significance of the abolition of the last-mentioned office is highlighted by the tenure and status of the judges whose appointment has thus been terminated, and the precedent which such termination establishes in respect of the tenure of judicial office generally.

Under s.41 of the *Accident Compensation Act* 1985.

"A person appointed as a presidential member [of the Accident Compensation Tribunal], whether that person is a Judge of the County Court or not, shall be designated 'Judge of the Accident Compensation Tribunal' and have the rank, status and precedence of a Judge of the County Court.

If a Judge of the Accident Compensation Tribunal may be removed from office by Act of Parliament, there would seem to be no reason why a Judge of the County Court should not be similarly removed from office.

Under section 43(1):

"Subject to this section, a presidential member holds office during good behaviour . . .

(5) The Governor in Council may remove a presidential member from office on the address of both Houses of Parliament.

(7) The office of a member shall become vacant . . .

(b) on the members attaining 72 years of age (being a presidential member appointed before 1 December 1987), 70 years of age (being a presidential member appointed on or after 1 December 1987) or 65 years of age (being a lay member) . . .".

Despite these statutory protections, the Judges of the Accident Compensation Tribunal have now been removed from office. It is contended that they are judges of a specialist court, that that specialist court has been abolished and that there is, therefore, no longer in existence a court which can use their specialist skills. If that be the case, one would have thought that such a judge could nonetheless exercise his or her specialist skills as the holder of a limited commission in a court of general jurisdiction.

## EXECUTIVE EXPEDIENCY V. JUDICIAL INDEPENDENCE

If it is not practicable for the Judge to be given such a commission, then termination of his or her office may be expedient in the interests of economy and efficiency. Expediency in the hands of a strong executive is a dangerous tool liable to emasculate democracy. Efficiency and economy may come at too high a price. History tells us that it was the fascist dictator, Mussolini, who made the Italian trains run on time.

If a Judge of the Accident Compensation Tribunal may be removed from office by Act of Parliament, there would seem to be no reason why a Judge of the County Court should not be similarly removed from office.

The issue of judicial independence is of deep concern to all who value the democratic process. Under the modern Westminster system the judiciary provides the only (albeit limited) control on the dictatorship of the executive.

"In our modern democracy the main threat to judicial independence comes from the executive. Increasingly powerful, the executive in practice usually controls the legislature or at least its most influential house": McGarvie, *Bar News*, Autumn 1992 p. 33.

"The executive is not restricted in its exercise of power by Parliament in any meaningful way . . . It follows that the most significant arm of government that inhibits or restrains executive power is the judiciary . . . without it there is no guarantee of the continuation of the democratic state. There is no other guarantee of the democratic state not being usurped by dictatorship": Meagher, *Bar News*, Spring 1992.

"Judges must be appointed to office until a specified retirement age appropriate for the end of a career. As a corollary, they must be protected against removal except on the address of both Houses of Parliament . . . seeking such a removal on the grounds of proved misbehaviour or incapacity. The reason is obvious if independence is to be protected . . . the *Staples* case is not unique. Indeed the shameful record extends beyond the cases of members of bodies such as the Conciliation and Arbitration Commission to members of courts to which the constitutional protection applies . . . State judges are generally much more exposed in relation to tenure than their federal counterparts . . . The Parliaments of the states other than New South Wales are legally empowered to remove a judge at pleasure . . . It is totally inappropriate that presiding members of a tribunal which must decide matters in which governments or public authorities are directly interested do not have the independence of a judge". Australian Bar Association statement on The Independence of the Judiciary, *Bar News*, Winter 1991, pp. 18 et seq.

It is true that the Victorian Parliament is a sovereign legislature which, within the limits imposed by the *Constitution Act* (which it may in an appropriate way amend) and the Commonwealth Constitution, may do anything. But the decision to remove judges of the Accident Compensation Tribunal from office augurs ill for the independence of the judiciary in the State of Victoria.

# WORKCOVER — THE COMMON LAW PROVISIONS

BACKGROUND

During the debate concerning the ALP's Accident Compensation Bill (subsequently enacted as the Accident Compensation Act 1985) in July 1985, Liberal and National Party politicians spoke against the removal of the right to sue for damages for injuries sustained in the workplace. During the debate on 17 July 1985 in the Legislative Assembly Mr. Williams (the Member for Doncaster) stated:

> "Negligence actions are at the core of rights in this country and ought to be written into the Bill of Rights. They should not be taken away by legislation such as the Bill now before the House."

It became apparent earlier this year that the State Coalition no longer supported this laudable proposition when it produced the first draft of its proposed WorkCover Bill.

In its first draft the Coalition proposed a radically different way of assessing damages for pain and suffering and loss of enjoyment of life in actions brought by employees against employers. Instead of making an assessment of an injured employee's injuries and then applying community standards to determine an appropriate amount of compensation, juries would have been asked to determine what percentage the injured employee was of "a most extreme case". Having determined the percentage a formula would then be applied to determine the amount of compensation payable. In the result a jury assessment that a particular plaintiff was 25% of a most extreme case would have resulted in no damages being payable. However, an assessment that a particular plaintiff was 27.5% of a most extreme case would have resulted in damages of $20,285 being payable. Further, in a case where a jury determined that the plaintiff was 30% of a most extreme case, then the Plaintiff would have received $40,620. One only has to state the consequences of the proposed provisions to realise that it would be impossible to make any proper assessment of what a jury would be likely to award in any particular case and that different juries hearing different cases involving similar injuries might form similar views as to the assessment of the injuries but give percentages leading to widely varying amounts of damages.

Little more needs to be said of the Coalition's first attempt to draft its WorkCover legislation other than that it was not particularly well researched. Clause 156 of the first draft purported to abolish the doctrine of common employment. Whilst it may have been necessary to abolish this doctrine in New South Wales in the not too recent past, the doctrine was in fact abolished in Victoria in 1976 by s.24A of the *Wrongs Act* 1958.

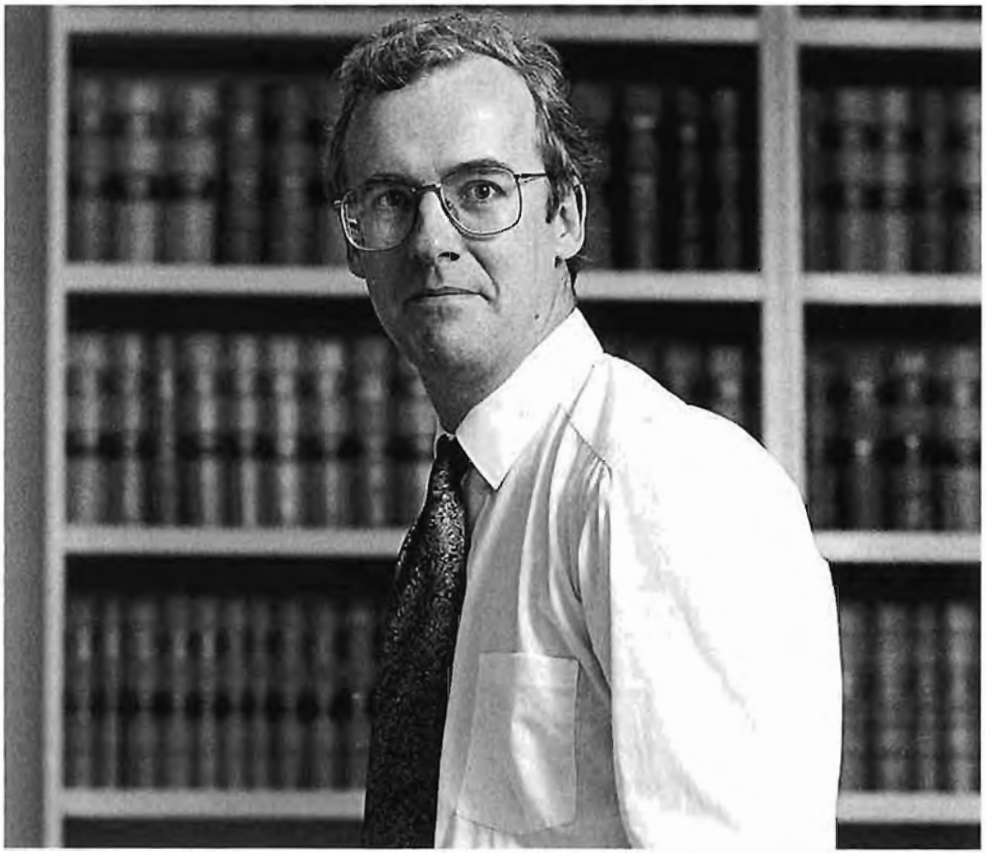
THE ACCIDENT COMPENSATION (WORKCOVER) ACT 1992.

On the Friday before the Melbourne Cup the Government released its *Accident Compensation (WorkCover) Act.* The Act in fact amends the *Accident Compensation Act* 1985. The Government's approach in enacting over 130 pages of amendments to the *Accident Compensation Act* 1985 is surprising when one considers the criticism that that Act has received. The Full Court of the Supreme Court in *Wellbridge* v. *Jackson* [1990] VR 689 at 690 delivered a judgment commencing with the words: "Yet another appeal comes before this Court concerning the construction of a section of the *Accident Compensation Act* 1985 ("the Act"). The section in question is the troublesome s.135 of the Act . . . " In a later judgment another member of a differently constituted Full Court said in *Casamento Management* v. *Garlick* [1991] 2 VR 1 at p.6: "Once again we plunge into the dark and thorny thickets of the WorkCare legislation."

The WorkCare legislation produced a prodigious number of appeals. There can be no doubt that the amendments that have been grafted to it by the WorkCover legislation will produce significantly more.

In the WorkCover Bill as read on 30 October 1992 there was a retrospective withdrawal of employees' rights to damages in accordance with the law as it stood at the time of the injury and at the time of the commencement of proceedings. After much debate the provisions providing for the retrospective withdrawal were removed from the Bill.

The provisions with respect to common law damages were to be found in s.135 of the *Accident Compensation Act* after the passing of the Bill read on 30 October 1992. However, substantial amendments were made to the Bill resulting in a Bill bearing date 12 November 1992 being produced. However, even this version is not the latest version as 26 amendments were made to it by the Legislative Council on 13 November 1992. In the result the common law provisions now appear to be contained in ss.135, 135A and 135B of the Act.



*David Beach*

Whilst the Act has been passed, at the time of writing this article copies have not yet been made available and it is not possible to determine the final form of the Act as passed during the late hours of 13 November 1992 or the early hours of 14 November 1992.

## THE GOVERNMENT'S PROPOSED COMMON LAW SCHEME

Whilst it is not possible to set out with precision the sections that have been enacted, some general remarks can be made.

The common law scheme has been substantially copied from the scheme in force with respect to injuries sustained in motor vehicle accidents. Various provisions from s.93 of the *Transport Accident Act* have been copied into the *Accident Compensation Act.*

In order to be entitled to recover damages an employee must show that he has a "serious injury". "Serious injury" is defined in identical terms to the definition of the same expression of the *Transport Accident Act* 1986. However, on page 4 of the second reading speech on 30 October 1992 the following is said:

> "The Bill reinstates common law rights for loss of earning capacity for seriously injured workers where the worker's injury is due to the negligence of the employer. The Bill, however, limits access to common law damages for minor injuries."

One might assume from the above passage that an employee who sustained an injury that was more than minor would be entitled to compensation. However, the expression "serious injury" as defined in s.93 of the *Transport Accident Act* was considered by the Full Court in *Humphries & Anor.* v. *Pollak* [1992] VR 129. On p.240 of the majority judgment the following is stated:

> "To be 'serious' the consequences of the injury must be serious to the particular applicant. Those consequences will relate to pecuniary disadvantage and/or pain and suffering. In forming a judgment as to whether, when regard is had to such consequence, an injury is to be held to be serious the question to be asked is: Can the injury, when judged by comparison with other cases in the range of possible impairments or losses, be fairly described at least as 'very considerable' and certainy more than 'significant' or 'marked'?"

Unless it is intended that the second reading speech modify the interpretation of the definition of "serious injury", the second reading speech, insofar as it states that the Bill will limit access to common law damages for minor injuries' is incorrect.

On one view of the second reading speech it would be open to argue that a Court considering the meaning of the expression "serious injury" should

disregard what the Full Court said in *Humphries* v. *Poljak* as it is clear from the second reading speech that in the context of this legislation only minor injuries are excluded. Such an approach would obviously have the unusual consequence of different meanings being given to identical words in different compensation statutes.

The monetary thresholds and ceilings enacted in the WorkCover legislation are identical to those in the *Transport Accident Act* save that the limit for pain and suffering damages in the *Transport Accident Act* is $298,600, whereas in the WorkCover legislation it is only $184,740. No rational argument has been advanced by anyone as to why this discrimination between people injured in motor accidents and people injured in the workplace should occur.

There is one significant different between the *Transport Accident Act* provisions and the WorkCover provisions in that s.93 of the *Transport Accident Act* provides that a person must be assessed by the Transport Accident Commission before proceedings can be commenced. The WorkCover legislation does not require an assessment to be made of the Plaintiff prior to the commencement of proceedings (although if the Plaintiff is assessed at less than 30% then it is necessary to obtain a certificate from the administering authority/self insurer for the leave of the Court before proceedings can be commenced). If no assessment has taken place, then an injured employee may commence proceedings and prove that he has sustained a serious injury at the trial of the proceeding (presumably the jury would be asked whether or not the Plaintiff has suffered a serious injury after having been directed as to what "serious injury" means).

An unfortunate aspect of the common law provisions in the WorkCover legislation is that the limits on the recovery of damages are not confined to claims against employers. The limits apply where an employee is entitled to compensation under the Act. This anomaly was brought to the attention of the Government but appears to have been ignored. In the result the provisions limiting common law damages will provide a windfall for "non-employer" defendants and their insurers. Public risk liability insurers and product liability insurers will benefit, having already taken premiums for policies that provide indemnities against claims for full common law damages. As a result of limiting the number of possible claims against insureds under these policies, these insurers will not be required to pay out as much as they otherwise would have been required to pay. The objects of the WorkCover legislation, insofar as they concern costs, are stated as follows:

"To ensure workers' compensation costs are contained so as to minimise the burden on Victorian businesses."

No argument has been advanced as to why insurers who have already taken premiums under public risk liability policies or product liability policies should be entitled to the benefit of provisions designed to ensure that workers' compensation costs are contained. Indeed, if the Government is serious about ensuring workers' compensation costs being contained, then it would seem appropriate to allow injured employees full access to common law rights against negligent "non-employer" defendants. The benefits of such an allowance are twofold, viz:

(a) If the employee succeeds in a common law action against the negligent non-employer, then the full amount of compensation paid under the WorkCover legislation would be repayable out of the damages to the administering authority or self-insurer.

(b) If an employee was able to sue a defendant who was not protected by the WorkCover provisions on the one hand or his employer on the other hand, he would be more likely to choose the non-employer defendant on the basis of an expected greater recovery, thus further reducing the total of the workers' compensation system.

Between the version of the Bill produced on 30 October 1992 and the version produced on 12 November 1992 in excess of 150 amendments were proposed. Some of the amendments were minor, although some were of major importance and were made to rectify omissions which would otherwise have added substantially to the costs of the scheme. Errors and omissions in the legislation are still being discovered and will no doubt require correction in due course.

## CONCLUSION

The WorkCover legislation still has many errors and omissions in it that need to be corrected. For example, there is a clear conflict between s.93 of the *Transport Accident Act* 1986 and s.135A(1) as to which section applies with respect to accidents involving motor vehicles in the workplace. Further, little if any consideration seems to have been given to how damages in asbestos claims where the exposure occurred many years ago are to be made.

When the Act is finally made available it will need to be scrutinised carefully. Whilst it might be said that the Government intends to exclude from common law those employees who have not suffered a "serious injury", there are grounds for asserting that the Bill read on 12 November 1992 coupled with the 26 amendments made by the Legislative Council on 13 November 1992 permits an employee to choose between claiming general damages for pain and suffering and loss of life only under s.135(1) or choosing to prove that he has suffered a "serious injury" entitling him to pecuniary loss damages. These matters and other anomalies will be able to be anlysed and corrected after copies of the Act are made available.

David Beach

# KILL ALL THE LAWYERS

MY ELDER BROTHER LOVES ME. HE was very proud when I was admitted to practice. He bought me a new suit. It was three-piece; I always wore it for best. It was my court suit. He travelled overseas regularly. He would often bring me a present. From Hong Kong he brought me a metal plaque, mounted on fine wood, on which was inscribed a quotation:

> *The first thing we do,*
> *let's kill all the lawyers*
> Shakespeare;
> *Henry VI*, Part 2, Act iv, Scene ii

My brother was not a lawyer. He was proud that I was one and yet here he was presenting me with an inscription insulting to my profession. I accepted the "gift" with good humour — lawyers are, sometimes, able to laugh at themselves. It was a fellow barrister who first told me the story which explains why, in California, they prefer to use lawyers rather than rats in their scientific experiments.

The plaque has sat on the bookshelves in my Chambers for some years now. From time to time it has been the focus of the attention of nervous clients. I have often had the impression that they subconsciously endorse the view of the Shakespearian character.

In recent years we lawyers have become accustomed to a low public standing. The media and the governments seem to demonstrate a strong anti-lawyer mentality. We tend to be paranoid about it and to regard the attacks of the late Law Reform Commission and others as a product of the present generation. Of course, nothing can be further from the truth.

It has always seemed to me somewhat of a paradox that, despite the apparent low standing of the legal profession in the community, nevertheless parents (and the students themselves presumably) hanker after admission of their children to the various law schools so that they also — at least as to a big percentage thereof — in due course may enter the ranks of the profession. The low standing of the profession is not restricted to the nineteen eighties and nineties. It is something that is reflected in contemporary society throughout the whole of recorded history. This can be demonstrated by Shakespearian reference cited. I have been intrigued by that expression of intention for a long time and have recently undertaken closer investigation of its source.

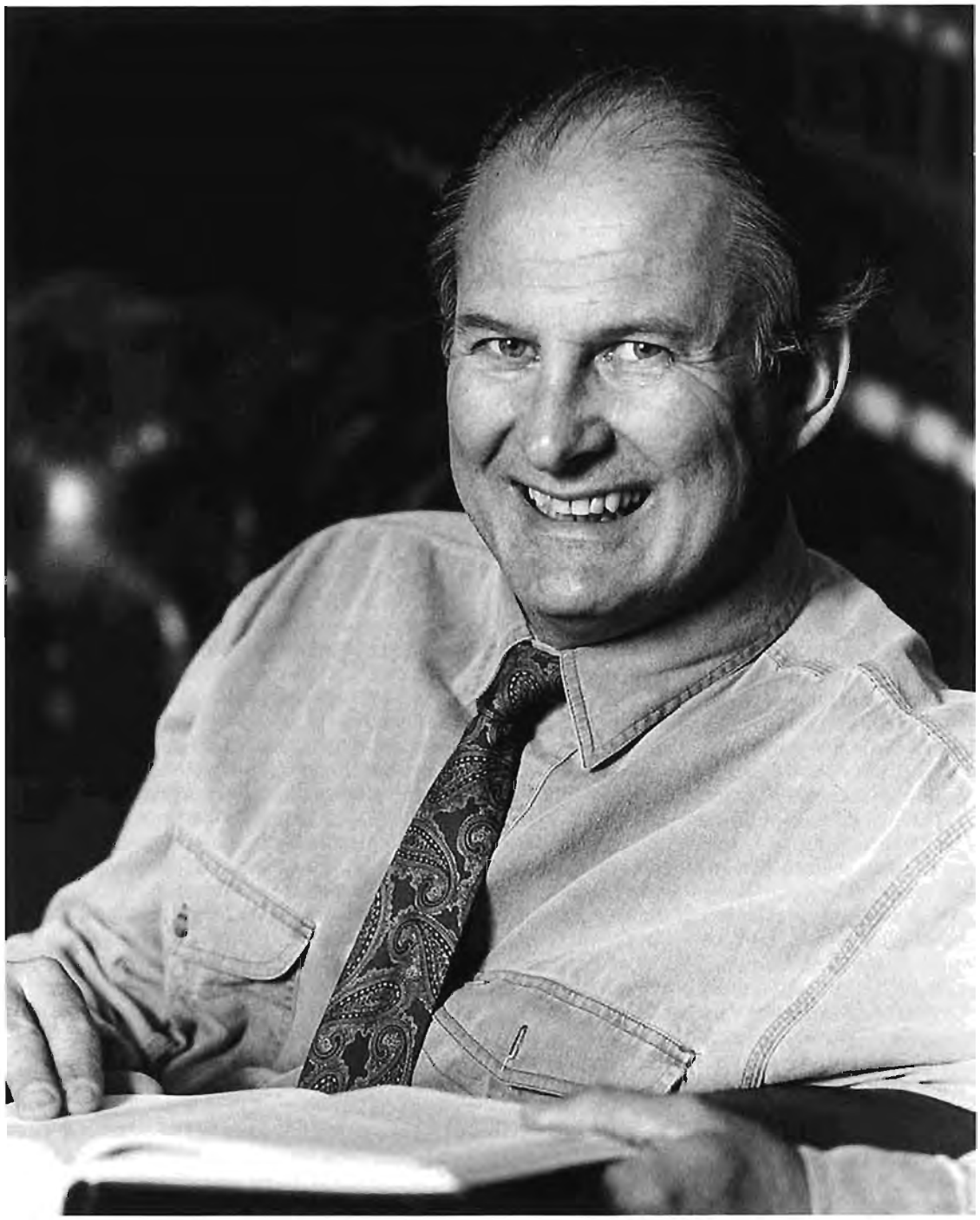
*Henry VI* was written in about 1584; that is, more than one hundred years after the events described in the play. Shakespeare, in putting the words into his character's mouth was, no doubt, echoing an attitude current in his own time. Henry VI reigned between 1422 and 1461. He ascended theThrone before his first birthday and his uncles acted as regents. Following the great victories over France, including that at Agincourt in 1415, the reign of Henry VI by comparison was inglorious. The Wars of the Roses occurred during this period and the country was subject to a great deal of civil strife. Henry himself was too weak to take any effective action against the peers of his realm who during the reign became increasingly rich and powerful. They pocketed the revenues of the Crown, leaving the King in great debt and without sufficient income to provide for effective government. At the same time there were many soldiers returned from the French wars who were trained in nothing but killing and were unable to find employment. They lived off the countryside, roaming in armed bands and acting as private armies.

