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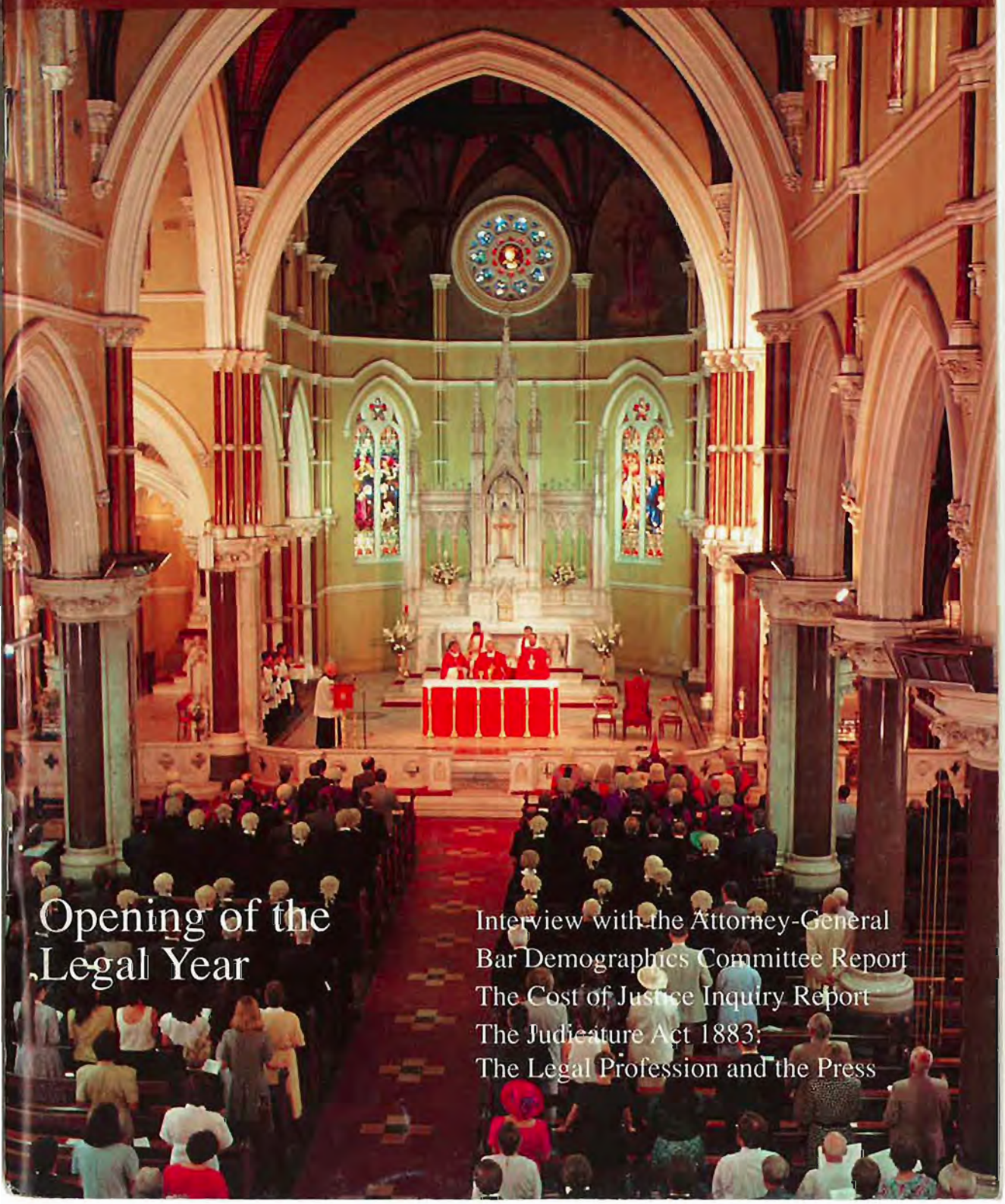

Opening of the Legal Year

Interview with the Attorney-General
Bar Demographics Committee Report
The Cost of Justice Inquiry Report
The Judicature Act 1883:
The Legal Profession and the Press

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'Opening of the Legal Year' service at St. Mary's Star of the Sea Church, West Melbourne, on Tuesday, 2 February 1993.

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EDITORS' BACKSHEET

The Winds Still Blow

WHEN THE SUMMER 1992 ISSUE OF *BAR News* was going to press it seemed as if the Bar and the legal profession had weathered the worst of the storms generated by the winds of change. That clearly is not the case.

In the last six months we have had the following cries.

(1) **Abolish the Bar** — A Bill has been introduced in South Australia, the intent of which seems to be to render the rules of an independent Bar unenforceable. We set out the relevant provision, if only because it may entertain those who enjoy statutory interpretation and cryptic crosswords.

"*A Bill For an Act to Amend the Legal Practitioners Act 1981* . . .

The Parliament of South Australia enacts as follows:

3. Section 6 of the principal Act is repealed and the following section is substituted:

"*Fusion of the legal profession.*

6.(1) It is Parliament's intention that the legal profession should continue to be a fused profession of barristers and solicitors.

(2) The voluntary establishment of a separate bar is not, however, inconsistent with that intention, nor is it inconsistent with that intention for legal practitioners voluntarily to confine themselves to practise as solicitors.

(3) An undertaking by a legal practitioner to practise solely as a barrister or to practise solely as a solicitor is contrary to public policy and void (but this subsection does not extend to an undertaking contained in or implied by a contract or professional engagement to provide legal services of a particular kind for or on behalf of another person).

(4) Despite this section, an association of legal practitioners may be lawfully constituted on the basis that membership is confined to legal practitioners who practise solely in a particular field of legal practice and in a particular way.

(5) No contractual or other requirement may be lawfully imposed on a legal practitioner to join an association of legal practitioners".

The Commonwealth Attorney-General's Department Submission to the Trade Practices Commission would bring the Bar under the auspices of the Law Institute.

The abolition of the Bar would decrease significantly the range of services which could be provided to the clients of country and suburban solicitors. To bring the Bar under the auspices of the Law Institute would inevitably lead to its decline and ultimate abolition.

(2) **Abolish Queen's Counsel** — the Premier of New South Wales.

The Premier of New South Wales, apparently a long time friend of the immediate past President of the Law Society of New South Wales, has decided to abolish the office of Queen's Counsel. We believe that he is wrong to do so, that it will not achieve a reduction in "the cost of justice" but will merely be change for change sake and the abolition of a tradition to no purpose. We do not, however, believe that the continued existence of Queen's Counsel is of vital importance to the future of the human race.

(3) **Abolish the Legal Profession's Monopoly** — Commonwealth Attorney-General's Department's Submission to the Trade Practices Commission.

The Attorney-General says he agrees with the Department's Submission — Surprising?

Removing the monopoly of the legal profession in certain areas might reduce costs; but if adequate standards and insurance guarantee fund requirements are to be imposed on the alternative possibilities, any cost-saving will be minimal. In litigation the use of lay advocates or the appearance of litigants in person will increase costs.

(4) **Abolish Self-Regulation** — Commonwealth Attorney-General's Department, the Attorney-General and the Shadow Attorney-General.

John Faine interviewed the Federal Attorney-General and Shadow Attorney-General on 22 February this year.

In the course of that interview Mr. Costello said:

"We have said there should be no compulsory membership of any association, whether it be a union, or a Law Institute, or a Bar Association. That goes under a coalition.

The second point and I announced this on Friday is, at the moment, the *Trade Practices Act* can apply to corporations and to unions but not to individuals and we will be seeking to extend the *Trade Practices Act* to

In Australia today the executive controls Parliament and, increasingly since 1972, is intolerant of independence in its top public servants. In the United States they wisely divorced the executive from the legislature.

individuals including lawyers — now, that will take cooperation from the States — so that lawyers, or any body else, are engaged in price fixing, or anti-competitive practice, that goes. Everybody gets equal treatment".

Mr. Duffy said:

"Peter says that it will need the cooperation of the States. I agree with that and it should be extended beyond corporations, there is no question about that. I agree with him on that".

(5) **Create A National Overseeing Body** to regulate the delivery of legal services throughout Australia — Commonwealth Attorney-General's Department.

(6) **Make Legislation "User Friendly"** for the lay man — Commonwealth Attorney-General's Department.

(7) **Lawyers Should Not Do Conveyancing**

"If you want to be a suburban practitioner do that properly. Abandon conveyancing". John Faine in the January/February issue of "The Lawyer".

(8) **Abolish Articles** and make the law degree the only prerequisite for admission — Law Institute of Victoria.

The Editors are divided on this one. One of us thinks it important that the profession not place, and not be seen to place, barriers in the way of applicants for admission to practice; and that (provided there is sufficient "practical" content in the law degree and provided there is a restricted right of practice for the first year or so after admission), such a change will not adversely affect the quality of practitioners. Such a change would remove from the system, at a time when two new law schools are getting up steam, those who enter into Articles of Clerkship merely for the purpose of obtaining the professional "ticket" though they have no intention of practising in the long term.

(9) **Give Judges Sex Education** — Paul Keating.

It is not true that already the judicial applicants for the Prime Minister's practical sex education course exceed the number of places available. It is true that no judges have yet enrolled for his course in sexual theory.

(10) **Abolish the Accident Compensation Tribunal.** The Tribunal has been abolished and its judges removed by the Victorian Parliament. It is a sad day for the independence of the judiciary and the rule of law.

(11) **Abolish Employees' Common Law Rights.** The employee's common law right to sue for negligence has been abolished by the Victorian Parliament.

THE RULE OF LAW

The last two matters are of vital significance. The other changes which have been mooted do not affect the rule of law and will not affect the capacity of the legal profession and the judiciary to do its job properly.

The abolition of the Accident Compensation Tribunal and the removal of its judges and the "reforms" in employment law are a step — perhaps only a very small step — backward in time to the days of James II.

The legal profession and the judiciary must maintain their role as a buffer between the executive and the individual. In Australia today the executive controls Parliament and, increasingly since 1972, is intolerant of independence in its top public servants. In the United States they wisely divorced the executive from the legislature. In England they wisely maintain a professional civil service. In Australia we have chosen the course of combined unwisdom. In this country (at least between polling days) the only fetter on executive despotism is to be found in an independent judiciary serviced by an independent legal profession.

Some of the changes and suggested changes seem designed to replace the concept that the Crown governs "under God and the law" with the concept that the executive (so long as it controls Parliament) is above the law. Others appear to stem from a complete misconception of what the rule of law is. For example, it seems to be thought that judges are not appointed to administer the law but to bring to the interpretation of the law a particular perspective and to implement that perspective.

THE NEED TO ADAPT

It is clear that the legal profession needs to adapt to the changing circumstances of society.

Those of us who believe that we can avoid change are living in the reflected glow of an era which probably vanished in August 1914. Fitness in the Darwinian sense equates to adaptability and flexibility. It is not to be found in a staunch refusal to accept reality.

We should adapt, however, only where the change: (a) will not adversely affect the quality of the service the public receives from the legal pro-

fession; and (b) will not interfere with the independence of the judiciary and the legal profession.

We should change in a way which is consistent with principle, which maintains the rule of law and which ensures that the greatest range of expertise is available even to the most unpopular cause and to the client of the smallest solicitor's practice.

There are changes we can live with even if we do not like them. There are other changes and perceptions which we must adamantly oppose.

It is important for the Bar to decide what are the real issues and to fight over those and not over procedural or trivial matters.

In an era when the executive believes that a ministerial statement has the same standing as an Act of Parliament, it is of vital importance that no "reforms" take place which will tend to make the law further subservient to executive whim.

It is possible for government to force change upon us. If our opposition to change can be seen as, or made to appear as, a defence solely of our own economic interests, it will be harder to win support for the maintenance of that independence and freedom, which the legal profession and the judiciary must enjoy if the executive-for-the-time-being is not to be free to do as it likes with democratic rights.

TRANS-TASMAN ADMISSIONS

At its February meeting the Council of Legal Education resolved to amend its rules to permit New Zealand practitioners to be admitted in Victoria without any further practical training or academic study.

This accords with a recommendation of the Consultative Committee of Interstate Admitting Bodies (a Committee set up by the Chief Justices some 13 years ago to consider uniform admission rules). It also accords with the policy of the Federal Government and the views of the Premiers on closer economic ties with New Zealand.

It does, however, create an anomaly, inasmuch as a New Zealand practitioner educated under a unitary system of government will not be required to have any knowledge of Australian Constitutional Law before he or she is admitted to practice in Victoria. But local graduates will still be required to study Australian Constitutional Law as will candidates from the USA and Canada.

If the purpose of imposing prerequisites for admission to practice is to ensure that the practitioner is equipped by training and education to serve the public, then:

(a) local graduates should not be required to study Australian Constitutional Law before admission to practice; or

(b) the decision taken by the Council of Legal Education in respect of New Zealand practitioners is erroneous.

CORRESPONDENCE

Dear Sir,

Comments in the recent annual report of Barristers' Chambers Ltd by its Chairman concerning the relationship between BCL and the Bar call for some response.

BCL is charged with a most difficult task: to provide accommodation of an appropriate standard to over 1200 professionals and many hundreds of support staff within strict geographical limits. This task would tax the most professional and well-resourced real estate firm. It is truly a tribute to the ability and efforts of the BCL Board and staff that they perform it as well as they do.

It is still pertinent to ask, however, whether they perform it well enough. Given the value of the Bar's real estate holdings and the complexity of its accommodation needs, it is reasonable to ask whether the Bar should leave it to a small staff and part-time directors with no particular expertise in real estate. BCL's recent performance suggests that it should not.

At the risk of being branded an economic "whiz kid" promoting a self image of unlimited wisdom, could I suggest the Bar give some thought to contracting out BCL's management function to a professional firm? The firm could be chosen by competitive tender and appointed by reviewable contract. Its remuneration could be performance-based, it could be charged with advising on appropriate levels of leased and owned premises and with projecting future demand. Despite the extra cost, I am sure this would avoid many of the recent difficulties experienced with chambers, particularly by the junior Bar.

It would also be timely to investigate the possibility of unlocking some of the enormous wealth in the Bar's real estate holdings and converting it into a transferable form, but without requiring equity contributions from new entrants. No doubt this sort of thing has been considered before and no doubt it involves serious difficulties. But recent innovations in financial techniques may provide solutions which did not previously exist.

The pressure on the chambers rule continues to grow. There is obviously a real risk that it will be one of the first casualties of the current reviews of

Bar rules. Improving the management of chambers and providing some transferable value to members could help to preserve the rule.

Yours sincerely,
Michael Pearce

Dear Sirs,

I noticed that in bidding farewell to the Law Reform commission at page 10 of the Summer 1992 edition (No. 83) it is reported that the "Honourable Member for Preston" said in the House "what the L.R.C. set out to do was achieve preventative detention through the back door".

Assuming that to be an accurate report of what the honourable member said, it is an unfortunate mating of two phrases.

"Preventative" is a noun meaning "that which prevents". Possibly the most commonly known and commonly used preventative is a condom.

"Preventive", on the other hand, is an adjective describing a particular attribute of something. When used in regard to custodial detention, it means, I believe, a detention which comes before some expected or feared offence and is imposed as a means of barring its commission.

To say that the L.R.C. set out to achieve preventative detention through the back door is not only inelegant, but confusing.

It tends to leave one in some doubt as to exactly what it is the honourable member asserts the L.R.C. set out to achieve.

Sincerely,
H.G. Ogden

Dear Sir,

I firstly wish to emphasise what this letter is NOT about. It is in no way a criticism of Hartley Hansen Q.C. either as a person, or in terms of his contribution to the previous Bar Council.

Secondly, I should point out that my dealings with Hartley have always been extremely cordial and he has been extremely helpful to me especially when I have sought guidance in ethical matters.

What this letter is about is a response to the anonymous article entitled "Bar Council Dinner" appearing in the summer of 1992 edition of the *Victorian Bar News*.

The conventional theory in a democracy is that if one does not like those who are elected to rule, one has the right to vote them out of office. To bemoan the fact that Hartley was not re-elected is to ignore this fundamental democratic principle. The Bar Council being what it is, no outsider can possibly have any idea as to the individual input of its constituent members.

However, it is clear that the failure to re-elect Hartley (which cannot have been directed at him personally) merely reflects the very wide dissatisfaction that many members of the Bar have held in recent times towards the previous Bar Council. The fact that Kent Q.C. resigned from the Bar Council in obvious dissatisfaction, only to stand for, and to achieve re-election seems to reflect that dissatisfaction.

The writer of this article however has the temerity to say

"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."

The clear imputation behind this observation is that some members of the Bar voted as a block. Whilst it is clearly true that many members of the Bar who practise in the criminal law felt that they were under-represented on the Bar Council, it is an outrageous allegation to make that the people who did not vote for Hansen voted in an isolationist trade-unionist way. That this is so is clearly demonstrated by the fact that Weinberg Q.C. who was elected to replace Kent Q.C. (and who is known to occasionally practise in the criminal jurisdiction), did not achieve re-election himself. Other criminal practitioners likewise did not succeed in their quest for election to the Bar Council.

The writer of this article regrettably has no concept of democratic principles. The fact that he wrote the article anonymously is cowardly. That the editors of the *Bar News* chose to publish such an anonymous slur on a substantial proportion of the Bar (i.e. everybody who did not vote for Hansen) is reprehensible.

In the meantime, it is to be hoped that the new Bar Council takes a good look at itself to make sure that it is representative of the interests of the whole Bar and to ensure that the sort of dissatisfaction that led to Hansen Q.C. not being re-elected does not recur.

Yours sincerely,
Nathan Crafti

CCH UPDATE

STANLEY LEAVER
LLM
Managing Editor
CCH Australia Limited

"Take the 13th century situation where the newly discovered trade route to Asia round the southern tip of Africa offered the promise of great profits from trade with the East to those merchants willing to risk their ducats on its development; take the further condition that no one merchant was prepared to speculate all his wealth on so risky a venture and you have the setting for the first joint stock company..."

This reference to the 13th century Genoese experiment into corporate law was how the first edition of our ***Guidebook to Company Law*** began.

That was in April 1972. Since then this book's been changed, not the least change being in its title. After 11 editions under its original title it became, because of the change in the name of the statute itself, the ***Australian Corporations Law Guide*** ... now in its 3rd edition.

The point is that through changes to the law which we've adapted to over the last 19 years the aim of this book hasn't changed; it's designed to meet the need for a plainly written explanation of the general principles of company or corporation law in Australia ... and what's made this so useful over the years is the fact that it explains the current law. Just as in 1972 we were explaining those massive amendments of 1971, so in 1993 we've included the changes introduced by last year's *Corporate Law Reform Act* which was passed in December.

■ ■ ■

As an example of the way corporate law is changing — and how necessary it is for all practitioners to be aware of it — take the "Loans to Directors" provisions. There's a new control regime to operate in this area (now called the "Related Party Transactions" provisions) which will operate — unless the directors decide to adhere to it earlier — from February 1994.

Query then. Will those provisions which treated illegal loans differently from other illegal transactions — ie illegal loans to directors aren't void as in law they normally would be — still apply to post-February 1994 transactions?

This is a question which quite clearly is of concern to those acting for lenders or borrowers in transactions that might be tainted. We're trying to make the fairly obvious point here that corporations law touches a whole mess of transactions, and a straightforward guide to the current principles is a useful way of getting up to speed, as our advertising copywriters say, with the latest developments.

■ ■ ■

In these days of the high market requirements for admission to a law school it's interesting to recall the story Julius Cohen, an American educator, told in 1962. It concerned an applicant for admission to a famous graduate school, who, when asked by the Dean of Admissions whether he had graduated in the upper half of his college class — replied with great pride: "Sir, I belong to that section of the class which makes the upper half of the class possible."

■ ■ ■

In the area of corporate law still, the point was made in the financial press recently — inspired by some of the general meeting dramas of late — that shareholder anger is accentuated by feelings of impotence and that perhaps one possible reform could be to use the voting system often used in the US which enables shareholders to concentrate their vote.

Presumably this is a reference to their cumulative voting system which applies only to the election of directors and in which each share carries as many votes as there are vacancies to be filled, the shareholder being permitted to distribute the votes for all his shares among the candidates in any way he or she desires.

The object of this form of proportional representation is to assure desirable minority representation on the board.

It isn't universally adopted in the legislation of the various States, and one interesting comment on it is that the right to vote cumulatively can often be diluted by decreasing the number of vacancies to be filled, by reducing the size of the board of directors, or classifying the board and having a stagger system of election.

■ ■ ■

A decision of the NSW Supreme Court last year[1] raised again this issue of the capital gains tax implications of damages awards. Gary Beath of Minter Ellison Morris Fletcher wrote an article on it for our ***CCH Journal of Australian Taxation***. Here's a summary of that article.

In *Provan's case*, the Court was required to consider whether, in an award of damages, the plaintiff was also entitled to be indemnified for any CGT liability on the amount of damages awarded. Although not able to decide the question of liability to tax, the Court made the order sought by the plaintiff granting the indemnity for any potential CGT liability.

The author argues that this case highlights the problems which may arise as a result of different Courts having to determine damages and liability to tax. He submits that both the operation of the CGT provisions in the Act and the new penalty regime under self-assessment combine to act to a taxpayer's detriment in this situation, adding weight to the Court's own suggestion that legislative intervention is required to ensure that the Commissioner is made a party to such proceedings.

■ ■ ■

Finally, talking about legal education brings to mind two quotes, one by Doris Lessing who said "In university they don't tell you that the greater part of the law is learning to tolerate fools", and the other by Robert W Meserve who as President of the American Bar Association in 1973 said:

> "Today, lawyers are educated and licensed as if they could eventually do everything which constitutes the practice of law. The myth of omni-competence is precisely that — a myth. Our economic and social life is far too complex to support such a reality."

■ ■ ■

1. *Provan v HCL Real Estate Ltd* 92 ATC 4644.

CHAIRMAN'S CUPBOARD

THE VICTORIAN BAR IS A HYBRID phenomenon. In one of its aspects, the Bar is a professional association. It makes and enforces rules of conduct to enhance the quality of its members' work and to protect the interests of their clients. In another of its aspects, the Bar is a form of business organisation. As we view things, it militates towards the achievement of the high standards to which we aspire that we are grouped together in chambers which we have as a body purchased or leased, and that we adopt a uniform system of clerking, and as a result we are thrown together as participants in business arrangements which may have no parallel elsewhere.

In its recent submissions to various public enquiries, the Bar has emphasised that it has no monopoly upon advocacy work in Victoria: any admitted legal practitioner can act as a barrister — if not as a member of the Bar, then by holding a practising certificate from the Law Institute. What is it, then, which makes the Bar attractive for so many practitioners who, even in these difficult times, are continuing to apply to sign the Bar Roll in considerable numbers? What is the glue which holds the Bar together?

I suspect that, for most of its members, the attraction of the Bar is that it offers the opportunity to practise law at a reasonably stimulating level without the everyday concerns which accompany responsibility for the whole of a client's affairs, or for the whole of the conduct of a particular matter. There may also be something seductive about operating as a sole practitioner, and the Bar offers the opportunity to do so whilst at the same time providing an administrative infrastructure which has the potential at least to operate as efficiently as that of the largest firms. I was present at the Monash Law School recently when Gordon Hughes reminded students that a recent survey by the American Bar Association of its members as to their reaction to the television production *LA Law* produced the unanimous result that the most realistic aspect of the show was "firm politics". Perhaps this is why some lawyers join the Bar in Australia, where that opportunity exists.

The Bar's very existence has been challenged recently, in the face of which the Bar Council has tended to strive to preserve the Bar as we know it. Perhaps we should have commenced by asking whether the Bar as we know it is the Bar which barristers want. The Bar has a history of some of its members from time to time questioning some of its rules or practices — there is nothing unusual or unnatural about that. Those episodes have been capable of being handled through the consultative and democratic processes which our collegiate structure makes available. But they do suggest that, before we can assert the importance of preserving the Bar for the future, we should have a clear vision of the kind of future we want.

We live in changing times, and change means trauma. The Bar has handled change in the past but, in the final analysis, has done so only because its members have provided a cost-effective service in an environment where that service could in other circumstances have been provided by others. This will continue to be so, but, in planning for the future, it will become increasingly necessary for the Bar to come to grips with its hybrid characteristics to which I referred at the outset. One of the difficulties about the atomistic structure of the Bar is that it does not lend itself to forward planning or to decision-making in the interests of the body as a whole. In one way of thinking every barrister is an island in business. Many members of the Bar would be affronted that anyone else, much less the Bar council, should take an interest in their own business arrangements. The Bar, they would have it, is merely a professional association. But so to confine one's thinking may not be the way to provide into the future the kind of competitive service we have so successfully provided in the past. Rather we should now be asking ourselves: "What kind of Bar do we want in 10 or 15 years time?" We might then be able to manage the process to which we attempt to reach that point. That we are being carried along by a current of considerable force is beyond question: whether we drift aimlessly or strike out for the high ground is the decision which we must as a group make.

There have been times in the past where existing members of the Bar have taken momentous decisions which were destined to affect the way in which barristers practised for many years there-

after. To date, these decisions have mostly been in the area of real-estate purchases and development. It may, however, be time for other business-oriented decisions to be taken in the interests of ensuring that the Bar will have a place in the sun for many years to come. Thinking of this kind no doubt motivated the New Barristers' Committee recently when they asked the Bar Council whether the Bar had a "strategy for the future". I think my own reaction may not have been atypical: "a what?". Barristers' Chambers Limited must of necessity have such strategies, and it has them, because of the commitments into which it enters to fulfill its charter to provide accommodation to the Bar. But the Bar as such tends to read, and react to, events as they unfold. In the result we often see the high ground through water-laden eyelids some time after we have drifted past it. I doubt that any half decent firm of solicitors would be so supine about its own future. To commence the process of identifying where we want to be over (and after) the next decade, and after consultation with the New Barristers' Committee, the Executive has decided to recommend to the Bar Council the holding of a weekend conference open generally to members of the Bar, at which there should be, in the words of the immortal cliche, "a full and frank interchange of views".

Chris Jessup

ATTORNEY-GENERAL'S COLUMN

I AM PLEASED TO HAVE THE OPPORtunity to introduce myself and to outline to the profession some of the major law and justice reform initiatives which the Government is proposing for the future.

1992 PARLIAMENTARY SESSION

During the first Parliamentary session of the Government, only one new act from my portfolio — the *Law Reform Commission (Repeal) Act* — was passed. *The Evidence (Unsworn Evidence) Bill* was introduced.

The *Evidence (Unsworn Evidence) Bill* brings Victoria into line with other jurisdictions by repealing the right of an accused person to make an unsworn statement or give unsworn evidence.

It is the view of the Government that the arguments for the retention of this right to avoid cross-examination are no longer relevant. Unsworn testimony was introduced at a time when an accused was not allowed to give sworn evidence and was often not represented. There have been enormous changes to the criminal justice law since then. Today it is the rule, rather than the exception, that an accused is legally represented. There is also an overriding judicial discretion to protect the accused from unfair questions. These changes mean that the need for the protection involved in a right to give untested evidence no longer exists. It is an historical anachronism that should be abolished.