In 1450 the south of England broke into open rebellion. A group of rebels led by Jack Cade marched on London. His army was made up of tramps and rough peasants. It was an expression of desperation by men out of work, oppressed and subject to injustice. Jack Cade first appears in the play in Act iv, scene ii. George Beavis and John Holland, who apparently regard themselves as good labouring men, are anticipating the arrival of Cade. The location is Blackheath in Kent. Following the *drum roll,* Cade enters with Dick the butcher, Smith the weaver and "infinite numbers". The following exchange takes place —

**Cade** Be brave, then, for your captain is brave, and vows reformation. There shall be in England seven halfpenny loaves sold for a penny; the three-hoop'd pot shall have ten hoops; and I will make it felony to drink small beer. All the realm shall be in common, and in Cheapside shall my palfrey go to grass. And when I am king — as king I will be —

**All** God save your Majesty!

**Cade** I thank you, good people — there shall be no money; all shall eat and drink on my score, and I



*Rex Wild Q.C.*

will apparel them all in one livery, that they may agree like brothers and worship me their lord.

**Dick** The first thing we do, let's kill all the lawyers.

**Cade** Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? That parchment, being scribbl'd o'er, should undo a man? Some say the bee stings; but I say 'tis the bee's wax; for I did but seal once to a thing, and I was never mine own man since. How now! Who's there?

*Enter some, bringing in the Clerk of Chatham*

**Smith** The clerk of Chatham. He can write and read and cast accompt.

**Cade** O monstrous!

**Smith** We took him setting of boys, copies.

**Cade** Here's a villain!

**Smith** Has a book in his pocket with red letter in't.

**Cade** Nay, then he is a conjurer.

**Dick** Nay, he can make obligations and write court-hand.

**Cade** I am sorry for't; the man is a proper man, of mine honour; unless I find him guilty, he shall not die. Come hither sirrah, I must examine thee. What is thy name?

**Clerk** Emmanuel.

**Dick** They use to write it on the top of letters; twill go hard with you.

**Cade** Let me alone. Dost thou use to write thy name, or hast thou a mark to thyself, like a honest plain-dealing man?

**Clerk** Sir, I thank God, I have been so well brought up that I can write my name.

**All** He hath confessed. Away with him!
He's a villain and a traitor.

**Cade** Away with him, I say! Hang him with his pen and inkhorn about his neck.

*Exit one with the Clerk*

It appears that the even slightly taller poppies were to be cropped!

There are several short scenes which follow indicating the success of the Cade-led rebellion. In Scene vii, with the action at Smithfield, London, following "*alarums*", Jack Cade enters with his company. He directs them:

*"So, sirs. Now go some and pull down the Savoy; others to th' Inns of Court; down with them all."*

Shortly after, he captures the Lord Treasurer, Lord Say. He adresses him thus:

"Thou has most traitorously corrupted the youth of the realm in erecting a grammar school; and whereas, before, our forefathers had no other books but the score and the tally, thou has caused printing to be us'd, and, contrary to the King, his crown, and dignity, thou hast built a paper-mill. It will be proved to thy face that thou hast men about thee that usually talk of a noun and a verb, and such abominable words as no Christian ear can endure to hear. Thou hast appointed justices of peace, to call poor men before them about matters they were not able to answer. Moreover, thou hast put them in prison, and because they could not read, thou hast hang'd them, when, indeed, only for that cause they have been most worthy to live."

Meanwhile a messenger to the King describes the rebels thus:

"His army is a ragged multitude
Of hinds and peasants, rude and merciless;
Sir Humphrey Stafford and his brother's death
Hath given them heart and courage to proceed.
All scholars, lawyers, courtiers, gentlemen,
They call false caterpillars and intend their death."

These passages make it clear that it was not only the lawyers who had earnt the wrath of the masses.

Poor old Jack did not last all that long. After the execution by him of the Lord Treasurer, who was a harmless old man, the City of London turned against him and his men deserted. A general pardon was offered and a promise made that misgovernment would end. Cade himself was hunted down and killed.

The Parliamentary rolls of 1451 record:

The false traitor John Cade, who named himself John Mortimer and was locally called Captain of Kent . . . although death and mischieved . . . had not then been punished by the law of the land.[1]

It was therefore ordained by the Parliament, and with the King's approval, that Cade be attainted of treason, that he forfeit all goods, lands (etc.) and:

That his blood be corrupted and disabled forever, and that he be called false traitor within the realm forevermore.[2]

It does not appear as if the project of Jack Cade and Dick the Butcher was carried out, at least in any meaningful sense. Lawyers continued to multiply.

It is noted elsewhere that the lawyers and judges did their best during this period operating under difficulties. Theodore Plucknett in his *Concise History of the Common Law*[3] writes:

The barons who hoped to establish their domination over the Crown were carrying out the same policy in the sphere of local politics. Large masses of evidence bear witness to the extent to which local government was demoralised through the influence of the great landowners. Trial by jury collapsed utterly; parliamentary elections either represented the will of the local magnate or took the form of small battles; the administration of law both at Westminster and in the country was seriously hampered by the breakdown of local machinery and widespread corruption. The lawyers did all they could under the circumstances. They elaborated the law patiently and skilfully. A succession of judges of marked ability were making decisions of great importance, but it was on the administrative and political side that the common law became ineffectual.[4]

By the fifteenth century, is seems, there were many men earning their living from the law. Even then, contemporary society thought there were far too many lawyers (whether they then outnumbered the rats is unknown!)

I suppose that in all Christendom are not so many pleaders, attorneys and men of the law as be in England only, for if they were numbered all that belong to the courts of the Chancery, King's Bench, Common Pleas, Exchequer, Receipt and Hell, and the bag-bearers of the same, it should amount to a great multitude. And how all these live, and of whom, if it should be uttered and told it should not be believed.[5]

Laymen frequently were complaining of the number of attorneys in their respective parts of the country. Although it might be thought that the volume of litigation in various regions led to the number of attorneys, contemporaries took the opposite view; the chicken hatched the egg! A bill was presented in the House of Commons in 1455 which

complained about the rising number of attorneys in Norfolk and Suffolk:

The most part of them not having any other living but only their winning by their said attorneyship, and the most part also of them not being of sufficient cunning [i.e. learning] to be any attorney; which go to every fair, market and other places where congregation of people is, and stir, procure, move and excite the people to take untrue suits, foreign suits, and suits for light trespasses, light offences and small sums of debt, the actions of which be triable and determinable in court baron . . .[6]

The legal profession grew in size and wealth during the sixteenth century. By the mid-seventeenth century the common lawyers came under particularly heavy and sustained attack. As one commentator put it,

The legal profession grew in size and wealth during the sixteenth century. By the mid-seventeenth century the common lawyers came under particularly heavy and sustained attack.

The church was once at the top of pride, then they tumbled; the lawyers are now, and must expect etc . . [7]

A pamphleteer of 1648 described,

that general and inbred hatred which still dwells in our common people against both our laws and lawyers [8]

Wilfred Prest in *The English Bar*, 1550–1700 quotes the pamphleteer and comments that this is:

a traditional hostility which can be traced back to the middle ages, not only in England but through Western Europe as a whole. [9]

A number of reasons are then listed by Prest as to why lawyers should have been particularly feared and reviled in late medieval and early modern times. Lawyers were seen as the standard bearers of change and disruption and in the ensuing conflicts they took leading positions, whether in or out of court. Governments and citizens relied on lawyers in view of the highly legalistic character of both public and private affairs. Accordingly, there was jealousy, resentment and suspicion of the lawyers high standing in the community and their perceived willingness to regard adherence to procedural forms as more important than justice.

Of course, whilst maintaining the rage at the legal profession nevertheless the litigants continued to avail themselves of their services. And even at the same time that lawyers were being banished from Thomas More's Kingdom of Utopia, parents were encouraging their sons to read for the Bar. According to Sir Anthony Benn (1628) recorder of London:

(laymen) . . . press hard upon lawyers yet they dispraise them, culpant sed commodunt (they blame but also use).[10]

We lawyers who owe our lineage to the lawyers of England might take some comfort in the knowledge that lawyers in other countries were similarly despised. In 1629 a solicitor posing as an advocate, in the province of Castile in Spain, was said,

to go about all of the towns and the villages inciting them to begin unjust lawsuits against each other and getting individuals to do the same,[11]

in an effort apparently to stir up new business and expand his clientele.

Popular Spanish proverbs at the time, reflecting hatred towards lawyers, included:

Look at the peasant between two advocates, like a fish between two cats,

The cloaks of the letrados (lawyers) are lined with the disputes of opposite litigants.

Stupidities and arguments make letrados rich.[12]

Some of these proverbs are well known to English and Australian lawyers, at least in their sense. There is little doubt that a man who is prepared to fight for his principles, regardless of the financial and common sense considerations, is a boon to all lawyers.

The Spanish satirist, Francisco Quevedo y Villegas (1622) was especially critical of the lawyers:

If there were no letrados, there would be no arguments; and if there no arguments, there would be no attorneys; and if there were no attorneys, there would be no lies; and if there were no lies, there would be no crimes; and if there were no crimes, there would be no constables; and if there were no constables, there would be no prisons; and if there were no prisons, there would be no judges; and if there were no judges, there would be no favouritism; and if there were no favouritism, there would be no bribery. Look at this display of infernal vermin produced by a single licenciadito, who is so young that he pretends to have a beard and whose authority comes only from his lawyers's cap.[13]

And the lawyers of pre-revolutionary France were also not free of criticism. French attorneys were notorious for their powers of obfuscation although they did not suffer from quite the same poor public identity as those in England. A French client's best protection in law suits was sometimes endless stalling and he could count upon his skilled attorney to uncover one procedural twist after another.[14]

Unfortunately some of these attitudes crossed the Atlantic to the United States. A tale published in the *Virginia Almanac* in 1762 concluded with the following:

I know not . . . what distinction there may be made in London; but I am sure, by sad experience, we in the country know no difference between a lawyer and a liar.[15]

In the years leading up to the American Revolution it appears that the colonial lawyers were less than popular. In 1768 a New York election campaign included the slogan, *"no lawyer in the assembly"*. And the citizens in New Jersey denounced lawyers as,

private leaches, sucking out our very hearts blood[16]

Unfortunately, we lawyers do not have a good press; we never have. Our reputation, particularly in court battles, is that of twisters of the truth. Shakespeare puts these words in the mouth of Bassanio,

In law, what plea so tainted and corrupt
But, being seasoned with a gracious voice,
Obscures the show of evil.[17]

An old Danish proverb goes,

Lawyers and painters can soon change white to black.

In this Century, novelists delight in painting the lawyer as a villain:

There's no better way of exercising the imagination than the study of law. No poet ever interpreted nature as freely as a lawyer interprets truth.[18]

And, this one:

You're an attorney. It's your duty to lie, conceal and distort everything, and slander everybody.[19]

A litigant has been defined as:

A person about to give up his skin for the hope of retaining his bones.[20]

Benjamin Franklin thought little of lawyers in his time:

God works wonders now and then Behold! a lawyer, an honest man![21]

Late last year I enjoyed reading *The Public and Barristers*,[22] based on a paper presented at the Law and Literature Conference at Monash in September, 1991. In the paper, the question is posed:

Is it only Australia that espouses sentiments that lawyers are totally devoid of any good and will do anything for money?[23]

I am afraid not, Paul. It's not only Australia and it's not only now.

It was always and probably will be evermore!

However, we all know we are nice people. Our families love us . . . and we don't kick our dogs. Half of us at least, at any one time, will receive the gratitude and possibly respect, of our clients following the successful conclusion of a piece of litigation: perhaps, *non culpant durante commodunt*. People who actually know lawyers quite possibly really like them (*"Some of my best friends are . . . !"*); but as a group we are unlikely ever to be loved. Politicians have the same problem (we, would say, with greater justification) but they also have children and dogs and, presumably, friends who are *not* politicians. (What about those characters who are both lawyers *and* politicians? Dearie me!)

So there it is! I think we should put up with our image, to the extent we can't do anything about it,

## God works wonders now and then Behold! a lawyer, an honest man!

and enjoy at least the prominence. You don't see the Mafia godfather complaining about his all-powerful and dictatorial image. Evil men seem to thrive on their press. Perhaps it is better than being ignored! There is one chance for us. Until this century, and really only in the latter part of it, women have played no great part in the practice of the law. It is to be hoped that they will bring to bear on the legal process all their undoubted good qualities and leaven the rough justice which men (according to popular theory) have contrived, connived at and condoned over many centuries.

But my big brother still loves me!

Rex Wild

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1. Stephenson and Marcham (ed.): *Sources of English Constitutional History*, 1937, London, 270.
2. Id, 271.
3. Plucknett, T.: *Concise History of the Common Law* (5 ed.) 1956, London.
4. Id, 37.
5. W. Caxton (1474) cited in J.H. Baker J.H: *The English Legal Profession, 1450–1550* in Prest W. (ed. ), *Lawyers in Early Europe and America*, 1981, London, 16.
6. Id, 24.
7. Prest, W.: *The English Bar, 1550–1700* in Prest W. (ed.) op cit, 73.
8. Ibid.
9. Ibid.
10. Id, 74.
11. Kagan R.: *Lawyers and Litigation in Castile 1500–1750* in Prest W. (ed.), op cit, 192.
12. Id, 195.
13. Ibid.
14. Berlanstein L.: *Lawyers in Pre-revolutionary France* in Prest W. (ed.), op cit, 166.
15. Botein S.: *The Legal Profession in Colonial North America* in Prest W. (ed.) op cit, 139.
16. Id, 142.
17. *The Merchant of Venice*, (1956–1957), Act 3, Scene 2, Line 75.
18. Jean Giraudoux: *Tigers at the Gates* (1935).
19. Jean Giraudoux: *The Mad Woman of Chaillot*, (1945).
20. Ambrose Bierce, *The Devil's Dictionary* (1881–1911).
21. Franklin B.: *Poor Richard's Almanack*, (1732–57).
22. Elliott Paul. D. (one of our editors!), *Victorian Bar News*, Summer 1981, 48.
23. Id, 50.

# EMPLOYEE RELATIONS BILL 1992

"THIS LEGISLATION [EMPLOYEE RElations Bill 1992] is not about confrontational division or exploitation. It seeks to redress and eliminate the imbalances and divisions inherent in the previous system by empowering the key players in the industrial setting, employee and employer, to negotiate mutually satisfactory arrangements. In so doing, the legislation does not seek to promote the interests of one party, or indeed of any other party, above those of another.": Mr. Gude, Minister for Industry and Employment, second reading speech, 29 October 1992.

## INTRODUCTION

Not since Gough Whitlam took office in 1972 has Australia been witness to such an orgy of legislative activity as is now being undertaken by Mr. Kennett's Government. Perhaps foremost among the bills being enacted is the Employee Relations Bill ("the Bill"). Its primary purpose is "to make fresh provision with respect to the law relating to employee relations in Victoria": c1.1(a). The Bill repeals the *Industrial Relations Act* 1979, the legislative cornerstone of industrial relations in Victoria over the past 11 years. As the change in nomenclature suggests, the burden of the new Bill is to shift the emphasis from a collective system of industrial relations to one that concentrates on the employer-employee relationship at a particular workplace. The Bill, if enacted in its present form, will have consequences for many members of the Bar in their capacity as employers. This article deals with some of them. (Words importing the male gender include females.)

## RELATIONSHIP BETWEEN AWARDS AND EMPLOYMENT AGREEMENTS AND AWARDS

Virtually every barrister's secretary's employment is currently covered by the Commercial Clerks Award, an award of the Industrial Relations Commission of Victoria. The Bill establishes the Employee Relations Commission of Victoria: c1.82(1). This Commission will replace the IRC. Awards made in the past by the IRC have been common rule awards applying to a particular "trade" throughout the State. The Bill contemplates the continuation of awards being made. However, it contemplates that awards will play second fiddle to "collective" and "individual employment" agreements that have been entered into. For example, the new Commission may only apply an award to an industry or a workplace if the consent of all employers and employees to whom the award is to apply has been obtained: c1.23. The prospect of obtaining the consent of *all* employees in an industry is most unlikely. All awards in force on 1 March 1993 expire on that day: c1.172(3).

## EMPLOYMENT AGREEMENTS

### *Collective employment agreements*

Part 2 of the Bill deals with employment agreements. An employer may enter into a collective employment agreement with any or all of the employees employed by the employer: c1.8(1). Two or more employers may enter into a collective employment agreement with any or all of their employees: c1.8(2). In negotiating for a collective employment agreement, an employer may negotiate with the employees or any representative or committee of employees authorised by them to represent themselves: c1.8(3). New employees may be covered by a collective employment agreement applying to employees of an employer if the employer and the new employee so agree: c1.8(4).

### *Individual employment agreements*

An employee not covered by a collective employment agreement and his employer may enter into any individual employment agreement that they think fit: c1.9(1). Although an employee is covered by a collective employment agreement, he or his employer may still negotiate terms and conditions of employment on an individual basis. Any such terms and conditions agreed between them that modify the collective employment agreement must be put in writing. If there is any inconsistency between the collective employment agreement and an individual employment agreement, the individual agreement prevails: c1. 9 (2). In negotiating for an individual employment agreement, an employer may negotiate with the employee himself or any representative authorised by the employee to represent him: c1.9(3).

*Employment agreements to be in writing*

A collective employment agreement must be in writing and must state the parties to the agreement, including the employees or categories of employee covered by the agreement and be signed by or on behalf of those parties. An individual employment agreement must be in writing and be signed by or on behalf of the employer and the employee if the employee so requests at the time when it is entered into: c1.10(1). An employer bound by an employment agreement must, on being requested to do so by an employee also bound by it, give a copy of the agreement to him as soon as possible: c1.10(2).

As the change in nomenclature suggests, the burden of the new Bill is to shift the emphasis from a collective system of industrial relations to one that concentrates on the employer-employee relationship at a particular workplace. The Bill, if enacted in its present form, will have consequences for many members of the Bar in their capacity as employers.

*When an employment agreement ends*

A collective employment agreement must specify the date on which it expires which must be no more than 5 years after the date on which it came into force: c1.11(1). Collective employment agreements cease to apply on their expiry: c1.11(2). If a collective employment agreement expires, each employee who continues to be employed by the employer is, unless the employer and the employee make a new agreement, bound by an individual employment agreement with the same terms and conditions as those that applied to them under the expired collective employment agreement: c1.11(3).

*Changing employment agreements*

The parties to a collective employment agreement may only vary a term of it if the variation is necessary to remove an ambiguity or uncertainty: c1.12.

*Lodging employment agreements*

If a collective employment agreement is entered into, an employer bound by it must, within 14 days after the coming into force of the agreement, lodge a copy with the Chief Commission Administration Officer: c1.13(1). In July of each year every employer in Victoria must notify that officer of the number of individual employment agreements by which they are bound as at 30 June of the relevant year: c1.13(2). The information contained in a copy of an agreement so lodged is only available to the parties thereto or a person authorised to enforce the agreement on behalf of a party to it: cl.13(3).

*The contents of employment agreements*

Employment agreements may contain provisions concerning some or all of the terms and conditions of employment: cl.14(1). The minimum terms and conditions of employment for employees who are parties to employment agreements are those contained in Schedule 1: cl.14(2). Schedule 1 runs to 19 pages. It deals with minimum terms and conditions of employment, maternity leave, paternity leave, adoption leave, and part-time employment. The minimum terms and conditions which Schedule 1 prescribes are—

(a) paid annual leave for each year worked of the number of ordinary hours required to be worked in any 4 week period during that year;

(b) paid sick leave for each year worked of the number of ordinary hours required to be worked in any 1 week period during that year;

(c) a rate of pay for each hour worked equal to the base award wage rate per hour for the classification of employee as at the commencement of Schedule 1 or, if the relevant award does not or did not then specify the number of hours to which the base weekly wage or salary provided for it applies, a rate of pay for each week worked equal to that base weekly wage or salary;

(d) subject to and in accordance with Schedule 1, maternity, paternity or adoption leave and an entitlement to work part-time in connection with the birth or adoption of a child.

A provision of an employment agreement is of no effect to the extent that it provides a term or condition of employment less favourable to an employee than the minimum applicable under c1.14: c1.14(3).

Employment agreements must contain provisions —

(a) that set out procedures to be followed to prevent or settle claims, disputes or grievances that arise during the currency of the agreement;

(b) for the standing-down of employees who cannot be usefully employed because of any reason for which the employer cannot reasonably be held responsible: cl.14(4).

*How employment agreements work*

Subject to c1.14, once an employment agreement has been made —

(a) the provisions of the agreement have the same effect, and can be enforced in accordance with the Bill in the same way, as an award;

(b) the provisions of the agreement prevail over any provision of an award inconsistent with them and which purports to apply to a person bound by the agreement: cl.17(1).

An employment agreement may provide that some or all of the provisions of an award shall not apply: cl.17(2).

*Application of law to employment agreements*

A contravention of any of the provisions of the Bill does not —

(a) make an employment agreement illegal; or

(b) except as provided in the Bill, make the agreement or any provision of it unenforceable or of no effect: cl.18.

*Limit on award of damages*

A Court must not, in any proceeding for breach of an employment agreement, award damages against any individual employee in excess of $5000: cl.19. In this respect, it is the express intention of cl.168 to alter or vary s. 85 of the Constitution Act 1975 to the extent necessary inter alia —

(a) to prevent the Supreme Court awarding damages in excess of $5000 against an individual employee in any proceeding for breach of an employment agreement: cl.168(a).

CONCLUSION

Up to now most barristers who employ secretaries have not had to concern themselves with the idea or content of an individual employment agreement applying to their secretary. The terms and conditions of employment of barristers' secretaries have been largely, if not exclusively, prescribed by a State award. If enacted, the Employee Relations Bill will change all that. Members of the Bar who are employers may enter into individual employment agreements. If they do so, certain provisions will have to be written into those agreements. Moreover, the entering into those agreements will provide scope for employer and employee to draw upon their powers of imagination and prowess as regards negotiation. I expect my secretary to serve a log of claims well before this article is published.

Nicholas Green

# 'INVESTORS THOUGHTS FROM ABROAD' LENDING IN THE AUSTRALIAN ECONOMY — 1980–1991

## The Role of Valuations for Loans

RECENTLY, IN A PRIVATE CAPACITY, THE writer wrote to one of Australia's major financial institutions concerning some matters of broad philosophical concern relating to its lending practices. One of these matters concerned the apparent reliance upon inadequate valuation methods.

The role of valuers in carrying out professional valuations must always be seen in a broader context than merely the provision of a written sworn valuation.

Valuations are usually, although not always, sought in the context of an application for the advance of capital by a potential lender. Such capital is either used for or said to be going to be used for: (i) the purchase of property, real or personal; (ii) the purpose of assisting in a takeover; (iii) both; (iv) research and development; (v) all four. The writer has no problem philosophically with any of the foregoing aims.

The following are the problems summarily raised by the practices of the last decade:

(i) the larger the capital outlay, the larger the return, expected (or hoped for);

(ii) there are or have been excessive expectations;

(iii) the expectation of repayments to the lender have in essence been one of the few things to warrant the initial advance;

(iv) doubtless in most cases some form of security has been taken; the security is really on security in the short term; the security is of course taken more as an incentive to attempt to enforce and/or influence both the making of the repayments and a regular regime in the making of the repayment in whatever form it is agreed that they are to be made;

(v) there are false horizons and false gains immediately apparent, notwithstanding that:

(a) there is short term gain for some;

(b) may be "massive investment" in housing and commercial (office, factory, warehouse) developments;

(c) there may be taxation benefits for some with, for example, negative gearing;

(vi) persons have been encouraged, if not expressly, then impliedly to borrow from all institutions;

(vii) much of the realty into which the capital is poured is non-productive, e.g. housing; there is much waste of overseas borrowing in this area;

(viii) there has never been enough cash in the banks to equal inflated prices sought and often gained for commercial, residential and industrial land;

(ix) much development has been felled by speculation and speculators who are profit driven, naturally;

(x) valuers have been working or attempting to work in this climate where borrowers and lenders have had unrealistic expectations;

(xi) valuations may be suspect where they are not sufficiently specific, where they lack better instruction, where they are not better researched and where they are not — after a (typical) geographic and planning controls""recitation" — in essence, one line opinions. The fault is more often than not, not there but the product of:

(a) undue time expectations;

(b) undue expectations simpliciter;

(c) lack of express instruction;

(xii) the lack of sufficient direction from The Reserve Bank and separately from the Federal Cabinet in these broad areas is, one would think, also apparent;

(xiii) in a land of apparent "plenty" there is also an unwillingness to admit to a smugness which is in any event blatant and the more insidious because of it;

(xiv) the banks generally have not or apparently have not had sufficiently tight lending policies — for there has been no sufficiently publicised ones to cope with either the Australian economy generally or the Australian economy in its:

(a) post 1982 recession;

(b) mid 80s boom; and

(c) late 80s post boom times.

It has all been apparently ad hoc.

If there have been strategies they are not necessarily apparent. If they have existed they seem to have failed in part. Whether or not they existed one has a repeat of the 1890s excessive overseas borrowing (on the London market), excessive speculation, a fancy land of overnight money gurus and a deplorable lowering of proper standards of business behaviour.

I find it odd, that now, again, there are critical questions rightly being asked generally — about banking practices. The House of Representatives is looking at these in a wider context.

I focus here on matters *including* an arguable credibility gap between valuers' reports and the lender.

One has a repeat of the 1890's excessive overseas borrowing (on the London market), excessive speculation, a fancy land of overnight money gurus and a deplorable lowering of proper standards of business behaviour.

A number of strategies can be adopted by would-be lenders. These could include:

(1) properly audited figures of past returns of an applicant should be requested with loan application by individuals or companies seeking loans or "development";

(2) projected figures of likely returns from the company should be accompanied by independently prepared detailed reports;

(3) banks should continue to seek adequate security, especially with large companies, by preferred securities either over companies own asset registers (that is including realties) or over subsidiaries or both. In the case of subsidiaries the banks should be careful not to encourage practices which may differ from properly audited and/or accounting practices nor from any direction of the regulatory authorities — especially in the context of what should or should not go into the balance sheets, e.g. a subsidiary's assets should not be included in the balance sheet of the parent company for most purposes, for such purposes might distort the true worth of the larger company;

(4) a more public regime of indicators of an acceptable takeover including emphasis on public interest;

(5) in looking at the nature of an applicant's operation and a proposed extension or variation or whatever it is for which the loan is sought — and this be by way of sole authorship or partnership or ventureship, etc., have due regard to:

(a) the nature, size, objects, trading records of the entity;

(b) the nature of risk taken by the proposed borrowing entity;

(c) the nature of the venture proposed;

(d) the history of the type of ventures to be undertaken;

(e) the likelihood, if any, or probability of success without the loan and with the loan.

(6) some attempt to prevent the continual escalation of commercial land prices.

Portfolios of capital or a sole source of capital should not necessarily be made available as of right. It should be remembered that there is rarely sufficient equivalent money to equate to alleged property values. Property values are often artificial. Risks especially in property may be too great and if money is allowed to flow continually, in large amounts from lending institutions unreal expectations are engendered by one's potential present borrower and also for later borrowers.

Further there may be apolitical, political, international or other implications which are unacceptable or unacceptable when much of the risk depends on interlinking strategies and/or certain national policies of one country coinciding with that of another or with others.

The use of bank's and other non-bank funds in the last decade has doubtless been accompanied by some preceding documentation asserting or alleging the purpose of the request; and the profit likely to be made at least for the lender.

Whether or not all applications have been, also, accompanied by a "prospectus" setting out a claim of certain profit likely to be made if the loan is made by the borrower or would-be borrower is perhaps another question.

It is in this context that the role of valuations, especially valuations of land, be it broad acres or land with improvements, especially in the warehouse, office development, industrial factory context, need to be looked at. In my view care needs to be taken in any climate where valuations are in fact or by default, relied on. The care needs to be taken by both those requesting the information and those providing it.

Thus, it must be seen that the valuers have all facts relevant to their valuation including in the appropriate context a sufficient range of, say, comparable sales or say, buildings of a like type, e.g. in the context of an application for an extension of a building of an office type.

The better information made available to the valuer, the greater the contribution, any valuation would make to the information available to a potential mortgagee. In this context one has often wondered at the apparent "weight" accorded, or apparently accorded, to a one line valuation. In this context I have seen countless valuations where the preambles consist of a recitation of dates of inspection, of dates of purchase (earlier purchase), of dates of development, of the geography of the area — in general, and of the necessary planning controls, of restrictive covenants and of easements, glossy photos abound. Then "I think the value is $X" — (BANG) end of quote, end of valuation.

In my view care needs to be taken in any climate where valuations are in fact or by default, relied on. The care needs to be taken by both those requesting the information and those providing it.

One might say that such an exercise might well be the product of a lack of time or lack of instructions or a lack of an ability to see more widely, other facts that might or would or should be more relevant; and all would better assist normal processes. Valuations, say over a valuation in a rent review context, in a sense may be more likely to be better researched, because of the intensity of the information required or because of easier reference to ample comparable buildings and their rents (all things being equal) of both. Valuation in the context of establishing the likely return on an office development in terms of returns per GLA may well accord with current market figures. Mortgagee valuation or rather valuations for mortgagees in this area are often highly expert. They are often highly regarded. This is a danger however. Valuation is a specialists' field but as discrepancies appear from time to time in sworn valuations in many areas, the cause of the discrepancy is as much a cause of puzzlement as for concern about the nature of the valuation process and the reliance by potential borrowers upon the process.

It is suggested that more care is needed in the *use* of the valuation process, by financial institutions as they seek new sources for investment in the 1990s. Tricontinental and others should not be repeated.

Anthony E. Radford

# BARRISTER GOES OVER THE TOP AT PENTRIDGE . . .

## Is this Touting?

*Showjumper Will Alstergren's mount takes a hurdle at Pentridge yesterday, as part of the state horse trials team's visit to the prison. The prison activities program is designed to overcome the boredom of life on the inside.*

*(Courtesy of the Age Newspaper)*

# THE AUSTRALIAN ADVOCACY INSTITUTE

IT IS NOW JUST OVER ONE YEAR SINCE the Australian Advocacy Institute was officially launched during the 27th Australian Legal Convention in Adelaide.

The aims of the Institute are to improve the standards of advocacy throughout Australia wherever and by whomever it is practised at all levels and to provide an Australia-wide forum in which ideas about the teaching of advocacy can be shared and developed.

In this the first year of its operation, the Institute has, successfully conducted workshops in all States and looks forward to a full program for 1993. In addition the Institute is engaged in developing teaching materials and establishing an advocacy library.

1992 has proved to be a busy year for the Board, whose members are the Honourable Mr. Justice Davies (Queensland), Mr. Alex Chernoff Q.C. (Victoria), Mr. Barry O'Keefe Q.C. (New South Wales), Mr. John Chaney (W.A.) and Mr. Christopher Crawley (A.C.T.) and the members of the Teaching Committee who are Mr. Sydney Tilmouth Q.C. (South Australia), Mr. Brian Donovan Q.C. (New South Wales), Mrs. Felicity Hampel (Victoria), Mr. Hugh Selby (A.C.T.) and Mr. Laurie Robson (Victoria) as well as for the many teachers who have given their time without remuneration to teach at the workshops.

The teaching of advocacy is based on the concept that good advocacy involves a number of developed skills and techniques as well as a degree of natural ability. Such skills and techniques can be taught whilst natural ability can be enhanced. This is best achieved by the workshop method which involves performance, assessment and instruction. The participants work in small groups, their performances are video taped and reviewed at least twice. Materials and exercises are designed to focus on various skills involved in good advocacy irrespective of the jurisdiction in which such skills are applied. Emphasis is not on the complete mock trials or hearings but rather on the performance of segments to identify and develop particular skills and techniques. In that context exercises involve applications for injunctions, opening and closing addresses, examination and cross-examination of witnesses, legal argument, plea making and general communication skills.

Teacher training is an important feature of the Institute's work. To qualify to teach with the Institute, instructors must not only be competent advocates with considerable experience but also persons who are interested in and committed to teaching. They are required to attend workshop sessions in which the concepts and the methods used by the Institute are taught. After attending teacher training workshops instructors who show a capacity for teaching are invited to take part in the workshops usually together with the more experienced teachers.

The teaching of advocacy is based on the concept that good advocacy involves a number of developed skills and techniques as well as a degree of natural ability. Such skills and techniques can be taught whilst natural ability can be enhanced.

One of the strengths of the Institute lies in its insistence on the use of materials specially created for the purpose. The writing of suitable materials is a difficult task and can be undertaken only by those who understand the Institute's teaching methods and appreciate the value of materials which are designed to teach particular skills at the required level.

Members of the Teaching Committee of the Institute and a number of senior experienced instructors are in constant consultation in an attempt to improve materials and teaching technique. The Institute hopes to hold an advocacy teaching forum in 1993 to enable further development to take place in this area. The members of the Institute are in touch with developments in advocacy teaching overseas particularly in the United States and in Canada. Recently both the English and the Scottish Bars

have requested assistance from the Institute in setting up advocacy teaching workshops. Such assistance will be available in the future.

During 1992 there were 12 workshops held throughout Australia (except W.A.) with about 400 advocates attending. They were solicitors and members of some Bars particularly the Brisbane Bar, as well as advocates from various government instrumentalities. Two teacher training weekend workshops were also held and were attended by 52 senior barristers and 2 solicitors.

Next year's program will be more comprehensive. The workshops to be held will include specialised workshops in areas such as examination and cross-examination of expert witnesses, jury advocacy, plea making and appellate advocacy. It is also proposed to conduct at least one workshop which will have communication skills as its main emphasis. The program will begin in Sydney in February with an appellate advocacy workshop to be opened by the Honourable the Chief Justice of the Supreme Court of New South Wales at 5.00 p.m. on Friday, 19th of February and to be conducted over the weekend by experienced appellate lawyers.

Members of the Victorian Bar have been actively involved in the Institute's work. The Victorian Bar has a strong tradition and much experience of advocacy teaching well ahead of other Australian legal bodies. It has in the past been the unquestionable leader in this field in Australia. The Victorian Bar Readers' Course has been the most extensive and sophisticated course of its kind for beginning advocates.

Unfortunately, however, the Victorian Bar has done little to develop advocacy training at a more advanced level. In this respect the Victorian Bar is lagging behind other States particularly Brisbane, to some extent Sydney as well as smaller Bars such as the Northern Territory and the A.C.T. Bar.

The Institute's workshops in some of those States are attended by some senior barristers and even silks.

What those of us who are involved in the teaching of advocacy have for a long time thought to be obvious has at last been generally recognised, namely, that at every professional level further education and development of skills, particularly advocacy skills, can be of benefit in the pursuit of professional excellence. It is now recognised that not only the basic but also the more sophisticated advocacy skills can be taught and developed. There is any number of senior members of the Bars, for example, whose skills in particular areas of advocacy can be improved. There are advocates who are particularly good in witness actions and are very able at leading evidence and cross-examination but lack equivalent skill at putting legal argument. There are those who manage a case involving documents and affidavit material and submissions well but have difficulty when witnesses are involved. Good appellate advocacy requires yet different skills and techniques which can be improved and developed. There are many advocates whose general communication skills can also be improved once they become aware how much can be and is in fact being done in this area.

In the past attempts to mobilise the more experienced barristers to continue their advocacy training by the Victorian Bar have failed. Every Readers' Course has been offered the opportunity to continue some form of periodic workshop program out of work hours in groups of 10 or more if they were prepared to organise themselves. Many have said that this is a good idea but nothing has come of it.

I fear that our Bar which has always been a leader in this area may not remain in that position.

The existence of an independent Bar in our legal community is in my view essential. The justification for its existence, particularly in these troubled times, lies in the quality of skilled professional advocates at all levels of experience.

The Victorian Bar has a strong tradition and much experience of advocacy teaching well ahead of other Australian legal bodies. It has in the past been the unquestionable leader in this field in Australia.

I hope that in the near future the Bar will take steps to develop continuing education in advocacy whether by developing its own programs or by taking advantage of the programs provided by the Australian Advocacy Institute, or both.

The combined knowledge and experience of those senior advocates in Australia who have been involved with the Institute can readily be made available together with any other assistance to the members of the Victorian Bar. I also hope that at the workshops planned by the Institute for next year the Victorian Bar will not be conspicuous by its absence. A booklet with a complete list of the workshops for 1993 is in the course of preparation and will be available early in the new year.

For further information about the Institute's work and its workshops please contact the Administrator of the Australian Advocacy Institute, GPO Box 1989, Canberra, A.C.T., 2600.

Telephone (06) 249 7600. Fax (06) 248 0639.

George Hampel
Chairman,
Australian Advocacy Institute

# HELPFUL HINTS TO PRACTICE IN PNG

THE VICTORIAN BAR HAS A NUMBER OF links with Papua New Guinea. For the last three years it has funded and conducted the advocacy workshop at the PNG Legal Training Institute in Port Moresby, and recent intakes of the Bar Readers Course have included readers from PNG. Several members of the Bar still score occasional briefs to appear there.

For those who aspire to a brief from Melanesia the following observations may prove helpful regarding some unfamiliar aspects of the PNG legal system.

## SORCERY

This is an offence which is rarely encountered at Broadmeadows Magistrates' Court. In PNG it is governed by the Sorcery Act 1971. A lengthy preamble explains that while the powers of sorcerers are not real, "there is no reason why a person who uses or pretends or tries to use sorcery to do, or try to do, evil things should not be punished just as if sorcery and the powers of sorcerers were real." Sorcery is of two kinds, innocent sorcery and forbidden sorcery. Only the latter is punishable.

In the village environment, accusations of sorcery frequently follow unusual events, for example: sunshine, rain, illness, bad luck, things going wrong. The Act recognises the risk that some people may make "baseless or spiteful or malicious accusations that their enemies are sorerers solely to get them into trouble with other people" and it attempts to guard against it. Hence the law tends to be invoked only where the consequences are serious, usually in the case of death. Of course, even where the cause of death is clear, accusations often follow. In the case of heart attack for example, the question will arise as to which sorcerer caused the heart attack.

In the more volatile parts of the country, accusations of sorcery (can lead to vendettas, tribal war or witch-hunts. A gruesome example of such consequences is set out in *The State* v. *Muare Kiage* and Others (National Court Judgment N.918 of 1990). Most accusations in the villages surrounding Port Moresby constitute little more than nuisance.

It is often the case that in each village, one or two local people have acquired a reputation for sorcery. Such people are hard put to behave naturally where sudden death has occurred within a village and they know they are likely to be accused. Their nervous demeanour is then cited as evidence of guilt.

In the relatively benign environs of Central Province, sorcery proceedings usually run their course as follows. Somebody dies and the deceased's relatives bring charges against the unlucky scapegoat. The first return date is usually attended by a couple of truckloads of aggrieved relatives. Tempers can run high. The proceedings are therefore adjourned (recommended time: 6 weeks), and on the second mention, one hopes that only one truckload of mourners will turn up. Another adjournment is obtained on any plausible pretext, and the process continued for as long as necessary. With luck, by the fifth adjournment another death will have taken place in the village, and even the widow will have lost interest. Proceedings are then adjourned sine die.

## ADULTERY

This is a criminal offence governed by the Native Regulations. The Law Reform Commission has long recommended that such conduct should no longer be subject to criminal sanction. However, mission influence and strong feelings in some provinces have led to its retention. In some areas in PNG adultery is regarded with horror, whilst in others, it is considered as natural as sneezing.

The regulations date back to colonial times and preserve the distinction between the former territories of Papua and of New Guinea, despite the country's independence as a unified country. They contain some discriminatory provisions worthy of South Africa. Only the husband can lay a complaint, not the wife. The maximum penalty for the male adulterer is six months imprisonment while that for the female is only half that. Most importantly, the regulations apply only to PNG automatic citizens, that is to say, those born there. Participating expatriates are therefore in theory immune from punishment.

Notwithstanding this, Australian expats sometimes find themselves charged with the offence. In practice it can prove expedient not to rely on the available defence. Some magistrates seem to resent the freedom foreigners enjoy to dally with their spouses, but which is forbidden to them. A tactful plea combined with an offer of compensation is often advisable. For this purpose, Courtroom 3 at the Port Moresby District Court is suitable for minimising embarassment.

## AFFILIATION

Basic common law principles apply, but the position is made more uncertain by the dearth of

blood-matching facilities and the diversity of the tribal groups, of which there are hundreds. Decisions are frequently made on the basis of appearance alone, and bookings should be made at the Children's Court every Tuesday. The Children's Court is housed in the fibro cement building behind Steamships Meat Freezer.

My own estimate for the contest was a couple of hours, and I was surprised when my opponent, who came equipped with a thick volume entitled "Encyclopedia of Bizarre Medical Facts", gave an estimate of four days.

Possible difficulties in this jurisdiction are illustrated in a matter in which I was retained to act for an attractive Melanesian lady who had been cohabiting with a white man. In addition she had been carrying on a liaison with a PNG National from whom she wished to claim maintenance. He was a Tolai — a member of a distinctive and good-looking tribe from the Rabaul area. The client attended court with her baby, which looked distinctly of part Tolai parentage.

The Tolai was represented and denied paternity. My own estimate for the contest was a couple of hours, and I was surprised when my opponent, who came equipped with a thick volume entitled *"Encyclopedia of Bizarre Medical Facts"*, gave an estimate of four days.

He explained that according to his client's instructions, mine had given birth not to one child but to twins. Furthermore, one twin was black, and the other was white! The Encyclopedia recorded several such cases in medical history, the most recent having occured in Peru in 1924. My client was alleged to have told the putative father that she had thoughtfully produced two offspring; "One for him, and one for you."

My client was very evasive as to what she had said or done. Enquiries from the hospital did not help much because the records did not run to such fancy details as whether a birth had been single or multiple.

Unfortunately the client ran short of funds, and her implied offer of alternative payment seemed to present possible ethical problems. In true PNG fashion, the proceedings petered out, but I learned later that the lady had actually given birth to one child only, but not the Tolai child she had brought to court. She had borrowed that from a friend for the occasion.

CANNIBALISM

The cash economy and the consequent availabilty of high protein bully-beef and canned mackerel makes this offence a rarity. A brief in such proceedings is much sought after, for one can dine out on the anecdote for years. The correct charge to bring is Misconduct with Regard to Corpses under s. 241 of the Criminal Code.

Two reported decisions illustrate how times have changed. In *R. v. Naboi Bosai* (1971–2 PNGLR 221), the accused was found tending a cooking fire on which was simmering a large pot containing incriminating ingredients. Prentice J in his judgement distinguished this culinary activity from acts of necrophilic perversity and "the kind of horseplay which is frowned upon but occurs in schools of anatomy . . ." The accused was acquitted.

The second decision is The State *v.* Aubafu Feama and others (1978 PNGLR 301). There, the three accused admitted having gone to a place where bodies were awaiting burial. With bamboo knives, they had taken the right leg off one of the corpses and removed some choice cuts from the left leg and buttocks. They had then cooked and eaten the lot.

Cannibalism: The cash economy and the consequent availabilty of high protein bully-beef and canned mackerel makes this offence a rarity. A brief in such proceedings is much sought after, for one can dine out on the anecdote for years.

This conduct was found to amount to improperly interfering with a dead human body within the meaning of the section. A long-standing practice of cannibalism in the area did not provide a defence of lawful justification or excuse. The accused, having spent twelve months in custody awaiting trial, were given a further three months.