LAW REFORM INITIATIVES

In relation to law reform generally, the Government, in aiming to reduce government intervention in the lives of citizens, will direct its energy towards reducing the number of laws on the statute books and in regulations, and ensuring that laws are not made without adequate consultation.

Today it is the rule, rather than the exception, that an accused is legally represented. There is also an overriding judicial discretion to protect the accused from unfair questions. These changes mean that the need for the protection involved in a right to give untested evidence no longer exists. It is an historical anachronism that should be abolished.

The Government intends to make extended use of the newly established Law Reform and Scrutiny of Acts Committees of Parliament. The Law Reform Committee, chaired by Mr. James Guest, MLC, has already been given three references to investigate: wills, restitution and directors of insolvent companies. The Scrutiny of Acts and Regulations Committee, chaired by Mr. Victor Perton, MP, has begun work on its references on the *Equal Opportunity Act* and the *Subordinate Legislation Act*.

A review of subordinate legislation is proposed to ensure that individuals and businesses are not unnecessarily regulated and that regulations are readily available to those affected by them, and by ensuring that matters that should be dealt with by law are dealt with by law, rather than by administrative arrangement.

A review of subordinate legislation is proposed to ensure that individuals and businesses are not unnecessarily regulated and that regulations are readily available to those affected by them, and by ensuring that matters that should be dealt with by law are dealt with by law, rather than by administrative arrangement.

Further use will also be made of the Law Foundation which has an impressive record in the area of law reform. Finally, the Government will create a Law Reform Advisory Council, to set in place a scheme whereby acknowledged experts in particular fields of law can be designated as temporary commissioners to conduct inquiries into areas within their fields of expertise.

SAFETY AND SECURITY

The Government is committed to giving a high priority to law enforcement, to assisting victims and to setting appropriate penalties for offenders.

To this end, the Government will pursue policies directed at reducing the incidence of violence in the community with education programs and programs directed at preventing domestic violence associated with alcohol and drugs.

The Government is examining proposals to extend the operation of the *Crimes (Family Violence) Act* and to implement domestic violence policies which will encourage police presence and the laying of criminal charges in domestic violence situations.

The Coalition has for some time been concerned with the effectiveness of the *Classification of Films and Publications Act*. Community concern has, in particular, been expressed about the unrestricted sale of magazines depicting acts of violence against women and degrading and demeaning images. An amending bill will tighten the definition of "objectionable publication" and will prevent the sale or display of such publications to children.

The Government believes that this initiative is a crucial link in any effective campaign to address violence against women. Any undertaking to ensure the safety of women in public places should not be contradicted by display advertisements on street corners for magazines condoning violence against women.

ASSISTING VICTIMS

A Victims of Crime Task Force will be established to report on steps which may be taken throughout the Government and private sectors to overcome problems faced by victims of crime. The Task Force will meet with victims to learn from their experiences. It will report on proposals from victims regarding the prevention and reduction of crime, victim support programs, victim witness assistance programs, privacy of victim information, and proposals for law reform in areas involving victims' rights.

Victim impact statements will be available for consideration by the Court prior to sentencing. These statements will take the form of comprehensive statements prepared at a time reasonably proximate to the offence or initial investigation. The statement will include information regarding the harm done and losses incurred and will be updated prior to the hearing so that the full effects of the offence upon the victim including any financial, social and psychological harm are made known to the Court. Victims will have the option of not making a statement.

The Government is also strongly committed to assisting victims in their understanding of the prosecution process. In working towards this goal, victims will be kept informed about the progress of investigations being conducted by law enforcement authorities, will be advised of the charges laid against the accused and any modifications to the charges, and in some cases, upon request, victims will be notified of a prisoner's impending release from custody.

PENALTIES AND SENTENCES

The Government intends to amend the *Sentencing Act* to ensure that sentences are in line with community expectations, particularly in cases involving extreme violence and sexual offences. The Government will increase custodial offences for sentences for serious and violent offenders and provide for cumulative sentences for repeat sex offenders.

On the topic of legal aid, requests for special Government grants for expensive trials raise sensitive issues about the relationship between the executive and the judicial system. It is inappropriate for the Government to determine, on a case by case basis, who does and does not get assistance for their defence.

Sentences for white collar criminals who misappropriate large sums of money will also be increased in line with community expectations.

The recent High Court decision *R v. Dietrich* poses problems for every state and territory in terms of legal aid resources. Means must be found to address this issue, particularly in the current economic climate. The Standing Committee of Attorneys-General has established a working party to consider options.

On the topic of legal aid, requests for special Government grants for expensive trials raise sensitive issues about the relationship between the executive and the judicial system. It is inappropriate for the Government to determine, on a case by case basis, who does and does not get assistance for their defence. The executive should not have a role in the conduct of a defence to a charge brought on behalf of the Crown.

THE COURTS

The Government is committed to containing the cost of access to the Courts by improving court and tribunal procedures and examining new ways of achieving speedy determinations of disputes.

Working towards these goals involves a review of the judicial and quasi judicial system of Victoria, protecting the independence of courts and tribunals and the development of a comprehensive framework within which they can carry out their functions on a fair and consistent basis. This entails protecting the constitutional independence of the Supreme Court and appointing members of tribunals and courts solely on the basis of merit.

The Government is also committed to efficient and cost effective management of courts and tribunals. Input from consumers, the legal profession and others on the performance of the courts will assist in the process.

THE JURY SYSTEM

Related to the proposals to reform the courts and court management procedures, are proposed changes to the jury system. The Government will introduce majority verdicts in criminal cases so that unreasonable disagreement with a verdict by one jury member alone will not affect the verdict. Amending legislation will also contain a number of amendments to streamline the jury system.

TRIBUNALS

It is the view of the Government that over recent years there has been a loss of confidence in tribunals. The independence of a tribunal may be open to question when it is located within a Ministry or Department with responsibilities that may create, or may appear to create, a conflict of interest. This is compounded where the members of a tribunal are short term appointees with no security of tenure.

Other problems are a lack of consistency in decisions, failure to apply the rules of natural justice, lack of acceptability where hearings are not open to the public and delays, which have the potential to destroy business and increase personal difficulties.

To address these problems the Government intends to reduce the number of tribunals, particularly where the jurisdiction of a tribunal overlaps that of the Courts. In future, the Government will carefully examine any proposal to extend the jurisdiction of existing tribunals and will establish tribunals outside the Court system only where there are special reasons which make a tribunal more appropriate.

The Government intends to bring the administration of tribunals which act judicially and determine disputes that raise general legal issues within the Attorney-General's portfolio, while leaving legislation establishing their jurisdiction and policy with the relevant minister.

I hope the proposals outlined above spark some debate among readers of this journal. I look forward to meeting with more of my colleagues to hear the views and ideas of the profession to assist in the law and justice reform process.

Jan Wade

DEMOGRAPHICS COMMITTEE REPORT

"The Future of the Bar"

THE BAR DEMOGRAPHICS COMMITTEE recently conducted an analysis designed to predict the future accommodation needs of the Bar. That analysis highlighted the financial pressures presently felt by members of the Bar and at the same time emphasized the difficulties which face Barristers' Chambers Limited so long as the present policy, namely that Barristers' Chambers Limited should be able to provide suitable accommodation for young lawyers who are commencing their career as barristers. So long as that policy is to be implemented, of course, it is essential that Barristers' Chambers Limited have the secure tenancy base provided by the present accommodation rules. The report of the Demographics Committee is reproduced below.

BAR DEMOGRAPHICS COMMITTEE
REPORT TO BAR COUNCIL

19 January, 1993

1. We have been asked to report on the likely future demand for accommodation at the Bar. The request comes at a time when, apart from the usual uncertainties attending any prediction, the following significant factors make the future more than usually obscure:

(a) national and international economies are in recession; the prosperity of the 1980s has receded for the present time;

(b) Victoria is more afflicted by the economic malaise than most other economies;

(c) the Victorian Bar is undergoing intense scrutiny by various bodies who consider that it may need to be reformed in ways both fundamental and cosmetic.

Add to these difficulties the consideration that mere barristers are being asked to embark on a statistical analysis of such data as exists, and it will be understood that, if a report to the Bar Council can be accompanied by a comprehensive disclaimer, this one is.

2. SOURCES OF INFORMATION

We have drawn from the Annual Reports for the past 20 years figures showing numbers in active practice and numbers signing the Roll each year. The numbers leaving the Bar each year can be calculated from those figures.

We have asked the clerks for information about the gross earnings of their lists from 1985 to 1992. They have been very helpful. We have provided them, in confidence, with a draft of this report, and have discussed it with them. Those clerks who have discussed the draft report with us agree with our conclusions.

3. CONCLUSIONS FROM FACTS AS KNOWN:

Rates of joining the Bar

Table 1 (annexed) shows the number joining the Bar, and leaving it, each year in absolute numbers and as a percentage of the previous years' total numbers. Table 2 (annexed) analyses each of those columns of figures, by identifying the maximum and minimum figure in each column, the average (arithmetic mean) of each, and the standard deviation[1] of each.

Numbers coming to the Bar have increased steadily in recent years. Thus, looking at numbers signing each year, the average over the past 20 years is 75, the average for the past 10 years is 85, the average for the past five years is 93. As a percentage of numbers in practice, however, the number signing the roll each year has been relatively stable.

Tables 2–4 (annexed) show that over the past decade the number signing the Roll each year is about 9% of the previous year's number in active practice. That percentage, or something like it, is common to the boom years and to the recession of the early 1980s.

At first glance, it is surprising that the rate at which people sign the roll does not vary more in response to broader economic trends. We think that there may be two quite different forces at work: in boom times, people come to the Bar because of a vocation or because they are attracted by the prospect of instant wealth. In lean years, people come to

1. For those not statistically minded, the standard deviation is a statistical measure of how widely any group of numbers is spread around the mean. The larger the Standard deviation, the less meaningful the average is.

the Bar because of a vocation or because it is the only occupation they can find.

Rates of leaving the Bar

By contrast, tables 2–4 show large swings in the rate of people leaving the Bar. In the years since 1978, it has varied from 1.5% to 8.1%. The average is 4%. It is difficult to know what factors contribute to the rate at which people leave the Bar from year to year; economic failure is clearly one of them. Pride, external financial support, and lack of employment alternatives probably act as damping factors.

Information provided by the clerks supports the anecdotal evidence that the recession is affecting the Bar as a whole and is seriously affecting between 20% and 30% of the Bar. The bottom 30% of the Bar (or thereabouts) is at or below the margin of viability.

4. PROFILE OF THE BAR

We have drawn from the current Roll of Counsel a table which shows the profile of the present Bar in terms of seniority. The profile treats each year of call separately. Taking the Bar by seniority in five year blocks, the present profile is:

Under 1 year call	81
2–5 years call	351
6–10 years	361
11–15 years	231
16–20 years	131
21–25 years	54
26 years plus	28
TOTAL	1237

Predicting the future size and composition of the Bar

Starting with the detailed profile, it is possible as a matter of arithmetic to postulate certain rates at which people join and leave the Bar in the future, and to generate a seniority profile as at any chosen time in the future. The exercise is relatively simple to do on an electronic spreadsheet. However, the simplicity of the task tends to obscure the speculative nature of the exercise.

For example, let it be supposed that the Bar will grow at a static rate each year for the next 30 years. Choose a net growth rate per year, say 5% (near enough the long-term historic average). The present number at the Bar is 1,237 people. In the year 2020, it would be 5,752. Suppose instead that a net annual growth rate of 4% is chosen: the number in the year 2020 would then be 4,430. The difference between the two projections exceeds the present population of the Bar.

We make it plain: the projections are extremely sensitive to small changes in the assumptions on which they depend.

5. ECONOMIC CIRCUMSTANCES OF THE BAR

For reasons discussed above, it is much more difficult to predict the rate at which people will leave the Bar. No obvious pattern emerges from the historical figures. Present circumstances are abnormally difficult for the Bar.

In our view, the most probable short-term future for the Bar will involve serious economic hardship for a significant number of barristers. Information provided by the clerks supports the anecdotal evidence that the recession is affecting the Bar as a whole and is seriously affecting between 20% and 30% of the Bar. The bottom 30% of the Bar (or thereabouts) is at or below the margin of viability. A significant number of barristers do not earn enough to survive without drastic economies or external support. The position has been deteriorating for the past two years, and is unlikely to start improving for several years.

Taking the Bar as a whole, gross fees received per head increased strongly from 1985 to 1990. In 1990 it stabilised and has now begun to decline slightly. The effects of this have not been uniform. If the Bar is notionally divided into three groups according to economic success, the top third continues to be busy and prosperous; the middle third is holding on by dint of hard work and ability to adapt; the bottom third is being decimated.

For the bottom third of the Bar, a crisis is at hand. Not all of them will leave the Bar. Some will no doubt stay because they are supported by a spouse; some because they are independently rich; some will hang on out of pride. Most will, no doubt, trim their expenses before accepting that they cannot survive at the Bar. Rent is for many the largest single expense. It is very likely that those barristers who are trying to trim their expenses will seek cheaper chambers if they can.

6. PROJECTIONS

We have done a number of projections, all extending to the year 2020. The critical assumptions are:

(a) the rate at which people sign the Roll each year;

(b) the rate at which people leave the Bar each year.

For reasons discussed earlier, we have assumed a static rate at which people join the Bar. We have chosen 8% in one case and 9% in the second, those figures being close to the historic average.

Such evidence as we have leads us to assume an abnormally high rate of departure from the Bar over the next three years. The principal reason for people leaving will be that they cannot afford to stay. In addition, our projections lead to the conclusion that the aggregate demand for accommodation will either stall or reduce in the short term. People leaving the Bar vacate chambers; people signing the roll do not take chambers for approximately 12 months. Accordingly, any apparent growth of the Bar caused by a sustained high rate of joining the Bar will not lead to a corresponding growth in the demand for accommodation. For this reason, we have shown in our projections not only the total projected numbers at the Bar, but also the number then in their first year.

Moreover, we believe that any increase in demand for accommodation will be an increase in demand for inexpensive chambers. This for two reasons: first, we think that some counsel who are not earning enough to survive may, before deciding to leave the Bar, try to cut their expenses. Rent is in many cases the largest single expense. Secondly, people coming to the Bar will mostly take the least expensive chambers. It is interesting in this connection to consider the range of rents charged by BCL. A table of accommodation provided by BCL is annexed. It is notable that a large majority of rents are in the range $500–$1000 per month. The physical accommodation provided in that range varies widely, according to the address. We think the demand for accommodation in or below that price range will increase significantly. This is especially so for those who share chambers: their accommodation is currently half-price. If sharing is prohibited, those who now share will very likely be reluctant to pay increased rent for the same or worse accommodation.

Table 5 shows the position from now until 2020 assuming a static joining rate of 8% and a rate of leaving which reflects a "shake-out" followed by a return to the historic average rate of leaving:

TABLE 5

	Join	Leave		<1yr	1+	Tot
1992				81	1156	1237
1992–95	8%	9%	'95	97	1103	1200
1996–00	8%	7%	'00	100	1162	1261
2001–05	8%	5%	'05	114	1349	1462
2006–10	8%	5%	'10	132	1564	1695
2011–15	8%	4%	'15	159	1904	2063
2016–20	8%	4%	'20	193	2316	2510

Thus, the assumptions in Table 5 lead to the conclusion[2] that at the end of 1995, there will be 1103 barristers renting chambers, and 97 reading in others, chambers; at the end of the year 2000, 1162 renting and 100 reading, and so on.

Table 6 assumes a static joining rate of 8% coupled with a less severe "shake-out" period, followed by a return to the same historic rates of leaving as are postulated in Table 5.

TABLE 6

	Join	Leave		<1yr	1+	Tot
1992				81	1156	1237
1992–95	8%	8%	'95	99	1138	1237
1996–00	8%	6%	'00	107	1259	1366
2001–05	8%	5%	'05	123	1460	1583
2006–10	8%	5%	'10	143	1693	1835
2011–15	8%	4%	'15	172	2061	2233
2016–20	8%	4%	'20	209	2508	2717

For the sake of comparison, Tables 7 & 8 assume a 9% joining rate, but otherwise adopt the assumptions used in Tables 5 & 6 respectively:

TABLE 7

	Join	Leave		<1yr	1+	Tot
1992				81	1156	1237
1992–95	9%	9%	'95	111	1126	1237
1996–00	9%	7%	'00	121	1245	1366
2001–05	9%	5%	'05	144	1518	1662
2006–10	9%	5%	'10	175	1847	2022
2011–15	9%	4%	'15	221	2359	2580
2016–20	9%	4%	'20	282	3011	3293

TABLE 8

	Join	Leave		<1yr	1+	Tot
1992				81	1156	1237
1992–95	9%	8%	'95	114	1161	1274
1996–00	9%	6%	'00	129	1348	1477
2001–05	9%	5%	'05	156	1642	1798
2006–10	9%	5%	'10	189	1998	2187
2011–15	9%	4%	'15	239	2552	2791
2016–20	9%	4%	'20	305	3257	3562

If asked to hazard a guess, we consider the most likely projections to be those in Table 8. However, if the economy improves significantly in the next few years, the assumed leaving rate for 1996–2000 may be overly pessimistic.

We are able to recalculate these projections using any combination of assumptions the Bar Council may think appropriate. We have limited the

2. It is important that the reader not be deceived by the apparent precision of these figures. They must be seen as estimates only. We think that as estimates they are a reasonable approximation of the future as we expect it to be. Note also that the calculations may show rounding-off discrepancies.

number of projections in this report, because there is a risk that an increase in the amount of mathematics may give this report an air of precision which it neither claims nor deserves.

CONCLUSIONS

The Bar as a whole is in recession. The bottom one-third is experiencing real hardship, which will cause many of them to leave the Bar over the next three years. People will continue to sign the roll in substantial numbers, but with limited prospects of success except for those with both talent and tenacity.

The demand for accommodation will not grow for the next 4 or 5 years. It will then begin to grow at about 4% per year. The present demand for accommodation is likely to shift, as some barristers move to less expensive rooms. The extent of this trend is likely to be affected by the quality of the refurbishment of Four Courts Chambers: if it provides inexpensive accommodation, but sheds its ghetto image, it is likely to be very popular for those who are just hanging on. The success of Isaacs Chambers shows that value for money is now a very important consideration.

J.W.K. Burnside
M.W. Shand
A.N. Bristow
A.P. Phillips
L.M. Simons

ANNEXURE: TABLES 1–4

TABLE 1:

Year	Sign	%	Left	%	Tot.	Growth	%
1992	95	7.7%	53	4.3%	1272	42	3.4%
1991	115	10.0%	38	3.3%	1230	77	6.7%
1990	103	9.4%	45	4.1%	1153	58	5.3%
1989	91	8.9%	19	1.9%	1095	72	7.0%
1988	82	8.2%	61	6.1%	1023	21	2.1%
1987	71	7.4%	29	3.0%	1002	42	4.4%
1986	63	6.7%	48	5.1%	960	15	1.6%
1985	71	8.0%	16	1.8%	945	55	6.2%
1984	95	11.5%	30	3.6%	890	65	7.9%
1983	86	11.2%	29	3.8%	825	57	7.4%
1982	61	8.4%	16	2.2%	768	45	6.2%
1981	73	10.6%	41	5.9%	723	32	4.6%
1980	63	9.7%	23	3.5%	691	40	6.1%
1979	82	13.2%	50	8.1%	651	32	5.2%
1978	67	11.9%	13	2.3%	619	54	9.6%
1977	44	7.9%	37	6.6%	565	7	1.3%
1976	97	19.5%	36	7.2%	558	61	12.3%
1975	68	15.3%	15	3.4%	497	53	11.9%
1974	38	8.9%	22	5.1%	444	16	3.7%
1973	38	9.6%	6	1.5%	428	32	8.1%
1972	44				396		

TABLE 2: 1972-92

	Sign	%	Left	%	Growth	%
Av:	75	10.2%	31	4.1%	44	6.0%
S.D.:	21	3.0%	15	1.8%	19	2.9%
Max:	115	19.5%	61	8.1%	77	12.3%
Min:	38	6.7%	6	1.5%	7	1.3%

TABLE 3: 1982-92

	Sign	%	Left	%	Growth	%
Av:	85	8.9%	35	3.6%	50	5.3%
S.D.:	16	1.5%	15	1.3%	19	2.0%
Max:	115	11.5%	61	6.1%	77	7.9%
Min:	61	6.7%	16	1.8%	15	1.6%

TABLE 4: 1987-92

	Sign	%	Left	%	Growth	%
Av:	93	8.6%	41	3.8%	52	4.8%
S.D.:	14	0.9%	14	1.3%	19	1.7%
Max:	115	10.0%	61	6.1%	77	7.0%
Min:	71	7.4%	19	1.9%	21	2.1%

CURRENT ACCOMMODATION PROVIDED BY BARRISTERS CHAMBERS LTD.

Building	Room size			Price bracket					
				$0—	500	1000	1500	2000	2500
	A	B	C	$500	—1000	—1500	—2000	—2500	—3000
Isaacs	30	59	0		59		30		
Aickin	6	12	0			12			6
Equity	3	29	19	48	3				
FCC	14	115	9	9	115	14			
Latham	25	79	48		127	25			
ODC	45	227	60		287	45			
ODCW	96	143	174		174		143		96
Seabrk	0	19	0				19		
Sub-tot:	219	683	310	57	765	96	192	0	102
Total:			1212						1212

REPORT OF THE NEW BARRISTERS' COMMITTEE

SINCE REPORTING IN THE LAST SPRING Edition of *Bar News*, I, along with others, have had the benefit of discovering just what the origins of the New Barristers' Committee are (See Summer Edition 1992). I am told that its establishment is due to the recommendations of a sub-committee appointed in March 1968 to look into "the ever increasing body of very junior Counsel". The sub-committee reported to the Bar Council on 17 July, 1972, recommending that the then 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".

Some 25 years later a more recently appointed committee of the Bar Council tells us that a demographic study of the Bar reveals that the Junior Bar remains "ever increasing", albeit less affluent. The nature of the Junior Bar has, like its senior counterpart to some extent, been greatly affected by the realities of our "ever increasing" economic woes.

The current members of the N.B.C. have taken on the task of dealing with issues affecting junior barristers, and ensuring that the lines of communication between the Bar Council and the Junior Bar remain open (as well as open minded). This in itself has not been an easy task, especially in the light of the little feedback the N.B.C. gets from its constituents. The Junior Bar must always keep in mind that its representation on the Bar Council is minimal when compared to the other more senior categories of representation. It is imperative, therefore, that the N.B.C. have a strong voice, and ensure that the Bar Council does not make decisions affecting the Junior Bar without reference to it.

Since last reporting, very significant inroads have been made into the Listing Practices at the Heidelberg Magistrates' Court and surrounding region. As a direct result of N.B.C. correspondence with the Chief Magistrate in June 1992 and there after, a committee consisting of representatives from various areas including the Police, Solicitors, Regional Co-ordinators and support agencies has been set up to look specifically into the listing and other problems encountered in the region. Understandably, the N.B.C. were invited to form part of that committee. Chris Wallis was nominated on behalf of the N.B.C. and is now working with the committee to look at ways of improving "traffic" through that region. No doubt many junior barristers are familiar with the working practices at Heidelberg Magistrates' Court and the frustrations often caused. Now is the time to air those frustrations and to make a meaningful contribution to the improvement of same. Expressions of interest, suggestions and/or grievances should be made to Chris Wallis or the N.B.C. as soon as possible.

The current members of the N.B.C. have taken on the task of dealing with issues affecting junior barristers, and ensuring that the lines of communication between the Bar Council and the Junior Bar remain open (as well as open minded). This in itself has not been an easy task.

In addition, the N.B.C. has forwarded correspondence to the Bar Council relating to the general management of the Bar including the problems of accommodation, purchasing of property etc. continuously afflicting the Bar in general, but more importantly the vast "ever increasing" Junior Bar. The N.B.C. has discussed in detail the possible formulation of a "Strategy" in respect of these problems. The Bar Council, in return, has expressed great interest in discussing these issues with the N.B.C. Recently, a meeting between the Executive of the Bar Council and the N.B.C. looked at ways that these issues could be addressed with as much input as

possible from the Bar as a whole. One of the suggestions was that a steering committee, consisting of members of the Bar Council and N.B.C., be set up to organise a conference at which all these issues could be addressed. Members of the Junior Bar are urged to contact any member of the N.B.C. with suggestions or concerns they may have, which could form part of the agenda.

Of concern to the N.B.C. has been the possibility that it may not be fully aware of its constituents' views on such matters as the keeping of Chambers and scale fees etc., and thus not be truly representative of the Junior Bar. Discussions are currently taking place as how best to achieve this awareness. One possibility canvassed is the distribution of a questionnaire. The format this questionnaire would take is still under consideration by the Bar Council and the N.B.C. Other forms of encouraging communications between the N.B.C. and its contituents are also being considered.

At a more recent meeting of the N.B.C. a substantial amount of time was spent on discussion pertaining to the possible setting up of Chambers in areas such as Dandenong. This was seen as a very positive discussion which addressed issues such as the Bar's accessibility to more remote areas, and the cost of same to the community. Whilst no formal decision or view has been reached by the N.B.C. on the establishment of regional chambers, it proves to be an issue which will be canvassed in future meetings. The Junior Bar is invited to discuss this matter with any member of the N.B.C., and any expressions of interest would be appreciated.

If, at this point, any member of Counsel is still reading, let it be known that the upshot of this article is to engender as much communication as possible between the N.B.C. and its constituents. Minutes of the N.B.C. monthly meetings are displayed in the glass cabinet outside Foley's office, and members are strongly urged to read them and discuss matters raised therein with the N.B.C.

The N. B. C.'s intention to take a far more active role in the decision making processes at the Bar has, I believe, been realised, but we still need to hear from you — the Junior Bar. In March of this year an election of the N.B.C. will take place. Use that opportunity to be heard and do not be shy in coming forward. After all, our strength lies in our numbers, and currently, the Junior Bar far outnumbers the "senior" Bar. It is always easy to express views about Bar Council decisions after those decisions have been made. With the ongoing "debate" about changes to the Bar in general, and as a profession, let's remember that the decisions of a few will predominantly affect the future of many — the Junior Bar.

Carmen Randazzo
ASSISTANT SECRETARY

BARRISTERS' CHAMBERS LTD

AT THE END OF LAST YEAR, AND SINCE the beginning of this year, rumours have been circulating that "BCL has issued (and some enormous number is quoted) eviction notices" to Barrister tenants. No doubt the subject has an inherent (if morbid) interest but the numbers quoted have always been a substantial exaggeration.

The general procedure followed by BCL in connection with rent collection is as follows. If a tenant fails to make two successive monthly rental payments, a Notice to Quit is issued. If the tenant fails to respond the matter is referred to solicitors who then start a process the successive stages of which are — demand, issuing a Writ for Possession and amounts owing, obtaining judgment and execution of the judgment. In a few extreme cases (4 over the last year and to date) the Sheriff has actually executed a warrant and taken possession of the chambers involved. The chambers are then advertised for reletting.