Both reports make fascinating reading, but epicures will be disappointed to find that neither contains a full recipe. Bon appetit.

Challinger's recently published book of stories (some of which have a legal flavour), *Port Moresby Mixed Doubles* is available from Harston Partridge in Owen Dixon Chambers at $11.95.

Michael Challinger

# NEW SILKS

On 30 November 1992, the newly appointed Queen's Counsel announced their appointments to the Supreme and Federal Courts

*(Left to right) Back row: Roland Williams, Simon Wilson, Brian Collis.*
*Middle row: John Rush, Anthony Howard, Frederick Davey, John Kaufman, Geoffrey Nettle.*
*Front row: Noel Ackman, Lillian Lieder, Betty King. (Absent: Michael Adams)*

| | |
|---|---|
| NAME: | FREDERICK G. DAVEY |
| DATE OF ADMISSION: | 2 April 1961 |
| DATE OF SIGNING BAR ROLL: | 8 August 1974 |
| READERS: | Sue Crennan Q.C., Stephen Wartski, Robert Lancy, John De Wijn, Merryl Sexton and Pato Potane. |
| AREA OF PRACTICE: | Commercial and building law. |
| REASON FOR APPLYING: | Because I've been practising as a junior for many many years. |
| REACTION ON APPOINTMENT: | Extremely pleased. |

| | |
|---|---|
| NAME: | JOHN V. KAUFMAN |
| DATE OF ADMISSION: | 1 April 1963 |
| DATE OF SIGNING BAR ROLL: | 25 February 1965 |
| READERS: | Phipps Q.C., Betty King, Q.C., C. Duncan, Jonas, Haven, Francis Millane, Lombardi, Gebhardt, R. Strong. |
| AREA OF PRACTICE: | Commercial. |
| REASON FOR APPLYING: | Oh hell, having been at the bar so long, it seemed the natural thing to do! |
| REACTION ON APPOINTMENT: | Elation. |

| | |
|---|---|
| NAME: | ROLAND GWYLLAM WILLIAMS |
| DATE OF ADMISSION: | 1967 |
| DATE OF SIGNING BAR ROLL: | 1968 |
| READERS: | David O'Doherty, Greg Laxton, Keith O'Donnell, Ian Fehring. |
| AREA OF PRACTICE: | Common law. |
| REASON FOR APPLYING: | Because the government has said that in my area of practice only the serious cases will be left! |
| REACTION ON APPOINTMENT: | Who wants my Interrogatory precedents? |

| | |
|---|---|
| NAME: | BRIAN WILLIAM COLLIS |
| DATE OF ADMISSION: | 3 April 1967 (Victoria) |
| DATE OF SIGNING BAR ROLL: | 21 March 1968 |
| READERS: | J. Bicknell, J. Hill, A. Robertson, I. Gourlay, A. Moore, J. Hall, N. Coburn, D. Farlow. |
| AREA OF PRACTICE: | General common law together with some criminal work. |
| REASON FOR APPLYING: | |
| REACTION ON APPOINTMENT: | After 25 years of "ups and downs' it was very pleasing to be recognised in this way. |

| | |
|---|---|
| NAME: | NOEL JEFFREY ACKMAN |
| DATE OF ADMISSION: | 1968 |
| DATE OF SIGNING BAR ROLL: | 1970 |
| READERS: | Schwarz, Ham, Robertson, K. MacMillan; Glover, Rivers. |
| AREA OF PRACTICE: | Family law. |
| REASON FOR APPLYING: | A form of tax minimisation. |
| REACTION ON APPOINTMENT: | My God, what have I done! |

| | |
|---|---|
| NAME: | LILLIAN LIEDER |
| DATE OF ADMISSION: | 1 April 1971 |
| DATE OF SIGNING BAR ROLL: | 13 September 1973 |
| READERS: | Weiner, Mackenzie, Williams, Stuogiannos, Slade, Dixon, Rozencwajg (Sol), Burrows, Auty. |
| AREA OF PRACTICE: | Criminal law. |
| REASON FOR APPLYING: | I suppose really I could get away with saying in current times, it's a death wish but I needed the challenge. |
| REACTION ON APPOINTMENT: | Very pleased. |

| | |
|---|---|
| NAME: | MICHAEL ANTHONY ADAMS |
| DATE OF ADMISSION: | 3 December 1973 |
| DATE OF SIGNING BAR ROLL: | 10 April 1975 |
| READERS: | Justin O'Bryan. |
| AREA OF PRACTICE: | Equity. |
| REASON FOR APPLYING: | |
| REACTION ON APPOINTMENT: | |

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|---|---|
| NAME: | BETTY JUNE KING |
| DATE OF ADMISSION: | March 1975 |
| DATE OF SIGNING BAR ROLL: | August 1975 |
| READERS: | Nil. |
| AREA OF PRACTICE: | Criminal law. |
| REASON FOR APPLYING: | It's hard to say, I almost didn'&t! But then you can't be appointed if you don't apply. |
| REACTION ON APPOINTMENT: | Stunned! and disbelieving. |

| | |
|---|---|
| NAME: | ANTHONY HOWARD |
| DATE OF ADMISSION: | 1 March 1974 |
| DATE OF SIGNING BAR ROLL: | 13 November 1975 |
| READERS: | Wendy James, Wendy Boddison, Mark Taft. |
| AREA OF PRACTICE: | Criminal/commercial crime, inquiries and commissions. |
| REASON FOR APPLYING: | It's difficult to articulate the reason but it does give an opportunity to diversify. |
| REACTION ON APPOINTMENT: | I feel honoured, delighted and thankful to the many friends and colleagues who have supported my over the years |

| | |
|---|---|
| NAME: | SIMON KEMP WILSON |
| DATE OF ADMISSION: | 1 April 1976 |
| DATE OF SIGNING BAR ROLL: | 8 April 1976 |
| READERS: | Peter Thomasz, Stewart Anderson, Tim Walker, Mary Stavrikakis, Austin Parnell, Suzanne Harmer, Suzanna Lobez, William Alstergren. |
| AREA OF PRACTICE: | General commercial litigation, defamation. |
| REASON FOR APPLYING: | Because I wanted to be a Queen's Counsel. |
| REACTION ON APPOINTMENT: | Euphoria and apprehension mixed in such proportions as to require several medicinal glasses of Vintage Veuve Cliquot.. |

| | |
|---|---|
| NAME: | J. T. RUSH |
| DATE OF ADMISSION: | 1 June 1976 |
| DATE OF SIGNING BAR ROLL: | November 1976 |
| READERS: | D. Weybury, E.A. Shanahan, I. Read. |
| AREA OF PRACTICE: | Common law. |
| REASON FOR APPLYING: | Because I know Dick Stanley's opening off by heart. |
| REACTION ON APPOINTMENT: | Honoured. |

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|---|---|
| NAME: | G.A.A. NETTLE |
| DATE OF ADMISSION: | 1 March 1977 |
| DATE OF SIGNING BAR ROLL: | 18 November 1982 |
| READERS: | Tate, Hay and Gordon. |
| AREA OF PRACTICE: | Commercial. |
| REASON FOR APPLYING: | It's all together too complex, but don't quote that! |
| REACTION ON APPOINTMENT: | Honoured. |

# AN INTERVIEW WITH THE CHIEF MAGISTRATE

*YOU'VE BEEN CHIEF MAGISTRATE FOR A couple of years. Let's start there. How do you find it?*

Most of the time I love it. It's been a different job, in some respects, than I expected. I think I knew a lot of what the job involved because I'd worked fairly closely with Darcy Dugan as Deputy. I've been interested to find how much one can make it what you want it to be. The job that is, not the organisation — that's harder to change. To try and work out what you want the court to be doing. What the magistrates feel is the direction the court ought to be taking. There are also a lot more opportunities than I probably realised, before I was in the position, to have input into a lot of areas outside the absolute bare basics of court administration and hearing cases.

*Do you see yourself, not so much as a trailblazer, though I suppose you are the first female Chief Magistrate?*

Look, I don't see myself as a trailblazer, although I accept that there are a number of areas where I might do this job differently from the way it's been done before. I think being a woman is certainly of interest to the wider community. For better or worse. That's clear from the people who want me to go and talk to them. I think it's also important that I'm the first person in this job who comes from the Bar and the legal profession. One who didn't end up as Chief Magistrate after a lifetime of work in the court. It's that which means I do the job very differently probably from the way my predecessors did, more than the fact of my gender. I think I bring a quite different perspective to the job. Not necessarily a better one. There may well be things that they did in the job that I've never even thought about and that would be better if I did. But I think I bring a bit more . . . detachment? A bit more openess to the idea that things could be done differently.

*How do you see women in the law?*

I think the whole culture of the law is still very masculine and, to some extent, women who enter it face something of a dilemma. I think to succeed they often have to be prepared to join that culture to a fairly substantial extent. Now there are various ways that can be done and that doesn't mean, at all, that they abandon their femaleness. Nevertheless, I do think that judgments are often made on a very masculine basis as to what is appropriate behaviour and what isn't. There are probably very honourable exceptions. But many of the women who are accepted by the men as doing a very good job, I think, have had to, in various degrees, perhaps not consciously, not suppress, but effectively modify aspects of their femaleness. I'm not talking about wearing low cut dresses. I think the whole profession, that is, the culture is very male; the Bar particularly. It is interesting to me when I hear barristers say, well, of course, we'll have women judges in due course when they've been around a bit longer. That was being said 10 years ago. It was probably being said 20 years ago. The really interesting question is why aren't there more women in senior positions in legal firms, or in senior reaches of the Bar? I'm not sure you can simply rely on time to have more women in each of those categories because they tend to fall out, many of them, along the way. Institutions ought to be able to modify and benefit from the skills which women bring to them. It's taking a long time for that to filter through to the behaviour.

*Do you think with more and more female graduates that's going to change?*

That alone won't change it. I think last year for the first time there were more female graduates than male. But when I was at university in the sixties, you weren't in a real minority. Lots of women did law when I did law. So that alone isn't the answer. You've got to look at what they're doing in 20 years time, and many of them, those still working in the profession, are working in underpaid, or less highly paid, or less high profile areas of the profession. Areas, of course, which used to be practised in by men when there weren't women around. I don't want to come across as if the profession is opposed to women. Not at all. I just think the culture is a very interesting one. I think it's easier to speak out when you're a bit more senior. I probably have some freedom now to say these things that I didn't have before. Obviously, too, because I've had more experience of it and so, I think, I'm a little more detached about it and can see my own work-life in the context of it. But, also, it's confidence. And it's very hard for young people to have that confidence. One doesn't have to be some crazed radical feminist, which some might criticise me for being, to see that it is common to discredit and downgrade areas of work that women do. That is so outside the law and it's so in the law.

*Chief Magistrate Sally Browne*

*You mentioned before the challenges of the position. Do you want to expand on that a little?*

There are a number of elements to the job. The court load of any magistrate is quite a challenge in itself. We're the court that most people have contact with. We do the vast majority of crime, civil work, a lot of family law work, a lot of domestic violence work, a lot of crimes compensation work. It's a constant challenge to keep on top of the major changes in those areas. I also think a real challenge of any judicial job is how you run your courtroom. I'm not talking about case flow management and court administration, but the actual way that, you the magistrate or you the judge, conduct your own court. I think that is terribly important and of abiding interest, and something, I think, hopefully, that one gets better at and will always keep getting better at. So there's that aspect of the job which, in some ways, is what all the other magistrates do. There are then a whole lot of other things. There's administration, which I'm slowly learning about. You carry essentially the responsibility for running the court system. I think the public perception is that I run the court. That I'm the person you come to if things aren't running properly. That's apparent from the mail and the phone calls and the sort of contacts you have with people.

*Do people actually write to you?*

Oh! Dozens of them. Dozens and dozens.

*And call you up?*

Oh! Yes!

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*What sort of complaints do they make?*

Big range. Many of them are litigants, or defendants in criminal proceedings, who are not happy with the outcome. Or who believe they weren't treated appropriately. Or they complain about administrative procedures; about not being notified, a document being lost, or whatever. Certainly the major complaints come from people who have lost a case. I get a lot of letters from members of the public about cases in which they have not even been involved based on a television program, or an article in a newspaper. My favourite is the one that says no wonder law and order is on the decline when the biggest court in the state is headed by a radical, feminist, separatist, lesbian, man-hating shrew and you should do the decent thing and resign, but people like you never do.

*But you can't take that seriously.*

Well, you don't. But you get a lot of people complaining about a huge range of things. I'm very ambivalent about this. There is a view that you take no notice of them. That you just throw them all away. I don't do that. I don't respond to sheer vitriol. You occasionally get really abusive, vile, filthy letters that just get put on a file. The other letters, even if all that one can say is that it's not appropriate for me to comment on a decision made by another magistrate and these are your rights of appeal, I try to have a letter sent back to them because I think the court system has a very bad press and I think to some extent we're responsible for it. We haven't done enough work to make what we do explicable to the general public. There's a huge thirst out there to know about it. I think because we have been so careful, quite properly, not to interfere with individuals' rights, that we have often gone too far in not talking about the courts and the way they work. We shouldn't be frightened of reasonable enquiry or criticism because we don't get it right all the time. I'm not talking about individual decisions. But the institution itself oughn't to be hidden behind a veil.

*There is a danger though, isn't there if you open up the court system too far?*

I don't mean that we should have the American system. But I don't see it any difficulty in me talking to people about the court system, about what standards of proof are, about what an acquittal means. People are often surprised to be told that an acquittal doesn't mean someone has been found innocent. All those sorts of things. There's a lot of ignorance about appeal rights. I think we can play a bit of a role in that. I think that all this is part of the responsibility of the job. If I'm going to be to some extent the public face of the court, then I think, I have to accept the responsibility for talking to people about it and listening to what they say about it.

Certainly the major complaints come from people who have lost a case. I get a lot of letters from members of the public about cases. My favourite is the one that says no wonder law and order is on the decline when the biggest court in the state is headed by a radical, feminist, separatist, lesbian, man-hating shrew and you should do the decent thing and resign, but people like you never do.

*On a more personal level. It must be very pressured at times?*

In terms of sheer volume of work, we are the courts that have the most pressure put on us. I think

that if you come from the Bar, or a practice in litigation, quite probably, as a matter of temperament, you are someone who has been able to be reasonably detached professionally. Not always, but generally. I think we all know, or have had dealings in the past, with judges or magistrates who clearly have not found detachment easy. I'm also confident that everybody has cases that get under their skin. I just don't think that anybody who has been a magistrate or a judge for a long time is probably being truthful with themselves, if they say: "I've never agonised over a case; I never find it hard to look a person in the eye and pronounce my sentence or deliver that judgement. Or I never wake up at night thinking I hope I got that right." If you did it all the time, the job would be untenable. But I think it's probably a measure of the fact that we're all human that that happens sometimes. One of the interesting things about this job, as opposed to a straight magistrate's job, of course, is that there is a lot of policy work involved. There is a lot of treading that fine line of policy being an area for government but, nevertheless, you have to look at how it's going to be implemented in your court. And there's a quasi¬industrial role that one plays, although I hate that expression, in terms of dealing with the government about terms and conditions of the magistracy, buildings, security, I'm the only person that can do it. It makes the job fascinating, but it carries a lot of responsibility as well because you've got a constituency of 90 magistrates out there who don't have a direct line themselves to the government.

*It is a large magistracy and not all located together in the way they are in the County Court or the Supreme Court. Is there some sort of isolation in the job, perhaps, for some of them?*

I think in the past there has been very much. One of the major areas I wanted to work in when I was given this job was to try to build a sense of camaraderie in the court, or partnership. But I think it's easy to say a magistrate in Horsham is isolated. What is often not realised is that a magistrate in Ferntree Gully can be just as isolated and can feel that what is happening in here has absolutely no relationship to him at all. That the perception is that it's all happening in the City Court and that when you're out working in Sunshine, or Ferntree Gully, or at Dromana, or Mildura that the Chief Magistrate doesn't care and nobody understands what it's like. I think there have been instances in the past when there's been a feeling of them and us within the magistracy. I would really like to break that down and I hope we're succeeding because it's not productive either for the system or the individual.

*As Chief Magistrate would you have a talking to magistrates?*

Look. It's very strange. Statutorily I have only one power, which is to direct the work that people do. But what really happens is that the magistracy gives the Chief Magistrate — I see it a bit as a social contract really — a lot more power over them as individuals as well as to act on their behalf with all sorts of other people. Presumably you have to earn it to some extent, and you have to keep on earning it because if you lost it, it would make life very hard. The public tend to think that we're a bit like the police force in the sense that I can discipline people. I don't do that at all. That doesn't mean that when we meet together, and we meet at the regional level and at the state level, that we don't have sessions that deal with all sorts of things: straight law; law reform; but also workshops on how to handle a busy list. Through things like that you can address, to some extent, some of those sorts of concerns. But it doesn't alter the fact that once someone is appointed to the bench, you've got them the way they are. If you were fairly terse and contrary as a barrister, you're not going to metamorphise into an angel on the bench. It's a very difficult area for people involved in court administration because judicial independence is very important. On the other hand, I think, all of us have a real responsibility to the community to do the job as courteously and pleasantly as it is capable of being done. The person going to jail may never think you did it politely enough, but that's a separate issue really.

*What about counsel before you?*

It's very interesting having come from the Bar myself. There's a real sense of looking at yourself in the people who come before you. I actually think we are pretty well served by both the barristers and solicitors who come before the courts. The word gets around pretty fast about people who abuse the system. I'm talking, for example, about people who wilfully and continually give bodgy estimates. I'm not talking about the case that changes from a three day estimate to a five day estimate because something happened. I'm talking about the plea that you're told is going to be a five minute matter, when its clear it's going to be three hours. Or the people who are briefed in three different courts and have a client languishing in jail, here in the watchouse and at 12 o'clock the barrister or solicitor still hasn't turned up. I think that's just unacceptable and unforgivable. I don't care that there is a magistrate here at 3 o'clock to hear the case. That's fine. But for the person in the cells, who has expected someone to be there at 10 o'clock, it's like eternity for them, sitting out there, having a cold pie for lunch, wondering if someone is going to turn up. My personal real bugbear is people who have clearly not prepared their cases, and there's not a lot of that, but it happens. I think that's inexcusable. We all have to learn and we all keep learning, and with the best will in the world, you can run things in a way that with a bit more experience you wouldn't have run that way, or whatever. But you still get cases where it's pretty

clear the barrister has not had a conference with the client, has missed something really very very vital, which you pick up yourself. That doesn't happen very often. But there a few people, barristers and solicitors, who think if you read the brief at the traffic lights on your way to court, if it's only a minor matter as they see it, it doesn't matter. I know it sounds a bit pious, but I really do think that you have to remember that for the individual their case is terribly important, regardless of whether it's a 0.05 plea, with an almost certain outcome, or a shoplifting plea, or something much more dramatic. I also think that it's very important that barristers work out how courts work. What I mean is how the listings system works; what notifications are sent to defendants when cases are adjourned. Those things are very easy to find out, if you ask a clerk. There's often a surprising ignorance among counsel about how the committal mention system works, or, even, how the summary mention system works. If you know how it works, then you know it will be sensible to ring up, and say, tomorrow, it's going to be a three-hour plea. Or you ring up and say this has been booked in for a three-day committal, the prosecution and I have just settled the case and we'd like to have it listed for mention on Monday rather than arriving on Monday with a magistrate set aside for three weeks to hear it, who has taken the brief home over the weekend and read it and may not even be the magistrate who hears it when it eventually comes up. If you don't think that you've any obligation, other than walking in the door and going to the court you're told to and doing what you've come to do, then you won't think about those extras, and it makes a huge difference.

*Counsel who just start out are invariably more nervous.*

I actually think this court has a big responsibility in that area. I mean everybody remembers when they were very junior at the Bar. Most of us can remember good experiences we had with judges or magistrates, who were very kind to us and led us away from a particular catastrophe we were about to embark on. Or who explained something very patiently. Or when you were quite clearly outflanked by far more experienced counsel, helped you out in a way that saved face. I think we've got a bit of a responsibility to be involved in their training. In building good court habits. I'm always happy to talk to practitioners about various things. How to announce your appearance. That you shouldn't model yourself on American television shows. Witnesses do it too. There's a lot of it. The foot on the chair. Throwing the arms around. Rhetorical questions to the air. There's always been a few splendid advocates who can get away with it, but it's very unwise to model yourself on that. Also just because you're learning all this wonderful stuff about the rules of evidence, it doesn't mean you leap to your feet everytime something inadmissible is said.

*With the hierarchy of the courts, is there much communication between you?*

Lots! I think more than most people realise. There are lots of areas where we have joint committees. Areas like computerisation, libraries, court costs, case transfers. Perhaps this court is a little more open to a wide range of judicial education than other courts. We've always had terrific support in terms of people coming to talk to us in areas where we've never worked before. Now we're starting to get some defamation work. Both the Bar and the superior courts have been willing to come and talk to us about how it's done and what sort of orders are made. We need to know that sort of thing. Both the Chief Judge and the Chief Justice have been extraordinarily helpful and good to me and have made aspects of this job a lot easier than they could have been.

*You've come to the job very young and it's a long time to be in the job, do you think you'll stay forever in the job?*

I don't know. I've only done it for two years. That's a very short time. The answer, I think, is that I'm enjoying very much what I'm doing. I think it's an important job. I don't mean personally, but in the sense that the court is important. I think the job needs to be taken seriously. That doesn't mean you take yourself seriously. There's a lot of things that I'd like to keep doing. A lot of projects that I'm working on. I think there are going to be challenges here for quite a long time. If I do something else one day, I don't know what that might be. It might be sitting in a French village reading poetry and sipping white wine.

*We had Dugan's court. What about Brown's court?*

Darcy was a pretty special sort of person. I very much doubt that I would ever, no matter how long I was in this job, develop a cult following. We have very different temperaments. I think he did a very fine job and, particularly, a fine job at a time of transition. But, no, you won't hear me on *Lawyers Guns and Money.*

*Do you think we've lost something by not having magistrates come up through the ranks?*

I couldn't say that we haven't lost something. I think that the state was very well served and continues to be. Most of the people who joined as clerks of courts and became magistrates were very practical and humane and, indeed, there were some very good lawyers among them. But I think the times have changed and, if you look at the whole jurisdiction of the court and the demands that are being made on it, it has to be a more professional court. I think it's reasonable for people to expect that the magistracy has full legal qualifications and experience of the wider legal community. One that is quite separate

from the police force. Of course, it needs also to be separate from lawyers. People can be critical of the old-style magistrates in having been too close to the police, but similarly, you can be open to criticism for your associations with lawyers. But those appointed under the old system have been, not just tolerant, but helpful and remarkably supportive of the newies. We now have, of course, on the bench far more people appointed since 1985 than before. Over three quarters of the magistrates have been appointed since 1985.

*It's a much younger bench.*

Yes. But probably the bulk would now fall between 40 and 50. There have been appointments of people in their mid-30s, which I think reflects, too, that more people are interested in the job. Perhaps there are people who, if you had asked them 10 years ago, would have said you've got to be joking but who now might be looking at it as a reasonable career change, not only when they are 35, but when they're 45 and 50.

*What is the future for the court in the next few years?*

Well! Everytime I pick up the phone in the last week, I've got another jurisdiction. I think the court is going to become, if anything, even more important. That a number of factors, including cost factors and the quality of the people appointed, are going to mean that the court is going to evolve in areas which, up until very recently, were the preserve of the County and Supreme Courts. This could be fatal, famous last words and all that, but I don't think we're in danger of being abolished.

*What about the promised new building. When's that happening?*

I still think we'll get a new building. This building has lovely bits, but it's appalling to work in. Most magistrates don't have a desk, a phone, or a computer terminal. I'm still very optimistic that in another two years' time we'll see a new Magistrates Court diagonally opposite the Supreme Court.

Tina Giannoukas

# BAR COUNCIL DINNER

A LOSS TO THE BAR

At the Bar Council elections conducted in September 1992 Hartley Hansen Q.C. was not re-elected. If he had been re-elected he would, in the normal course of things, have been Chairman of the Bar Council. To that position he would have brought a combination of intelligence, perspective, conscientiousness, common sense and a wealth of experience which would seldom have been surpassed in the history of the Bar.

To describe his departure from the Bar Council, at a time when the Senate Cost of Justice Inquiry has yet to report and the practices of the Bar are under review by the Trade Practices Commission, as "unfortunate" would be the most extreme form of understatement.

At a dinner for past members of the Bar Council held on 29 October 1992 Chris Jessup, as Chairman of the Bar Council commented on Hartley Hansen's vast experience and his devotion and dedication to the cause of the Bar. As Jessup pointed out, the mere list of Hansen's Bar commitments over the last twenty years speaks for itself.

1980–83 and 88-92 member of Bar Council.

197375 Honorary Secretary.

1975–89 Member of Accommodation Committee, Chairman from April 1985.

1982–83 Assistant Honorary Treasurer.

1981–91 Member of Ethics Committee, Chairman 1988–91.

1985–92 Director of Barristers' Nominee Pty. Ltd.

1990–91 Director of Barristers' Chambers Ltd.

1990–91 Member of Bar Staff Committee.

1973–74 Member of Rules Committee.

1988–92 Member of Gowans Revision Committee.

1980–87 Member of Applications Review Committee.

1982–84 Member of Board of Trustees for Superannuation Fund.

1985 to date Member of Law Reform Committee Panel.

1991–92 Member of ABA Committee.

August 1992 Bar delegate to Law Council of Australia.

*Past and present Chairmen, Merryl Jessup and Jenny Richards*

*Ross Ray, Jan Ray, Paul Elliott, Barbara Walsh*

*The Hansens and the Connors*

*Melanie Sloss*

*Merralls Q.C. and friend with the Crennans*

1984 to date Member of Chief Justices Committee for religious observants.

Currently Chairman of Victorian Bar Dispute Resolution Committee.

Jessup went on to say the following:

"On 11th April 1975 R.E. McGarvie QC wrote in the following terms to Hansen 'I would like to add a personal word to the resolution of the Bar Council at its last meeting expressing its gratitude to you for your work as Honorary Secretary of the Bar Council'. McGarvie then referred to the role which Hansen played in the introduction of a system of administration in October 1973, in a course of which he said "both personally, and on behalf of the Bar, I have an enormous appreciation for the positive support and cooperation which was forthcoming from you at all times . . . I have thoroughly enjoyed working close by with you and have grown to respect your practical judgment and your high standards.

In the light of the great experience which Hansen has had, most of which is recorded in the Annual Reports of the Bar, it seems incredible that the members of the Bar in September 1992 would deprive him of the support necessary to continue this voluntary work, which had extended over a career at the Bar.

In the 1992 Bar Elections, the overall number of votes case were 18% up on those cast in September 1991. Of those sitting members of the Bar Council in the top category who increased their vote (as might be expected with the overall trend) the average increase was 13%. For some inexplicable reason Hansen's personal vote was down 14%.

This is beyond explanation. There was no scandal, no expose, no incompetence: to the contrary, Hansen's last 12 months as senior vice-chairman were marked by dignity, decorum and industry.

Ironically, he must be one of the few Bar Council members to have got his name into *Hansard* when the then Shadow Attorney-General complained of the way the Chairman of the Law Reform Commission had dealt with correspondence from Hansen in his capacity as acting Chairman. This was the 'Coles to Newcastle' letter, although Grandma and broken eggs would be a better metaphor."

In conclusion Jessup said that the fact that Hartley Hansen was no longer a member of the Bar Council was "a great loss to the Bar Council and the Bar as a whole".

Despite the high quality of the office holders in the new Bar Council, it is difficult to dissent from Jessup's conclusion.

At a time when the Bar is under outside scrutiny and when (whether we like it or not) change is inevitable, the Bar cannot afford an isolationist, trade unionist philosophy. It needs at its helm men of perspective, common sense and flexibility. Hartley Hansen was (and is) such a man.

# LUNCH

FOR TOO LONG THE BAR HAS ATTRACTED criticism (both from within and without) that it is a select club run by its topmost members for themselves (see recent articles in the *Sunday Age,* 18 and 25 October 1992).

Even *Bar News* has contributed to this perceived view. In times of general economic restraint a recent "Lunch" column reviewed Restaurant Paul Bocuse at Diamaru. To redress the balance *Bar News* has commissioned the junior barrister Brien Briefless to contribute dining reviews directed towards the majority of our readers who are only too aware that only those few high-fliers of the Bar have entered into a land flowing with silk and money. Lest readers deplore this down-market move (we prefer the adjective "realistic") the editors note that even the august Greg Brown of the renowned Browns Restaurant in Armadale has confessed to being "a bit of a junk food junkie" and suggested that "McDonalds is one of the greatest restaurants of the nineties; . . . not for being a great gastronomic delight but for feeding so many people" — *The Melbourne Weekly,* October 28, 1992 at page 18.

Brien's initial contribution was to be the Little Pasta House in Little Bourke. Sadly, that establishment has fallen victim to the Victorian malaise and closed. The same cannot ever be said of the RMIT University's Union Cafeteria. Thus the editors are proud to present the lunch we have to have for the recession we had to have.

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This open plan eataria has a utilitarian decor (early 80s undergraduate) with an ambience enhanced by the crowded chatter and muted construction noise arising from the extensions to the Union Building in Swanston Street.

Located conveniently within walking distance of the City Court my instructing solicitor and I recently patronised this cafe after disposing successfully (our client was committed and I hope I impressed my instructor sufficiently that she will brief me for the trial) of a preliminary hearing in the morning.

One hates to criticise but service is abysmal. We waited and waited. Finally I was forced to concede my companion's suggestion that the stainless steel counter railings leading to a bank of cash registers and the fact that nobody appeared to be waiting on the other clientele led, inexorably, to the conclusion that this was a "self-service" establishment. Immediately I concluded that the management had elected to follow the trend set by some self-proclaimed posh American West Coast eateries whereby the diner selects his own cut of meat or fish or whatever and then proceeds to cook it to his own satisfaction on the charcoal grill. I was wary of an inflated bill arising from this privilege. In the course of events it was wrong of me to be so cynical.

The wine list was non-existent. In fact, the premises have not yet obtained a licence. I was pleased to demonstrate my resourcefulness to my instructor by extracting from my voluminous case — realistic imitation leather vinyl, $45 from Strandbags in Collins Street — two cans of WA Hannan's Lager ($19.95 per slab on special from Safeway). Of course, the cans were not optimally chilled and that perhaps explains my instructor declining hers. She murmured something about return 'phone calls that afternoon back at her office. I was pleased twofold; what she didn't drink left more for me and I am looking forward to running the trial instructed by an obviously professional and conscientious solicitor.

In times of general economic restraint a recent "Lunch" column reviewed Restaurant Paul Bocuse at Diamaru. To redress the balance . . . the editors are proud to present the lunch we have to have for the recession we had to have.

No matter which way you view Alan Bond, the new Hannan's is not a bad drop. He no longer controls the brewery but this Perth-brewed lager is a vast improvement over the original Kalgoorlie slops that for years was notorious for its "front-end" hangover. No other beer suffers the consumer to experience the headache before he goes to bed rather than the morning after. Under Bondy's helmsmanship this has been turned around. My instructor appeared most impressed when I imparted this information to her.

*RMIT University's Union Cafetaria*

I note that glassware is not provided for the clientele. Although there was a vast store of polystyrene coffee cups near the cash register I was concerned lest this breach of etiquette raised doubts in the mind of my instructor with regard to my savoir-faire and opted to drink from the can. Certainly I would advise the management that they would be wasting their time applying for a liquor licence if all they are prepared to offer is disposable coffee cups.

After a cleansing ale it was time to order. For somebody who only a short time before had declared she was ravenous and was confident that Fanny's in Lonsdale Street would fit her in as a regular without a booking, my instructor ordered a serve of chips with vinegar. She told me how concerned she was with her diet and it must be true as she only ate one chip and left the rest of the serve. I am really looking forward to running the trial instructed by an obviously professional, conscientious and strong-willed solicitor.

My choice for the tucker was the Singapore Noodles. I suppose it was more a process of elimination than choice, the dim sims and Chiko rolls appeared decidedly over-heated and certainly over-cooked while what she optimistically described to me as lasagne reminded me of a mess in the bottom of my fridge that I've put off attempting to deal with for too long now. And in fact the noodles weren't bad — crisp with a generous variety of vegetables and pork and beef pieces.

Additionally there is a self-service sandwich bar where all the makings are provided and the consumer pays by weight for the finished product made up by the customer to their own taste and style.

One has to put the horse before the cart but this is an odd place. One pays before one eats. At the cash register at the end of the long stainless steel servery counter. I suppose the advantage is that when you're in a hurry to leave you don't have to wait for the bill. I had no cash on me but I wasn't concerned — I produced the trusty plastic. One hates to criticise but if they won't accept Bankcard, how the hell do they expect to make a go of it? This was beginning to become an embarrassment, complete with sniggers from the unwashed undergrads behind us in the queue at the cash register. Fortunately, my companion is an understanding person and she rum-

maged round in her purse and paid the bill — $3.50 for the noodles and 90 cents for the chips — in cash. Surely the management must realise they ought to offer Bankcard facilities and I attribute the furrowed frown on my instructor's forehead to the difficulty of scabbling around for the $4.40 in loose change. I am really looking forward to running the trial instructed by an obviously professional, conscientious, strong-willed and understanding solicitor. I am not sure that the editors will print this but I wish to emphasise to any feminist solicitors who may be reading this that I am not an old-fashioned conservative fuddy-duddy. Nosirhee! I am a sensitive new age guy not at all put out when a woman picks up the tab. Not even when it was me who proffered the invitation to lunch.

The tucker — well, I'm a lawyer — it wasn't too good but then again, it wasn't too bad. Neither I nor *Bar News* have the deep pockets of Leo Schofield and the *Sydney Morning Herald*. One can't complain of the expense. And it was filling. We didn't have coffee. My companion murmured about the work awaiting her back at the office. She left me to finish off the second can and I then approached the woman at the cash register. I wanted to speak to the chef. Not so much to compliment him but to pass on some discreet advice — no liquor licence, poor service, no glassware and no credit card facilities. I explained this to the cash register person but she just shrugged. If this place fails to survive, these are not easy economic times, I can't be held responsible — I did try to give them the benefit of my advice.

In conclusion, I hope the *Bar News* editors have not blown my (and their) trumpet too hard and too loud. True, they have commissioned me to review further eateries but I am concerned that in the near future I'll be too busy running a trial instructed by an obviously professional, conscientious, strong-willed, understanding feminist solicitor. I really am looking forward to it. Consequently, I may not have the time to live up to the editors' promises. Damned if I can figure out why that brief hasn't arrived.

RMIT UNIVERSITY UNION CAFETERIA,
Swanston Street.

| | |
|---|---|
| Tel: | 660 2876 (bookings not necessary) |
| Unlicensed | |
| Lunch: | 11–3 Mon–Fri |
| Dinner: | Closed |
| Food: | ? |
| Ambience: | **** (if you're adventurous and a 60s hippie). Note; no muzak — add another half. |
| Cost: | $4.40 for two not including drinks, no corkage charge. |
| Cards: | Nil. |

Mal Park

# VERBATIM

## Supreme Court of Victoria

*Graham* v. *Bradbury & Ors.*
Hardy for the Plaintiffs
Hurley for the Defendants
3 December 1990

**Witness to Hurley:**
My full name is Rita Maureen Bradbury. I reside at 176 Perribar Road, Hallett Cove, South Australia. I am a bookkeeper by occupation.
**Hurley:**
You are the husband of the last witness?

. . . I am the wife actually.

## Melbourne Magistrates' Court

Graffiti on the Walls of the Mens Toilet

1. Annette — if you are reading this we are through!
2. I fought the law — and the lawyers won.

## Federal Court of Australia

*Jaldiver Pty. Ltd.* v. *Nelumbo Pty. Ltd.*
Coram: Heerey J.
14 September 1992

Southall (Cross-Examining):
"And did you consult with Mr. Magee and Mr. McFarlane then about your evidence that afternoon? . . . No.
Mm. And were you talking with Mr Magee for that three quarters of an hour/hour? . . . Some of the time he was on the phone for — a lot of the time.
And you are saying that during that time you did not discuss at all the evidence you gave on Friday afternoon? . . . No, other than I expressed a brief that had incorrectly joined two facets, two parts of two meetings and portrayed them as being one.
And you were for three quarters of an hour to an hour, and that is all you said? . . . Well, he was on the phone most of the time, your Honour.
Yes? . . . Mr Magee was frantically trying to make some arrangements for a social event which I was advised he had that weekend at his place, and chasing around about a piano.

## Full Court of the Supreme Court of Victoria

*Accident Compensation Commission* v. *John Valves Pty. Ltd.*
Coram: Crockett, Smith & Ashley JJ.

Uren Q.C. (explaining to the court how to ascertain the intention of Parliament from the words of the *Accident Compensation Act* 1985):
"When you are searching for something you need to know what you are looking for to be able to find it".

## District Court of Western Australia

*The Queen* v. *Wheeler*
Coram: O'Dea DCJ
Birmingham for the Crown
Cullity for the Accused
23 September 1992

**Birmingham:** I object to the witness giving evidence in relation to the presence of oxide and chemical matters. He is not qualified in that area.
**O'Dea DCJ:** Is he not?
**Birmingham:** I think if the witness were permitted to answer the question the answer would be that he is not.
**O'Dea DCJ:** Well, if somebody asked me what would happen, I would be able to tell them.
**Birmingham**: But your Honour is not giving expert evidence.
**O'Dea DCJ:** This man can't tell what will happen when an ert gas takes the place of an inert gas?

## Legislating for Injury

A Bill recently before Parliament provided as follows:

A BILL

to amend the Accident Compensation Act 1985, the Workers Compensation Act 1958, the Occupational Health and Safety Act 1985 and the Transport Accident Act 1986 and for other purposes.

Accident Compensation (WorkCover) Act 1992

. . . . . .

(c) after "impairment of the pelvis"
insert —
"Severe facial disfigurement".

## Magistrates' Court of Victoria

*Kamil Export (Aust.) Pty. Ltd.* v. *N.P.P. (Australia) Pty. Ltd.*
Coram: Mr. Tuppen M.
17 July 1992

His Worship:

"In hearing these two cases I have been whisked from images of South Pacific islands with quiet white beaches, soft breezes, gently moving palm fronds behind, or simple lives and long drinks topped with fruit and little umbrellas, the world that Gaugin and Stephenson found delightful and difficult to leave, and of which Conrad wrote:

A world of colourful island traders, their shippers and agents of corruptible and incompetent officials, and the difficulties they all face in recovering and securing their money and goals.

Back to this bleak sterile world which we inhabit considering the meaning of mindless complex, almost incomprehensible documents, and statutes and decisions of courts around the globe, made on fine distinction and sometimes partly even in French, as was the situation here today, with which these island people carry through the rather less exotic daily business of acquiring cheese, butter and nappies.

The issue in both cases is simple. Who bears the loss when the goods are not delivered in the manner required by the Bills of Lading".

## County Court of Victoria

*DPP* v. *Stokkel*
Coram: Higgins J.
5 November 1992

Richard Read for Crown
Tony Howard for Accused

Cross-examination of a Crown eye witness:
**Howard:** You thought that the person referred to as an 'arsehole' was somebody other than (the victim), is that right?

Yes . . .

What made you think that?

Because he was the only arsehole that I knew at that time.

## Grounds of Appeal

The following Notice of Appeal was filed in August this year by an appellant in person:

"To the Industrial Relations Commission of Victoria:

In the matter of an appeal against the decision of Commissioner PIMM Decision D92/0271 Security Employees Award.

An appeal is made by [Appellant in person] against the determination made on the 24th July 1992 by Commissioner Pimm sitting as a Commission Member alone.

The appeal is made against the following part of the determination decision. All parts.

The appeal is made on the following grounds.

Hearsay evidence
Contradictory evidence
Impossibilities
Innuendos
Thoughts

Date 2nd August 1992 Appellant's Signature"

## County Court of Victoria

*Harry* v. *Brown*
26 August 1992

Coram: Judge Nixon and jury
Jordan for Plaintiff
Saccardo for Defendant
Jordan for plaintiff, cross-examining defendant —

Horse trainer in an action alleging negligence against the trainer for having the plaintiff, a female apprentice, ride a stallion the "NSW way" of track work resulting in a fall. Defendant somewhat on the defensive:

**Jordan:** You made her canter the stallion and then gallop him flat out.
**Defendant:** There is no difference.
**Jordan:** No difference between a canter and a gallop! Have you ever trained a winner?
**Defendant:** Plenty of them.
**Jordan:** They cantered home faster than the rest of the field did they?

## Broadmeadows Magistrates' Court

October 1992
*Police* v. *Dix*

Defendant: Arnold Dix of Counsel
Counsel's Counsel: Max Perry
prosecution: instructed by: Mark Hebblewhite of Counsel
Cheer squad: Tim Young of Counsel
Coram: Mr. B. Coburn M.

The charge: failure to comply with arrows painted on road.
Gallery: corroborators, most Broadmeadows prosecutors and a gaggle of petty criminals.
Plea: Guilty
Aim: Non conviction with no loss of licence points.
COURT PUBLIC ADDRESS SYSTEM: Matter of Dix to Court 3, Mr. Perry to Court 3.
(Dix enters court. Perry is standing. Clerk of court grinning. A selection of prosecutors smirking, Mark Hebblewhite (Honorary police instructor) almost cackling. Tim Young cautious but entertained.

But what's this! There is no chair for Mr. Dix to

sit on. The public are so eager to be prosecuted they have taken all the front seats. A call for a chair. Mr. Dix of Counsel is looking distressed. Dix is unceremoniously planted on a chair somewhere between the dock and the bench.

Mr. Perry greets the Court. The Court welcomes Mr. Perry and notes it has been some time since Mr. Perry has come down to Broadmeadows for a traffic plea. Mr. Perry is, as always, most gracious. Mr. Perry's morning suit is starkly contrasted by the moccasins which surround him. This is Broady!

Mr. Dix still sitting on the chair looking as Mr. Dix always looks. They say he wears Fletcher Jones suits but the head does not match.

The prosecutor reads the summary. Mr. Dix unlawfully made a right hand turn at a two lane roundabout from the left hand lane contrary to the arrows marked on the road. (On his way to Broadmeadows Court!)

The Court is visibly distressed.

**Prosecutor:** "When asked his reasons for committing the offence", Mr. Dix replied, "Oh! can't you make your turn like that?"

**His Worship:** I find the matter proven . . . Yes Mr. Perry.

**Mr. Perry:** "Mr. Dix's explanation is consistent with a lifetime interest in the practice of equity but ignorance as to the realities of everyday existence".

The Court is visibly moved by Mr. Perry's first observation of the wicked defendant's excuse for his heinous crime.

**His Worship:** "I am in your hands Mr. Perry, what would you like?"

**Mr. Perry:** "No conviction with a bond".

The Court considers this proposition.

**Mr. Perry:** (Turning and facing Dix) "Stand felon!"

Dix stands,

**His Worship:** "Sit!".

Dix sits (He looks like a dog, albeit a shabby one!).

Dix gets a 2 month bond with a contribution to the Court fund.

One week later at Broadmeadows Court . . . Dix of Counsel for the defence, the Coram is McLean M. Dix has just negotiated a plea in the matter of a clients petty traffic offence.

**Prosecutor:** "If it pleases the Court I'll just hand up these photographs which have been kindly provided by my Learned friend the defendant!"

(Following the commission of this crime the roundabout was modified so as to comply with the design of all other two lane roundabouts in Victoria. Dix's turn is now legal. Rumour has it that Dix reckons they modified the roundabout because of his heroic stand. Max Perry is claiming it was his Plea that did it. Mark Hebblewhite thinks it was his bow ties, while Tim Young still reckons Dix should have been gaoled).