In the substantial majority of cases, negotiations take place early in the process and the matter is resolved. Unfortunately, some Barristers use the system to delay payment or (in a few cases) even avoid it altogether. The Barristers who do so cover a complete cross-section of the Bar from Seniors to Juniors.

The collection of outstanding rents was occupying so much of the time of the Board that a special Debtor Tenant Committee had to be constituted. It consists of Kellam Q.C., Habersberger Q.C., E.T. Fieldhouse, and myself, and has to meet at regular short intervals. There is no doubt that some members of Counsel find the current economic position extremely difficult. As at 19 February 1993:

Number of Notices to Quit currently served awaiting expiration:	20
Number of matters currently referred to solicitors:	23

Number of vacant chambers as at 19 February 1993

(a) ODCW	10
(b) ODCE	1
(c) Latham Chambers	14
(d) Aickin Chambers	nil
(e) Equity Chambers	nil
(f) Four Courts Chambers	57
(g) Isaacs Chambers	3

In accordance with its role as a Trustee on behalf of the Victorian Bar as a whole, BCL has no option but to (and will) pursue debtors as vigorously as possible, as the amount of rental collected is its major source of revenue to meet the many commitments which it has, itself, on behalf of the Bar.

Garth Buckner
CHAIRMAN OF DIRECTORS

REPORT OF FAMILY LAW BAR ASSOCIATION

SINCE THE LAST EDITION OF THE VICTORIAN *Bar News*, the Executive of the Family Law Bar Association has been active in representing its members interests. Communication between the Association and the Family Court continues to be maintained at a high level with the Judge Administrator (Southern Region) and the Registrar of the Court keeping the Association through its Executive advised of all current developments. In addition, the Executive reports to and advises the Victorian Bar Council on those matters relevant to the operation of Family Law.

The Melbourne Registry of the Family Court went live on "Blackstone" on 27 October, 1992. This completed the computerisation of the Court making the program operational Australia-wide. The Court requires that all documents be filed at least two clear days prior to the hearing, but in special circumstances the Registry has enabled documents filed prior to 4 p.m. on the previous day to be in court at the commencement of the hearing. This streamlining procedure has been most successful.

A number of barristers practising in Family Law have complained that the Legal Aid Commission has been slow in payment of their fees. This may well reflect the straitened economic times. However, this impacts greatly upon the junior Bar as much of their work is derived from the Legal Aid Commission. In addition, a number of barristers practising in Family Law remain critical of the unrealistic approach taken by the Commission in relation to the preparation of complicated Family Law matters. No consideration is given to reading and preparation time, or for the preparation of Chronology and other documents required pursuant to the Practice Directions of the Court.

On 23 October, 1992 the Association's Chairman, Guest, Q.C. and Vice Chairman, Watt, met with the Honourable Justice Frederico, Judge Administrator (Southern Region) and other members of the profession. The Association was advised: (a) that various simplifying procedures are to be introduced in the Family Court as from the 1 July, 1993, particularly with respect to Initiating Applications and pleadings; (b) the pilot mediation project continued to be funded by the Court, but whether funding can continue is speculative in the current economic climate; (c) the continuance of the judicial and registrar circuits will again depend upon funding, but the Chief Justice of the Family Court is strongly in support of maintaining country circuits; (d) a new protocol has been established concerning notification to Community Services Victoria (CSV) with respect to all notification and child abuse cases.

Concerns were raised at this meeting that CSV members answering subpoenas in child abuse cases were inexperienced. This matter is currently being investigated further by members of the Association and the profession in general.

Discussion also took place as to the duty solicitor scheme. It was considered that members of the Family Law Bar should act as duty counsel on a pro bono basis.

Recently, the Family Court has set out guidelines for special medical procedures pursuant to Order 23B of the Family Law Rules. These are intended as guidelines to operate between the Family Court of Australia, Melbourne and Dandenong Registries, the office of the Public Advocate (Victoria) and the Legal Aid Commission of Victoria. A circular setting out Practice Guideline 1/93 was recently sent to all members of the Association.

In addition, the Association was recently represented by Ron Curtain at a meeting of the judiciary and legal profession at the Dandenong Registry of the Family Court. A report of that meeting has been distributed to all members of the Association.

Once again, the Association conducted an extremely successful cocktail party for its members and selected guests on 27 November, 1992. Those responsible at Seabrook Chambers kindly gave their permission for the festive occasion to be held

in their building. Members also gathered to acknowledge and congratulate Noel Ackman on taking silk. Those present were treated to a humorous (and lengthy) discourse on the progress of Noel's career at the Bar. All members heartily join in wishing Noel success in his new role as one of Her Majesty's Counsel.

Any members of the Bar desirous of joining the Family Law Bar Association can contact either Elizabeth Davis (7592) or Graeme Thompson (7367).

AUSTRALIAN ADVOCACY INSTITUTE REPORT

THE AUSTRALIAN ADVOCACY INSTITUTE recently conducted a bold experiment. It staged an appellate advocacy workshop expressly aimed at senior and experienced advocates. In the panoply of virtues which characterise the average barrister, humility is not prominent. It might be thought that a workshop intended to teach senior advocates how to run an appeal would wither for want of starters.

The result was otherwise. Forty senior and experienced advocates from around Australia enrolled and attended the weekend workshop. It was held in the Supreme Court building in Sydney. The teaching team comprised Mr. Justice Hampel and 10 silks and senior juniors from around Australia. Without exception, the response of participants was enthusiastically favourable. Even those participants who were obviously very talented and experienced found the workshop rewarding and instructive.

Since the verbatim column of the *Bar News* is uncompromisingly up to date, it is essential to record here a story told by Barry O'Keefe, Q.C. at the workshop. It arose in the context of discussing techniques of handling uninformed questions from the bench. As O'Keefe tells the story, R.P. Meagher, Q.C. (now Meagher JA) was appearing as Counsel in the Court of Appeal of New South Wales. Mr. Justice Kirby was presiding. His Honour asked Meagher a question which involved a legal proposition not closely connected with any of the principal systems of jurisprudence.

Meagher — not widely known for his tact or discretion — leaned forward, looked at the President and said: "Oh, Your Honour is such a tease".

He then passed on to another subject.

It is to be hoped that the Australian Advocacy Institute will continue to conduct workshops at such a high level.

Julian Burnside

REPORT OF THE COST OF JUSTICE INQUIRY

THE SENATE STANDING COMMITTEE ON Legal and Constitutional Affairs published its first report on the Cost of Justice in February this year. That report is entitled "Foundations for Reform". The Committee reached a number of conclusions some of which are set out hereunder.

18. The Committee believes that Australia has a basically sound legal system which nevertheless is in urgent need of substantial reform.
19. The disrepair is of such a degree that it will require continual attention by those who share the responsibility for the current situation and who, through that responsibility, have an opportunity to contribute to making the system what it should be.
20. There are a number of reasons for the legal system's current incapacity to meet community needs.
21. From a structural perspective, responsibility for the legal system is significantly dispersed. This, of course, is on one hand an important attribute. It allows a variety of approaches to be taken to particular issues and offers a vital protection against any one body gaining ultimate control. An uncontrolled legal system, in that sense, is vital. Nonetheless, with no single body holding responsibility it has been relatively easy for each body to allow their contribution to the operation of the system to fall short.
22. The vast majority of the users of the system are touched by it only occasionally in their lives. When they try to use the system and find it unsatisfactory, the consequences, both personally and financially, can be devastating.
23. However, until that happens, few citizens have much interest in the legal system. The consequent lack of interest shown by the majority of the population, combined with the pressure historically exerted by sections of the profession, has made maintenance and reform of the system a secondary issue for political parties and successive governments.

SECTION 4 — THE LEGAL SYSTEM: THE COMMITTEE'S APPROACH TO NEEDED REFORM

24. There are many strengths in the present legal system and these ought to be preserved. It is independent from political interference and generally free from corruption. Most courts are competent and that competence should not be allowed to diminish. Criminal trials are generally conducted with care, with keen attention to individual rights and with the integrity of the whole criminal justice system in mind. This approach is appropriate and should be maintained. Most practitioners carry out their legal work professionally and to the highest ethical standards. Australia has developed legal assistance schemes of merit and these should be maintained and improved.
25. There has also been a significant growth over recent decades in the opportunities available to people to protect their rights. The establishment of such bodies as the Administrative Appeals Tribunal, the Social Security Appeals Tribunal and the various small claims jurisdictions are examples of this.

WEAKNESSES OF THE PRESENT SYSTEM

26. While our legal system has undeniable strengths, it also has obvious and endemic weaknesses. Criticisms of our courts have included the cost of conducting litigation before them, the delays in having matters heard, an apparent tolerance for unwarranted tactical manoeuvres rather than resolving the issues in dispute, and disparities in the quality of representation before them.
27. A particular weakness the Committee points to elsewhere in the legal system is the arcane work practices used by some members of the profession.

REFORM ALREADY OCCURRING . . .

28. The Committee recognises that reform of the legal system has been considerable in recent times. There has been a series of inquiries into the legal profession by both federal and state bodies. When reform is the subject matter of intense public discussion, much change is likely to occur. This has been the case since the Committee's inquiry was initiated in May 1989. Many now see, for example, that there is a different attitude to advertising by lawyers, to the availability of contingency fees, to intervention by judges in the management of litiga-

tion, and to the use of processes other than the courts for resolving disputes.

. . . BUT NOT COMPLETE

29. However, evidence before the Committee showed that there are still widespread problems within the legal system, and its effective reform requires change in many areas, and co-operation between all those involved in it.

NO CO-ORDINATION OF REFORM

30. While many people and organisations have a voice in the operation of the legal system, no one accepts overall responsibility for examining problems and co-ordinating reform. The judiciary, the executive, the legislature, the legal profession, the law schools and law reform and legal aid bodies are among those organisations which share responsibility. As a consequence of Australia's establishment as a federation, responsibility is further divided among a multiplicity of judiciaries, executives and legislatures.

MOMENTUM FOR REFORM

31. While there remains much to reform in the legal system, the Committee's inquiry showed that there is now widespread commitment to change. It is imperative to maintain a permanent process for renewal and change. The first report aims to set in train a systemic renewal which will put reform of the legal system permanently on the agenda of those who have the capacity to improve the system.

QUALITY OF JUSTICE

41. It is vital that recommendations for reform of costs and legal processes should not reduce the quality of justice. This means that a fair outcome should be delivered expeditiously and at a reasonable cost. The community needs a legal system to enable its members to obtain relief from the oppressive actions of government, to provide for the proper resolution of civil disputes, to ensure a fair trial for criminal proceedings, and generally to ensure peace, order and equity. A legal system which inexpensively produces flawed results is not a legal system which produces justice. A system which produces 'fair' results only after an endless wait and boundless expense is similarly not a justice system.

MATTERS DETERMINING QUALITY

42. The quality of justice is determined by a number of factors. For example, it is affected by the competency of the people who administer the legal system, by their ethical standards, and by the time taken and the costs involved in having a matter resolved. It depends on the ability of the public to understand the workings of the law and, of course, the public's preparedness to use the law in an ethical manner.

ACCESS TO JUSTICE

43. The Committee received this reference as a result of the concern felt by many members of the community at the high cost of enforcing or defending their rights. Clearly, there is no point in having unenforceable or non-exercisable rights. A legal system which is not affordable is not accessible. It therefore does not meet community needs. There is little point in offering an elaborate system of justice which is so expensive few can make use of it.

DIRECT RESPONSIBILITY

48. In principle, the Committee considers that it is those who operate the machinery of justice who must bear the direct responsibility for its maintenance and repair: namely Parliament, the Executive, the Judiciary and the legal profession.

PARLIAMENT

49. What the law is to be and what resources are to be allocated to its administration are matters within the direct responsibility of Parliament.
50. Parliament passes and amends an ever-increasing volume of legislation. For example, the number of pages of legislation produced by the Commonwealth Parliament in 1991 was approximately 270% more than that produced in 1980.
51. It is difficult to establish how much of this legislation has been necessary or reasonable, but a considerable proportion has clearly been made without regard to the costs that result — costs which are ultimately borne by the community.

THE LEGAL PROFESSION

72. The legal profession currently has much say in many of the rules governing the conduct of its own members, including legal training, admission to practice, fee scales, advertising of services and of fees, and complaints against practitioners.
73. Broadly, the profession must ensure that it uses the privilege of self regulation not for its own self-interest but for the benefit of litigants and the general community. If the profession cannot deliver to the community a proper opportunity to exercise its legal rights expeditiously and at reasonable cost, the community will have to take steps to see that it does.
74. On the other hand, the profession as a whole has borne an unfair share of the public resentment at the high cost of justice to which some of its members have contributed.

Some lawyers charge very high fees. They say people do not have to engage them and can get adequate legal services elsewhere. This means they reserve their services, which are usually of the highest quality, for wealthy clients only.

75. It is important to realise that lawyer's fees are affected not just by the rate or scale used to charge but the work which they must do in order to achieve a particular goal for their client. What work is done is in turn affected by the procedures and rules of evidence laid down by the judiciary and to a certain extent by Parliament, and the work practices that have evolved over the years.
76. It is fair to point out that it is not the profession which makes the rules of evidence, the procedural rules or the practice directions under which they operate. It is the legislators and the judges who do so.
77. The profession cannot, however, wash its hands of the problems facing those who wish to exercise their rights and because of the cost cannot do so.
78. If the profession wishes to continue to be regarded as a pre-eminent profession then it must exercise, to a greater extent than it has, a measure of professional responsibility. It can do this in a number of ways.
79. First, it can raise ethical standards and promote ethical conduct among solicitors and barristers. The profession should ensure that the highest standard of professional behaviour is followed by its members.
80. Second, it can make greater efforts to stamp out the over-servicing and over-charging that does exist. It can do this by making the public more aware of the avenues through which complaints as to costs and inefficiency can be addressed and by setting and rigidly maintaining standards of conduct which ensure that clients are fully aware of the basis on which fees will be charged.

FEES: THE LEGAL PROFESSION

86. Lawyers' fees are usually the main component of the costs which make it difficult or impossible for a litigant to prosecute an action or to properly defend one. Lawyers' fees also form the major part of the cost of undertaking non-contentious legal work.
89. Fees are in large measure a problem it is incumbent upon the profession to alleviate. There are members of it who deserve great credit for the efforts they have made to do so. But given the fact that the expense of litigation denies many people proper access to justice, the profession must do more.

FEES AND FAIRNESS

90. Some lawyers charge very high fees. They say people do not have to engage them and can get adequate legal services elsewhere. This means they reserve their services, which are usually of the highest quality, for wealthy clients only. Those with moderate incomes must be content with solicitors and barristers who experience and abilities command lesser fees, or must hope that experienced and able practitioners will act for them at lower charges than they might otherwise make. An adversarial system requires that there be a reasonable balance between the strengths of the adversaries, which may be disturbed by a disparity in representation.
91. One of the ways to alleviate this imbalance is to initiate new forms of legal assistance and improve existing schemes. Future reports will deal with Legal Expense insurance schemes and Contingent Legal Aid Fund schemes which can help increase the supply of legal support available to clients.
92. The Committee is also encouraged by developments such as the pro bono scheme proposed by the Law Society of NSW, and in force in Western Australia. However, in general terms, the present situation hardly seems consistent with a profession whose avowed purpose is seeing justice done.

LEGAL WORK BY NON-LAWYERS

95. Evidence was put to the Committee that there is a substantial amount of work that lawyers now do which could, without any risk to the community, be done by others. For example, the transfer of interests in land is undertaken by licensed conveyancers in South Australia and Western Australia with no demonstrable harm to the public. There is no good reason why this situation should be restricted to these few jurisdictions.

TRADE PRACTICES COMMISSION

96. The legal profession may at this stage not be subject to the power of the Trade Practices Commission (TPC) but if it does not take significant and continuing action to reform itself then Parliament should make it subject to the TPC and take whatever means available to it to bring about the level of improvement that is required.

BAR COUNCIL REACTION

THE VICTORIAN BAR COUNCIL REACTED to the C.O.J.I. Report with the following press release:

"The Victorian Bar Council read with great interest the Senate Committee's Report on the Cost of Justice. It is probably premature to comment in detail but the Senate Committee has decided to publish a series of reports of which this is the first, in order to maintain a momentum for change and this initial report recognises that responsibility for the legal system is "significantly dispersed". This forebodes a balanced, fair and constructive enquiry which perhaps most importantly of all will elicit, as a result, voluntary support and effort from all sections of the legal profession in its endeavour to achieve change and reform.

The Victorian Bar welcomes the suggestion that all sections of the profession identify what they have done each year to reduce costs. Last year, the Spring offensive in the Victorian supreme court involved the Court, its Judges and counsel and solicitors acting free of charge, in a co-operative effort to reduce backlog in the Court's Lists.

The Senate Committee Report recognises that legislators, legal bureaucrats and Courts in addition to barristers and solicitors all have a role to play in reducing the costs of justice. Technology also will have a part to play. This is a balanced, realistic and global view. Understanding the structure of the legal system is critical to proposing constructive suggestions for change.

The Senate Committee also recognises that all Australia is undergoing microeconomic reform. The Victorian Bar is considering every suggestion for change made by the Committee. It is not expected that the Bar will see eye to eye with the Committee on every single matter, but the considered tone and wide perspective of the Report promises a fair hearing to all providers of legal services while at the same time expressing uncompromising determination for change. Change it promises but it will be well thought out change and will occur across the entire legal system".

LAW COUNCIL REACTION

IN RESPONSE TO THE RELEASE OF THE C.O.J.I. Report the Law Council put out a press release in the terms set out below:

"The President of the Law Council of Australia, Robert Meadows, said today that although he had not had an opportunity to study in detail the first report on the cost of justice by the Senate Standing Committee on Legal and Constitutional Affairs, he believed the majority of the committee had dealt with the issues in a balanced and constructive way.

Mr. Meadows said that as he read the report he found himself agreeing with much of what had been said by the majority, and was pleased to see that the committee had not been taken in by some of the more hysterical submissions put to it.

Mr. Meadows said: 'The legal profession is more concerned than anyone about access to justice. I am sure the profession will continue to co-operate with the committee, and with others, in an ongoing effort to make justice more accessible. The committee's acknowledgement of the changes that have already occurred in the justice system is welcome.

'The Law Council agrees that the responsibility for the legal system lies not just with lawyers, but is dispersed amongst parliaments, governments, judges, practitioners, law schools and users, and we will work with them all.

'The committee refers to the huge increase in the volume of laws — some of it (much of it, in my view) complex, ill-expressed and difficult to distil — and says it is difficult to establish how much of this legislation has been necessary or reasonable and that a considerable proportion clearly has been made without regard to the costs that result — costs which are ultimately borne by the community. I agree.

'This flood of legislation is a major contributor to the cost of justice, and efforts to reduce the flow and produce laws that are as simple and clear as possible must be pursued by all legislators.

'It is significant that the committee says it has received little evidence to show that there has been any significant growth in real legal fees over recent years, and that there are members of the profession who deserve great credit for the efforts they have made to alleviate the burden of fees.

'Nevertheless, the profession does recognise that there is a serious cost burden for many people. That is why the profession pioneered the legal aid system many years ago, and took the lead

in developing legal expenses insurance schemes and litigation funding schemes, and new, alternative approaches to the resolution of disputes to avoid litigation. What does not seem to be recognised is that these are all initiatives of the profession'.

Mr. Meadows said the assertions of Senators Schacht and Spindler in their dissenting report were based on isolated anecdotal evidence, and could not be seen as giving a fair view of the profession as a whole. They appeared to ignore the efforts of the profession to provide appropriate complaints mechanisms in which lay people were already involved, and to have chosen to ignore the report by the South Australian Institute of Labour Studies which had told the truth about lawyers, incomes.

Mr. Meadows said: 'It is unfair to the great mass of lawyers to seek to equate their income with those of the relatively few high-flyers'".

ABA GOES BACK TO FIRST PRINCIPLES

THE AUSTRALIAN BAR ASSOCIATION AT its February Committee Meeting adopted a Charter which "sets out in simple form the principles by which the Bars in Australia set their standards, maintain their rules and justify their existence".

THE CHARTER OF THE AUSTRALIAN INDEPENDENT BARS

The essence of the independent Bar is service — to the community, the institutions of Justice and the law itself.

The Australian Bar Association now, for the first time, formulates the previously unstated — but widely understood — principles by which this goal of service is to be achieved. It is these principles which the unique structure and features of an independent Bar seek to embody.

The principles are:

1. INTEGRITY

Barristers should maintain the highest standards of integrity and straight dealing with clients, solicitors and colleagues. There is also the primary duty owed to the court itself of truthfulness and frankness. It covers the obligations which are cast upon a barrister by reason of access to clients' confidential information.

2. QUALITY

That the quality of the representation and other work performed by barristers should be maintained at the highest possible levels is of course fundamental, and has always been one of the cornerstones of the independent Bars.

3. INDEPENDENCE

Independence is perhaps the most striking feature of practice as a barrister at a separate Bar. Barristers should be, and by virtue of their membership of the Australian Independent Bars are, independent of each other, of the courts, of Government and (save for such dependence as is required by a particular professional engagement) of solicitors and their clients.

4 ACCESS

Barristers should be accessible to all members of the community who have legal problems, particularly those requiring representation in the courts. Access to a competent barrister of their choice is in most cases the means by which members of the community may achieve "access to justice".

5. INFORMATION

The community, particularly the solicitors by whom barristers are briefed, should be well-informed of the range of barristers available to perform work within the various fields of practice.

6. DIVERSITY

As far as possible the range of choice of barristers available to solicitor and client for the performance of a particular brief should be maximized. Diversity in this sense will increase the likelihood that the barrister best suited to the problem in question will be available for the brief.

7. COMPETITION

This principle is no more than a statement of the reality that barristers are in competition with each other (and in many cases with other providers of the relevant legal services) for the work which is available. The existence of this competitive framework enhances the standard of service provided by barristers.

These principles, no one of which can be taken in isolation, are those by which the independent Bars set their standards, maintain their rules and justify their existence. The Australian Bar Association and its constituent bodies pledge themselves to support measures which will promote the practical expression of these principles.

Australian Bar Association, Canberra
1 February 1993

WELCOMES

AUSTIN ASCHE: CHIEF ADMINISTRATOR

ON 26 FEBRUARY 1993 AUSTIN ASCHE WAS sworn in as Chief Administrator of the Northern Territory. He is the second of Sir George Lush's readers to presently hold the highest office in a State or Territory of the Commonwealth. The Governor of Victoria is the other.

Austin was born on 28 November 1925. Both of his grandfathers were lawyers — Thomas Asche who emigrated from Norway and George Woinarski who came to Australia from Austria. His great uncle was the celebrated Australian actor Oscar Asche. His father Eric Asche interrupted a law course at Melbourne University to join the first A.I.F. In France he completed his law studies at Magdalen College Oxford. Austin's mother was a niece of Judge Zichy Woinarski and cousin of Judge Severen Woinarski, father and son, and both former judges of the County Court of Victoria.

Some time after returning to Australia Mr. Asche was appointed Crown Law Officer in Rabaul and subsequently Crown Law officer for the Northern Territory. The family then moved to Darwin and it was at the Darwin Primary School that Austin commenced his formal education. There, he and those of occidental origin, were overwhelming outnumbered by young Australians of oriental family background. Later he continued his education at Melbourne Grammar School and made the sea voyage home only in every second year. He was awarded a scholarship to Melbourne Grammar and a scholarship to Trinity College within the University of Melbourne.

From 1944–1946 he served in the R.A.A.F. Most of his service was as a member of a radar unit stationed on Bathurst Island which lies off the coast from Darwin.

On discharge, taking up the scholarship at Trinity College, he commenced his studies at Melbourne University, graduated B.A. L.L.M., served articles under Sir Rupert Hamer, signed the Bar Roll in Queensland in 1951, read with Graham Hart of the Queensland Bar and practised in Queensland for three years. He then returned to Melbourne, signed the Bar Roll here in 1954, read with George Lush, took silk in 1972 and practised until he was appointed Senior Judge of the Family Court in Victoria on the information of the Family Court in 1976. In 1986 he resigned from the Family Court and was appointed first a Judge of the Supreme Court of the Northern Territory and in 1987 Chief Justice of that Court. From the latter appointment he resigned to become Chief Administrator of the Northern Territory.

His energy is inexhaustible, his interests are legion and always being extended, his manner is easy and relaxed, his nature — tolerant, friendly, gentle and loyal.

Few could have had busier practices than he in his middle and senior years at the bar. For most of that time he employed four secretaries to type the product of his dictation. His special interest at the bar was family law. In this field, not only did he have a huge practice, but also, he lectured, served on numerous relevant committees and assisted in the drafting of legislation. After taking silk he practised more generally, particularly in the criminal jurisdiction.

From 1974 to 1985 he was a member of the Council of the R.M.I.T. and its President from 1980 to 1982. From 1983 to 1986 he was Chancellor of Deakin University. He became Chancellor of the Northern Territory University in 1989. Apart from making contribution to education at the highest level, he has for a long time, and continues, to give lectures to senior school students on the law, Shakespeare, and Australian and English poetry. Recently he re-read all of Dickens' novels to prepare himself for a lecture he gave to a learned society. For years his friends have enjoyed his recitations of poems from Banjo Paterson, Henry Lawson, John Shaw Neilson, Judith Wright, Douglas Stewart, William Yeats and a host of others.

He has devoted much of his time to membership duties and service to Free Masonry. Between 1984–1986 he was Grand Master of the United Grant Lodge of Victoria. Many of his friends believe that his great capacities have been enlarged by his successful marriage to Val. She is a micro-biologist, a Ph.D. and in her own professional field has made and continues to make as great a contribution as Austin has to his. Their daughter Wendy works as an anthropologist in Timor. Their son Harry is a civil engineer in Queensland.

Austin is fortunate that the Australian Akubra and not the Gold Laced Cocked hat is de regueur for Northern Territory Chief Administrators — he has a habit of losing hats.

DOUGLAS GRAHAM Q.C.: SOLICITOR-GENERAL

ON 22 DECEMBER 1992 DOUGLAS GRAHAM Q.C. was appointed the 5th 'modern' Solicitor-General for the State of Victoria. All agree that he will be a very model of a modern Solicitor-General. Douglas Graham comes of a long line of lawyers, his grandfather, father and brother have, each in succession, been the senior partner of the old-established firm of Madden Butler Elder & Graham. He was educated at Melbourne Grammar School and Trinity College, Melbourne University; and graduated with an honours degree in Law in 1962. He was admitted to practice in 1963.

He spent some time as an Associate to the Honourable Mr. Justice Kitto before taking up practice at the Bar. In 1978 he was appointed one of Her Majesty's Counsel for the State of Victoria and thereafter appeared frequently in the High Court. He was much briefed in Administrative Law and Constitutional cases and he has a wide experience in the Commercial, Town Planning and Valuation areas.