## Supreme Court of Western Australia

*The Queen* v. *Rodd*
Coram: Murray J.
7 October 1992

R. Birmingham for the Crown
T. Percy for the Accused

**Percy:** So you have known him for about 18, 19 years?
**Accused:** Yeah, yeah. Well, his three brothers — Michael Krakouer, Marlon Miller — well, Marlon, Michael, Two Bob — well, they call him Two Bob, one bloke. Another bloke's — well, his name's David. One bloke's name's Albert.
**Percy:** Sorry, his name is?
**Accused:** They were brothers.
**Percy:** They are all brothers?
**Accused:** With Walter, but they — different fathers.
**Percy:** I see?
**Accused:** But Marlon, he's my nephew because, you know, his father was my cousin.
**Percy:** Okay, I think we follow all that?
**Accused:** I hope so.

## History in the Supreme Court

In *Peppin Point Pty. Ltd. & Ors.* v. *Hoffelner,* Hayne J. on 8 September 1992 signed an order which, in the format in which it was presented to his Honour, contained the following:

"The Court Orders That:
1. Subject to any contrary directions of the history master direct that the proceeding be fixed for hearing in List E of the Causes to be heard on or after 9 November 1992 on an estimated time of hearing of four days."

# MOUTHPIECE

IT IS LUNCHTIME AT A FRANCHISE SANDwich shop. It is noisy and moderately busy. At a corner, wolfing down meatloaf on rye sandwiches with small bottles of orange juice are two well groomed young men. They are wearing unremarkable suits, white shirts, black shoes and sporting conservative haircuts. They ooze intensity. They carry the latest in mobile telephones. They do not work for stockbrokers but rather two different mega firms of solicitors.

**Brian:** Have you decided what to do next year?

**Brett:** No not really. I am still looking at my options?

**Brian:** What options?

**Brett:** I could stay where I am, try another firm, work for an institution, go into the public service or try the Bar.

**Brian:** The Bar sounds like a bit of a risk these days. I reckon its days are numbered. Everyone wants to abolish it.

**Brett:** Do you?

**Brian:** I am not sure. I used to think that all Barristers were on themselves a bit. Treated us all like lackeys, peered down their noses at us.

**Brett:** You reckon its changed?

**Brian:** Too right! The shoe's on the other foot now. They suddenly realise that they need us more than we need them.

**Brett:** That's only true of a small group of very junior briefs.

**Brian:** Not so. It goes almost all they way to the top. I reckon I get more invitations to lunch in a month than I had in a year. Not long or expensive lunches but they insist on paying. I get innumerable calls "out of the blue" enquiring after my health and well being.

**Brett:** They obviously care. They must have started to believe all that crap you go on about how hard you work, how important you are and how busy you are.

**Brian**: It is not like that. It's more like a frenzy of sharks hovering around a dying whale or a trail of taxis on the prowl cruising for a fare.

**Brett:** Oh come on, you're exaggerating.

**Brian:** No way! I kid you not. Less than a minute into the conversation they drop a hint that they are free the next day. Two minutes later and I am left in little doubt that they will doing anything, anywhere. Some even hint that they may be amenable to negotiating a less than scale fee.

**Brett:** It can't be as bad as all that.

**Brian:** Believe me it is. All the time they complain about how slow their money comes in, about how they take for ever to get paid yet their creditors expect to be paid immediately. I tell you: I do and I am sick of it.

**Brett:** You are having me on.

**Brian:** Have you tried a Clerk recently?

**Brett:** For what?

**Brian:** A brief! I can remember not so long back when Clerks only had one or two people available and it didn't matter for what. "Try Hyslop" they'd say "He's an expert in that jurisdiction". Expert! Bull! He didn't even know where the Court was. To make matters worse he had three briefs already and had to Court hop to fit us in.

**Brett:** It wasn't all that long ago either.

**Brian:** And now . . . you generally get the Barrister of your choice. Often enough for Maggies Court work you are offered a choice of a handful who only a month ago treated us with great disdain and looked down their noses at anything less than a jury trial. I reckon they are hurting badly even if they are pretending it isn't.

**Brett:** I dunno . . .

**Brian:** Are you really seriously thinking of going to the Bar then?

**Brett:** I am thinking about it.

**Brian:** You must be mad. You'll starve.

**Brett:** I reckon not. I had one of the top Clerks sound me out recently. Said he had plenty of work for me.

**Brian:** Did he guarantee you a spot on his list.

**Brett:** Not exactly.

**Brian:** Did he or didn't he?

**Brett:** W-e-l-l sort of?

**Brian**: Sorta?

**Brett:** It was as good as a promise.

**Brian:** But I thought they had a brand new fair ballot system that was Clerk proof.

**Brett:** That is the theory.

**Brian:** Anyway its worked well on all accounts for the last three intakes.

**Brett:** Well, this Clerk reckons he has found the way around it.

**Brian:** What's the big secret.

**Brett:** Well the day before the big ballot I have to send all the other Clerks a fax saying that if they ballot me I'll refuse to go on their list even if I have to stay with my present firm another year.
**Brian:** So you are going to get on that Clerk's list. He really is cunning isn't he?
**Brett:** Actually I am not going to the one who put me up to the scheme.
**Brian:** Why not? Couldn't be that he is too cunning for you!
**Brett:** No. That's not the reason. He wouldn't agree on my terms.
**Brian:** Your terms!
**Brett:** Too right! I wanted a guarantee that I wouldn't be booked for County Court Chambers, Heidelberg Magistrates Court or any family law work in a Maggies Court.
**Brian:** Sounds reasonable. And he bucked at that.
**Brett:** No he agreed to that. It was when I suggested a reduction in his percentage to 3.25% and a moratorium on that for my first six months.
**Brian:** Sounds a bit rich to me too.
**Brett:** Well I have been offered that 3.25%. I am still trying to get the moratorium.
**Brian:** Has it occurred to you yet that 3.25% of nothing isn't much less than 5% of nothing.
**Brett:** Don't you worry about me. The ones who really want me have all said that they have all their boys in Court every day.
**Brian:** And you believe them?
**Brett:** Why ever not?

## OPENING OF THE LEGAL YEAR

**2 Tuesday February 1993**

**RELIGIOUS CEREMONIES**

| | |
|---|---|
| 9.30am | St Paul's Cathedral, Corner Flinders Street and Swanston Street, Melbourne |
| 9.00am | St Mary's Star of the Sea (Red Mass), 33 Howard Street, West Melbourne |
| 9.30am | Temple Beth Israel, 76-82 Alma Road, St Kilda |

Note: There will be no Greek Orthodox service this year owing to a conflict in the Orthodox religious calendar.

**Attended by the Judges and other members of the legal community in procession.**

**For further details, please refer to insert in the December edition of the *Law Institute Journal*.**

# LAW SCHOOL ROWERS OF THE 19TH CENTURY

THE MELBOURNE UNIVERSITY REVIEW, 25th July, 1885, p.41 laments the decline of rowing in favour of football both as a participatory and spectator sport.

"ROWING NEWS

How times have changed. Rowing at one time in Melbourne had more attraction for the public than football as the following extract from some old minutes of the University Boat Club show, 'A. letter was received from the Secretary of the Melbourne Football Club requesting that the date of the University Trial Fours might be altered so that the attendance at an important football match fixed for the same date might not be interfered with' . . . This was granted, and we have no doubt the football club's coffers were considerably benefited. Would that those times would come again. Even the most enthusiastic rowing men have caught the football fever, and are to be found on the turf than on the river . . ."

In the days to which this extract relates, and despite the increased popularity of football in the 1880s, Melbourne University Law School competed regularly and successfully in intra-university rowing.

Records show that Inter-School races were rowed by fours as early as 1870. The Law School won in 1870 and 1871, and when next rowed the Medical School won in 1876. By 1890 the race was for eights and Mr. John Grice had presented a Challenge Shield for perpetual competition.

In 1894 the Law School defeated the Arts crew "The Arts crew were a formidable combination with three 'varsity oarsmen in the crew but they did not practice and only put their eight out for the first time on the day of the race. They were easily beaten". (This Arts crew included P.A. Jacobs, No. 0033 on the Bar Roll). In the final, Law won by three lengths over the Engineers.

In 1895 seven of the 1894 Law oarsmen made up the crew for the Solicitors and Articled Clerks and defeated the Arts school crew (which included H.C. Winneke No. 0079 on the Bar Roll) in the first heat and in the final the Engineers.

The photographs of the successful oarsmen of 1894 and 1895 have been made available for reproduction by M.U.B.C. Unfortunately, none signed the Bar Roll although, no doubt, they delivered many briefs to the fledgling bar of the 1890s.


*1894*


*1895*

# LAWYER'S BOOKSHELF

## The Subject Index of Legislaton Victoria

From time to time you may have read the useful Annual reference book entitled "An Index To The Subject Matter Of The Public General Acts In Force In Victoria" together with "An Index To The Local And Personal Acts In Force in Victoria" and "A Chronological Table Of All Unrepealed Acts In Victoria"; or the General Index To Subject-Matter contained in Volume 9 — Victorian Statutes 1958.

For example: At page 109 of the 1982 Volume is a title: "Trees", and a Note — "See Vegetation And Vine Diseases". At page 112 is a listing for the above Act with details about its number, the 1958 Volume Number and Amendment numbers.

Now to the subject of this Article —

The new Subject Index Of Legislation Victoria was launched by the then Hon. James Harley Kennan, Q.C., MP, Attorney- General Of Victoria on 4th September, 1992 in the Queen's Hall, Parliament House amongst many representatives from the law and libraries. James Kennan stressed the importance of remembering that there may be an Act(s) of Parliament relevant to issue(s).

I enjoyed the occasion very much and recommend a visit to Queen's Hall to see the works of art.

The preface of this Subject Index states (inter alia) that: "the need for a comprehensive index of subject matter of Victoria Legislation had been recognised for many years.

In 1991 the Victoria Law Foundation provided a grant which enabled the Chief Parliamentary Counsel to appoint an indexer for one year from July 1991 and to purchase the necessary hardware and software to support the compilation of the index. The office of Chief Parliamentary Counsel was fortunate to acquire the services of an experienced Law Librarian and indexer, Ms. Rosemary Bunnage, B. Soc. Sci. Lib. RMIT. Monash University generously agreed to her secondment to the project from her position as Deputy Law Librarian.

Her dedication and commitment to the task of compiling the index were exemplary and resulted in the indexing of over 500 Acts by 30th June, 1992.

[The project also had a reference group which included representatives from the Law Institute of Victoria, the Victorian Bar (myself), the State and Parliamentary Libraries and the Society of Indexers].

Regular Consultation with indexers and potential users from public and law libraries, as well as members of the Parliamentary Counsel's Office, ensured that the index was tested as thoroughly as possible during the year available for its compilation."

The cover design is impressive by depicting the Coat of Arms — (more legal references could have some illustrative work to assist their presentation). The recommended retail price is $75. The subject index is available from the Law Printer Bookshop, Information Victoria and other outlets. (The Supreme Court Library has copies. I shall recommend that the Bar Library purchase a copy).

The explanatory pages are most readable and use short paragraphs and include a "How To Use This Index", on one page with an example — "Is there any legislation about people's rights to end their own lives?"

The index is intended to enable readers with no knowledge of legislation to find the right Act from the starting point of broad subject headings. There are 6000 entries.

The office of the Chief Parliamentary Counsel would welcome comments on this index and suggestions for future editions (the person and address are listed at page vi).

Getting back to the subject "Trees" referred to above, this new Subject Index Of Legislation Victoria states under the title, "Trees", 18 terms with references to their respective Acts for example: over easements, removal of — Water Act 1989 s. 149; tree (defined) Forests Act 1958 s. 100.

There are exceptions to the coverage by this Index, so please be aware of them and read the scope of the Index at p. x.

At page xii — "The Next Index. The subject index will be upgraded on a regular basis to incorporate changes resulting from new legislation. It is intended to extend the scope of the index to include local and personal acts, regulations, and listings of subject — related matters, such as relevant Commonwealth Legislation, Statutory bodies and international conventions.

A long term project is to compile a thesaurus to support and control headings used in future editions of the index."

Richard Brear

# Australian HIV/AIDS Legal Guide

**Authors: John Godwin, Julie Hamblin and David Patterson**
**Publisher: The Federation Press, 1991**
**pp i–xxvi, 1-278.**

The HIV/AIDS Legal Guide is, surprisingly, the first Australian publication to attempt to comprehensively deal with the legal issues relating to AIDS and the HIV virus. Included in this book are commentary, legislation and case law at the federal level and for each State and Territory as at June, 1991.

The main focus of the HIV/AIDS Legal Guide is on issues involving the criminal law. Chapters 2, 6, 7 and 8 discuss, respectively, transmission, sexual, drugs and prostitution offences. There is also a chapter on prisoners with the HIV virus and the criminal justice system (Chapter 9). The criminal and civil liabilities of those who treat, and those who live with, AIDS patients are also dealt with at length (Chapter 5 covers medical treatment and Chapter 10 covers euthanasia, suicide and natural death).

Unfortunately, less space is devoted to the legal rights of HIV infected persons (perhaps reflecting the present state of the law). In any event, the laws relating to privacy and confidentiality (Chapter 3), anti-discrimination and equal opportunity (Chapter 4) and medical complaints (Chapter 5) are discussed, and the authors have indicated they will include chapters on censorship and media standards, compensation for HIV infection, superannuation and insurance, and drugs and therapies in future editions of this book. These will be welcome inclusions to a legal guide which should already be essential reference for lawyers in matters involving AIDS and the HIV virus.

Anna Megalogenis

# Advocates

**David Panick**
**Oxford University Press**
**$39.95 hard back 307pp**

Anyone who has read David Panick's "Judges" will not be disappointed with his "Advocates". It is a book which analyses the role of the barrister in a civilised society and the relationship between advocate and court.

The purpose of the book is stated in the preface: "It may seem somewhat presumptuous for a barrister whose first client was hanged to write a book on advocates. By way of mitigation I emphasize that this is not a book about *advocacy*. It does not purport to tell others how to perform. It has the more modest -– and, I hope, more entertaining -purpose of exploring and defending the role of the advocate".

The book is entertaining and interesting but much of the logical development is marred by the plethora of anecdotes. These are entertaining and useful. They provide a handy ready reckoner for after dinner speeches. But they detract from the logic and development of the analysis of the role of the advocate.

Of the reforms recently introduced into England he says:

"There have always been barristers - their shirts not predominantly white, their visiting cards containing unauthorised material — who have resented the controls imposed by the Bar Council as a wholly unjustified interference, contrary to the public interest, by an overpowerful regulatory body in matters which are no concern of theirs. Until recently, that was a dissident view. The reforms introduced by Lord Chancellor Mackay have precipitated changes in the English legal system so fundamental as to render almost incredible that we tolerated so meekly and for so long as arbitrary and as conservative a regime as that imposed by the Bar Council".

His analysis of those reforms makes interesting reading both for the defender of the status quo in Victoria and for would-be reformers.

Panick canvasses at length the cab-rank rule and its importance in the administration of justice, stressing that "the essence of the adversary process is that judgments of right and wrong are to be made after the process is completed, not before it begins. It is the task of the judge, not the advocate to make such judgments".

In a chapter entitled "Success (And Failure)", he warns about the dangers of judicial appointment:

"If he accepts an appointment as a judge, the advocate may, like Norman Birkett, find that 'there is no satisfaction in work on the bench at all comparable with the work one used to do at the Bar' and that he enjoyed 'the limelight and cannot bear now to be in obscurity'. He may prove a disastrous appointment. Lord Campbell explained that there can be many reasons for this. 'The celebrated advocate, when placed on the bench embraces the side of the plaintiff or of the defendant with all his former zeal, and — unconscious of partiality or injustice — in his eagerness for victory becomes unfit fairly to appreciate conflicting evidence, arguments and authorities'".

It is a fascinating book, containing insight and interesting anecdote. It is not, however, a book which one can sit down and read. It is a book for dipping into at random. In this respect, perhaps, it fails in its prime purpose.

Gerard Nash

# HYLAND LIST DINNER

ON FRIDAY THE 23RD OF OCTOBER 1992 the Hyland annual list dinner was held at the Victoria Club Melbourne. The list was honoured to have as its speaker His Excellency the Governor of Victoria, Mr. Richard McGarvie, a former member of the list. His Honour regaled the throng with interesting anecdotes of his early days at the Bar. His message was that the Bar had gone through bad times before. There had been periods when work was scarce. Therefore those experiencing difficulties in the present legal crisis should not give up. Experience has taught barristers that the Bar will survive and indeed flourish. It can only be hoped that the Governor's optimism is well founded.

Other guests included His Honour Mr. Justice Heerey of the Federal Court, a former Chairman of the list. His Honour had the temerity to enter the Club of Racing Men resplendent in his Savage Club bow tie. Rumour has it that there had to be a tossing of coins before His Honour was admitted to the Victoria Club as a guest. However His Honour soon found solace with fellow Savage and former co-editor Elliott who was adorned with the Savage Club cummerbund. Both had correctly called 'heads' in order to gain entry to the exclusive confines of the club.

Chairman of the list Batt Q.C. is rumoured to have given an erudite and witty speech. Those with double firsts in classics went so far as to say that indeed his speech was given in old Greek. However this was not the case and such misapprehension can be put down to the rather poor microphone system provided for the speakers.

It can be categorically stated that Merralls Q.C. did attend this dinner. He was not at home interfacing in a sociologically meaningful manner with the "Bill." Rumour could not be confirmed that he was later seen at "Silvers" nightclub dancing the night away with the large group of list members who had decided to continue the high spirits of the evening.

Other members of the list retired to the Tabaret accompanied by Clerk Gerard Hyland. Gerard Mehan was seen later in the evening in heated discussion with our learned Clerk requesting that the Clerk should bear 5% of his losses on the machines. Those who had won on the pokies had left without discussing percentages.

All in all it was an extremely enjoyable dinner. Many took the opportunity to catch up on Jack

*Gerard Hyland*

*His Excellency, The Governor*

*John Batt Q.C. and John O'Toole*

*Jack Hyland, Xavier Connor Q.C. and Brian Thomson Q.C.*

Hyland's activities in semi retirement. The view from the Victoria Club high up in the Rialto was breathtaking. However the same could not be said of the food. Perhaps those on the list who have some influence at the club should have some deep and meaningful interchange about the quality of the dinner. However in these times of turmoil and pressure there is no doubt that there will be many more clerk's dinners to come.

*The Throng*

# GOOD NEWS AT LEO CUSSEN

ALL THE STAFF AT THE LEO CUSSEN INSTITUTE are smiling following the announcement that the Institute has purchased the premises it occupies at 360 Little Bourke Street, Melbourne.

After several months of protracted negotiations the Institute successfully completed the arrangements which will give the profession's educational body a permanent home and, hopefully, an assured future.

The purchase is particularly important because it relieves the Institute of a large rental burden which had contributed to the financial difficulties experienced by the Institute in recent years.

With its future now more certain Lao Cussen is enthusiastically pursing its Continuing Legal Education program which is being developed with an emphasis on projects designed to meet particular interests in addition to the established program of seminars and workshops

The Bar representatives on the Board of Leo Cussen are Hampel J. (Chair) and Kent Q.C. — both enthusiastic contributors to the training programs offered by the Institute.

The Institute is grateful to those members of the Bar who assist as Instructors and Seminar presenters and invites other members of the Bar to participate as Instructors in the Practical Training Course and CLE Workshops. Suggestions for seminar topics and publications are always welcome.

# A letter from the Managing Editor of CCH Australia Limited

In May next year we will publish a new type of loose-leaf publication. It will be specifically written for Australian company directors and will be called ***The Directors' Manual*** ... and because of recent legislation we've published an Advance Report[1] which discusses the various pieces of the proposals of particular interest to directors.

May we quote:

**What does "in a like position" mean?**

Whether you have properly carried out your duties as a director is subject to a newly worded test; to be sure, this new test isn't meant to change the law all that much and, indeed, the government believes that the new wording in actual fact just confirms the law as it's been stated by the courts lately in such cases as AWA.

But it is new wording. It's meant to provide an objective test and the phrase they've chosen to express that is "in a like position" ... so that the description of a director's duties is now that in the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a reasonable person *in a like position* in a corporation would exercise in the corporation's circumstances.

There's no doubt that this new provision will be subject to some pretty extensive scrutiny henceforth ... with the starting point being how the government itself sees those words. Here's what their explanation said:

"The addition of the phrase 'in a like position' will enable the court to look both at any special expertise held by individual directors and the distribution of functions within the corporation."

In that Advance Report we've also included a Quotes of the Month column which includes:

"It is an unenviable position, recommended only for those with a high boiling point, a thick hide and willing to be available all hours at less than commercial rates for questionable prestige."

> *The Australian Financial Review* 5 Nov 1992 reporting the imminent appointment of Mr Alan Cameron as new Chairman of the Australian Securities Commission.

"Control [of a business] must be exercised with a responsible sense of accountability to the community as a whole, or we face either revolution or a feudal system based on business overlordship."

> Wallace B Donham, Dean of Harvard Business School, in an article originally published in the "HBR" in July 1929 and republished in the Sept-Oct 1992 issue.

"One cannot prevent dishonesty by legislation. What can be done, though, is to establish an environment which makes dishonesty less likely to result in losses for investors. Better enforcement is a key aspect of this, but the content of the law can also help, by establishing simple rules with a bias in favour of disclosure."

> Explanatory Memorandum to the *Corporate Law Reform Bill 1992* Nov 1992.

On hearing of Woodrow Wilson's 14 points, French President Clemenceau was supposed to have exclaimed "Quatorze? Le bon Dieu n' a que dix"[2] ... which now fairly ancient history comes to mind with the dismemberment of the Europe that back in 1919 Wilson and the others were at such pains to refashion.

But with the affairs of Eastern Europe moving so rapidly these days, it's hard to keep up to date. Well, for those who need to be aware of what is happening east of that iron curtain that used to hang from Stettin to Trieste, CCH's ***Doing Business in Eastern Europe*** is an extremely useful reporting service.

Take, for example, their report recently on the major legal changes in Bulgaria which begins:

"The 'best kept secret' in Europe: that was the generous compliment paid to Bulgaria by the then US Deputy Secretary of State Lawrence Eagleburger following a recent visit. Bulgaria had been known to lag behind while most other countries in eastern Europe decisively turned towards open economies and democracy. Unreconstructed Soviet-style rule persisted in Bulgaria until 1989 only to be followed by a similar-minded socialist government.

To a surprised Mr Eagleburger, therefore, the newly discovered Bulgaria of 1992 deserves praise. Large strides have been taken to overcome the legacy of communism: strong democratic forces are at work, steps towards a market economy are proceeding apace and reconciliation is beginning to overcome old ethnic hatreds.

Although legal changes represent only part of Bulgaria's transformation, the new enactments and other regulatory pronouncements serve as indicators of the progress to date."

It's doubtful whether it can be said of any other tax jurisdiction "October is a turbulent month. It brings the monsoons and the Budget", but that's how Dr Subramaniam begins his article about Malaysia's 1993 Budget in the November/December issue of the ***CCH Journal of Asian Pacific Taxation***. The main item in that Budget, he reports for those doing business in Malaysia, is the developments in the indirect tax system.

And in the same issue the article "Hong Kong on the Italian Black List" highlights the lack of promotion of Hong Kong's tax system which, although it offers a simple and predictable tax system with low rates and exemption from tax on offshore income, doesn't sell its advantages when compared, for example, with Singapore. Italy is used as an example of those countries whose tax laws operate to discourage the use of tax havens and who have blacklisted Hong Kong although the colony is not a tax haven as such.

It's not only tax practitioners who need to know what the income tax rates are or to know about stamp duty rates, or about payroll tax rates and thresholds, or land tax rates, or who need to see that list of funds and institutions that tax free gifts can be made to, and so on through all, what we call, the significant numerical data concerning taxes in Australia. Our ***1992/93 Tax Rates & Tables Book*** ... is spirally bound and packs in 450 pages a surprisingly comprehensive lot of ... well, numerical data.

Like the preface says, "an invaluable desk top companion".

Finishing off with the anonymous quote:

> *Education makes life much easier. For instance, if you hadn't learned to sign your name, you'd have to pay cash for everything.*

1. If you'd like a copy, contact your CCH rep
2. "Fourteen? The good Lord has only 10."

**If you're interested in seeing any of the publications noted on this page — or indeed any publication from the CCH group — contact CCH Australia Limited ACN 000 630 197 • Sydney (Head Office) 888 2555 • Sydney (City Sales) 261 5906 • Newcastle 008 801 438 • Melbourne 670 8907 • Brisbane 221 7644 • Perth 322 4589 • Canberra 273 1422 • Tasmania 008 134 088 • Adelaide 223 7844 • Darwin 27 0212 • Cairns 31 3523.**

SL 12/92

# A FAIRY TALE (continued)

NOW GATHER AROUND ME MY DEARS whilst I tell you more about the VicBees. Some things have changed for them and some things have not. They are still getting thinner and thinner and they appear to have smaller and smaller flower patches to visit. They still have to wend their way past all the rusty old pipes to get out of their hives. And the pipes are spreading everywhere. I told you about the Telecom hive. Its pipes have a permanent air about them. So do the new ones around the FedCrt hive.

Well the biggest change to the VicBees was the change in GovBees. The red GovBees were decimated by a plague which left only the large, sleek and shiny red, white and blue ones. The VicBees rejoiced because they thought the red GovBees were their enemies and the red, white and blues one their friends. After all they had promised to get rid of their worst enemy — the ReformBees. And so they did.

But the sleek and shiny red, white and blue GovBees had big stings and they waved their stings all over the place. Every one got a shock. All the Bees thought that only the red GovBees would suffer but that was not to be the case. First of all the WorkerBees were told that they would have to work harder for less honey. Then the PSBees were told that less of them would be needed and even they would have to work harder for less honey. Next it was the turn of the sick, and not so sick, worker bees. They were told they they would have to give back their keys to the honey stores unless they had lost at least one wing, three legs and a feeler.

Throughout all of this initial frenzy of the rampant red, white and blue GovBees the VicBees went about the collection of honey secure in the knowledge that all the threats to their flower patches made by the vanquished red GovBees and their friends the ReformBees were no longer to be feared.

How utterly and completely wrong they were. Especially those who thought the new GovBees would open up lots of new flower fields. Instead there are to be no new fields and some of the best fields are to be ploughed under.

But has the message got through, you ask? I do not really think so. VicBees are the most optimistic of Bees. They tell everyone that they are fine, they have have lots of flowers to harvest, that their flowers have the most nectar and there are always more flowers to visit. It seems that they believe their own buzzing, even against all odds and all reason. "Don't you worry about me" they buzz in unison.

We worry about them don't we my dears? Perhaps we'll look in on them again in a little while. In the meantime, close your eyes, happy dreams and it is off to school again tomorrow.

(to be continued; GovBees permitting)

# ORIGINS OF YOUNG BARRISTERS' COMMITTEE

THE YOUNG BARRISTERS' COMMITTEE was established by the Bar Council pursuant to the recommendations of a Committee appointed by the Annual General Meeting of the Bar in September 1971 to review the structure of the Bar Council. The Committee's Report dated 17 July 1972 recommended that the Young Barristers' Committee be established "with a view chiefly to improving communications between the Bar Council and the junior Bar and to increasing the involvement of the junior Bar in the affairs of the Bar and the Bar Council."

It appears that the establishment of the Young Barristers' Committee grew out of a five year discussion as to the composition of the Bar Council.

In October 1967 Kelly submitted a proposal for alter-ation of the Constitution of the Bar Council primarily directed to ensuring some direct representation on the Council of "the ever increasing body of very junior counsel".

In March 1968 a Sub-Committee consisting of Lazarus, Rendit and Kelly was appointed to report on Kelly's proposals.

In September 1971 further discussion of the proposals to increase the representation of the junior Bar on the Bar Council were canvassed at the Annual General Meeting of the Bar. On 7th October 1971 a Committee consisting of Young, Marks, Hedigan, Ormiston, Winneke, Black, Graham, Shaw, Gurvich and Walls was appointed to review the structure of the Bar Council.

In November 1971 the Sub-Committee appointed in 1968 reported. On 20th September 1972 the Committee appointed in 1971 reported.

Two of the seven pages of the 1968 Sub-Committee's Report and two of the four pages of the 1971 Committee's Report are set out below.

## VICTORIAN BAR COUNCIL
## COMPOSITION OF THE BAR COUNCIL
## REPORT OF AD HOC SUB-COMMITTEE

### 1. HISTORY

Shortly prior to the Annual General Meeting of the Bar held in October 1967, Kelly submitted to the Council a proposal directed to ensuring some direct representation on the Council of the ever increasing body of very junior counsel. This proposal was submitted to the General Meeting without any recommendation of the Council. There was some fairly keen debate, the outcome of which was a resolution directing the Council to consider and report upon the proposals and to submit its recommendations to an adjourned General Meeting of the Bar to be called not later than the 30th April 1968. Although the debate was inconclusive it is suggested that there was substantial feeling expressed at the meeting that some reform was desirable and this in the direction of creating some representation of very junior men.

### 2. APPOINTMENT OF SUB-COMMITTEE

The present sub-committee was appointed at a meeting of the Council held on the 28th March 1968 to report to the Council on the proposed amendments to the competition of the Council.

### 3. PRESENT CONSTITUTION

The present sub-composition of the Council is governed by Rule 6 of Council Rules which provides:

"6. The Bar Council shall consist of

(a) The Attorney-General of the Commonwealth for the time being, if of Counsel on the Roll;

(b) the Attorney-General of the State of Victoria for the time-being, if of Counsel on the Roll;

(c) the Counsel who is for the time being the immediate past Chairman of the Bar Council (if such Counsel is not an elected member of the Bar Council);

(d) eleven others of the Counsel on the Roll of not less than seven years' standing as Counsel on the Roll at the time when voting closes for the election;

(e) four others of the Counsel on the Roll of not more than ten years+ standing as Counsel on the Roll at the time when voting closes for the election."

### 4. SCOPE OF CONSIDERATION

(a) Under Kelly's proposals, categories (a), (b) and (c) under the present Rule 6 remain unchanged. There has been no attack on these categories — the ex officio members — in the General Meeting, in the Council or in the committee, and for the sake of brevity these are hereafter ignored. The only questions which have been considered by the committee are the categories into which elected members should be divided for electoral purposes, with the subsidiary question whether any multiplication of these categories or alteration of the boundaries between them should be permitted to involve an increase in the number of Council members.

(b) The committee felt bound to confine its deliberations to the question of composition of the Council and felt that it was not authorised to consider the method of election. Nothing contained in this report however is intended to impugn the system whereby one electorate comprised of all members of the Bar votes for representatives of each category of elected members. Nor is it intended to enforce by silence the retention of the present system of voting in any other respect. All such matters have been regarded as lying outside the scope of the committee's terms of reference.

The present sub-committee was appointed at a meeting of the Council held on the 28th March 1968 to report to the Council on the proposed amendments to the competition of the Council.

### 5. KELLY'S PROPOSALS

The amendments originally proposed by Kelly and placed before this committee entailed the substitution for the present paragraphs (d) and (e) of Rule 6 of the following three paragraphs:

"(d) Ten others of Counsel on the Roll of not less than five years' standing as Counsel on the Roll at the time when voting closes for the election.

(e) Four others of Counsel on the Roll of not more than ten nor less than five years' standing on the Roll at the time when voting closes for the election.

(f) Two others of Counsel on the Roll of not more than five years' standing on the Roll at the time when voting closes for the election."

It was Kelly's view, which seems to be justified by experience, that with the junior category defined as at present to comprise Counsel of not more than ten years' standing, the tendency was for Counsel to stand and to be elected who were not so very far short of ten years' standing, providing no direct representation of the very junior Bar. Kelly's middle

category was therefore designed to preserve the present junior representation in effect, and his last preserve the present junior representation in effect, and his last category to add representation of the very junior Bar.It was thought by Kelly, and the committee endorses the view, that if the last category is to be represented one representative would not be fully effective and two are necessary. To avoid undue increase in the size of the Council, the senior category is reduced by one. There is of course an overall increase of one in the composition of the Council, bring its members to sixteen.

6. RENDIT'S PROPOSALS

When the committee met Rendit put forward the view that the absence of very junior representation was not the only or indeed the principal vice in the present composition of the Council. He regarded the greatest objection to it as being the failure of the system to provide a sufficient opportunity for the election of representatives of that strong body of the Bar which can be broadly called the middle Bar. He therefore proposed the substitution for the present two categories contained in paragraphs (d) and (e) of Rule 6 of the following three categories:

"(d) Nine others of the Counsel on the Roll of not less than fifteen years' standing as Counsel on the Roll at the time when voting closes for the election;

(e) four others of the Counsel on the Roll of not more than fifteen not less than six years' standing as Counsel on the Roll at the time when voting closes for the election;

(f) two others of the Counsel on the Roll of not more than six years' standing as Counsel on the Roll at the time when voting closes for the election."

## VICTORIAN BAR COUNCIL MEMORANDUM: RE PROPOSED "YOUNG BARRISTERS' COMMITTEE" AND ALTERATION TO COUNSEL RULES — INCREASE IN SIZE OF BAR COUNCIL — JUNIOR SECTION

1. Following the discussion which took place at the Annual General Meeting of the Bar in September 1971 at which a proposal had been advanced for an amendment to Counsel Rules to increase the representation of the Junior Bar on the Bar Council, the following were on 7th October 1971 appointed to review the structure of the Bar Council: Messrs. J.McI. Young Q.C. (Chairman), X. Connor Q.C., K.H. Marks Q.C., J.J. Hedigan, W.F. Ormiston, J. Winneke, M.E.J. Black, D. Graham, H.G. Shore, M. Gurvich and D.J. Walls. Mr. Justice Connor left the Committee on his appointment to the Supreme Court of the Australian Capital Territory. The Committee presented a unanimous report to the Bar Council, which is summarized in the following paragraphs.

2. It is useful to record the composition of the Bar Council from time to time to show when changes have been made.

At a meeting of counsel held on 21st September 1900 Counsel Rules were adopted whereby the Victorian Bar was constituted as a voluntary Association. Those rules created a Committee of Counsel to consist of counsel of not less than seven years' standing and one other of counsel on the Roll of not more than ten years' standing.

On 18th February 1914, the rules were amended to include the Attorney-General of the Commonwealth (if of counsel on the Roll) as an ex officio member of the committee.

It is useful to record the composition of the Bar Council from time to time to show when changes have been made.

On 11th May 1933, the rules were amended to increase the number of counsel of not more than ten years' standing from one to two. On 19th July 1935 the rules were amended to increase the number of counsel of not less than seven years' standing from seven to nine.

On 25th February 1960 the rules were amended to increase the number of counsel of not less than seven years' standing from nine to eleven and to increase the number of counsel of not more than ten years' standing from two to four.

On 23rd February 1963 the rules were amended so as to include the immediate past Chairman as an ex officio member of the Council if not an elected member.

On 15th August 1968 the council was reconstituted as follows:

(a) The Attorney-General of the Commonwealth (if of counsel on the Roll).

(b) The Attorney-General of the State (if of counsel on the Roll).

(c) Eleven others of counsel of not less than twelve years' standing.

(d) Four others of counsel of not less than six nor more than fifteen years' standing.

(e) Two others of counsel of not more than six years' standing.

On 23rd September 1969 the rules were amended so as to exclude the immediate past Chairman as an ex officio member of the Council.

3. The structure of the Bar Council must depend

to some extent upon what the Bar Council does or is required to do and although there is probably a good deal of agreement about the purpose and functions of the Bar Council there is also probably a good deal of disagreement about the precise limits of those purposes and functions. In the end the functions of the Bar Council tend to be what the Bar Council does.

4. It is not so very long ago that a committee consisting of Messrs. Lazarus, Rendit and Kelly was appointed to consider the composition of the Bar Council. It was appointed on 26th March 1968 and its report commenced "Shortly prior to the Annual General Meeting of the Bar held in October 1967, Kelly submitted to the Council a proposal for alteration of the constitution of the Bar Council primarily directed to ensuring some direct representation on the Council of the ever-increasing body of very junior counsel".

5. The 1971 Committee found that there was much in the report of the 1968 Committee which it could accept and little, if any, of it with which the Committee disagreed. The 1971 Committee expressly adopted one passage from the report of the 1968 Committee which reads as follows:

"Before attempting separate discussion of the issues involved, it may be noted generally that they do not appear to us to raise matters of fundamental principle. Not on the other hand are they susceptible of solution by the application of logic. The problem is seen rather as an exercise of judgment in an attempt to seek a scheme of composition of the Council which, so far as can be foreseen to serve best the interests of the Bar as a whole and to perform the varied functions which the Council is now called on to discharge. Among the broad aims which we have borne in mind are:

(a) That the views of various cross-sections of the Bar differ and that it is desirable that all points of view should find representation on the Council;

(b) That it is neither necessary not desirable that representation of any class of Counsel should be directly proportional to the numbers of the class;

(c) That it is desirable that for the most part the members of the Council should be men of considerable experience, and therefore necessarily of reasonable seniority;

(d) That the Council should be of sufficient size to allow of a reasonable representation of as many classes of Counsel and as many points of view as possible and also of sufficient size to provide the necessary work for committees and so on without over-burdening individual members;

(e) That the size of the Council be restricted below a level at which it might become unwieldy;

(f) That consistently with maintaining continuity and stability, a stimulus to some change in the personnel of the Council year by year is to be cultivated rather than avoided."

# COMPETITIONS

## Selling the Bar

RECENT LEGISLATIVE CHANGES, COMbined with the recession and a number of empty rooms in the premises controlled by BCL indicate that, if we could find a buyer, this might be the time to sell the Bar.

If not, perhaps it is time for a new marketing technique to sell our services. Some inspiration may be derived from a correspondent in the New Law Journal (7 August 1992), who has indicated that the continued use of wigs and gowns may well be a selling point for English (and Australian) barristers on the world market. His letter is reproduced below.

If the idea caught on, the Victorian Bar Council could advertise in international journals under such headings as "International Arbitration by Lawyers of Integrity and Learning" and using the trademark of the Victorian Bar — A Wig Slightly Askew Sinister?

The Editors would welcome correspondence suggesting suitable advertising formats and an appropriate trademark. The most eye-catching format and Trademark will be rewarded with a bottle of Essoign claret.

*"Marketing Wigs and Gowns*

The discussion on court dress has overlooked the marketing possibilities of wigs and gowns, which are a very strong brand symbol or trade mark for the Bar and for English justice.

As a result of films and television series, the horsehair wig is recognised around the world as being associated with British courts.

In the international commercial field, where jurisdictions compete for choice of seat of arbitration and choice of law, that is a potentially very valuable right, because it gives English lawyers a means of differentiating themselves from competing jurisdictions.

A marketing strategy will typically involve giving a particular product a distinguishing feature (so that consumers know brand X is different from brands Y and Z) and then attempt to persuade the consumer that the product has advantages over its competitors in a chosen segment of the market.

Crucially, the first stage of producing the brand feature is usually much more difficult than the second of singing the brand's praises. It often happens that a particular brand starts to look outmoded or to appeal to fewer classes of consumers.

The invariable remedy is not to abandon the brand, but to reposition it: to have an advertising campaign to make the product look fashionable or appeal to new groups.

The wig is a very strong brand feature because it is so universally recognised. The perceived problem is that it is seen as dated and out of touch.

The solution is not to abandon the wig (there is no brand symbol to replace it), but to reposition it by a modest marketing campaign — in other words to associate the wig with English law's traditional strengths: e.g. independence, professionalism, certainty.

It is worth bearing in mind that traditional dress is not incompatible with modernity. The reputation of the Guards as the elite of the British Army is not decreased by the anarchronistic dress to be seen in Horse Guards Parade and Buckingham Palace.

Moreover those universities like St. Andrew's and Oxford which avoided the radical wholesale abolition of academic dress in the 1950s and 60s (when interestingly the current generation of judges and Q.C.s was educated) are generally pleased that they did not.

Removing wigs from judges may merely show them to be ageing lawyers. Will that encourage international litigation to come to this country?"

## Onanism

FROM A CORRESPONDENT WHOSE SIGNAture is illegible the Editors received a copy of the decision of Mayo J. in *Curtis* v. *Curtis* [1949] ALR 331 together with the question: "Is this authority for the proposition that people whose senses are not gratified and/or satiated by marital sex are unhappy persons?"

The Editors are not, of course, qualified to make the psychological assessment which our correspondent seeks. It may be, however, that some of our readers will be able to assist our correspondent through the pages of *Bar News*. To assist them in doing so we reproduce below the judgement in *Curtis* v. *Curtis*.

The best advice as decided by the Editors will expose the writer to a bottle of red.

MAYO, J., delivered the following written judgment: The plaintiff is claiming a divorce from her husband on the ground that he has been guilty of cruelty to her for a period extending over one year during the marriage. The parties were married at the office of the Registrar of Births, Deaths and Marriages, Flinders Street, Adelaide, on 1st May, 1937. On the date that proceedings were commenced, 20th June, 1948, they were domiciled in this State. There is one child of the marriage, Raymond Curtis, now almost eleven years of age.

The facts that are alleged to constitute cruelty have required some consideration, and I delayed my

decision so as to have the advantage of the argument and deliberations in another case wherein judgment has not yet been delivered. But I am sure that the circumstances of the instant case are capable of being regarded as constituting cruelty as that word is understood (*inter alia*) in sec. 6 (b) of the Matrimonial Causes Act 1929-1941.

"The facts that are alleged to constitute cruelty have required some consideration . . . I am sure that the circumstances of the instant case are capable of being regarded as constituting cruelty . . ."

In the first place, I am satisfied that the course of conduct of the defendant yet to be described has been such as to invoke a constant and continuing danger and apprehension of danger to the mental health of the plaintiff, and, indeed, to her physical wellbeing also — *McCann* v. *McCann*, [1947] S.A.S.R. 108 at p. 110. Her health has been seriously impaired. She is subject to a genuine fear that the same behaviour by the defendant will be persisted in should cohabitation be resumed. That fear is not unwarranted. The plaintiff has suffered some rough handling by the defendant and he has made threats. These are not in the forefront of her complaint, although she is not without anxiety concerning the use of physical force by him.

The defendant is one of those unhappy persons whose senses do not seem to be gratified, or at least not satiated, by marital intercourse with his wife. The evidence does not show that he is a sodomite (as I was at first led to understand), but his practices are such as to make him a severe trial to a wife who has had to live with him on intimate terms. His behaviour has been a menace to the moral wellbeing of his son, a growing boy, until August 1945, living in the same house. Apparently on the rare occasions that marital coitus did take place (perhaps three or four times a year) it did not even then follow a course that might be described as union in accordance with instinct — the normal and natural association of spouses in harmony with each other. In general his pleasures took another form. He delighted in disrobing and exposing himself in a state of nudity, not only at home, but even in semi-public places. Disclosure and sight of his own genital organs seems to have induced an erotic excitement, that was followed, usually if not invariably, by masturbation. As a result, the occasion of a bath was habitually a prelude to this unnatural practice. Nor was he careful to conceal these performances by ensuring privacy. His procedure was such that, I infer, no member of the household, adult or child, male or female, could remain long in ignorance of the fact that he was an habitual onanist. His aberrations led him into other objectionable conduct. He took an excessive and manifestly an unhealthy in pictures of nude females, of which he had a collection. One of his practices was to spy from some point of vantage upon women or girls bathing, a sight that tended to induce him to remove his own clothes. He responded to this kind of urge also by watching couples on or near beaches at night. These nocturnal excursions have been given a mysterious, if not a sinister, quality at times by the defendant making strange preparations, *e.g.*, by dyeing his hair (which is white), so that it was of black or red colour. The nature of his *modus operandi* (I suppose it was in character a kind of sensual luxuriation in lecherous and salacious imaginings) can be illustrated by an incident. A female visitor, sitting on the floor in one of the rooms of their home, partially exposed her legs. The defendant, who had been in the same room, rose up from his chair and forthwith committed an act of self-abuse. It is to be conceded that he did so in another room, the breakfast-room.