He served as Honorary Secretary of the Bar Council in 1969-1971 and as a member of the Bar Council for a period of 4 years from 1984 to 1987. He was Vice-Chairman in 1986–1987. In 1983–1984 he was a member of the Legal Aid Commission.

At the time of his appointment he was Chairman of the Bar's Rules of Conduct Committee and a valued member of the Ethics Committee. His capacity for precision combined, at least in recent years, with a certain degree of pragmatism, contributed significantly to the deliberations of the latter Committee.

That same penchant for precision and what one solicitor described as his "generalship" were highly relevant to his success at the Bar. They will assist him to fulfil the fascinating but difficult role of Solicitor-General in a detached and precise, but realistic, fashion.

The Bar wishes him well.

FAREWELLS

Hartog Berkeley, Q.C.: Solicitor-General

IT WAS THE SUMMER OF 1983. HARTOG had been Solicitor-General for a few months. The air conditioning in 221 Queen street had broken down. Hartog rang the Secretary of the Public Works Department to tell him that he had just installed an air conditioner in his chambers at his own expense. "Oh no Mr. Berkeley, what you have to do is . . ." "I didn't ring you to ask permission I rang you to tell you that I have fucking well done it''. Ten minutes later the Secretary of the Law Department with a broad smile on his face arrived at Hartog's chambers. "Gee it is hot in here Hartog". He left. The Public Service knew that Hartog had arrived.

Over the next ten years Hartog devoted himself to cutting through the palaver in order to give direct sensible and practical advice to the Government.

As one would expect his term was not without controversy. The stories are too many to be recounted here. Those addicted to tradition for its own sake found Hartog a difficult hurdle to jump. Those who needed advice (rather than to be told what they wanted to hear) found him a man of the highest professional standing and integrity. The Judges of the High Court could rely on Hartog for some light relief from the tedium so often the result of dull presentation of serious argument.

Hartog for many years, and particularly when Chairman of the Bar Council, has been unstinting in his support of, and loyalty to the Bar. On his retirement as Solicitor-General in September last year he returned to private practice and has taken chambers on the 16th floor of ODCW. He has brought with him his lovely secretary Rosemary Gordon.

Welcome back Hartog and welcome Rosemary.

Master Gawne

MASTER VINCENT MATHEW GAWNE retired as Listing Master of the Supreme Court of Victoria on Friday 26 February 1993 having completed 15 years of service to the Court, the profession and to the public of Victoria.

Prior to his appointment Master Gawne was a very experienced and highly respected litigation solicitor, having been a partner with Molomby & Molomby for some 25 years. This background gave him the knowledge and might necessary to enable him to carry out his tasks as Listing Master with fairness and precision,

The initiative to appoint a Listing Master came about because of the recognition by the Judges of the fact that judicial time and Court resources were not being fully utilised under the then listing procedures of the Court.

Upon his appointment Master Gawne had to introduce a whole new culture to the listings of cases in the Supreme Court. Judges and the profession had to be educated to changing community expectations and there was some reluctance on the part of practitioners to the changes which had to be brought about. To achieve these changes Master Gawne demonstrated great commitment, knowledge and experience and those who can compare the current day procedures for the fixing of cases and those which were relied on prior to his appointment will verify that major changes for the better have come about.

The single biggest achievement has been a better utilisation of the Courts resources and a more efficient system of listing cases and this achievement will be a lasting monument to Master Gawne and the undoubted success he has had in this position.

Master Gawne was born in 1926 in Ararat. Upon moving to Melbourne he was educated at De La Salle College, Malvern, and as soon as he was eligible in age, he joined the Australian Army in 1944 and served overseas in several theatres of war. Master Gawne was with the first Australian troops to land in Japan at the end of the war and served for a time in the occupation forces. Upon returning to Australia he undertook his law course at the University of Melbourne working long hours during his vacations to support himself through his course. His

close friends will vouch for the fact that he spent many hours as a maintenance painter on the St. Kilda Pier.

On graduation Master Gawne served his articles with Mr. T.W. Brennan and on admission to practice as a barrister and solicitor he joined Molomby & Molomby where he remained until his appointment as Listing Master. Master Gawne who is married to Elizabeth and has three adult sons is looking forward to his retirement. He has always had a keen interest in public affairs, is a prolific reader, and proposes to undertake studies in art and music, activities which will complement his plans; to travel widely overseas in future years.

Master Gawne has a very keen sense of humour, but given the circumstances of many of the applications before him was denied the opportunity of sharing that quality with practitioners. From time to time a flash of that humour was evident, particularly when inexperienced applicants sought to support their applications by referring to unusual problems they were encountering in practice. Without doubt Master Gawne will draw on those situations as he muses on his 40 years of service to the law. The profession wishes him a long and happy retirement.

NINETY NOT OUT!

THE HONOURABLE SIR REGINALD SMITHERS Q.C.

REGINALD ALLFREE SMITHERS WAS BORN in Echuca on 3 February 1903. He attained the age of 90 years on 3 February 1993, an occasion for much rejoicing. He was educated at Melbourne Grammar School and did law at Melbourne University. He signed the Roll of Counsel in 1929. He married Dorothy Smalley in 1932 and they had one daughter and two sons. His legal career was interrupted by World War II during which he served as a squadron leader in the R.A.A.F.

After returning to the Bar he developed a highly successful common law practice and in 1951 he took Silk. After that he became one of the most successful leaders in jury trials. His ability to persuade juries was legendary and he habitually succeeded for plaintiffs in cases which appeared hopeless to everyone but himself.

He gave substantial service to the Bar Council and was Chairman from 1961–62. Together with Gillard Q.C. and Ashkanasy Q.C. he played a leading role in the now historic move from Selborne Chambers to Owen Dixon Chambers in the early 1960s.

He received his first judicial appointment in 1962 to the Supreme Court of Papua and New Guinea where he served for three years. Subsequently he sat in the Supreme Court of the Northern Territory and the A.C.T. In 1965 he became a judge of the Australian Industrial Court and subsequently of the Federal Court of Australia when it was formed in 1977. He served on that Court until he retired as its senior puisne judge in 1986 at the age of 85. He was knighted in 1980.

Throughout Australia and Papua and New Guinea he was held in great respect and affection by the bars of the courts in which he presided. He was a hard working judge who was popular wherever he sat. He disposed of matters with expedition and high judicial skill. In 1987 he became a legal consultant to the firm of Dunhill Madden Butler and the respect and affection he had enjoyed on the bench followed him there.

On the occasion of Sir Reginald's 90th birthday Mr. Justice Black, the Chief Justice of the Federal Court, organised a lunch which was attended by the Federal Court Judges of the Melbourne Registry, some retired judges and his son Adrian who is a Family Court Judge. It was a most happy occasion at which the guest of honour spoke with his customary clarity and warmth. From the lunch he proceeded to a late afternoon party given in his honour by Dunhills where he charmed yet another audience with yet another of his speeches.

To meet and talk with Sir Reginald is always an enlivening and challenging experience. At the age of 90 his faculties appear to be undiminished. The Bar is delighted to mark the occasion of the 90th birthday of one of its distinguished sons. We extend our kindest wishes and warmest regards to Sir Reginald and Lady Dorothy.

No one really knows the secret of how Reg Smithers remains so active and young at heart. One possible explanation is his intense interest in the affairs of the moment. Reg is not averse to talking about the old days if someone asks him about them but his primary interest is in what is happening this week. Another Bar nonagenarian, Sir James Tait Q.C., had the same quality. Perhaps it is the secret of eternal youth.

OBITUARIES

Mary (Molly) Connor Kingston, 1911-1992

"No-one will forget her polite way, it was always the first, unprompted expression of her kindness, the true symbol of a mind as clear as day".
Jurge Luis Borges.

MOLLY KINGSTON WAS A POLITE WOMAN. She was also very determined and her career is testimony of her character. She was born on 29 May 1911, the daughter of the Sergeant in charge of the Highgate Police Station in Western Australia. Growing up with a brother and three sisters in the family home at Elvin Street Mount Lawley she attended the Sacred Heart Convent. She went to the University of Western Australia at Irwin Street (then known as 'Tin Pot Alley"), then to the new campus at Crowley. After completing a BA she went on to a Bachelor of Laws. A contemporary, Joan Heenan, describes her at the time as a woman with "a no-nonsense personality and a good sense of humour". Molly was a person who spoke of "not hiding one's light under a bushell". She said to me "there is no place in the world for a shrinking violet!" It seems on all accounts as an undergraduate Molly was a pleasant, friendly young woman competent and efficient. She had confidence in herself and her future. Joan Heenan also says "She was not at all shy — rather a strong character but not pushy — adept at putting forward her own views clearly." These descriptions seem very apt to those who subsequently knew her.

Molly Kingston was one of the first women students in the faculty of law at the University of Western Australia. She was taught by Professor F.R. Beasley, as well as such eminent part-timer academics as Sir Ross McDonald and Sir John Dwyer. After graduation she obtained articles with Lohrman Tindal and admitted to practice on 16 May 1933.

Anecdotal evidence is that her first appearance was before Chief Justice Northmore in the Supreme Court of Western Australia. The Chief Justice, a crotchety bachelor in his late 60s, apparently scrutinised the young Molly Kingston and exclaimed "And what do we have here! . . .". Molly was undeterred.

Molly Kingston

Molly set up practice with Sheila McClemans. The firm of Kingston and McClemans operated from 1934 to 1938 tending to specialise in family law. At the time members of the profession were non-plussed as to how they should write to the firm. "Dear Sirs" was obviously incorrect but what was the alternative. It was apparently left to Sir Walter James, the first President of the Law Society and doyen of the profession to come up with the right answer: "Just Dears".

In 1938 Molly Kingston joined the firm of Stone James & Co. After the war came she joined the WAAFS (Womens Australian Auxiliary Air Force) as a legal officer. Discharged in 1945 she spent 3 years in Sydney as General Secretary of the Australian Institute of Intentional Affairs. Sir Richard Boyer was Chairman. It was a time of vigorous growth in the Institute's history. By the beginning of 1949 Molly was ready to return to legal practice. She moved to Melbourne. She was admitted to practice on 3 October 1949. She immediately se-

Photograph courtesy *of "Brief"* The Law Society of Western Australia .

cured a partnership with the firm Ridgeway Pearce (later to be known as Ridgeway Pearce & Kingston and now known as Gadens Ridgeway). The lifestyle of Melbourne suited Molly. She lived in a flat in Hawthorn. She drove a succession of Peugeot motor vehicles. Her contemporaries at the time described her as a tall, slight, elegant woman (she had good lines a friend remembered), she dressed smartly and was a good conversationalist.

In 1962 she signed the Victorian Bar Roll. Her application to sign the Bar Roll was accompanied by this letter:

379 Collins Street
MELBOURNE
17 January 1962.

D.G. Williamson Esq.,
The Honorary Secretary,
Victorian Bar Council,
Owen Dixon Chambers,
205 William Street,
MELBOURNE C.1.

Dear Sir,

Enclosed herewith is my application to sign the Roll of Counsel.

I would be grateful if you would bring this letter to the attention of the Council so that it may be treated as an application for dispensation of the reading requirement.

The grounds upon which I make this application are:

1. I was admitted to practise as a barrister and solicitor in Western Australia in 1933 and in Victoria in 1949. With the exception of a period of 3 years in the Womens Australian Auxiliary Air Force during the war and later as General Secretary of the Australian Institute of Intentional Affairs, for three years, I have practised continuously as a barrister and solicitor since 1933.
2. Both in Western Australia and in Victoria my experience as a solicitor has been in common law and both in that State and in Victoria I have appeared frequently as Counsel in proceedings relating to domestic relations.
3. I propose to practise as Counsel along the lines of my experience.
4. While this application is based primarily on the above considerations there is the further factor that suitable chambers might not be available to me in six months time at the end of the normal reading period. I anticipate that my practice will be such that it could not conveniently or efficiently be carried on in shared accommodation either during the reading period or at its conclusion.

Yours faithfully,

M.C. Kingston."

Molly Kingston was never intimidated by Judge or silk. She fought her cases tenaciously — "like a lioness" one colleague says of her. She built up a solid practice specialising in Family Law. For seven or eight years she was a part-time lecturer in Family Law at the University of Melbourne.

With the coming of the Family Court system in 1973, Molly Kingston found herself less comfortable with the changing style of family law adjudication. She retired from practice in 1978 and thereafter devoted herself to the study of the arts and completed a fine arts degree.

She said of herself when signing the Bar Roll that it had traditionally been a male domain. "I really think this has deterred a lot of women from going to the Bar. Although there were no overt prejudices, nevertheless we were well aware that the Bar was seen to be a man's domain".

On her retirement she said "Being a woman was never an advantage to me, one always had to prove one's worth no matter what the circumstances". She certainly proved her worth. Her death at the age of 81 years concludes a remarkable career for a woman who pioneered practice at the Victorian Bar. Molly returned to live in Western Australia on retirement. She died peacefully at Alfred Carson Nursing Home on 26 December 1992.

NB. The writer acknowledges the assistance provided in this article by Geraldine Byrne, Editorial Committee Secretary of "Brief" The Law Society of Western Australia.

Graeme William Morrish Q.C.

GRAEME WILLIAM MORRISH, ONE OF HER Majesty's counsel, died on 26 January 1993 aged 50.

Morrish Q.C. was, for a long period, one of the leaders of the Criminal Bar in Victoria. He was born on 28 February 1942 and educated at Williamstown High School, the Royal Australian Naval College and the University of Melbourne, where he graduated in law.

Articled to John McDonald Smith of J. McDonald Smith & Co. in 1965, he was admitted to practice in 1966 and was employed by L. W. Broben & Co. from 1966 to 1968.

At the age of 26 he signed the Bar Roll on 21 March 1968 with McGrath, Monotti, Collis Q.C., Chernov Q.C. and Aizen. He read with Norman O'Bryan, now Mr. Justice O'Bryan, and immediately took up criminal law.

His readers were Champion, Patmore, Grant, Corker, Pirrie and Heeley.

He took silk in 1983 at the age of 41 and after 15 years at the Bar. His extensive practice was in all aspects of criminal law, including prosecution, defence, Royal Commissions and other Enquiries and appellate work in the Supreme and High Courts. He was regarded as one of the finest practitioners in his chosen area. His early death cut short a career which would have marked him as one of the greatest criminal advocates of his day. All who dealt with him found him to be a kind and gentle man who was determined to be calm and fair in all circumstances. He was always available to discuss other barristers' cases with them, even if that involved putting aside his own work. He was an immensely popular man who will be deeply missed by his colleagues at the Bar.

At a personal level, his lasting interests were athletics (he was a world class high jumper) and his beloved Richmond football team. He leaves behind his widow Jeanette (a member of this Bar) and many saddened friends.

Peter Faris

GST AND THE PROFESSIONS (AN ELECTION FOOTNOTE)

Reprinted from *The Australian Tax Review* with kind permission of the author, Dr John Emmerson Q.C.

IN THE MARCH 1992 EDITION OF THE AUSTRALIAN Tax Review Dr. Emmerson Q.C. contributed an editorial article which explained the impact of a goods and services tax on the professions.

With Dr. Emmerson's kind permission, this article which should be of significant interest to members of the Bar is reproduced below:

In view of the general approval which has greeted the proposed Goods and Services Tax, it may seem a little churlish to suggest that for most professional people GST will be a complicated and unnecessary additional burden leaving them worse off financially and having to spend an increasing proportion of their time and energies satisfying the administrative requirements of the Tax Office. However, much of the publicity which has surrounded the *Fightback* papers has tended to concentrate on income tax scales alone rather than on the wider effects of GST, and this is capable of creating an entirely misleading impression. The present article deals with the effect of GST on the professions, but it also contains some warnings which are of wider application. In expressing doubts about the value of GST, the article should not be taken as a general critique of the *Fightback* proposals, many of which are valuable. It is concerned with GST alone.

In the *Fightback* papers, the authors set out proposed new personal income tax scales to operate from 1 October 1994 and add that this, "means, in practice, that all taxpayers will enjoy substantial tax cuts". The question is whether this is true for the professions. In considering this question, it is a mistake to concentrate on income tax alone. As the example of the Medicare Levy should warn us, a tax is still a tax however skilfully it may be re-labelled.

Under the proposed GST system, income is taxed as income when it is derived and again as expenditure when it is spent. The combined effects of the two must be considered when calculating the total tax burden. In this context it is a mistake to conclude that money saved rather than spent is somehow not subject to GST. One only saves money in order to spend it in due course, and at that time GST is payable. The *Fightback* papers state:

"The present tax system discourages savings. Savings are discouraged because income earned from savings is taxed twice. In the case of a wage and salary earner, income is earned and taxed. If savings are made from after-tax income, the interest income earned will then be taxed. Thus income from savings incurs double taxation."

Both stages of taxation would be retained under the proposed GST system, but in *addition* further tax would be payable when the money was eventually spent.

It follows that in considering whether professionals will enjoy substantial tax cuts it is necessary to take into account not only the proposed changes in income tax but also the GST that will later be levied on what remains after income tax has been paid. GST will be levied at 15 per cent. However the authors of the *Fightback* papers estimate that the cumulative effect on the CPI will be an increase of 4.4 per cent. For the purpose of the present discussion it will be assumed that this estimate is cor-

rect, but two matters should be noted. First, for those taxpayers whose pattern of expenditure is not as assumed in CPI calculations, the effect of GST on their expenses may be considerably greater. Secondly, although the *Fightback* papers refer to GST as having a "net one-off price effect", GST is no more "one-off' than income tax or sales tax. It would be payable on substantially every purchase of goods or acquisition of services. In assessing the "gain in after tax income" produced by the proposals, the figures set out in the *Fightback* papers should be reduced to take into account the additional tax payable when the income is spent.

If GST increases the cost of professional services by 15 per cent but increases the cost of other goods and services by only 4.4 per cent, then there will be an immediate *relative* increase of cost of professional services of over 10 per cent. It would be too much to hope that there will be no consumer resistance.

Furthermore, tax on expenditure is not the only effect that GST will have on the disposable income of professional people. For the great majority of them, GST will be a new tax of 15 per cent levied on their gross receipts. The *Fightback* papers suggest that GST is not a tax on business: "It is the final consumer who ultimately pays" the tax. On this analysis, the professional person is seen as a tax collector rather than as a tax payer. However, a little reflection suggests that life is unlikely to be so easy. If GST increases the cost of professional services by 15 per cent but increases the cost of other goods and services by only 4.4 per cent, then there will be an immediate *relative* increase of cost of professional services of over 10 per cent. It would be too much to hope that there will be no consumer resistance. However clearly the client may recognize that GST is beyond the control of his professional adviser, he will be under financial pressure to economise on the services of that adviser. Nor, on past experience, are critics of the professions likely to take into account the impact of GST on those professions. In complaining about the cost of professional services, they are likely to concentrate on the total cost to the consumer, not the actual rewards received by the professional. The outcome of these pressures is likely to be that the professional adviser must absorb part of the GST himself or find that his volume of work decreases.

At this stage a disagreeable feature of GST emerges. GST is levied on *gross* revenue. No deduction is allowed for expenses save to the extent that they are rebateable (and in any event a rebate applies to part only of the expense). For professionals, major expenses are likely to be salaries and wages which are not rebateable. Thus, GST is levied on *gross* revenue, but if absorbed, must be paid out of *net* revenue. This tends to increase the importance of absorbed GST for the professional by comparison with income tax.

Similarly, if the professional seeks to pass on all GST to his client and thereby loses volume, he not only suffers a direct loss of revenue but also (since expenses seldom fall in line with reduction of revenue) a smaller profit margin on the revenue that he does receive.

Thus, in considering the effect of GST on professionals one should take into account

(a) a fall of 4.4 per cent in the purchasing power of after tax income,

(b) any GST which must be absorbed by the professional, and

(c) any reduction in volume of business produced by GST loading on professional fees.

The precise numerical result of these matters depends, of course, on one's detailed assumptions. However several general points emerge from simple calculations. First, if the professional seeks to absorb the whole of the GST then his purchasing power falls *regardless* of his original income and expenses. If, more cautiously, he absorbs sufficient of the GST to keep the increase in charges to his client to the CPI figure of 4.4 per cent, then his purchasing power still falls, regardless of his original income and expenses. Suppose, more cautiously still, he absorbs only one third of the GST, then his position depends on the size of his expenses and the extent to which his volume of work is affected by GST. However, even here on most reasonable assumptions his purchasing power falls. Take, for example, a rather favourable case in which his expenses amount to one third of gross revenue after tax and there is no fall in the volume of work as a result of GST: then he would break even on an income of $50,000 but suffer a fall in purchasing power at either a higher or a lower income. (The reader may care to calculate the effect of GST in his own case.)

Thus, it is likely that the purchasing power of most professionals (other than those in exempt professions such as medicine) would be reduced. The picture that emerges is unfavourable on this ground alone. However GST has the additional problem of requiring a greatly increased amount of dealing

with the Tax Office. Typically, the taxpayer would be required to file six returns per year. In this context, an undesirable feature of GST is the amount of paper involved. As the *Fightback* papers note, one of the burdens imposed by government in Australia is "endless paperwork". Unfortunately, for professionals the proposals would not reduce the paperwork associated with income tax returns but would add a whole new set of paperwork.

The system assumes that, while the ultimate burden of tax would be borne by the eventual consumer, it would actually be paid on every taxable activity. This requires the tax burden to be shifted successively down the line as goods or services are provided. To do this the taxpayer must keep records of both goods and services supplied and goods and services received. Each transaction must be documented by a "tax invoice". Under this system, although he must actually pay tax only on the *difference* between tax payable and tax refundable, the amount of paperwork is *cumulative*. The burden of producing, preserving and ordering all these tax invoices should not be underestimated.

At this point it is necessary to remember a further regrettable feature of Australian tax law. Tax avoidance in the 1970s has led, by reaction, to a climate of opinion in which almost any burden on the taxpayer is justifiable if it is imposed for the purpose of preventing tax avoidance. Reversing an earlier view, it is thought better that a thousand innocent should suffer than that one guilty should escape. This has led to a style of statute drafting which lays more stress on covering every possibility than on providing a clear statement to which the taxpayer can turn in order to understand his obligations to the revenue. The result has been that many aspects of our taxation law have become disgracefully uncertain.

The authors of the *Fightback* proposals seem to recognise the existence of the problem but not, it seems, its cause. There is still a concentration on tax avoidance, including such pieces of silly rhetorical misinformation as the assertion that "under the Hawke Government, paying tax has still been only an option for the rich". There is still a determination to cast the net as widely as possible. There is a suggestion that all will be well because the legislation will be expressed in "plain English". Unfortunately, the latter expedient is of value only if the draftsman understands precisely what he is seeking to express. The problems of past taxation drafting have been a result of lack of clarity of thought rather than over-technical use of language.

Of course, it may be said that the principle of GST is simple and therefore that the resulting statute should be simple also. However, it is difficult to think of a single example in recent years in which a simple principle has led to a simple taxation statute. Once the draftsman is instructed to cover everything, complexities follow inevitably. For an example one need look no further than the capital gains tax provisions, the understanding of which has become a full-time occupation. It is fair to say that the capital gains tax provisions have continued to exist in their present form only because they affect relatively few taxpayers. But GST would affect every taxpayer at every stage of the provision of goods or services, and difficulties and uncertainties would have very wide effects.

It may be said that the principle of GST is simple and therefore that the resulting statute should be simple also. However, it is difficult to think of a single example in recent years in which a simple principle has led to a simple taxation statute. Once the draftsman is instructed to cover everything, complexities follow inevitably.

It is true that at present the precise difficulties with the legislation cannot be identified with certainty, although the supplementary papers in the *Fightback* proposals suggest a number of likely areas of difficulty. It is also true that some would argue that difficulties are inevitable and should be accepted in any tax regime. However the facts that GST will impose an enormous burden of paperwork and will almost certainly entail major difficulties of interpretation should be borne in mind when considering whether it should be introduced. It would be quite wrong to approve GST merely because the *principle* sounded plausible and ignore the difficulties which it is likely to cause *in practice*.

This analysis suggests that a cursory reading of the *Fightback* proposals is likely to give an unduly favourable impression of GST. For professional taxpayers the statement that "in practice, all taxpayers will enjoy substantial tax cuts" overlooks most of the important effects of GST. Other taxpayers, particularly those about to retire, should consider carefully the effect of the proposals on their own affairs, rather than simply take the proposals on trust. As the psalmist warns, "put not your trust in princes, nor in any child of man: for there is no help in them".

J. McL. Emmerson

THE JUDICATURE ACT 1883: THE LEGAL PROFESSION AND THE PRESS

Joseph Tsalinidis

1. HISTORICAL BACKGROUND

The second half of the nineteenth century marks a significant period in Victorian legal history. In 1852, the Resident Judgeship of the strangely titled "Supreme Court of New South Wales for the District of Port Phillip, now called as and being the Colony of Victoria" was replaced by the Supreme Court of Victoria.[1] The Supreme Court was conferred with the common law jurisdiction of Her Majesty's Courts at Westminster and by s. 14 of the Act it was empowered to exercise, separately, the equitable jurisdiction of the Lord High Chancellor. From the outset, there was a clear dichotomy between the Supreme Court's common law jurisdiction and equitable jurisdiction.[2] For practitioners, however, mastery of complex rules of procedure was further required. During this period the courts were shrouded in antiquated procedures. Form was all important. The outcome of a proceeding would often depend on a technical point of pleading, irrespective of the merits of the case.[3] At common law, a plaintiff was without a remedy if he could not fit his case in a recognised form or cause of action. In equity, the matter was largely one of discretion, though established principles were gradually being formulated to modify the harshness of the common law.[4]

With the division of the Supreme Courts civil jurisdiction into law and equity and the distinct pleading and procedural rules which applied hearing of cases and further resulted in long delays costs for litigants. From the beginning of the Colony of Victoria, as Sir Arthur Dean points out in *A Multitude of Counsellors,*[5] there were constant complaints about the delays and the expense of litigation. In England, general public outcry especially from the commercial community resulted in urgent legislative reforms culminated with the *Common Law Procedure Acts* of 1852, 1854 and 1860. In Victoria, these reforms were faithfully adopted with the enactment of the *Common Law Procedure Act* 1865 and the *Equity Practice Act* 1865. These Acts attempted to consolidated the law relating to pleading and practice in the Supreme Court.

Ironically, one effect of these mid-nineteenth legislative reforms was to increase considerably the amount of business of the courts. The English *Law Times* viewed the reforms as only "promoting the pecuniary interest of lawyers".[6] In England, the matter was referred to a Royal Commission and its recommendations were ultimately embodied in the English *Judicature Act* of 1873.

The Judicature Act 1873 (U.K.) was not adopted in Victoria until a decade later. In the meantime the Supreme Court continued to operate with a divided civil jurisdiction and complex rules of procedure and pleading. For instance,

> In *Ping Kong* v. *Robertson*[7] the plaintiff sued the Defendant for failing to deliver "a case of opium" belonging to the plaintiff. The plaintiff pleaded that the opium was to be delivered to Sydney "for" one Ah Chong. Stawell C.J. held that the use of the word "for" might be embarrassing and the word "to" ought to have been used. *McDonald* v. *Board of Land and Works*[8] was a case relating to pleadings in equity. Mr. Faquhar McDonald applied to the Supreme Court in its equitable jurisdiction for an injunction to restrain the defendants from selling "a portion of Royal Park in the city of Melbourne". Mr. McDonald alleged in the bill that he was informed and believed that Royal Park was reserved "for the use and recreation of the public" and could not be sold.[9] Molesworth J. held that the bill was bad as the allegations were merely based on the plaintiff's information and belief and were not pleaded as specific allegations of fact. His Honour further considered that the Bill was bad because it was not signed by counsel.

The strict adherence of the Supreme Court to its rules of practice and procedure and the proliximity in pleadings in order to ensure no relevant matter was omitted, added to the delays and the cost of litigation. In equity cases, it was not unusual for legatees to wait up to 10 years after the death of a testator or testatrix before an estate was settled.[10] The situation was accurately reflected in a letter to *The Age* signed by "A practical Accountant":

> I was in court not very long since when a case which had dragged its weary length for upwards ten years came before the Full Court. One of the Judges asked "How much money was there in this estate?" "Oh,", said

counsel "about so-and-so", naming thousands. Said the Judge, "I suppose that accounts for its length".[11]

Another writer to *The Argus*, who signed as "An old campaigner" commented thus on the delays caused by the late attendance of counsel and law clerks:

> some of the clerks are like women who attend a fashionable church, proverbially late.[12]

The need for reform therefore became increasingly pressing and renewed attention was directed to the English *Judicature Acts* 1873 as providing a panacea.

The strict adherence of the Supreme Court to its rules of practice and procedure and the proliximity in pleadings in order to ensure no relevant matter was omitted, added to the delays and the cost of litigation. In equity cases, it was not unusual for legatees to wait up to 10 years after the death of a testator or testatrix before an estate was settled.

2. THE QUESTION WHETHER TO ADOPT A JUDICATURE ACT IN VICTORIA

The possibility of adopting a Judicature Act in Victoria was raised as early as 1873.[13] It was not until 1880, however, that the matter was seriously reconsidered. On 2 April 1880, a Royal Commission was established to consider what reforms in the procedure of the Supreme Court "may be advantageously made so as to provide for the more speedy, economical, and satisfactory dispatch of the business now transacted by the said Court." The Royal Commission was headed by the Stawell C.J. and comprised such eminent Victorian legal personalities as Sir Redmund Barry, Mr. E. Kerferd (the Attorney-General), Mr. John Madden (then Minister of Justice), T.S. Cope (Judge of the County Court), Mr. E.D. Holroyd Q.C., Mr. J.D. Davies (President of the Law Institute), Dr. Hearn and others. The Royal Commission published its Report on 28 September 1880[14] and recommended that "a comprehensive reform" in the procedure of the Supreme Court was required. It was considered "advisable" and "advantageous" to adopt the English *Judicature Acts* but only insofar as they were suitable.[15]

For instance, it was recommended that the Divisional Court system existing in England should not be adopted in Victoria. This was significant. Only in the preceding year, Mr. Justice Fellows had drafted a Bill which contained machinery for the establishment of Divisional Courts in Victoria. *The Australian Law Times* had attacked Mr. Fellows' Bill of 1879 arguing that it overlooked the historical origins of the Victorian Supreme Court as a single court:

> There seems to be no reason for these provisions except that they are found in the English Act, and it was considered advisable to copy them, the reason why they were introduced in the English Act having been apparently forgotten.[16]

More importantly, the Royal Commission recommended that the common law and equity jurisdictions of the Supreme Court should be "fused" and law and equity concurrently administered and in the case of conflict, the latter would prevail. Certain Rules of Court were to be applied when concurrently administering law and equity and a Council of Judges was to be met every year to examine the operation of the proposed Act and the Rules of the Court. The suggested reforms of the Royal Commission were received favourably and there was general consensus that a *Judicature Act* embodying these would soon be enacted.

Between 1880 and 1883 two unsuccessful attempts were made to pass the Judicature Bill.[17] On 10 July 1883, Mr. Kerferd, the Attorney-General, introduced the Bill to the Legislative Assembly.[18] Mr. Kerferd stated that as the Bill was most significant and reform was needed quickly: "I am going to ask the House to take the unusual course of passing the Bill without altering a word of it."[19] The Premier, Mr. James Service and Mr. Wrixon, a member of the Royal Commission of 1880 agreed that the Bill should be passed in globo.[20] *The Argus* had long criticised the legislative inactivity of Parliament over the Judicature Bill and its attack was renewed:

> The Supreme Court (Judicature) Bill which has been promised year after year, has not been placed on the Statute-book . . . it has been hung up session after session.[21]

During the second and third reading of the Bill, Mr. Kerferd urged the Honourable Members that "there are almost overwhelming reasons why the Bill should pass into law as it stands".[22] If enacted, he assured them, it will diminish the expense of litigation and reduce delays and added that the Bill had been gone over "line by line" by the Chief Justice, Mr. Justice Molesworth, Mr. Justice Holroyd

and others.[23] The later statement did not go unnoticed. In a letter to *The Argus*, Mr. Justice Molesworth disassociated himself from the Royal Commission of 1880 and voiced his strong disapproval of the Judicature Bill.[24] Mr. Kerferd was accused of having "misled" the House and an adjournment of any further debate on the Bill was pressed by Mr. Graves. However, it was the oratory of Mr. Wrixon and a touch of patriotic fervour that saved the day:

We have almost a duty cast upon us of following in the steps of England, because we are, to a great extent, dependent on the law reports of the old country, and if we do not follow in the steps of law reform at home the reports will be so much waste paper to us.[25]

The Judicature Bill was passed on 16 August 1883 and came into operation on 1 July 1884.

3. THE JUDICATURE ACT, THE PRESS AND VICTORIAN SOCIETY

From early 1883, the cry for reform was voiced frequently in the Press.[26] By late 1883, however, there was a noticeable change in the editorial outlook of some newspapers. A correspondent to *The Argus* using the pseudonym "Lex", observed that the proposed *Judicature Act* had a number of defects and pointed out that Victorian Judges unlike his English counterparts, were not prevented from hearing an appeal from their own decision or order:

Judges are liable to the ordinary infirmities of the human race — they are liable to error, and, like the rest of mankind, they are unwilling to admit their blunders.[27]

"Lex" also noted that no provision was made for the admissibility of notes of shorthand writers where a direction to the jury was in question. He described the problem as follows:

Judges like pretty girls, love to be flattered, and like pretty girls, they are flattered to keep them in good humour, and make them more agreeable. But amongst the infirmities which they sometimes share with fascinating flirts is that of occasionally forgetting what they said.[28]

The harshest treatment of the Judicature Bill in the Press came from *The Herald* which attacked the Bill, describing it as "incomplete" and "dangerous".[29] *The Herald's* attack was relentless:

(The Judicature Act) has reformed the law as you might reform a pair of old shoes by cutting holes in them whenever they pinched.[30]

The Herald was even bold enough to advocate its own proposals for reform. It cynically viewed these as "a model for the world":

That whenever a judge, through ignorance or carelessness admits improper evidence . . . improperly misdirects a jury, or otherwise bungles the work for which he is handsomely paid, he should himself defray the costs of his bungling . . . If the judges could be brought in the way we suggest, by bearing the expenses of their own tripping, we would, in a few years, have a system of law administration so simple, effective, and economical as to be a model for the world.[31]

In contrast, *The Weekly Times* presented a rational appraisal of the Judicature Bill and expressed general optimism about is aims:

Mr. Justice Williams lodged a scathing attack on the Judicature Bill. In two letters to *The Argus*, he claimed that the Bill was "so defective, so costly to litigants, so profitable to the legal profession" that it would not achieve any of its intended aims. This provoked a bitter and personal attack against his Honour. He was called "the Narcissus of the Victorian Bench" and accused of having "fallen into a somewhat serious mistake".

The measure, even as it stands, will undoubtedly tend to render the administration of justice more speedy and less expensive than at present.[32]

Whether or not the Judicature Bill found favour with the bulk of Victorian society is not clear but the fact that it aroused much public debate cannot be doubted. Rarely a day passed in the months of July and August 1883 without *The Argus* publishing a letter or commenting on the *Judicature Act* in its editorial. The Supreme Court Bench was, at this time, anything but reserved. Mr. Justice Williams lodged a scathing attack on the Judicature Bill. In two letters to *The Argus*,[33] he claimed that the Bill was "so defective, so costly to litigants, so profitable to the legal profession" that it would not achieve any of its intended aims. This provoked a bitter and personal attack against his Honour.

He was called "the Narcissus of the Victorian Bench"[34] and accused of having "fallen into a somewhat serious mistake".[35] One reader pointed out that Mr. Justice Williams' views should not be given great weight because other eminent Judges had sat on the Royal Commission of 1880 and said of his Honour's views:

I trust the fly on the wheel will not be allowed to stop the coach.[36]

Sir Archibald Michie, an influential legal figure at the time and ex-Attorney-General, characterised the Judicature Bill in a lengthy letter to *The Argus*[37] as a "plagiarism" and "a poor and partial imitation" of the English Act and criticised Mr. Kerferd for rushing the Bill through the House.[38]

Although much controversy surrounded the adoption of the *Judicature Act* in Victoria[39], the fact that it was finally passed is explicable only after having regard to the social, economic and political environment of the 1880s.

The latter part of the nineteenth century was a major period of change and transition in Victoria. As gold mining declined, a population shift back to Melbourne from the mining towns and even from other colonies occurred.[40] By 1881, Melbourne's population had reached 283,000.[41] Lawyers, doctors, schoolmasters, men in the civil service, bankers and merchants were well represented in Victorian society. Many of the skilled tradesmen who had arrived in great numbers during the gold rush era stayed on and pursued other occupations.[42] The manufacturing industry developed rapidly in Melbourne and by the 1880s its output surged ahead.

The 1880s were also a period of rising economic prosperity for Victoria. The Railways were operating at a profit, wheat flour exports had reached their highest level and there was even increasing overseas investment in Victoria.[43] A building boom occurred and real estate speculation increased.[44] Lawyers, too, shared in the prosperity with their busy conveyancing practices.[45] Public confidence was high. The Victorian government had also committed itself to the cause of Federation and forced an agreement to form a Federal Council. The economic boom and public confidence were attributable, in part, to Victoria's political stability. After the elections in January 1883, a coalition government came into power. Ideological differences were put aside and the neglected business of developing the colony now proceeded. The Service-Berry ministry strongly associated itself with liberalism and reform.

David Syme, the founder of *The Age* and an influential political figure in this period, criticised the prevailing laissez-faire attitude in his book *The Outlines of an Industrial Science*. He asserted that if reform was needed, then, "the State should perform it".[46] Legislative reform took a high priority in 1883. *The Victorian Railways Commissioners Act*, a long awaited reform, was passed, as was the *Public Service Act*. The later Act abolished ministerial patronage which had reached alarming levels at the time and set up an independent Public Service Board. There was also a renewed interest in land reform.

It was in such a climate of general economic prosperity, political stability, liberalism and reform that the enactment of the *Judicature Act* was assured.

4. THE OPERATION OF THE *JUDICATURE ACT*

The *Judicature Act* came into operation on I July 1884. One of its main aims was to overcome delay in the Supreme Court and reduce the cost of litigation. In order to achieve this, the Judges of the Court were empowered by s. 34 of the Act to "alter and annul" any Rules of the Court. On 9 May 1884 new Rules as to costs were introduced. The Rules provided that the lower scale of costs would apply and the higher scale would be available only in exceptional cases. Notably, costs in all proceedings were made subject to the discretion of the Court. The legal profession had long enjoyed costs payable on the higher scale. An immediate attack was mounted by the legal profession against the new Rules generally and against the Judges in particular. *The Australian Law Times*[47] allied itself with the "deeply dissatisfied" lawyers and suggested that some friction between the Judiciary and the legal profession had developed:

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The latter part of the nineteenth century was a major period of change and transition in Victoria. As gold mining declined, a population shift back to Melbourne from the mining towns and even from other colonies occurred.

A rumour has got abroad that many of the attorneys are deeply dissatisfied with the new regulations relating to costs as they were not submitted to them before being adopted by the Judges.

On 10 July 1884, Mr. Harper presented a petition to Parliament calling for the annulment of the

new Rules.[48] The petition was signed by approximately 190 members of the legal profession and was especially critical of the wide discretionary power given to Judges in relation to costs.

Mr. Harper's petition was received favourably in Parliament. Mr. Bent, generally regarded by his peers as a "formidable bully", unscrupulous and self-seeking,[49] criticised the Judges for altering the Rules as originally enacted:

> If Judges want to legislate, they should stand for Parliament like other people.[50]

The *Judicature Act* had been in operation for a few months when it was claimed by a number of barristers, whose letters appeared in *The Argus*, that the delays in cases were so grave that the "block" or "deadlock" in the Supreme Court required the appointment of another Judge.

The Law Institute circulated a memorandum which described the new Rules as an "unjust encroachment" by the Judiciary into the profession's reasonable remuneration provided by the higher scale of costs.[51]

The Argus published three lengthy articles by Robert Woodfall (Barrister-at-Law) explaining the operation of the Rules.[52] *The Australian Law Times*,[53] regarded the new Rules as "humiliating" and "offensive" to lawyers because they "menaced" their independence and "assailed" their self-respect. As a result of the outcry of the legal profession, the operation of the Rules as to costs was suspended until 1 January 1886.

The *Judicature Act* had been in operation for a few months when it was claimed by a number of barristers, whose letters appeared in *The Argus*, that the delays in cases were so grave that the "block" or "deadlock" in the Supreme Court required the appointment of another Judge. They observed that the *Judicature Act* had increased rather than diminished the necessity for judicial exertion.[54]

That the *Judicature Act* created extra work cannot be doubted. Mr. Kerferd had remarked in Parliament only within a matter of days after the *Judicature Act* had come into operation about 50 writs were issued against persons outside the jurisdiction.[55] A writer to *The Argus*[56] who signed himself as "Fiat Justitia", argued that the popularity of the non-jury trials as a result of the *Judicature Act* also increased the work of the Supreme Court. Chambers work was "a large and increasing branch since the Judicature Act". Sir Arthur Dean contends that the delay was due in part to the complex provisions of the *Judicature Act*.[57]

The 1880s were a period of major growth and development in Melbourne. An increasing population coupled with rapid socio- economic development resulted had an effect on the volume of litigation.

As *The Age* pointed out at the time:

> The fact is that we have outgrown the system that was good enough twenty-five years ago.[58]

One view, however, which was advanced only by *The Age* with much audacity, was that the delays were caused by the Judges of the Supreme Court and by the "scrupulous exactitude" of one of their brethren:

> There is . . . a deep feeling in the legal profession that much public time is unnecessarily spent by the morbid and irritating exactitude of one of the members of the Supreme Court Bench . . . Time is consumed at trials by the unnecessary minuteness with which evidence is taken down by the same learned judge, the cross-examination, which ordinarily affords judges a little relaxation from note-taking, being committed to writing by his Honour with scrupulous exactitude.[59]

Mr. Justice Higinbotham was well known for his meticulousness.

The delay in the Supreme Court was partly accidental. From 1885 till his retirement, Stawell C.J. was on leave due to illness and Molesworth J. was tied up with equity cases. The *Judicature Act* required three Judges to constitute a Full Court and by s. 69, a Judge could not sit on an appeal from his own decision. As a result, the remaining members of the Court, namely Higinbotham, Williams and Holroyd JJ., could not sit as a Full Court if one of their decisions were appealed. *The Argus*[60] adverted repeatedly to this problem. Urgent reform was therefore needed.

On 22 July 1885, the Honourable J. Campbell introduced the *Acting Judge of the Supreme Court Bill* to meet the mounting delays and the difficulties created by the absence of the Chief Justice.[61] The Bill provided for the appointment of a Judge from the County Court. The Victorian Bar Council voiced strong opposition to the Bill and petitioned in Parliament. The Honourable J. Lorimer, a wealthy merchant and later Minister for Defence,[62] presented the petition before the Legislative Council and claimed that an acting judgeship was "undesirable" and that the Supreme Court Bench should be "permanently strengthened".[63] On 28 July 1885, a deputation representing the Bar Council met with the Premier Mr. Service and the Attorney-General

Mr. Kerferd. Mr. Moule, supported by Mr. Purves, argued that the County Court Judges were unacquainted with the *Judicature Act*:

On this ground alone, it [is] preferable to appoint as a Judge of the Supreme Court one of the many barristers who were fit for the position, and who were thoroughly acquainted with the working of the Judicature Act.[64]

In evidence given before the Royal Commission on Law Reform 1897, Mr. Justice Williams made some startling comments about the *Judicature Act* and County Court judges:

I do not wish to say anything derogatory about the County Court judges, but you must remember that the men who are on the County Court bench are men who either failed in their profession or never attained beyond mediocrity.[65]

The Bill was passed on 4 August 1885 and on 10 August 1885 Judge Cope of the County Court was appointed as an Acting-Justice. The disappointment of the Bar was well known and the view of one barrister in a letter to the *The Argus* was as follows:

The Legislative Council has lent a hand in turning County Court into Supreme Court Judges, and will soon turn barristers into solicitors and solicitors into barrister.[66]

The second reform, and one introduced by the Attorney-General Mr. Kerferd in early October 1885 was the *Administration of Justice Bill*. This was one of the most controversial post-Judicature Act reforms. The Bill, which was expressed to "secure the better administration of Justice in Victoria", provided that the present members of the Supreme Court were to sit only as appellate Judges and three new puisne Judges would deal with the rest of the work of the Supreme Court including all County Court work. The Bill was favourably received by the Bar. *The Argus* wrote:

With the Bar in all probability, the new system will be popular; for it means new and unexpected opportunities for those who are ripe for the Bench and larger incomes for those who are waiting for other men's shoes.[67]

The Bill was necessitated, it was claimed, by reason of the delays in civil cases caused by the *Judicature Act*.[68] By late October 1885, there were indications that the delays were easing.

Judge Rogers of the County Court, in a lengthy letter to *The Argus*,[69] opposed the Bill and stated that the arrears were "diminishing" and would disappear if the Bar was "somewhat less prolix". It will be noted that the *Administration of Justice Bill* envisaged the gradual closure of the County Court, so Judge Rogers' concerns were quite understandable. *The Argus* agreed that the "new system" should not be adopted.[70] In Parliament, it was asserted that the Bill should be substantially abandoned except for a provision authorising the appointment of an additional Judge.[71] It was rumoured that if there was to be an additional judgeship, then the Attorney-General Mr. Kerferd should be appointed. The news that Mr. Kerferd was a potential candidate for the judgeship provoked the strong denunciations.[72]

The Bar, supported by *The Age*, argued that a sixth Judge was not needed and in any event, Mr. Kerferd was not suitable for the position. A barrister, in a letter to *The Argus*, wrote:

It is well known that Mr. Kerferd never had but a scant practice, and for the last two or three years he has not appeared at all in the Courts. Would those members of the Legislative Assembly who supported the appointment of Mr. Kerferd prefer his opinion on some question of law affecting their own private rights and property, to that of some or seven leaders of the bar whose names are familiar to us?[73]

The Age[74] claimed that "the country should have the worth of its money" by appointing someone from the Bar and named a number of contenders:

There are not wanting amongst the barristers in active practice highly trained and experienced men such as Mr. Webb, Q.C., Dr. Madden, Mr. Thomas A'Beckett and others — the elevation of any one of whom to the Supreme Court Bench would meet with universal approval.

The Age mounted a personal attack against Mr. Kerferd:

One of his admirers in the Press assures us that he has stored away in some secret corner of his soul an immense reserve of common sense, and that "if he has been good enough to make laws he is surely good to administer them" — a sort of reasoning that would justify a wood cutter setting up as a carver in wood, or an oil and colour man for a landscape painter.[75]

In contrast, *The Argus* only made some mild criticisms[76] and was accordingly branded by *The Age* as "Mr. Kerferd's newspaper".[77]

The views of the Melbourne newspapers can be usefully compared with those of the country press. *The Bendigo Advertiser* rejected *The Age's* contention that someone from the Bar should be appointed:

Long experienced advocates at the Bar are apt to take one sided views of cases submitted to their judgment.[78]

The Bendigo Advertiser also pointed out that the attack on Mr. Kerferd was instigated by self-seeking members of the Bar.[79]

The Ballarat Courier adopted a similar view:

The Age does not occupy a very enviable position in the vendetta it has launched against Mr. Kerferd.[80]

Mr. Kerferd was appointed to the Supreme Court Bench on 28 December 1885.[81] The Bar openly displayed its disapproval by refusing to send a letter of congratulations, as was customary.[82] Turner suggests that even some of Mr. Kerferd's new colleagues on the Bench were coldly

polite.[83] An interesting aspect of the controversy surrounding Mr. Kerferd's elevation to the Bench was the suggestion by the *The Age* that some of Mr. Kerferd's Bills were only passed to create a judgeship for himself .*The Administration of Justice Bill* was seen as "simply" a measure to provide Mr. Kerferd with a "billet".[84] More importantly, however, *The Age* stated with regard to the *Judicature Act*:

> The notorious Judicature Bill, we now see was not introduced for any public purpose whatever, but simply with the benevolent design of providing the Attorney-General with a billet for the rest of his life.[85]

Mr. Justice Williams and Sir John Madden, in giving evidence before the Commission, stated that they would like to see this judicature system knocked on the head altogether, and were inclined to think the judicature system altogether was rather a failure".

In assessing the operation of the *Judicature Act* some of its early effects need to be examined. The increase in Chambers work for Judges has already been noted. Sir John Madden, in giving evidence before the Royal Commission on Law Reform 1897, spoke of the "multiplicity of applications" following the *Judicature Act*.[86] Another problem that arose concerned the interpretation of the *Judicature Act* and the Rules of the Supreme Court. Abel-Smith and Stevens have suggested that up to 40 per cent of cases in England, during the early operation of the Act, arose from litigation on the pleading and procedure rules.[87] Similarly in Victoria, the Council of Judges established under the *Judicature Act* reported in 1886 that the Rules had encouraged "numerous technical and frivolous and always costly objections on points of pleading and procedure".[88] The same criticism of the Rules was made by Mr. Bent in the Assembly.[89] In the index to *The Australian Law Times* of 1885, 81 decisions were reported dealing with the Rules of the Supreme Court and 12 of these were on Order 19.[90] *The Age* also claimed that:

> The lawyers spend time and earn money in trying to "pick holes" in these rules.[91]

Another significant shortcoming of the *Judicature Act* was that it did not address the needs of the commercial community. The commercial community in the 1880s was a growing and discernible section of Victorian society.[92] While the *Judicature Act* was being debated in Parliament, Mr. M. Davies, a well known land speculator and financier, argued that the needs of business men should be recognised by the new procedure.[93] Abel-Smith and Stevens point out that the Association of Chambers of Commerce in England was so disappointed with the *Judicature Act* that it promoted the setting up of tribunals for resolving disputes.[94] In Victoria, the Royal Commission of 1880 did not favour the use of arbitration to resolve commercial disputes but recommended that the Court should be empowered to call expert witnesses.[95]

Despite these shortcomings, the central principle of the *Judicature Act* — the concurrent administration of law and equity — was significant. The Royal Commission on Law Reform 1897 referred to the "intrinsic merits" of the *Judicature Act* and concluded that some of its shortcomings were not "inherent in the main principles of the Judicature Act".[96] Mr. Justice Williams and Sir John Madden, in giving evidence before the Commission, stated that they would like to see this judicature system knocked on the head altogether,[97] and were inclined to think the judicature system altogether was rather a failure".[98]

The Royal Commission disagreed. Notably, the Royal Commission found, first that the Judges deserved some of the blame for the initial deficiencies of the Act because they failed to properly exercise their supervisory duty.[99]

This finding appears to be supported by an examination of the Reports of the Council of Judges required by s. 54 of the Act. In August 1885, Mr. Kerferd stated in Parliament:

> (The Judges) reported to the Governor in accordance with that section, and told him that they had nothing to report (Laughter).[100]

Judge Rogers of the County Court, accused the Judges of failing to discharge a statutory duty and making a "ridicule" of their official report by "solemnly" stating that they had nothing to report.[101] In 1886, the Judges' Report praised the *Judicature Act* subject only to the many technical objections on points of pleading being made in cases.[102] In 1887, the only reference to the *Judicature Act* was in the following terms:

> The Act as it stands is now in steady, and, on the whole, fairly satisfactory operation.[103]

The rest of the Report was devoted to a discussion of:

> The interruption of public business (in the Court) occasioned by the noise proceeding from the street

With the "block" in the Supreme Court removed and the Kerferd scandal almost forgotten, the operation of the Act was rarely commented upon in the newspapers. By 1886, there was little, if any, reference to it. The Act was soon regarded as a "valuable" and "sound" reform,

traffic [and] the request to the Council of the City of Melbourne that parts of William and Lonsdale Streets, on the west and north side of the Court, may be laid down in wood or asphalt.[104]

The Report which, by s. 54 required the Judges to indicate what amendments would be expedient to make to the Act or in any law relating to the administration of justice, concluded with the following plea:

We beg leave to express the hope that the Tramway will not be constructed in either of those streets in the immediate neighbourhood of the Court.[105]

After this transitional period, the *Judicature Act* appears to have operated successfully. With the "block" in the Supreme Court removed and the Kerferd scandal almost forgotten, the operation of the Act was rarely commented upon in the newspapers. By 1886, there was little, if any, reference to it. The Act was soon regarded as a "valuable" and "sound" reform,[106] but as Mr. Justice Holroyd reflected some time later:

I think (the Judicature Act) would work much better if it were liked better by the members of the legal profession.[107]

1. *Supreme Court (Administration) Act 1852*, 154 Vict., No. 10.
2. Jenks E., The Government of Victoria (Melb., 1891) pp. 174-5.
3. Abel-Smith B., Stevens R., *Lawyers and the Courts*, (London, 1967) p. 37.
4. *Maitland's Equity* (2nd ed, 1936) pp. 18–19.
5. Dean A., *A Multitude of Counsellors* (Melb, 1968) p. 116.
6. 2 September 1864, p. 237.
7. (1870) 1 V.L.R. 141 (at Law).
8. (1875) 1 V.L.R. 90 (in Equity).
9. This was supported by a report of the Surveyor-General who had caused official maps of Melbourne to be prepared showing Royal Park as a reserve.
10. Abel-Smith and Stevens, Op. Cit., p. 37.
11. 21 August 1883, p. 8.
12. 31 July 1883, p. 8.
13. Mr. Justice Stephen introduced in Parliament that year the *Supreme Court (Judicature) Bill* but it was not passed by the Council.
14. *Papers Presented to Both Houses of the Victorian Parliament*, Session 1880/81, Legislative Assembly, Vol. 3 Report No. 28.
15. Ibid., p. 5.
16. *Australian Law Times*, 30 August, 1879 p. 19.
17. Introduced by Mr. Vale but only reached the Second Reading stage. Introduced by Mr. Dobson on 25 July 1882, and not proceeded with after the First Reading.
18. *Parliamentary Debates*, Op. Cit., Vol. 43, p. 122.
19. Ibid, p. 146.
20. Mr. Service at p. 231; Mr. Wrixon at p. 152.
21. 3 July 1883, p. 4.
22. Op. Cit., p. 232.
23. Presumably he was referring to the Royal Commission of 1880.
24. 25 July 1883, p. 10.
25. *Parliamentary Debates*, Op. Cit. Vol 43, p. 619.
26. *The Argus*, 3 July 1883, p. 4; *The Age*, 31 July 1883, p. 4; *The Herald*, 16 July 1883, p. 2; *The Weekly Times*, 4 August 1883, p. 8; *The Australian Law Times*, p. 43; 12 May 1883, p. 188; 4 August 1983, p. 18.
27. 18 July 1883, p. 8.
28. 21 July 1883, p. 5.
29. 24 July 1883, p. 2.
30. 24 July 1883, p. 2.
31. 19 July 1883, p. 2.
32. 4 August 1883, p. 8.
33. 28 July 1883, p. 10; 23 August 1883, p. 10.
34. *The Argus*, 30 July 1883, p. 8. In mythology, Narcissus loved no one until he saw his own reflection in water and fell in love with it.
35. *The Argus*, 24 August 1883, p. 10.
36. *The Argus*, 31 July 1883, p. 8.
37. *The Argus*, 31 July 1883, p. 8.
38. It appears that Mr. Kerferd did not take the criticism kindly. During debate in the Assembly he pointed out that when Sir Archibald Michie was Attorney-General, he had passed the *Insolvency Act*, the only portion read in the House being the marginal notes: See Parliamentary Debates, Vol 43, p. 633.
39. The controversy in New South Wales over the *Judicature Act* had been so intense, that the Act was not passed till almost a century later; *Supreme Court Act 1970* (N.S.W.)
40. Serle, G., *The Rush to be Rich: A History of the Colony of Victoria 1883–1889* (Melb. 1891), p. 47.
41. Ibid., p. 6.
42. Ibid.
43. This was especially noticeable with the influx of capital from London for investment in wool.
44. Ibid., pp. 47–48.
45. During the Parliamentary Debate on the Judicature Bill, Mr. M.H. Davies commented that conveyancing constituted "at least three-fourths of the legal work of the colony": P.D., Op. Cit., p. 230.
46. David Syme, *The Outlines of an Industrial Science* (Melb., 1876) pp. 181–185.
47. 10 May 1884, p. 162.
48. *Parliamentary Debates*, Vol. 45, p. 535.
49. Serle, Op. Cit., p. 264.