His behaviour has been indecent and offensive in the manner described over a period of many years, from quite early in their marriage until they parted in or about August, 1945. The disgrace and shame that necessarily attaches to the perpetration of such odious conduct cannot fail to be reflected upon his family and those closely associated with him. The semi-public manner in which it was carried on would inevitably (apart from the personal detriment) produce in the course of time social ostracism for the whole family unit. The degradation to wife and child must not be under-estimated, nor the added agony to the mother when she saw her son in danger of being demoralised and permanently injured. The defendant's conduct was not accidental and unpremeditated. Although his purpose may not have been to be cruel to the plaintiff, he was regardless of the suffering inflicted upon her, of which he was well aware. What he did was without any reasonable ground of justification or excuse.

I find that the defendant was guilty of cruelty to the plaintiff over a period commencing in or soon after May, 1937, and continued with regularity up to August, 1945, when they parted. There was been unreasonable delay in instituting these proceedings for which there is no adequate explanation, but on this aspect I have no hesitation in exercising my discretion in favour of the plaintiff. There will be an order *nisi* for divorce on the ground stated. As to custody, before making any order for custody, to which may be added a declaration under sec. 19 of Guardianship of Infants Act 1940, I desire the defendant to be given an opportunity to be heard.

# LETTERS

AVOCA & DISTRICT
HISTORICAL SOCIETY INC.
EST. 1984

Dear Mr. Brear,

Many thanks for the two copies of the Winter edition of the *"Victorian Bar News"* which I found waiting for me on return from an extended trip into Far North Queensland.

I was very pleased with the way the article about the Avoca Court House was presented and delighted with *Bar News* recommendation that old records should be preserved correctly.

Enclosed is a copy of the Society's newsletter No. 97 for September, 1992, in which I have acknowledged the use of the article in your journal.

I may say that we are aiming to have a grand opening of the Court House on 17th April next and this will be announced in the next newsletter which is about to be produced. You may wish to make a note of this date.

We thank you for your interest and understanding of the importance of preserving our heritage.

Yours sincerely,

Mrs. Lorna Purser
Newsletter Editor

Dear Sir,

RE: CRITIQUE ON THE TASMAN REPORT

I refer to your letter of 14 September 1992 with its enclosed copy of the Critique and presume (although the letter does not specifically say so) that you are interested in any comments. No doubt you will receive a properly formulated response from the Council of the Law Institute of Victoria, but as I feel rather strongly on a number of issues canvassed by it I believe a few personal observations are warranted;

a. It is nonsense to say that an independent Bar is either undesirable or anti-competitive. The U.S. Fused Profession concept has a result of concentrating the best advocates in the more affluent firms, meaning that the costs structure of such firms makes them beyond the reach of most individuals. This is entirely the consequence that the Tasman Report seems to be directed at avoiding. Equally, the opening up of access to advocacy services by complete deregulation would lead to chaos. Unfortunately there appears to be no statistical evidence on areas that are currently deregulated and hence one is forced to rely on experience and anecdotal material. Even so, one has only to consider some of the extraordinary behaviour of advocates in the "closed shop" Industrial Tribunals, of social worker "advocates" in welfare and like Tribunals and of planners, architects and the like in Planning Tribunals to realise this. It is not necessary for me to sight my own specific examples to confidently state the conclusion that no over-all system of advocacy can properly operate where individuals within it are not strictly regulated by enforceable ethical guidelines such as those currently enforced in the Legal Profession. For example, how could any system operate if no faith could be put in the undertaking of an adversary, if one could not trust an opponent not to knowingly mislead or if the inexperience or ineptitude of an opponent put you in the position of virtually having to run their case for them. On this latter point the experience of conveyancing solicitors is perhaps instructive in that most firms are now taking the attitude that they will not expose themselves to potential liability by giving any assistance whatsoever to unqualified conveyancers, even when it is patently obvious that they are about to make a fundamental mistake.

b. I can see no harm in, the Bar being a monopoly (in the natural sense of that word, not its technical sense) as both historically and practically the need for solicitors to be able to draw on a readily accessible repository of specialist knowledge has been invaluable, especially to smaller firms and those in general practise. To some extent the value of this service has diminished since I was first admitted to practise due to the growth in the size of the Bar being largely attributable to inexperienced people who could not get jobs as solicitors entering its ranks. Even so, a solicitor

who knows the Counsel who are good in particular areas or who can rely on the advice of a particular clerk can still gain a considerable advantage for his/her clients at reasonable costs.

c. It is untrue to say that there is no real competition to the Bar. I personally appear quite frequently in the Federal and High Courts of Australia, but have an aversion to appearing in the Supreme and County Courts due to the archaic listing procedures. Cost considerations also prevent me from appearing very often in the Magistrates Court. I am thus able to still run cases in the latter three Courts by selective recourse to the Bar. By the same token, in many Magistrates Court matters I regularly brief solicitors. This is particularly so in country Courts where it would not be cost-effective to send a barrister or in suburban Courts where simple mentions and the like are involved and it is far cheaper to brief a solicitor who already has matters before the Court than to brief a barrister specifically for that one case. This practise is not unique to me — several years ago the Law Institute put out a "Lawyer to Lawyer referral directory" including a section of solicitor/advocates prepared to appear in suburban Courts. This directory was (and I believe still is) regularly used by solicitors to brief one another.

d. On a time/cost basis it is usually cheaper for my clients and me to brief Counsel to draw documentation such as Answers to Interrogatories than to draw them myself. The client gets the added advantage that the barrister may pick up some problem with the case that I have overlooked in the course of reviewing the brief.

e. My preceding two points illustrate the nonsense of drawing any conclusion that there is a "rigid division between barristers and solicitors" and obviously reinforces the conclusions at pages 10 and 11 of your critique.

f. There is an unfortunate analogy drawn with restraints of trade arising from franchise agreements at page 6 of your critique. I am surprised that this was not picked up before the document was circulated as it requires little common sense to differentiate between the minimal restraints of trade that occur in a market place where multiple franchise operations work in competition in the same area (such as fast food outlets) from organisations (such as the Bar) that could be monopolistic. In these latter cases the question is not really whether there is in fact a monopoly, but rather whether the existence of such a monopoly or potential monopoly is in the public interest. No one would seriously argue that such cliques ought not to exist (or heaven help anyone referred for triple bypass surgery if the colleges of surgeons were unregulated), the only real question being whether in the individual case the degree of monopoly should be permitted. In my view the Bar is not entirely monopolistic and, to the extent that such monopoly does exist in practise, it is deserved and in the public interest.

g. In my view most of the cost pressures on the Bar (and many on the profession in general) arise from archaic or unnecessary procedures imposed by the Courts. For example:

   i. Why can't the State Courts impose more order on their business than they do at present? This does not appear to be a problem in the Federal Courts, yet in State Courts we still have the situation where cases are repeatedly "not reached" or parties are kept waiting around all day. In passing on this point, it is my view that the practise of the Bar of not marking a fee where a case is not reached only fosters this problem by not bringing any pressure to bear on the Courts to face economic reality.

   ii. One may ask (perhaps rhetorically) why the Supreme Court adheres to its current call-over system. Once, whiling away some time in the listing Court, I counted the assembled practitioners and estimated the total public cost involved of the whole exercise to be about $40,000 for the morning. Yet exactly the same result can be achieved by any clerk of the Magistrates Court by the simple expedient of sending out a questionnaire and calling on for mention only those cases in which thepractitioners do not respond.

   iii. From what I hear from members of the Bar (particular junior members) the problem of delay in fee recovery and bad debts is of significant concern. I cannot for the life of me see why clerks cannot maintain trust accounts and in appropriate cases require pre-payment of fees before a brief is accepted. This is no more than any competent firm of solicitors would do.

   iv. Something ought to be done to resolve the situation of a barrister owed fees by a solicitor who commits a major defalcation with client monies being unable to claim on the Guarantee Fund. My firm has recently taken over a practice where this problem exists and, although we are trying to collect where possible, the fact remains that around $100 000 of outstanding Counsels fees will be written off just by the collapse of one small firm.

h. Finally, I firmly believe that advertising by either branch of our profession is undesirable as in my experience those who advertise most prominently to the public at large often are the ones who provide the worst service. As far as the solicitor branch of the profession is concerned, I am undoubtedly championing a lost cause, yet I suspect that our most strenuous efforts could curb excesses and will only succeed in partially restraining the most blatant offenders. In my

view it would be sad to see the Bar falling into this trap.

I trust these rather random observations are of some use to you. They are being dictated the day before I leave on a 2 week holiday, hence I apologise for the fact that they will have to be signed "dictated but not read".

Yours faithfully,

LINDSAY R. FORD

Dear Editor,

Proof of foreign law is often regarded as vexed and difficult. The International Trade and Business Law Committee of the Law Council of Australia is interested in researching practical problems associated with proof of foreign law. If, as is suspected, significant problems are being experienced by the profession, the Committee will work towards solutions to those problems.

The Committee would like to hear from members of the profession about their experiences in proving foreign law. We are particularly interested in the following:

(a) Under what circumstances has proof of foreign law been necessary?

(b) On how many occasions has proof of foreing law been required?

(c) How did you locate an appropriate expert?

(d) What was your experience with the process?

(e) Was there a genuine conflict, in the litigation context, between the various experts called to prove foreign law.

The Committee is also contemplating the establishment of a register of foreign law experts. If any of your members are admitted to practise in an Australian jurisdiction as well as a foreign jurisdiction, or if any member has a foreign law qualification, the committee would appreciate his or her contact with us giving relevant details of qualification and/or experiences.

Kindly forward any response to the above request to Ms Ivy Kristo, International Law Section, Law Council of Australia, GPO Box 1989, Canberra ACT 2601.

Yours faithfully,

MARY ANNE HARTLEY
on behalf of the International Trade and Business Law Committee of the Law Council of Australia.

# WICKETS AND WINE

## Romsey Vineyards 22nd November, 1992

"WELL RICHIE IT'S ALL HAPPENING HERE, isn't it?" "Yes Bill, the fans are certainly in for a treat today." At approximately 11 a.m. on a typical cold, wet, windy, Melbourne spring day approximately 20 intrepid members of Counsel arrived at the Romsey Vineyards for the annual grudge match between Latham Chambers and Owen Dixon Chambers West scheduled to commence at 11 a.m. Although Romsey was cold and windy, unlike Melbourne it was dry.

For the first half hour, discussion and debate raged within the 20 member selection panel over the choice of the Captains. Both teams showed remarkable consistency: Latham reappointed its Captain of the previous years; whilst ODCW again sacked its captain of the previous year and opted for Simon "I was in hospital last year having a major operation" Wilson.

For the next quarter of an hour, Latham turned its mind to its bowling attack and ODCW tried to settle on a batting line up. Hank Wright and Stuart Morris were selected to open for ODCW. Unfortunately, the former was not to arrive for another two hours. Paul McDermott was hastily elevated up the batting list and did so ably until beaten by "a fast in swinging Yorker" propelled into his stumps by Tony "Typhoon" Cavanaugh. And so the precedent was established.

If each of the following batsmen could be believed they all suffered the same fate. In every instance it was an unplayable ball which toppled their stumps, caught the edge of their bat and/or flew to waiting hands from the toe of the same implement. The only batswoman present, Michelle Quigley, carried her bat whilst all around the wickets tumbled.

*The Panorama*

*Rossie's Rong'un*

*His Honour Heaving*

*The Quigley Chuck*

For those interested in such statistics Morris' unplayable ball was bowled by S. Jessup (aged 11) and E.W. Gillard's by S. Morris Jnr (aged 12). The largest partnership for ODCW was garnered to the sound of creaking bones, snapping tendons and considerable theatrics by Wilson and Elliott (PD). Unfortunately, their much self-vaunted partnership was not matched by their prowess in holding the catches which later came their way.

None of the remaining batsmen managed double figures but provided Jessup (CN) and Middleton (R) with two wickets each and M. "I couldn't believe it either" McInerney with two catches.

Weighed down by some excellent tucker accompanied by not a little of the local produce Latham commenced its chase of the 129 runs needed somewhat confidently. Middleton was so sure of a long stay in the centre he stubbed out his cigarette. He needn't have. He did however make up for his unexpectedly low score by some rather dubious umpiring decisions later in the innings.

Middleton would have us believe that the rather onerous concurrent tasks of being umpire and scorer weighed heavily on his shoulders. He certainly did have trouble acknowledging his own signals. Despite this early setback, Latham then motored along quite comfortably with Southall, Cavanaugh and Rice(A) all reaching the statutory retiring score

*The Chairman's Chop*

and Radford smashing a quick 21. The less said about the other batsmen the better.

Again, for the statistically minded, Quigley was the only bowler with the courage to "pitch" the ball at Heerey J'.s stumps. Perhaps she considered herself at least risk of a suddenly truncated Federal Court practice. Wilson, Elliott, Laird and Rice each took a wicket. McDermott, Barton, Pannifex and Devries each toiled without reward. Gillard, after a few uneventful overs, suddenly had to depart, claiming pressure of work. He was more than ably substituted for by C. Devries (aged 83/4).

*Spot the Bowler*

*Bunter Bats*

Despite McInerney's hasty and unexplained departure from the ground when it came his turn to bat, Latham managed to overhaul its target with some batsmen and overs to spare.

Without a doubt, and despite aching muscles for many days thereafter, all of the participants enjoyed themselves thoroughly as did their loyal fans and family members who almost certainly found their diversions other than in the spectacle being played out on the oval.

Yet again Peter Vickery had organised a great day marred only by his inability to take the field due to "a pre-existing functional overlay."

"Well Keith it certainly has been a most entertaining afternoon."

"I am not so sure Tony, if it hadn't been for the food and the wine . . . "

In any case, the Chris Spence Fund profited well from the day. The fund (c/o A.J. Dever) remains open for donations.

(Accompanying photographs by Graeme Holdsworth)

Graham Devries


*The Teams*

# BAR HOCKEY

IN YEARS GONE BY THE BAR HOCKEY team has traditionally been defeated by an RMIT XI in a warm-up match to the annual tussle with the solicitors for the right to possess the Scales of Justice Cup — this year was no exception.

Having been defeated 6-1 by RMIT, the Bar was quietly confident that it could "take" the solicitors and retain the Cup (which the Bar has held since 1988), although pessimists in the Bar side pointed out that 6-1 was a more substantial defeat than usual and further that the Bar's only goal was in fact scored by an RMIT player seconded to the Bar's team to make up the numbers.

As the day of the game with the solicitors approached there was growing concern as the availability of champion forwards Andrew Tinney and Michael Tinney. Despite an attempt by solicitors from the DPP's office to deprive the Bar of the Tinneys (by sending one on circuit to Horsham and one on circuit to Bairnsdale) the Bar was able to field an impressive (albeit ageing) lineup. Andrew Tinney was prevailed upon to drive from Horsham to Melbourne for the match. Unfortunately Michael Tinney did not make the trip back from Bairnsdale. However, the Bar side was strengthened by the return from injury of Coldrey, J (readers of the Bar News will recall that in a prior match with the solicitors Coldrey, J scored "THAT GOAL" as described by a former anonymous source, c/- the DPP's office Melbourne).

The match against the solicitors was played at a fast and furious pace for the first five minutes. Early in the first half the solicitors scored. It was at this stage becoming apparent that Tom Lynch (in goals) had not complied with the strict training regime that had been prescribed and followed in previous years. Lynch had had a short lunch on the day of the match and was considerably more mobile than was required by the management committee of the team.

Following the early setback of the solicitors' goal the Bar settled down and played the disciplined and careful brand of hockey for which it has become famous. Rupert Balfe QC and Peter Burke carefully demolished any solicitor foolish enough to come within range. Meryl Sexton carefully avoided assaulting and/or making physical contact with most of the solicitors' team, skilfully moving the ball around opposition players. David Beach carefully avoided taking any pass directly on his stick and, in a tactic that still has the opposition guessing, allowed many passes to him to disappear over the sideline.

It become apparent early in the first half that the solicitors were only playing with nine players (seven men and two women). By dint of this devious tactic the solicitors were able to avoid the usual squabbles amongst themselves as to which of them should have possession of the ball in midfield. In the result the solicitors obtained an unfair advantage over the Bar side which had sportingly selected eleven players and one interchange player.

The Bar being 1-0 down at half time, Balfe QC made his customary address in an attempt to motivate the Bar to greater heights.

Following the early setback of the solicitors' goal the Bar settled down and played the disciplined and careful brand of hockey for which it has become famous.

In the second half the Bar were all over the solicitors (in a metaphoric sense only): John Bryson and Richard Brear combined well; Andrew Tinney almost scored; Peter Burke almost scored; Phil Burchardt starred; Sexton dominated; Colin Fenwick and Mark Dreyfus controlled the centre; Coldrey, J almost scored; Lynch, Balfe QC and Burke were solid in defence and Beach was interchanged off.

Notwithstanding the dominance of the Bar in the second half, the solicitors managed to hold on to their 1-0 lead and to take the Scales of Justice Cup from the Bar. Following the game the Bar resolved:

(a) that it had played well;

(b) that it had been unlucky not to win;

(c) that the solicitors had been lucky to win.

The crowd in the stand (Andrew McIntosh) agreed.

# CONFERENCES

## 24TH INTERNATIONAL BAR ASSOCIATION CONFERENCE — CANNES

A legal conference on the Cote d'Azur in September certainly seemed like a great idea and the 24th Biennial IBA Conference in Cannes was no disappointment. The principal conference centre was the *Palais des Festivals et des Congres*, celebrated as the venue of the annual Film Festival and superbly sited on the shore of the Mediterranean and the Boulevard de la Croisette.

On this Boulevard are located several hotels built in the grand, wedding-cake style of the 1920s and 30s, including the *Carlton*, the *Majestic* and the *Martinez*, names well-known to devotees of Somerset Maugham and Ian Fleming, and many of those attending the Conference stayed in one of these three. However the partners of the London firm Frere Cholmeley of Lincoln's Inn Fields outdid all others, their address in the list of participants being modestly given as: *Adventus*, Berth 961, Old Port, Cannes.

Sally and I opted for rather different accommodation, staying at the small and charming *Mas Candille* near Mougins, a village in the hills about 10 km outside Cannes and in an area which has several excellent restaurants.

The theme of the Conference was 'Europe: 1993 and Beyond', and, very fittingly, opened on the evening of 20 September, the day of the referendum on the Maastricht Treaty. The opening ceremony was quite an affair, the principal address being given by Monsieur Pierre Drai, *Premier President de la Cour de Cassation*, France's most senior judicial officer, and the entertainment being provided by the French Army Choir, whose rendition of *"La Marseillaise"* was superb. Then followed a buffet dinner on the beaches of Cannes attended by several thousand participants who enjoyed a range of French regional specialties, both food and wine, and laser and fireworks displays.

This was the best-attended conference yet organised by the IBA and there were dozens of sessions every day on a wide range of topics. Amongst many interesting sessions, particular reference should be made to that entitled *"The Independence of the Judiciary"*. Judge Tony Smith, President of the Victorian AAT was chairman and the speakers included Mr. Justice Sears of the Hong Kong Supreme Court and Lord McCluskey of the Scottish Court of Session. Their speeches were followed by a lengthy and lively discussion.

*Le Palais des Festivals et Congres, Cannes*

My chief involvement was with the Defamation and Media Law Section. The first of its sessions was entitled 'Cameras in the Courtroom'. This began with a series of excerpts on video from the Kennedy Smith rape trial in Florida last year, the whole of which had been televised live. Those telecasts attracted enormous audiences in the US and it was easy to understand why, but important questions remain undetermined.

The second session was entitled 'Invasion of Privacy: Recent Comparative Developments." It may be recalled that revelations of, and about the Duchess of York (Fergie) had been on the front pages of the World's press, prominently and frequently, in the previous few weeks, so the choice of topic was, to say the least, timely.

One of our colleagues, a London solicitor specialising in defamation, was able to illustrate his critical comments about the English tabloids with the aid of a stack of striking examples. However, as another participant, Donald Trelford who is the Editor of *The Observer* pointed out, that recent spate of publicity is likely to hasten the implementation of the proposal of the Calcutt Committee for a degree of control over the British Press to an extent which verges on Government censorship. I fear that these heady contributions overshadowed my own, which was concerned with the proposals of the Australian Law Reform Commission on the subject of Privacy and with the Commonwealth Privacy Act.

No doubt many members of the Victorian Bar will be inspired to attend the next Biennial IBA Conference at some other exotic venue. With mixed feelings I must record that it will take place in Melbourne, in October 1994.

Douglas Graham

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## SUMMER ASSAULT

SUPREME COURT — CRIMINAL LISTS

Following the success of the Spring Offensive in the Civil Lists the Court will now focus on streamlining the listing system in its Criminal Jurisdiction in an attempt to obtain greater efficiency in the listing and conduct of criminal trials and thereby reduce delays.

Mr. Justice Hampel will be in charge of the Criminal Lists. He will be assisted by other judges in overseeing what is to be a judge controlled listing system. To this end a system of call-overs and mentions will be established with a view to fixing a calendar of cases. This will provide greater certainty for people awaiting trials, witnesses, those involved in preparation and listing as well as for counsel and the Court.

The Director of Public Prosecutions, Bernard Bongiorno Q.C., and the Officer in charge of the Criminal Division of the Legal Aid Commission, Ross Gordon, have indicated their full support and cooperation with the proposed scheme.

It is proposed that three judges sit in Crime in December and five judges in the first term of 1993 between the 18th of January and Easter.

The Court is confident that the profession will give this scheme its full support and cooperation, as was the case with the Spring Offensive.