50. P.D., Op. Cit., p. 536.
51. *The Argus*, 11 July 1884, p. 7.
52. Part I — 15 July 1884, p. 9; Part II — 18 July 1884, p. 7; Part III — 22 July 1884, p. 7.
53. 2 August 1884, p. 23.
54. *The Argus*, 14 March 1885, p. 8.
55. P.D. Op. Cit., p. 536.
56. 14 March 1885, p. 13.
57. Dean, Op. Cit., pp. 111-112.
58. 21 March 1885, p. 9
59. 9 December 1885, p. 4.
60. 12 March 1885, p. 10; 14 March 1885, p. 13.
61. P.D. Vol. 48. p. 453.
62. Serle, Op. Cit., p. 42, 330.
63. P.D. Vol. 48, p. 446.
64. *The Argus*, 29 July 1885, p. 10.
65. Papers *Presented to Parliament*, Session 1899–1890, Vol. 3. p. 366.
66. 6 August 1885, p. 6
67. *The Argus*, 26 October 1885, p. 4.
68. *The Argus*, 16 October 1885, p. 4.
69. 10 November 1885, p. 9.
70. 11 November 1885, p. 6.
71. P.D. Vol. 50, p. 2147.
72. Turner, H.E., *A History of the Colony of Victoria* (London, 1904) Vol. 2. p. 250.
73. 18 November 1885, p. 13.
74. 9 December 1885, p. 4.
75. 24 December 1885, p. 4.
76. 1 December 1885, p. 6.; 23 December 1885, p. 4.
77. 24 December 1885, p. 4.
78. 19 December 1885, p. 3.
79. Ibid.
80. 23 December 1885, p. 3.
81. See [1885] 11 V.L.R., Memoranda.
82. Dean, Op. Cit., p. 114; Turner, Op. Cit., p. 250.
83. Ibid.
84. 1 December 1885, p. 4.
85. Ibid. Mr. Justice Kerferd's tenure on the Supreme Court was short lived. He died on New Year's Eve, 31 December 1889. See [18901] 16 V.L.R , Memoranda.
86. Op. Cit., p. 342.
87. Op. Cit., p. 88.
88. Papers presented to Parliament by Command, Session 1889–90 Vol. 3, p. 504.
89. P.D. , Vol. 52, p. 1782.
90. (1884–1885) Vol. VI, pp. 289–297.
91. 9 December 1885, p. 4.
92. Serle, Op. Cit., pp. 87–86; Davison, G., *The Rise and Fall of Marvellous Melbourne* (Melb., 1978) pp. 21, 25.
93. P.D. Vol. 43, pp, 229–230.
94. Op. Cit., pp. 51–52.
95. Op. Cit., pp. 6–7.
96. Op. Cit. p. 8.
97. Ibid., p. 360.
98. Ibid., p. 342.
99. Ibid., pp. 5–6.
100. P.D. Vol. 49, p. 881
101. *The Argus*, 10 November 1885, p. 9.
102. *Papers Presented to Parliament*, Op. Cit., p. 504.
103. Ibid., p. 505.,
104. Ibid.
105. Ibid.
106. Royal commission of 1897, Op. Cit. p. 8.
107. Evidence given before Royal Commission of 1987, Ibid,. p. 400.

THURGOOD MARSHALL

EVENTS HAVE OVERTAKEN WHAT WAS TO be a biographical note on Thurgood Marshall, retired Associate Justice of the US Supreme Court (1967-1991). The main thrust of the note was to be the concern that he should be remembered for his accomplishments rather than the controversy surrounding the Senate confirmation hearing into the appointment of his successor, Clarence Thomas, appointed by President George Bush and sworn in on November 1, 1991.

Marshall died of heart failure on 24 January, 1993 at 84 years of age with the ABC radio program *PM* announcing the death on the following day and describing him as the "grandfather" of the US Civil Rights movement. In fact he was the father of the movement with the title "grandfather" rightly belonging to Marshall's teacher, mentor and predecessor as lead counsel for the NAACP (National Association for the Advancement of Colored People): Dr Charles Houston. Similarly, one can take issue with the suggestion that the indignity of being refused enrolment at the University of Maryland Law School was never to be forgotten by Marshall. In the 1930s the only law school that an ambitious young negro aspiring to become a lawyer would consider was the powerhouse Howard University Law School under its Dean Houston who, in the space of two years, had turned it from "a fifth-rate law school" (as described by Justice Louis Brandeis of the Supreme Court to Howard's president Mordecai Johnson) into an American Bar Association fully accredited law school and gained it membership of the Association of American Law Schools "without qualification". Howard Law School and Houston were behind the twentieth-century Civil Rights movement and Houston, as mentor and guide was well placed to direct his graduates towards the fight for equal rights for US Negroes. One of Houston's graduates, first in the 1933 class, was Thurgood Marshall.

Thoroughgood (named after his grandfather and later shortened to Thurgood) Marshall would assert in later years that he learnt the US Constitution as punishment in after-school detention brought about by his schoolboy misdemeanours. When he had acquired near legendary status among American Negroes, his hometown Baltimore's Negro weekly newspaper, the *Afro-American*, effusively proclaimed that he had passed the state bar exam with one of the highest marks ever recorded. Marshall responded setting the record straight by saying that his score was "as I remember it, less than one point above the pass mark of 210".

For 28 years from his graduation in 1933 to his appointment in 1961 to the US Court of Appeals Marshall devoted his career to public interest law for the NAACP. An interview with the retired justice in the June 1992 *ABA Journal* concludes:

"James Mettale signals that my time is up. I ask one last question: What advice does he give to young black attorneys today?

'None, I don't,' he crisply replies. 'I don't give advice to either one of my boys. I had a deal with them: I wouldn't volunteer advice. And it ends up that one of them gave up a job paying $100,000 and some with the biggest law firm here to go to work for Ted Kennedy, and I said, 'With all the money I spent on your education, why did you take that?' You know what he said? 'I know somebody else who didn't give a damn about money, too'".

Before he acquired his legendary status, he served a long and presumably at times dispiriting apprenticeship in the backwoods and backwaters of the southern states with the NAACP attempting to stand between community lynch law and his criminal clients. Marshall wrote the brief for the successful *Chambers* v. *Florida* (1940) appeal to the US Supreme Court. The NAACP's finances were so stretched that he couldn't attend in Washington to hear it argued. Justice Hugo Black wrote the *per curiam* decision, an opinion in which he took great pride for the next 30 years:

"Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement . . . No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution — of whatever race, creed or persuasion".

Chambers v. *Florida* was to lay the base upon which the later landmark decisions of *Gideon* v. *Wainwright* (1963), *Escobedo* v. *Illinois* (1963) and *Miranda* v. *Arizona* (1966) were founded. *Chambers* was not a civil rights case — it involved the questioning of suspected criminals who in this instance were Negroes and thus the NAACP took it on board.

A refusal to act the deferential 'Uncle Tom' could be dangerous in the Deep South was evidenced by the incident described in Kluger's *Simple Justice* (1975). [Marshall's] closest call

probably came on a November night in 1946 while he was driving on a highway in Maury County in the middle of Tennessee, where he had just unofficially won the prize as least popular Negro in America from local police. Marshall had been summoned to defend twenty-five blacks charged with assault to commit murder. After a series of night raids by local police resulting in beatings and frame-up arrests in the coloured neighbourhood of the small city of Columbia, the blacks had organised a resistance movement. From hiding places in a row of one-storey shops, they had repulsed a further raid with a fusillade that wounded four of the invading police. Not only did Marshall succeed in getting the trial switched to a town thirty miles away, but he also got twenty-three of the twenty-five defendants acquitted. At a new trial back in Columbia, one of the two remaining defendants had just been acquitted, and Marshall and two other lawyers for the defence were driving back after dark to Nashville, where they were staying, when three patrol cars sirened them to a halt. Out piled patrolmen, constables, and a deputy sheriff with raised guns and a search warrant. It was a dry county, and the police later said they had been tipped off that Marshall and his associates were carrying liquor in the car. A search uncovered nothing, and Marshall was allowed to drive on. He was stopped a second time and his driver's licence checked, and again he was let go. But on the third try they arrested him for drunk driving and sped off with him to Columbia. At one point, the patrol car carrying Marshall swung off onto a side road, but returned to the highway when the other lawyers following in Marshall's car remained in close pursuit.

In Columbia, Marshall was ordered out of the patrol car and told to cross the street unaccompanied to the magistrate's office. Marshall knew better. The toll of black men shot in the back while "escaping" custody was well imprinted on his mind. Escorted into the office of the magistrate, an aggressive teetotaller renowned for his skill at sniffing out even a trace of alcohol on a man's breath, Marshall breathed — "as hard as I could" — into the nostrils of the human drunk-meter, who pronounced him clean and ordered him released. "After that", Marshall said, "I really needed a drink". Temperance prevailed, though, and a good thing, for while Marshall was under custody, his colleagues had returned to the coloured section of town called Mink Slide and switched cars so they could head back up to Nashville without further harassment. As a decoy, their original car left Mink Slide in another direction. It was overtaken by police and its driver beaten, Marshall learned the next day. He wired United States Attorney General Tom Clark and requested a federal investigation of the entire incident. Then he returned to court in Columbia the following week and won acquittal for the last of the twenty-five defendants. Nineteen years later it was the resignation from the Supreme Court of the then Justice Tom Clark that created the vacancy permitting President Lyndon Johnson to appoint the first negro, Thurgood Marshall, to the Court.

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The NAACP strategy that culminated in the two *Brown* decisions overturning the 1896 *Plessy* v. *Ferguzon* doctrine permitting segregation so long as the separate facilities provided for Negroes were "equal" (based upon the statute challenged in *Plassy*: ". . . railway companies . . . shall provide equal but separate accommodation for the white and coloured races") was long term and incremental. The tactic was to target graduate vocational schools such as medicine, law, pharmacy and dentistry where the states provided no facilities at all for negro students. The logic ran that the respondent states would be hard-pressed to justify "whites-only" graduate educational facilities when separate facilities for Negroes did not exist.

Thus the NAACP opened up the law schools of the University of Maryland (1937) and the University of Missouri (1939). The Maryland case required Marshall (the pupil) to move the admission of his master and lead counsel (Houston) to the Maryland Bar.

Thereafter the NAACP progressed towards a full attack upon the separate but equal doctrine enshrined in *Plessy* v. *Ferguson.* By now Houston had entered private practice and Marshall was lead counsel for the NAACP. Houston had begun the case which was to become *Bolting* v. *Sharpe* — one of the five cases collectively known under the name of *Brown* v. *Board of Education of Topeka.*

Houston's death in 1949 intervened and the NAACP inherited *Belling* v. *Sharpe*. *Brown* was first argued in December 1952 before the Supreme Court under Chief Justice Vinson. With signs of a split court narrowly upholding *Plessy* v. *Ferguson*, Justice Felix Frankfurter set to work and was able to persuade the other members of the Court to reschedule the case for further argument in October 1953.

The NAACP operated on a shoe-string budget. Marshall had previously adverted to the problem facing any minority in enforcing its legal rights during the 1952 oral argument when Jackson J asked the appellant's counsel if his argument regarding the intent of the Fourteenth Amendment to the US Constitution would equally apply to North American Indians as well as Negroes.

The NAACP operated on a shoe-string budget. Marshall had previously adverted to the problem facing any minority in enforcing its legal rights during the 1952 oral argument when Jackson J asked the appellant's counsel if his argument regarding the intent of the Fourteenth Amendment to the US Constitution would equally apply to North American Indians as well as Negroes:

Marshall: I think it would. But I think that the biggest trouble with the Indians is that they just have not had the judgment or the wherewithal to bring lawsuits.

Jackson J: Maybe you should bring some up.

Marshall: I have a full load now, Mr. Justice.

Frankfurter's manoeuvring to postpone judgment stemmed from his desire for a strong unanimous opinion as much as his view that *Plessy* should be reversed. However, under the guise of seeking further argument on five questions posed by the Court the NAACP was forced to extend itself further. It urgently solicited donations totalling $15,000 to research the questions raised by the Supreme Court. The respondent states challenged the tax deductibility of such donations and set about researching the same questions themselves. The resources available to the respondent states were formidable. Marshall observed in mid-1953.

". . . one of the evidences of our general problem of fighting governmental agencies is that the Attorney General of Virginia had written to the Attorney General of each of the (thirty-six other) states which considered the Fourteenth Amendment and, in turn, each of these Attorneys General are doing the research for them without cost or obligation".

Before the scheduled re-argument, Chief Justice Vinson died in September 1953. Frankfurter's law clerk Alexander Bickell recalled:

"I had lunch with Justice Frankfurter the day he was going to the funeral. It was in his chambers and he was putting on his striped pants. I can still see that barrel chest and the sleeveless undershirt. As he dressed he kept murmuring, 'an act of Providence, an act of Providence', from which I concluded that he feared a splintered Court on *Brown* with himself in the role perhaps of casting the deciding vote".

To another former clerk Frankfurter remarked, "This is the first indication I have had that there is a God". Pending the appointment of Chief Justice Earl Warren re-argument in *Brown* was held off until December 1953.

With the assistance of Frankfurter, Chief Justice Warren was able to forge a unanimous decision in Brown. Such a decision was important because of the subject matter of the *Brown* case and the fact that it was Warren's first major case as Chief Justice.

Some short time prior to announcing the decision Chief Justice Warren took off for a few days in the Court's limousine to visit Civil War sites and monuments in Virginia. He was driven by the Court's black chauffeur. At the end of the first day the car deposited Warren at his hotel where he had a booking. The next morning Warren was dismayed to observe that his chauffeur had obviously slept overnight in the car and he sought an explanation. "Well, Mr. Chief Justice, I just couldn't find a place, couldn't find a place to . . ." The Chief Justice was mortified to realise that he had wrongly assumed accommodation would be available for his driver without regard to his colour. The rest of the trip was cancelled and the Chief Justice and chauffeur returned to Washington.

The *Brown* decision was handed down on May 17, 1954 with the Court holding that "[s]eparate educational facilities are inherently unequal". However, the Court did not wish to impose immediate desegregation and required the parties to make further submissions regarding the orderly implementation of the Court's ruling. This was a sop

to the south to reassure it that change would be gradual.

The further oral argument in what became known as *Brown II* was held in late 1954. By this time the lead counsel for the respondent states, John W Davis — the Democratic Party's candidate in the 1924 Presidential election — had died. As the US Solicitor General in President Wilson's cabinet he had argued his first case before the Supreme Court forty years earlier. He had been successful in that case, ironically enough striking down a state law discriminating against the Negroes right to vote. Justice Oliver Wendell Holmes had described Davis as the most elegant, clear, concise and logical advocate to have ever appeared before him in his fifty year judicial career on the Supreme Judicial Court of Massachusetts and the Supreme Court. Thurgood Marshall's wife of twenty-five years, Vivien Burey Marshall, had also died in the meantime as had Justice Robert Jackson who was replaced on the Court by John Marshall Harlan. Thus it came to pass that the fifty-five year old grandson of the sole dissentient in *Plessy* v. *Ferguson* would participate in the reversal of the decision and fulfil his grandfather's prediction that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case" per Harlan J, 163 US 537 at 559 (1896).

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One fortunate aspect of the *Brown II* decision was that the Court did not specify a date by which segregation was to end as Marshall had vigorously sought. Instead the Court opted for an ambiguous phrasing that the states were to dismantle segregation "with all deliberate speed". It had been Justice Felix Frankfurter's suggestion to Chief Justice Warren that saw this phrase included in the again unanimous opinion written by Warren. It was, perhaps, Frankfurter paying homage to Oliver Wendell Holmes who had written in a 1911 opinion that West Virginia should proceed, "in the language of the English Chancery, with all deliberate speed". Frankfurter was unable to persuade the Chief Justice to credit the phrase to Holmes 1911 opinion. The derivation of the phrase gnawed at the scholarly Frankfurter. All his research could not determine from where Holmes had taken it. He even enlisted the assistance of Professor Mark de Wolfe Howe of Harvard. All to no avail. William Safire who has a language column in the *New York Times* has been unable, even with the assistance of Justice Potter Stewart and Professor Alwin Thaler of the University of Tennessee, to shed further light. The earliest recorded usage of the phrase is in one of sir Walter Scott's Waverley novels Rob Roy (1817):

". . . there was no mode of recovering it but by a suit at law, which was forthwith commenced, and proceeded, as our law-agents assured us, with all deliberate speed".

The consequences of the Court's decision were far reaching but slow in coming. The recalcitrant southern states interpreted deliberate speed as justifying any conceivable delay. They were aided by the Eisenhower administration which was lukewarm towards enforcing desegregation and nine years later Justice Black expostulated in *Griffin* v. *County School Board* (1964):

". . . there has been entirely too much deliberation and not enough speed. The time for mere 'deliberate speed' has run out . . ."

Black was to confide to his law clerks that he "should never have let Felix get that into the opinion".

The southern states were encouraged by the Southern Manifesto signed by 101 of the 104 southern senators vowing to reverse this unconstitutional decision of the Supreme Court. The three southern holdouts included Senators Lyndon Johnson and Albert Gore. Thirty-seven years later Senator Gore's son requested of the by then retired Supreme Court Justice Thurgood Marshall that he administer the vice-presidential oath at the January 1993 presidential inauguration. The day before the inauguration Marshall's declining health forced him to decline the honour and fellow retired Justice Byron White swore in Vice-President Al Gore followed by Chief Justice William Rehnquist swearing in President Bill Clinton. Four days later Thurgood Marshall died.

In 1961 President Kennedy appointed Marshall to the Court of Appeals (2nd Circuit), an appointment that fuelled speculation that William Hastie (Houston's successor as Dean of the Howard Law School and then serving on the 3rd Circuit of the Court of Appeals) would be elevated to the Supreme Court, the first negro to be appointed to the Court. If that were the case, the time was not politi-

cally ripe and the next vacancy was filled by the President appointing Assistant Attorney General Byron White to the Court in 1962.

President Johnson persuaded Marshall to resign from the Court of Appeals in 1965 and accept the position of Solicitor General. When Marshall hesitated, LBJ sealed the appointment by putting his arm around Marshall's shoulder and telling him:

"I want folks to walk down the hall at the Justice Department and look in the door and see a nigger sitting there".

Marshall was the last Supreme Court justice appointed by a Democratic administration. As the members of liberal Warren Court resigned and were replaced by conservatives, Marshall became more isolated until the 1990 retirement of Justice William Brennan left him the sole holdout.

Two years later when Ramsay Clark was appointed Attorney General, his father Justice Tom Clark retired from the Supreme Court in line with his view that it would be improper for him to determine cases brought before the Court by his son. LBJ filled the vacancy with Marshall and told the nation:

"I believe it is the right thing to do, the right time to do it, the right man and the right place".

An insight into Marshall's irreverent acceptance of his position on the highest court in the land is provided by Woodward and Armstrong's *The Brethren* (1979). For Chief Justice Warren Burger there was no more intimidating experience than his first few encounters with Marshall in the marble corridors of the Court. "What's shakin', Chiefy Baby?" Marshall would sing out. Puzzled, Burger mumbled a greeting of his own. It did not take Burger long to realise the pleasure Marshall got from making him uncomfortable. Marshall had many similar stories of putting people on. A favourite of is involved unsuspecting tourists who mistakenly entered the Justices' private elevator. Finding a lone black man standing there, they said, "First floor please". "Yowsa, yowsa", Marshall responded as pretended to operate the automated elevator and held the door for the tourists as they left. Marshall regularly recounted the story, noting the tourists' puzzlement and then confusion as they watched him walk off, and later realised who he was.

Thereafter Marshall served for twenty-four years on the Court in an increasingly conservative line-up brought about by Republican appointments — Marshall was the last Supreme Court justice appointed by a Democratic administration. As the members of liberal Warren Court resigned and were replaced by conservatives, Marshall became more isolated until the 1990 retirement of Justice William Brennan left him the sole holdout. He and Brennan found themselves more often dissenting and had always, however ineffectually, dissented in capital punishment cases. After Brennan's resignation he continued with their standard dissent:

"Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments I would grant certiorari and vacate the death sentence in this case".

Marshall had vowed to himself that he would not retire during the administrations of Presidents Reagan and Bush so as to deny them the opportunity of replacing him with a conservative judge. In the end his age, his health (he had been fitted with a heart pacemaker for many years), and perhaps his disillusionment with his holdout position on the Court led him to announce his retirement at the close of the 1990–91 Supreme Court term. At that time the stocks of the incumbent President George Bush were at an all-time high following the Desert Storm victory over Iraq in the Gulf and the prospects of a 1992 Democratic presidential victory were almost non-existent. Perhaps had Marshall been able to foresee the turnaround in Bush's fortunes and the emergence of Bill Clinton he may have been moved to hold on that little longer.

Marshall's life permitted him to see the realization of Martin Luther King's 1963 dream. His life permitted him to participate in the realization of that dream.

Sources:
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Mal Park

HARTLEY HANSEN INTERVIEWS THE ATTORNEY-GENERAL

HH: IN THE 11 WEEKS SINCE THE ELECTION how you have found your position as Attorney-General?

AG: I think I could sum it up in a couple of words by saying very busy.

HH: What are the responsibilities.

AG: Well you can divide them into a number of categories. I suppose first of all the Attorney-General is the first law officer of the Crown and in that capacity is responsible for ensuring that the government operates at all times in accordance with the principles of public law.

HH: Are you called upon by other Ministers and departments for advice.

AG: Yes, quite frequently, and advice ranges over quite a wide area. I suppose the other aspects of the attorney-General's office is to ensure that the courts and the other activities associated with this department continue to operate as effectively and efficiently as possible.

HH: Have you found the position any different from your expectations.

AG: I think the position has changed. I suppose of all recent Attorneys-General I have probably had the longest apprenticeship because I in fact have worked quite a long time in the Department myself gong back to 1967, and the position of Attorney-General has changed since then. There are probably more demands on the Attorney now than there were in the late 60s through the 70s. The volume of paper work is immense and ranges over an enormous area. I think government moves along at a faster pace these days perhaps than it did 20 years ago.

HH: You mentioned your background of working in the Department. Can you describe that and indicate how you think that has been of advantage to you.

AG: Yes, I started work in the Department in 1967. I came here expecting to stay for three months and I stayed for over 20 years. I had actually accepted a job as a tutor at Monash and I was filling in a bit of time at the Parliamentary Counsel's Office and I found the work absolutely fascinating.

HH: Was the position of Parliamentary Counsel the first you had in the Attorney-General's Department?

AG: That's right, yes. I was there for 12 years and subsequently I was Commissioner for Corporate Affairs for six years and President of the Equal Opportunity Board for just on three years.

HH: You also have other Ministries?

AG: Yes I am Minister for Fair Trading and Minister for Women's Affairs. Fair Trading was a bit of a surprise to me. I had prior to the election also been Shadow Minister for Gaming but following the election that became Haddon Storey's responsibility and I picked up Fair Trading from Phil Gude, so its an area that I am having to come to grips with. I wasn't following it as closely as I was the Attorney-General's portfolio prior to the election.

HH: Fair Trading suggests the Fair Trading Act which might well be in your province but does it go wider than that?

AG: We have changed the name from Consumer Affairs to Fair Trading and that area under the previous government appeared to be ideologically driven and our idea is to get a bit more balance back into it between the interests of business and the interests of consumers. We intend to re-write quite a bit of the legislation in that area to simplify it and get the balance better. And also I feel there is a need to concentrate in that area much more on enforcement than has been the case in the past. In the past there has been a lot of emphasis on advice to consumers and not enough emphasis on the enforcement activities.

HH: When you say that the balance might have been wrong with the previous government, do you mean too much of an emphasis on one side of the ledger against the other.

Hartley Hansen talks with Jan Wade.

AG: Yes, there appeared to have been too much emphasis on rights of tenants and consumers and a feeling on the part of businesses and landlords that they were not getting a fair deal. It is difficult to tell how justifiable those feelings were but I think we need to have a look at the legislation, have a look at the tribunals and endeavour to restore confidence.

HH: So that would be a number of tribunals, for example, Small Claims, Residential Tenancies.

AG: Residential Tenancies and Small Claims in particular.

HH: Credit Tribunal too?

AG: Well there appear to be some concerns also about the Credit Tribunal but somewhat different to the other two.

HH: What you have said perhaps touches on a topic called tribunalisation about which a great deal has been said in recent years and a lot was said by the Supreme Court in their annual report in 1988 about the amount of work that was being given to tribunals rather than the courts. Do you have a view about that?

AG: Well there are two competing aspects. One of the major difficulties confronting an Attorney General now is access to the legal system and the cost of access to the legal system and a large part of the response to that has been to set up tribunals but there is no doubt that the criticisms of the Supreme Court that members of tribunals have short term appointments and that they are not perceived to be truly independent of government has caused quite a bit of concern to the present government.

HH: There is also a concern about the giving of exclusive jurisdiction to some tribunals, e.g., the Residential Tenancies Tribunal and taking it away from the Supreme Court.

AG: Yes, that has been a concern and in fact that is something that we fought quite hard about in opposition, the removal of the entrenchment of the Supreme Court's position in the Victorian constitution which the previous government tried to take that away. We used our numbers in the Upper House to prevent that happening. Nevertheless, that removal of jurisdiction from the Supreme Court has continued bit by bit as specific pieces of legislation have come through and in fact I think there is a need now to go back over what has been done in the past and also devise rules for the future to ensure that doesn't keep happening. I am also thinking that the jurisdiction of a couple of tribunals may go back to the courts. We are looking fairly closely, I don't specifically want to mention tribunals but there ere a couple of tribunals where the jurisdiction is more appropriate to the courts and the procedures of some tribunals are a matter of some concern.

HH: One aspect of the role of the Attorney-General has I think traditionally been that on speaking on behalf of the judges who are unable to speak for themselves or at least that has been the attitude they have taken in the past, do you see that as part of the responsibility of the office of Attorney General? If there is an attack say in the press made upon the judges or a particular judge, of speaking in answer.

AG: Yes I do, I think that that is an important function. I also have been appalled recently by attacks on the judiciary made by Ministers including the Federal Attorney-General and I think that is to be absolutely avoided by an Attorney-General. I am talking here about the importance of the judiciary itself, not about the terms and conditions of appointment of judges and so on. It is important to distinguish being an advocate for the judges and protecting the position of the judiciary. And I don't see myself as being an advocate for the legal profession either. Again, I think it's important that my concern be with the legal system itself and the service it's providing to the community and not as an advocate for the solicitors or the Bar.

HH: Could you comment on the portfolio of Women's Affairs.

AG: There has been some criticism of Women's Affairs being transferred from the Premier's Department to the Attorney-General's department. In fact I think it's a very good place for the Women's Affairs portfolio to be because quite a lot of issues of importance to women are related to legislation and quite a lot of them are related to Attorney-General's Department legislation. There has been

quite a lot of discussion about the need for the appointment of women as judges.

HH: How do you see this?

AG: I think it is important that there are more women judges in that there is no doubt that, generally speaking, women have a different life experience to men. I think it's important that those experiences should be taken into account both in the political sphere with policies being developed and in a legal area where law is being developed. And therefore it is desirable that women be appointed to courts and I have no doubt they will be. When I first signed the Bar Roll in about 1970 there were hardly any women at the Bar. In fact I think I have said this before, the first time I had lunch over in Owen Dixon, the chairman of the Bar sent someone over to see what I was doing there. That is not the case now, there are a lot of women who have come up through the Bar since that time.

HH: I think the point now that people are interested in is whether you would see appointment of women as being made on merit rather than tokenism for the sake of having women appointed to whatever position there may be.

AG: I don't think anyone is arguing for tokenism and I'm saying there is no need for tokenism. There are women coming up through the Bar who will be very suitable for appointment to the Bench. And can I just say to you, not every man appointed to the Bench is absolutely suitable. You know, it's the argument that women put up all the time, when incompetent women are appointed as easily as incompetent men we will have true equality. I would hope that the appointments I make to the Bench both men and women will be people who are competent. I regard it as one of my most important functions to ensure that the right appointments are made right throughout our courts, that is from the Supreme Court to the Magistrates Court and to tribunals.

HH: Does the portfolio of Womens Affairs relate in other particular ways to Attorney-General and Fair Trading.

AG: The Women's policy unit which is within this Department looks across all portfolio areas to ensure that women's concerns, matters that are different between men and women are taken into account in formulating government policy. Things like women have a more broken working life generally speaking than men and that when you are formulating employment policies you take into account those aspects of women's working life which are different to men. And again health issues. In many ways women's health issues have been overlooked not because of a deliberate intention to overlook them but because men have been the predominant members of the medical profession and have tended to give more emphasis to problems that are of more concern to men.

Equal opportunity is often about opening your mind to see things from a different point of view. The women's policy unit is ensuring that women's interests are not overlooked. In the Attorney-General's Department and in Fair Trading there are a lot of issues that are of particular importance to women. For instance, a couple of areas we are looking at, wills and the administration and probate legislation are areas where women may have a different perspective.

The budget for the Attorney General's Department has been understated in the last four to five years and in fact has been surreptitiously topped up during each year and that's causing me some concerns now because there's not so much money around these days, and there's no money around for topping up, and I have to persuade the Treasurer that in fact the initial budget has been underestimated.

HH: What type of changes are being contemplated in that area of wills and probate?

AG: Well, there has been a Wills Bill around since 1983–4 which for some reason the previous government didn't put through which is a fairly straight forward up-dating of wills legislation to pick up quite a number of problems that have been raised by the legal profession and others. The previous government did have an Administration and Probate Bill which was directed at changing the law with respect to inheritance on intestacies largely to put a de facto partner in the same position as a spouse and also to extend the testator's family maintenance provisions to a wide range of people

who are not currently able to make applications. The Coalition felt that there were very significant deficiencies in the proposals put forward by the previous government but we do recognise that changes are required as a result of the changing family structure and we will be putting forward our own proposals.

HH: Could I ask you about judges and what we may look forward to there in the future. From time to time the profession calls for more judges. Are we likely, looking forward to 1993, to see an increase in the number of judges.

AG: Well, I see it as important that we have enough judges to ensure that cases are heard expeditiously. Justice delayed is justice denied. But I have to say there are some problems in this portfolio as a result of the financial difficulties in the Victorian public sector. This has been compounded by the fact that the budget for the Attorney General's Department has been understated in the last four to five years and in fact has been surreptitiously topped up during each year and that's causing me some concerns now because there's not so much money around these days, and there's no money around for topping up, and I have to persuade the Treasurer that in fact the initial budget has been underestimated. If I can't do that we are in very considerable difficulties and there will be no additional judges and it's going to be very difficult to keep the Department functioning across all the areas in which it currently operates.

HH: When the government came into office in October, did the Treasurer introduce cuts in the budget of this Department.

AG: There was, as has happened in previous years, a requirement to cut back 1½ per cent which is called a productivity saving and in addition to that as a result of the financial difficulties that were far worse than we anticipated, we have been asked to cut back a further 2 per cent This department has a relatively small budget compared to say Transport, Education or Health and it is harder to find that money in a smaller budget. But as I say it is has been compounded by this problem that the budget was understated anyway as it has been for the last five years by around about $11m.

HH: Over a five year period?

AG: No, no, $11m this year. Each year, for instance last year the budget was understated by $12.8m and it was topped up by the previous government during the year. This time it's been understated by at least $11m and I have to say the Treasurer is not into topping up budgets this year so this is a very significant problem for me and I'm hoping by a combination of persuasion of the Treasurer to recognise that this is not a case of asking for special consideration, but just a case of ensuring the Department is not more severely cut back than other departments, and of finding savings in lower priority areas we can keep the courts running in a way that does not build up further delays.

There's no doubt that we need a new Magistrates Court in the city. There are fairly severe problems in the existing court with accommodation problems, problems for people using the court and security problems, and I would like to go ahead with it if possible but there are some difficulties with the arrangements that were negotiated by the Kirner government.

HH: Is the project for a new Magistrates Court to proceed?

AG: We're looking at that. I would like it to proceed. There's no doubt that we need a new Magistrates Court in the city. There are fairly severe problems in the existing court with accommodation problems, problems for people using the court and security problems, and I would like to go ahead with it if possible but there are some difficulties with the arrangements that were negotiated by the Kirner government. As you will recall, after the election had been called, the previous government entered into this contract rather hurriedly and there are some problems with the arrangements which have been made which we are currently looking into.

HH: Another topic is the County Court. There had been talk that the County Court would relocate by building on the Mint site and then there was a suggestion of transferring the Court to the Water Board building.

AG: The Department of Finance is still pursuing those suggestions. I find it hard to believe that we're going to be able to find the money for the County Court to move but certainly I'm open to any

proposals that are put to me. I have to say that one of the things I would like to do very much is to remove the scaffolding.

HH: If the County Court doesn't relocate, doesn't it have sufficient premises for its judges to hear cases?

AG: No, it doesn't. My understanding is that there have been a number of occasions in the last year where there have been judges who have been available to sit who have not been able to sit because a court is not available and that is totally unsatisfactory. It is something that we will have to tackle. I am going to have to explore each of the options available.

HH: Can I ask you about another topic that has been in the news lately, judicial independence This has several aspects to it. The basic one of course being independence from the Executive. How do you see the abolition of the office of the members of the Accident Compensation Tribunal as being compatible with the principle of judicial independence.

AG: This is something I had to think long and hard about. I do not believe that what we have done is an attack on the independence of the judiciary. In fact I looked at every conceivable option and decided that what we did was the best way. The abolition of the Tribunal was in the context of a total reconstruction of the workers compensation system in Victoria which was absolutely essential because of the loss of money involved in it. One of the decisions was to move away from a specialised tribunal and have cases heard in courts of general jurisdiction. So the decision was made that the jurisdiction of the Accident Compensation Tribunal should be moved to the County Court and that was the policy that was announced prior to the election. Now, once you move the jurisdiction to the County Court there was nothing left for the judges in that Tribunal to do. There was no question of the judges being removed on political grounds. It was a decision about the accident compensation scheme and if I could quote from Sir John Donaldson, Master of the Rolls, in relation to a similar situation, "If the government judged that abolition was necessary in the public interest it was not only their right but their duty to propose to the parliament that this should be done." We felt that it was important in the public interest. We did not do any of the things for which governments have been criticised in the past. It was not a case of abolishing a tribunal and then restructuring it without certain judges that the government didn't like. There was no question of singling out one judge from another for special treatment for appointment to a court or tribunal and all the judges were offered a compensation package which was based on their length of service and their superannuation entitlement. We have not criticised those

judges for the way in which they discharged their duties. Once we decided to transfer the jurisdiction, I had discussions with the Chief Judge and as a result of those discussions I eventually decided to transfer part of the jurisdiction to the Magistrates Court and part to the County Court and a small portion of it to the AAT. Then the question arose as to whether the judges of the Accident Compensation

Tribunal were entitled to appointed to any of those jurisdictions. Now I discussed that with the Chief Judge and the Chief Justice and with the President of the Accident Compensation Tribunal. I felt, as did the President of the Accident Compensation Tribunal, that it would be inappropriate to make appointments to the Magistrates Court. The Chief Judge indicated to me that he didn't consider any additional judicial appointments were required in the County Court. It was possible we might have been able to make a couple of appointments to the AAT but that would have meant picking and choosing amongst the former members of the Accident Compensation Tribunal. In fact one of the members has experience in the AAT and has been offered a position there, but that was on the basis of experience not on the basis that we decided to pick and choose amongst the members. So far as the County Court was concerned, it appeared 'We didn't need any additional judges, but if additional appointments had been required it seemed to me that my greatest duty would be to ensure on behalf of members of the public and future litigants that the best possible appointments were made. In making appointments to any Court everybody who is qualified for appointment should be considered and the best person appointed. I believe that that is consistent with the decision of the High Court in Quinn's case. I don't remember who it was who said it but they said the executive government is entrusted with authority to decide who is best fitted to fulfil the duties of the office and that it is inconsistent with the public interest to postulate any preferential right to appointment in an individual, and that was of course in relation to the Magistrates in New South Wales.

HH: One of the arguments made was that there was a principle that a person whose court or tribunal was abolished should be reappointed to a court or tribunal of equal or superior status.

AG: No additional appointments were necessary in the County Court and only one or two in the AAT. I do not believe it would be responsible to ask taxpayers to support 10 or so judges who are not required. Nor do I believe there is any principle which indicates they should have been appointed.

HH: Can I ask you about another aspect of judicial independence. You will recall that last year Xavier Connor Q.C. and Keith Marks Q.C. recommended to the previous government that there be established an independent tribunal for the determination of the salaries of judges and magistrates, that the tribunal be constituted by persons who were independent of the judiciary and government and that the tribunal's decision be binding on government; the previous government responded to that recommendation by deciding that future adjustments to judicial remuneration be considered by a judicial remuneration committee of Cabinet. Does the government have an attitude in relation to that recommendation.

AG: We have considered it and our Law and Justice policy which was circulated before the election does contain a commitment to providing that judges salaries are recommended by an independent tribunal.

HH: Has any step been taken to implement that?

AG: No it hasn't at this stage. It would be desirable I think to look at that in the context of amendments to the Constitution because as you will remember the provisions relating to Supreme Court judges remuneration are contained in the Constitution. We are intending to look at the need for amendments to the Constitution and that should be looked at in conjunction with other amendments we are considering.

HH: Would you envisage that the government would retain a power to accept or reject determinations.

AG: Well I suppose the preferable position is that the government be bound by an independent tribunal I have to say that the current financial difficulties which we have been battling with over the last couple of months have concentrated my mind on the difficulties a government has in controlling non-discretionary expenditure. I think that it perhaps depends on how we establish the tribunal and how often it reports. There is a significant problem where you have a tribunal reporting once every five years or so when the increases tend to be quite large and maybe we should be looking at reports on a shorter time frame.

I don't foresee that we are going to have extra money available for legal aid. We are confronted by the decision of High Court in the Dietrich case and that could very well add to the problem. I think there is going to have to be a cap on the amount of aid provided in criminal cases.

HH: A matter of concern to the profession in the last year has been the Legal Aid Commission and particularly of course when the Commission reduced fees it paid in certain areas. In the newspaper today the Commission is reported as proposing a cap of $50,000 on all future grants of aid both criminal and civil. Can I ask what is the present position with funding by the government.

AG: The situation is that the Victorian government has a commitment to contribute a proportion of the Legal Aid Commission's costs and the Commonwealth government pays the rest of the costs of administration and professional assistance In past years the Victorian government's commitment was largely picked up from the solicitors guarantee fund but for a number of reasons including low interest rates the money that used to be available from that fund is now falling very far short, so we are looking at paying somewhere between $18 and $20m this year out of the Consolidated Fund and that's money that has to be found either by increasing taxes or by cutting down services elsewhere. I don't foresee that we are going to have extra money available for legal aid. We are confronted by the decision of High Court in the Dietrich case and that could very well add to the problem. I think there is going to have to be a cap on the amount of aid provided in criminal cases.

HH: Has that yet been decided.

AG: Well I read the newspaper report too and I believe the legal aid commission said that it had made the decision but that it was going to ask both the Commonwealth and State for approval. Now I don't think they have to do that. In fact I don't think they've done it in the past. So, yes, I imagine it has been decided.

HH: They may intend to propose a cap of $50,000 per grant as part of an application to Commonwealth and State governments for further funding but you have I think already announced that the State funding is to be reduced in the current year.

AG: We have done, yes.

HH: By how much?

AG: Well there are a couple of areas which were identified as previous government policy. One was the courts delay program and the other was the moneys for expensive criminal cases, that is cases over the previous limit which was $200,000 and in addition to that the Legal Aid Commission has been asked to make the 2 per cent cutback. We are looking at a number of different issues. First of all I am looking at the decision in the Dietrich case because, as I have already indicated, money is a major consideration and I don't know where we're going to get the money from to top up legal aid and if the Dietrich case applies to Victorian cases unless something is done about it we have got very severe difficulties. I have reviewed the case to the Victorian government solicitor to see whether we can override it by legislation. That is not to say that that decision has been made but is to see what the options are. My own view is that probably if we were to make a decision to override it by legislation we probably could do so. I think that there is room for improvement in the way in which the Legal Aid

Commission operates. The Commission itself has instituted a number of reviews of its own operations and I anticipate that they may be able to cut back some of their administrative costs and make more money available for professional assistance. There is no doubt that legal aid cannot be open ended. The Legal Aid Commission is going to have to live within a budget. It is just going to have to try to operate more efficiently within that budget.

The Commission itself has instituted a number of reviews of its own operations and I anticipate that they may be able to cut back some of their administrative costs and make more money available for professional assistance. There is no doubt that legal aid cannot be open ended. The Legal Aid Commission is going to have to live within a budget. It is just going to have to try to operate more efficiently within that budget.

HH: Turning to a different topic, reform of the profession, the Victorian Law Reform Commission published two papers last year dealing with the profession, one dealing with various practices and one dealing with the regulatory structures. One aspect concerned a proposal that the State refer to the Commonwealth its power to deal with trade practices. Does the government have a position in relation to such transfer of power to enable the Commonwealth to deal with trade practices purely within the State.

AG: No, this has not been considered by the government. It is not something that we were in a position to have a policy on prior to the election and I haven't had time to consider it since the election. The previous government and the previous Attorney-General in particular seemed ready to hand over everything to Canberra. I don't know why he didn't go ahead in this particular instance. My own view is that if we need any trade practices type legislation in this area then we could do it by way of State legislation. We don't need to hand it over to Canberra. And I think we've got to be very careful. We're very concerned to try to keep small businesses in operation in Victoria, to encourage more small business people, medium sized business people to come to Victoria and there's an equal need to ensure that our professions flourish. We have a very good legal profession here in Melbourne and I don't believe we should hand over the regulation of that to Canberra. I don't think it's necessary or in our best interests. But I have to stress it's not something the government has at present considered.

HH: In that connection would you see it as important that along with a strong and active local profession there be a court system which is sufficiently staffed and efficient so as to fully service business and indeed attract business. For instance, cases may be commenced in other states if those courts are seen as being more efficient, with cases more likely to get on and be disposed of more quickly.

AG: Yes, that's absolutely essential and in fact something that I have had a very keen interest in since I was Commissioner for Corporate Affairs. One of the areas I was particularly interested in there was efficiency in handling commercial cases and in fact it's something I had a look at when I visited the United States in 1985. 1 found that the jurisdictions that provided efficient services to business did attract business to those Sates. It is absolutely crucial and it is very disappointing that Victoria used to have a reputation in that area and to some extent has lost it.

HH: Some of the proposals of the Law Reform Commission are discrete. Take the proposal for contingency fees. Do you have a view about whether they ought to be allowed.

AG: Well again this is an area that the government has not considered. I have talked about contingency fees to quite a number of practitioners and to representatives of the Law Institute and the Bar. I myself have some doubts about the desirability of contingency fees I think that there are potential conflicts of interest between the practitioner and the client, so, for example, there can be a temptation on the part of a practitioner to encourage the contingency arrangement when there's a good case. I think that there is always the possibility that practitioners might be tempted to manufacture evidence, or withhold evidence in cases. Or perhaps more that they might be perceived to have done that. I have to say as Shadow Attorney-General I was besieged by people who have been dissatisfied with legal practitioners. Very often, I don't think they've had a case, but they certainly have a perception that they have not been treated fairly and I think contingency fees would make those criticisms

worse for legal practitioners, and have a bad effect on the reputation of the profession.

HH: What about the immunity of advocates from being sued.

AG: Well that's something I haven't spent a great deal of time on but I have to say that in England they appear to have come to exactly the opposite conclusion to the Law Reform Commission's view that immunity should be abolished. In England the immunity has been extended. As you probably know they have made provision for other people to act as advocates in the court, that is people other than barristers and solicitors and they have extended the immunity to those people so I want to find out a bit more about why they have done that, in fact I have asked the Bar to provide me with the information, which I don't seem to have got yet, on that issue before we make any decision on that.

HH: Have you had time to consider the report of the Law Reform Commission concerning the regulatory structures of the profession?

AG: All of these reports are going to have to be considered together. We're going to have to decide what we're doing right across the board. I haven't had time to reach a conclusion on this. I have to say that so far as solicitors are concerned, the Solicitors Board seems to be working quite well. But there does seem to be some concern, and I'm not sure how widespread it is, about the cases that don't actually get to the Board from the Law Institute.

HH: Under the Act the secretary has the discretion, he has to form a prima facia view of misconduct. If he forms a view he has a discretion whether to refer the matter on to a hearing or take no further action.

AG: The fact that it happens at the Law Institute as opposed to happening in an independent environment causes some people some concern and I think we are going to weigh up the advantages and disadvantages, I haven't reached any conclusion on that. So far as the Bar is concerned, I have not had very many complaints. I think the only problem there perhaps is public access to the Ethics Committee meetings. I believe there is public access but I doubt whether anyone ever finds their way in there. I think the only independent person present is the Lay Observer and it's probably a question of perception rather than anything else that causes problems.

HH: There seemed to be a suggestion in recent times that the abolition of the Victorian Law Reform Commission was the product of a conspiracy that the Bar was involved in and, as one who had something to do with the Bar Council last year, I would be grateful if you would confirm that that wasn't so.

> I don't know if it's obvious to members of the Bar but as a politician going out to large numbers of public meetings I have no doubt that there has been a considerable loss of confidence in our criminal justice system and I see it as one of my major objectives to try to restore that confidence.

AG: No, it definitely wasn't so. The situation was that the Coalition was concerned to ensure that we had an effective system of law reform, an effective ongoing system of law reform. And that one component of that should be independent advice to government. Law reform takes place here in the department and that is not divorced from the political arena but we also want advice of a purely independent nature. Now the previous government said it got that from the Law Reform Commission. We had some concerns as to how independent that Commission was, for a number of reasons. There were quite a number of arrangements existing between the Department and the Law Reform Commission. There was an exchange of staff between the Law Reform Commission and the Department. In some quarters anyway the Commission was not perceived to be independent. We also thought it was fairly expensive. I have had an audit done on the Commission as a result of those concerns. We believe we can do better without the Commission and reduce the cost, and we are proposing to set up an advisory committee which will advise me on law reform projects that need to be done and the best people with the greatest expertise who can be retained to carry them out. We hope to get a bit of pro bono work as well as paying for it. We have established two Parliamentary Committees which will consider law reform issues and in particular issues where we are seeking public submissions.

HH: Well, much law reform previously was done on a pro bono basis of course, and the Bar for its part often provides advice to government and opposition in relation to law reform and I'm sure they would always be prepared to continue doing that. Do you propose to use the Bar in that way?

AG: Yes, as Shadow Attorney-General I had a lot of assistance from both the Law Institute and the Bar and from community legal centres and from individual practitioners. I think that law reform is always better for the greatest possible input and it is particularly important that people with expertise in particular areas should have ability to advise the government in that particular area. I've had a lot of help from people, for instance on the Defamation Bill, which is unlikely to go ahead in its present form. I had a lot of assistance from members of the Bar with the detail of that Bill.

HH: One matter I must ask you about is the institution of Queen's Counsel. Does the government have a view yet as to the continuance or abolition of the office.

AG: No, the government doesn't have a view. The issue was raised initially I think in South Australia by the South Australian Attorney-General and then subsequently in Western Australia and New South Wales. The Victorian government currently is in a holding pattern on this issue, and I will certainly be consulting with the Bar. But I have to say it has been suggested to me by some very senior practitioners in Victoria that as a result of the abolition of the two-counsel rule it might be desirable to make some changes to the way in which Queen's Counsel are appointed. But I haven't formed a view on that one.

HH: Will you attend meetings of the Bar Council in your capacity as an ex-officio member of the Bar Council.

AG: I attended a meeting at the Law Institute last week in my ex-officio capacity and I would be only too happy to attend meetings of the Bar. I don't know how often the Council meets and I don't imagine you would wish me to attend every single meeting but I certainly would be happy to attend.

HH: How do you see 1993?

AG: I think full of challenges. I've got a very big legislative program both in the Attorney-General's area and the Fair Trading area. That Department is already telling me I'm expecting too much of them in that regard. I think there are going to be ongoing requirements to continue cutting our budget and that is also going to be very challenging. I would hope to be able to achieve a number of our objectives in 1993. The Attorney-General's portfolio does have the advantage that there are quite a number of things you can do that don't cost money and that's particularly so in the area of law reform. I'm not here just to let the place jog on as before. I suppose my major objective, which is going to take longer than 1993, is to restore confidence in the criminal justice system. I don't know if it's obvious to members of the Bar but as a politician going out to large numbers of public meetings I have no doubt that there has been a considerable loss of confidence in our criminal justice system, and I see it as one of my major objectives to try to restore that confidence.

HH: Do you think that might be because of delays?

AG: I think it's partly to do with delays. I think it's partly to do with sentencing. I think there is a perception that a lot of time is spent in courts without achieving as much as should be achieved. I mean a case has gone for months and really the outcome doesn't satisfy the community's expectation. I think that there is a lot of concern that the pendulum has gone too far in terms of looking after the accused and not really paying attention to the victim. I think there are reforms that can be carried out which will have the effect of restoring confidence. The perception is perhaps that the faults are even worse than they really are. But I will have to tackle both the reality and the perception.

HH: A report produced last year under the chairmanship of the Chief Justice was the Pegasus Report, will that be implemented? A concern about it was that it was going to cost money to implement.

AG: The theory is that it's going to cost money to implement, but the savings will be greater in the long term. But once again you've got the problem we haven't got the money to spend. Yes, I am looking at that Report. Some parts of it insofar as they don't require legislation are already being implemented and I'm looking at the rest of it.

HH: But what you propose next year is looking at the criminal justice system and seeing whether it can't be administered in a more efficient way, to produce quicker and speedier trials.

AG: Thats right. But there are a whole range of things we are looking at. We are looking at majority verdicts which we have promised to go ahead with, if just one member of the jury does not agree. We're looking at and will go ahead with our legislation which is already in parliament to abolish unsworn evidence and unsworn statements. We're looking at the issue that was considered by the Supreme Court the other day about the way in which the blood samples legislation is operating and there are quite a range of other things that we are doing. We are looking at the Sentencing Act to see what changes are required there for the reasons already mentioned, and in addition we are looking at prostitution, wills, cooperatives, a very large program.

Hartley Hansen

PARAS

the almost but not quites

IT HAS BECOME FASHIONABLE IN OUR society to promote the use of "paras" in areas previously entrusted to professionals.

Social engineers, with the enthusiastic but misguided support of politicians, have sought to supplant dentists with paradentals, doctors with paramedics, more importantly lawyers with paralegals.

The recent submission of the Commonwealth Attorney-General's Department to the Trade Practices Commission plagiarising, without credit, the propaganda of the now defunct Victorian Law Reform Commission (perhaps in the spirit of returning a favour — i.e. the unsolicited offer of the Law Reform Commission to rewrite the *Commonwealth* Income Tax Act) at page 26 says:

> "In the interests of greater freedom of choice for clients and the reduction of costs there is scope for removing barriers to the use of appropriately trained and skilled non lawyers or paralegals in various areas of the law."

What will constitute a paralegal? In dentistry moves have been underway to replace many of the skilled tasks of dental surgeons with dental hygienists, dental therapists and dental technicians. In medicine the doctor is being replaced by the paramedic.

The Oxford Dictionary defines "para" as "having a status or function ancillary to". This means less skilled, trained or experienced persons undertaking auxiliary functions under the careful supervision of a professional. The experience in medicine, dentistry, and the like is the displacement of the professional from the overseeing or supervisory role and their mere retention for limited highly complex situations.

Be not fooled. The same is in mind for the legal profession. The idea is to remove the lawyers entirely from many areas of the law. Were paralegals to undertake the tasks of auxiliary or ancillary support, as the definition above suggests, little else would be needed than to rename Law Clerks and Legal Executives as "Para-legals".

Instead, the idea appears to be to give paralegals almost exclusive rights to conveyancing, debt collection, probate and many other areas for centuries properly the province of lawyers. The public will need resort to these areas of law. But when they receive a standard less than the present professions, they will complain — and sue. Then there will be resort *back* to the real professionals. No amount of para-training will replace the professionals.

The same people who push for paralegals passionately believe in equality of outcome from the education system. They *require*, nay *prescribe*, that all persons who complete their time in the education system come out with the same qualification, irrespective of their levels of learning, ability, successes in assessment tasks and so on. Just as everyone who completes 12 years of schooling — however well or badly — will succeed in attaining a VCE, every person who aspires to be a professional will be so enabled albeit that some will have the prefix "para".

Would it be too cynical to suggest that those who most press for such outcomes are those self proclaimed "professionals" such as economists, journalists, social workers, teachers and the like who forever glory in chopping down the "tall poppy" doctors and lawyers that they so passionately wish to emulate? Is this why the concept of the "level playing field" finds such great favour with them and their like; with those that so like to sit back and tell others how to do things properly when so few of them have done so themselves, or have ever *resolved* any disputes at all.

The inevitable consequence of this trend will be that the standard for "professional" services will be that of the lowest common denominator just as it is now for so much of our society. Still it will be cheaper! Or will it? How expensive will it be to bring in the true professional to rectify or remedy the manifest errors that will be created; unless they have gone beyond the point of no return? Just as no one expects the cheap unnamed factory seconds sandshoe to equal the performance of a Reebok no one ought expect a paraprofessional to attain the heights of the professional.

Of course, there may not be any true professionals left. Why should a person complete a lengthy degree followed by a considerable period of supervised hands on training to become a doctor, dentist or lawyer if with less effort, less costs, less risk and less time one can become a paramedic, paradentist or paralegal. As well, in the current spirit of equality of outcome, it may be soon be deemed necessary to drop the distinguishing prefix of "para".

When that day comes we will have attained the status of true "banana republic" PARAguay perhaps?

Before that happens a halt must be called to the para-professionals and their use of jargon, models, graphs, equality-at-all-costs philosophies, micro-economic "reforms" and level playing fields. The almost but not quites, those that tell us how to do it but have never done it themselves, those who have had their way with the modern Australian politician (who would wish to be perceived as a [para] statesman) have brought this country to where it is — have had their day!

Paul Elliott and Grahame Devries

OPENING OF THE LEGAL YEAR

THE OPENING OF THE 1993 LEGAL YEAR took place on Tuesday 2 February 1993 at three venues in Melbourne, St. Paul's Cathedral, St. Mary's Star of the Sea Church, West Melbourne, and the Temple Beth Israel.

In previous years, due to the time differences between Melbourne and Geelong, the Legal Year in Geelong commenced a day later than in Melbourne. Some weeks later, in a manner reminiscent of the itinerant justices of the reign of Henry III, the Legal Year arrived in Ballarat.

This year, the formal Opening of the Legal Year occurred in Melbourne, Geelong and Ballarat on the one day. The logic is impeccable but it required that representatives of the judiciary, the Bar and the Law Institute to be distributed in small parcels not only through the Melbourne venues but also elsewhere throughout the State.

The Chief Justice attended the service at St. Mary's Star of the Sea which by reason of the renovations to St. Patrick's Cathedral was the venue for the Catholic service. Our cover photo shows the interior of the church during the service.

The Governor of Victoria, Mr. Richard McGarvie, attended the service at St. Paul's. The photos on these pages were taken during and after that service. As can be seen, the judiciary were in good voice.

In this age of secular puritanism there may be the fear that rituals such as the Opening of the Legal Year are both arcane and archaic, that they may in some obscure way increase the cost of justice, or perhaps even lead to dancing.

It is, however, important sometimes to recall where we have come from and where we are going; to pause to appreciate the traditions of our profession. To do so may not increase our efficiency but it may help us to maintain perspective. Certainly the pomp and ceremony assist in maintaining the strength, integrity and independence of the profession.

Perhaps our independence and unity, and the significance of the legal profession's role in the community, would be better emphasised and fostered if there were a single ecumenical service to usher in the New Legal Year? Many who now attend none of the disparate services might well add their numbers to those attending a single service, attendance at which did not imply a particular view of the hereafter.

GETTING AHEAD

Only in Southern California

They seek it here,
They seek it there,
Those coroners seek it everywhere.
Is it alive or is it dead,
That damned, elusive frozen head?

THIS WAS NOT AN UNUSUAL PROCEDURE at Alcor — there were in fact six other frozen heads and one entire frozen body already on the premises — but nevertheless the suspension team on duty that night which included Michael Darwin, president of Alcor, and Jerry Leaf, the staff surgeon, committed a minor technical blunder that would later turn out to have some major repercussions, not only for them personally, but for the practice of cryonics in general. The problem was that in their haste to get on with the freezing process, they failed to have the patient *pronounced* dead. That the patient was *in fact* dead (at least according to generally accepted medical standards) no one present had any doubt, for she had stopped breathing and had no heartbeat. Both Darwin and Leaf had verified this by means of cardiac monitor as well as by stethoscope, but neither of them was a licensed physician, so their clinical findings had no legal status. Nevertheless, because time was crucial, they immediately went ahead with the drug protocols and all the rest, and in a matter of hours Dora Kent's head was off and on its way to the "cephalarium vault", a special earthquake-resistant storage chamber that Alcor had developed for the better protection of its neuro-preservation patients (frozen heads).

The following Monday, officials at the Buena Park Chapel and Mortuary, with whom Saul Kent had contracted to cremate the rest of the body, tried to file a death certificate with the public health service in order to get a cremation permit. But the health service refused to issue one, because no physician had been in attendance at the time of death, and what was worse, the body in question was without a head, which was a highly unusual circumstance even for Southern California. Two days later, people from the county coroner's office showed up at Alcor to examine the so-called nonsuspended remains. The coroner removed these from the premises, and later performed an autopsy on them.

Apparently, though, there would be no further difficulty. The autopsy showed that pneumonia was indeed the cause of death, and soon a deputy coroner signed a death certificate to this effect, listing atherosclerosis and organic brain syndrome as contributory factors. On December 23 (1987), with everyone satisfied, Dora Kent's body was cremated and the case was closed.

Or so everyone thought at the time. But at about noon on the very next day, 24 December, the day before Christmas, an NBC camera crew from Los Angeles showed up at Saul Kent's home on the outskirts of Riverside. They wanted to know how he felt about the story in the paper.

"What story?"

"The story that you cut your mother's head off while she was still alive. And that now you're being charged with homicide".

Ed Regis, *Great Mambo Chicken and the Transhuman Condition: Science Slightly Over the Edge* (1990) pp. 78–79 and p. 143.

. . . and in Northern California

[SAN FRANCISCO LAWYER GARY] Merritt was known on the Peninsula as an excellent attorney, although he had a reputation for very aggressive courtroom behaviour on occasion. His colleagues particularly loved to tell the tale of the armed robber whom Merritt once defended. The case was seemingly hopeless. Merritt's client had allegedly badly assaulted a nun during a hotel robbery. Before trial began, Merritt filed a motion to keep the nun from testifying, knowing that her words might be what swayed the jury. The nun, he argued to the judge, was clearly incompetent. After all, Merritt said, "we have here a fifty-two year old Catholic virgin who believes she's married to a poor itinerant Jew born two thousand years ago who was an admitted felon in his own time. Can this woman really be believed?" Merritt's tactic failed, as he had felt certain it would, but he believed in pushing the justice system to its limits.

Sue Horton, *The Billionaire Boys Club* (1989) p. 143.

Mal Park

THE BAR CHRISTMAS PARTY

IT WAS A SHOCK TO READ IN THE BAR'S newsletter *In Brief* that the Bar Christmas party is in danger of extinction. Not enough folks turned up to cover the cost! Who would have ever thought that this institution would become another victim of the recession. But the party is not over — not quite yet. Our beloved chairman has called for suggestions! Perhaps another venue? Perhaps a change in style? Suggestions have poured in.

Mick Casey (Pictured), well known father of Pat and brother of Terry, has suggested that it be moved to the Celtic Club. A beautiful buffet of green beer with Irish stew on skewers would liven proceedings up. It would be sure to attract a large crowd. WASPS and women would, naturally, be excluded.

Many suggested that the Bar should not hold any functions at clubs which have discriminatory policies. All male clubs such as the Savage, Australian, Melbourne, etc. should be ruled out as bastions of chauvinism. However adherence to this policy would, of course, rule out the Essoign Club. This club is one of the most discriminatory clubs of all. It is a disgrace that only barristers and the odd judge can be members. The Trade Practices Commission and the *Sunday Age* are presently conducting an inquiry into the club and its practices. Senator Schacht (the one without ties) has made a submission that Christmas itself is discriminatory, in a multi-plural-non-sexist-non-racist-non-cultural society and therefore all Christmas parties should be illegal, and void as against public policy. This has been taken on board. Haysey Ball is drafting the Bar's reply in conjunction with Michael Crennan. However it is inevitable that the doors of the Essoign Club will be swinging open to social workers, sex workers and others involved in the whole law industry, (i.e. recidivists).

The red faced yachties of the bar suggested a Christmas regatta far away from the foyer of Owen Dixon West. The Merri-Creek or the Maribyrnong River were suggested as suitable festive sites. In line with the recession hundreds and thousands could be served washed down with creaming soda. No members of yacht clubs could attend as these clubs discriminate against non-knot-tiers.

Mick Casey and John McCardle.

Doug Salek, the Chief Justice, Kathy and Pat Tehan.

Mark Dreyfus, Stewart Anderson, Bar photographer Gillian Tedder (at work) and Mark Dean.

. . . Pauline Schiff, Liz Murphy and Michael McInerney.

The gloom that has swept the Bar, because of the possible demise of the Christmas party, has been profound. Both Phil Dunn and Ross Ray were so distraught that they cut off their moustaches. (Historically Phil is pictured in this article with his moustache, discussing the possible effects of its removal with Sue and Mick Crennan) . Phil has taken a part time job as Santa Claus at the now-underthreat Bar Childrens' Christmas party. Ross can be seen regularly at the intersection of Punt Road and Swan Street shaking a tin in the traffic which bears the words "Save the Bar Christmas Party — give generously to needy Barristers". The scheme is under investigation by the Chook Raffles and Lotteries Board.

Needless to say those who attended the 1992 Christmas party had a whale of a time. Now that Christmas parties in Solicitors offices are virtually extinct, we *need* the Bar Yule Tide Bash. Get behind our chairman. Pencil this year's date in, — now! Wherever it may be, whatever the food, BE THERE.

Spy Catcher

Michael McInerney attempts to engage Glenda McNaught as his clerk.

Phil Dunn, Sue and Michael Crennan.

AVOCA COURT HOUSE

IN AN EARLIER ISSUE OF *BAR NEWS* WE drew attention to the activities of the Avoca & District Historical Society Inc. in seeking to "restore" the old Avoca Courthouse. Their efforts are about to be rewarded as can be seen from the extract from the Society's January 1993 Newsletter which is set out below.

We would draw the attention of members of the Bar to the opening of the court house to take place on 17 April and to the Society's hunt for people whose ancestors were connected with the Court House

"The Grand Opening of the old Avoca Court House on Saturday, 17 April, is uppermost in our thoughts, with much work yet to be done on the building before that big day arrives. To this end, working bees are to be held there on Saturday, 13 February, and the following Saturday, 20 February, with cleaning down of walls and painting on the agenda. Do please lend a hand.

Great plans are afoot to mark this special occasion. A procession down High Street on Saturday afternoon, 17 April, will be led by the Police Pipe Band, including the very popular horse, "Gendarme". This band is ranked as one of the top pipe bands in the world so we are in for a great treat.

Members of the Police Historical Society will be dressed in colonial police costume and will be in charge of a restored gold escort wagon.

Chief Commissioner of Police Mr. Neil Comrie and Mrs. Comrie will be present. It so happens that Mr. Comrie has a connection with the Avoca district as his grandfather was a former police officer stationed there.

[The official opening will be performed by Mr. Brian Clothier, Deputy Chief Magistrate of Victoria.]

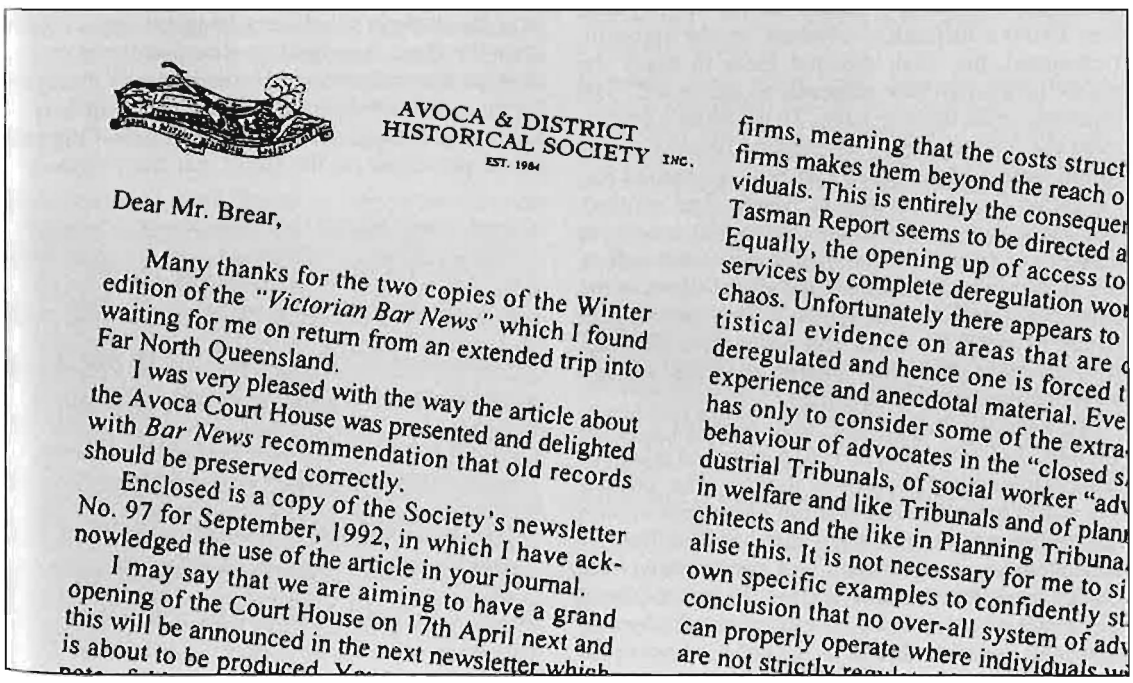
We need to borrow two or three horses used to putting a cart and the mounted troopers are also in need of a few horses. If you can help fill this need, please contact Helen Harris or Jan Burnett.

We look to our members to join in the spirit of this occasion by taking part in the procession dressed as their ancestors.

We are particularly interested in contacting people whose ancestors had some connection with the Court House, e.g., police officers, Clerks of Petty Sessions, mining wardens, barristers and solicitors, police magistrates, coroners, etc."

Snippets From the Past. From the *Avoca Free Press*, 10 January 1885:

'At the police court on Monday before Mr. E. Snell, J.P., James Wimble was fined 2s 6d, on the complaint of Constable Young, for drowning three dogs in the Avoca River at a place where the supply of water for the inhabitants is obtained. The defendant, who pleaded guilty, was informed that the bench had power to impose a penalty of £100 or six months' imprisonment for the offence, or both'.



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. Y

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can properly operate where individuals w
are not strictly

THE LORE OF MATHEMATICS AND LAW

[Apologies to my master Master Wheeler]

Quite apart from anything else, the elementary mathematics of judges are prone to error, except in the case of Lord Denning who was a wrangler, and his maths are too good for anyone else to understand.

Nicholson, *Esprit de Law* (1973) 236.

FABLE HAS IT THAT AN ANCIENT SHAH was outsmarted by his grand vizier who invented the game of chess. In gratitude for the new pastime the Shah desired to reward his vizier with a gold piece for every one of the board's 64 squares. The vizier declined and suggested an alternative reward acceptable to him. He suggested that the Shah give to him a single grain of wheat for the first square, doubling it to two grains for the second square, doubling it to four grains for the third square, doubling it to eight grains for the fourth square, and so on, doubling the grains for the next square until all 64 squares of the board had been accounted for. Quickly comparing the relative value of the gold he had offered with the wheat requested by the vizier, the Shah accepted the vizier's counter-offer.

The Shah ordered a bag of wheat to be brought into the room and bade his servants to carry out the vizier's instructions. After the servants had placed the requisite number of grains on the tenth square, they found it difficult to continue on the eleventh. Undaunted, the Shah directed them to place the grains in a small pile adjacent to the board. The small pile soon became large. To the Shah's amazement the bag of wheat was emptied before the sixteenth square of the board had been accounted for. He called for another bag of wheat. And another. The large pile soon became huge. He called for more bags of wheat. He finally conceded defeat. All of the wheat in India, indeed all the wheat in the then world was not enough to satisfy the bargain struck between the Shah and his vizier. The man who invented chess was smarter than the average vizier or even the average Shah.

To keep the bargain the Shah required 2 : 1 or 18, 446, 744, 073, 709, 551, 615 grains of wheat or (approximately) 180 billion tonnes. The present day world harvest is 415 million tonnes *per annum* (at least it was prior to the United States' "export enhancement programmer'). Consequently, the Shah was indebted to his vizier to the tune of about 435 years of present day annual world production of wheat: Poundstone, *Labyrinths of Reason* (1988) 149; Peterson, *Islands of Truth* (1990) 196.

An alternative illustration from Devlin, *Mathematics: the new Golden Age* (1988) [page 1] is that using coins, each two millimetres thick (the approximate thickness of the Australian twenty cent piece). The total number of coins stacked on top of each other "will stretch out beyond the Moon (a mere 400,000 kilometres away) and the Sun (150 million kilometres) and will in fact reach almost to the nearest star, *Proxima Centauri*, some four light years (or 40,000,000,000,000 kilometres) from Earth".

When I was a judge at first instance, sitting alone, I could and did do justice. But when I went to the Court of Appeal of three, I found that the chances of doing justice were two to one against?

Lord Denning, *The Family Story* (1981) 183.

The ancient Shah was not the only one to be caught out by a geometric series — Megarry's *Second Miscellany-at-Law* (1973) [page 283] refers to the following from Charles Butler's autobiography: Butler was instructed to prepare a partnership deed between ten landowners who were engaged in a mining venture. His instructions were to include a provision for one or more of the partners to be advanced money by any other or others of the syndicate, the moneys so advanced constituting a charge upon the share or respective shares of the borrower or respective borrowers. At that time any mortgage for an indefinite sum was subject to stamp duty of £25 and Butler advised his clients against the proposed provision on the basis that the stamp duty

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would amount to £90,720,000. Butler miscalculated but his advice was to save his clients £25 duty on each of the 57,002 possible mortgages or a total of £1,425,050, a tidy enough sum in the early nineteenth century.

Unfortunately for Butler's credibility, doubt is case on this story by Willock's claim, in his volume of legal reminiscences, to advising his clients upon an identical problem — identical even to the extent that Willock made the same miscalculation as did Butler (Willock, *Legal Facetiae* (1887) 352-3).

Consequently, Judge Street modified his order to provide that Walton's deposition be taken at the Wal-Mart headquarters in Bentonville — this location being agreed to by all parties to the suit although not necessarily by Walton himself who was not a party.

The reason for doing this controversial work, much of it unpaid or *pro bono*, seemed obvious to the partners. "We have to take it on", said Fortas, "because if we don't nobody else will". To which Thurman Arnold later added, "Isn't it wonderful to work on something in which you really believe?" In the same spirit was Paul Porter's motto for the firm: "When in doubt, do the right thing" (later changed by Fortas once on the Supreme Court to "'We are never in doubt. We always do the right thing'. Sometimes we have to do it 5-4").

Murphy, *Fortas: the rise and ruin of a Supreme Court Justice* (1988) 82.

A century before Butler, a Mr. Whitacre was sufficiently imprudent to agree with a Mr. Thornborow that in return for 2s. 6d. down with a further £4/17/6 to be paid to him in a year's time *upon* Whitacre performing his part, Whitacre was to deliver to Thornborow two grains of rye corn on Monday 29 March and four grains on the Monday then next following and eight grains on the Monday next and sixteen grains on the next Monday and so on for one year when Thornborow would pay the outstanding £4/17/6 to Whitacre: *Thornborow* v. *Whitacre* (1705) 2 Ld Raym 1164, 92 ER 270; 6 Mod Rep 305, 87 ER 1044; 3 Salk 97, 91 ER 715.

Salkeld for Whitacre sought to maintain the defendant's demurrer on the basis that the amount of grain required to fulfill the agreement was in excess of all the rye in the world and thus the agreement was void for impossibility of performance.

Holt CJ construed the contract terms so as to require Whitacre to double his delivery of grain every *other* Monday or each fortnight instead of weekly every Monday (this would amount to a total of less than four tonnes while a weekly delivery would require more than 175 million tonnes).

Salkeld, noting the way the judicial wind was blowing, offered the plaintiff the return of his half crown and costs which was accepted.

During argument the case of *James* v. *Morgan* (1664) 1 Lev 111, 83 ER 323; 1 Keb 569, 83 ER 1116 was referred to. This case, before Hide CJ, was that the defendant was to pay for a gelding with a barley-corn for each nail, doubling it every nail with a total of eight nails for each of the four feet. The estimated "price" was 500 quarters of barley and the Chief Justice directed the jury to award the plaintiff damages in the sum equal to the value of the horse (LB) which they did.

Given that the authoritative constitutional (but non-judicial) dictum of Sir Robert Garran:

> . . . imagine a law student approaching the study of the Constitution for the first time [and in particular the first fifty years of case law on section 92]. He buys his law books, opens his notebook and begins with a historical survey . . . The student [understandably] closes his notebook sells his law books, and resolves to take up some easy study, like nuclear physics or higher mathematics.

Prosper the Commonwealth (1958) 413-415 has only recently been conferred with the highest judicial imprimatur: *Cole* v. *Whitfield* (1988) 165 CIR 360 at 392 *per* the Full Court; consider the career path chosen by the son of Harlan Fiske Stone, Associate Justice of the US Supreme Court (1925-41) and Chief Justice (1941-46). The narrator is Stanislaw Ulam:

> Marshall Stone, whom I met when he came through Warsaw with [John] von Neumann and Birkhoff in 1935 on the way back from [the] Moscow Conference, had had a meteoric career at the university, although he was only thirty-one years old. Already a full professor, he was quite influential in the affairs of the department and of the university for that matter. He wrote a classic work, a comprehensive and authoritative book on Hilbert space, an infinitely dimensional generalization of the three-dimensional or n-dimensional Euclidean space, mathematically basic to modern quantum theory in physics. He was the son of Harlan Stone, Chief Justice of the Supreme Court. It is said that his father proudly said of Marshall's mathematical achievements, "I am puzzled but happy that my son has written a book of which I understand nothing at all".

Adventures of a Mathematician (1976) 92.

Unlike King Shivim, the Shah bested by his grand vizier Sissa Ben Dahiv, the Honourable John Street, Judge of the 352nd District Court, Tarrant County, Texas is not a man mystified by geometric progressions. The judge had the conduct of a per-

sonal injury action brought by Andrew Cavrizales against Wal-Mart Stores, Inc. The plaintiff's lawyers wished to interrogate Sam Walton who, until his death in early 1992, was the founder, major shareholder, Chairman of the Board and past President of the defendant company. He was also reputed to be the wealthiest person in the US and one of the wealthiest in the world.

Originally Judge Street had ordered that Sam Walton present himself for deposition at the District Court, Fort Worth. The defendant company opposed this direction and on appeal, the Texas Supreme Court ordered a modification to Judge Street's order such that the deposition be taken in the county of Walton's residence at Bentonville, Arkansas.

Well might Australian lawyers (even those who participated in the epic Holmes á Court–BHP and Bond battles) envy Wallace Craig's windfall provided by Judge Street's appreciation of the geometric series. Each equation . . . in the book (*A Brief History of Time*) would have halved the sales.

Consequently, Judge Street modified his order to provide that Walton's deposition be taken at the Wal-Mart headquarters in Bentonville — this location being agreed to by all parties to the suit although not necessarily by Walton himself who was not a party. Sam wasn't too happy about this and he sought and obtained a protective order from the District Court in Bentonville directing that the deposition be taken at the same time as that ordered by Judge Street but at the local courthouse in Bentonville rather than the Wal-Mart headquarters. Presumably ol' Sam sought the change in venue to allow for the presence of a judge to rule on any legal questions arising from the taking of Sam's deposition upon which he might seek a judicial ruling.

On the appointed day for taking the deposition Wallace Craig, counsel for Carrizales, attended at the Wal-Mart head office and declined to attend at the Bentonville courthouse to take Sam's deposition although it was only about one mile from the head office.

Thereafter the plaintiff sought and obtained from Judge Street an order that was a real zinger: the judge truck out Wal-Mart's pleadings, granted a default judgment regarding liability against Wal-Mart and ordered Wal-Mart to produce Sam for deposition in Judge Street's Forth Worth courtroom and imposed sanctions on Wal-Mart for failing to so produce Sam. The sanctions would have taken even the breath of Sissa Ben Dahiv away.

The sanctions imposed by Judge Street penalized Wal-Mart for failure to produce Sam for deposition as directed to the tune of $10,000 for the first day of non-compliance, $20,000 for the second day of non-compliance and doubling thereafter for each day until the eighth day of failure to comply was to cost the defendant company $1,280,000. Thereafter a penalty of $1,000,000 per day was to be imposed for each subsequent day of failing to comply. While $1m per day may sound a lot to us mere mortals; Sam's fortune, estimated at $9 billion would have permitted him to hold out for nearly 25 years before he was forced to seek bankruptcy protection. But then again, the sanctions were imposed against Wal-Mart and not against Sam who was not, after all, a party to the suit. Let us not forget the authoritative pronouncement of Nelson Bunker Hunt (and he is one who should know):

A billion dollars ain't what it used to be.

Of course Wal-Mart appealed: 761 SW 2d 587, Court of Appeals of Texas (Fort Worth, December 12, 1988). Although the Texas Rules of Civil Procedure provide for sanctions in the event of discovery abuse there seems little point in seeking to compel Walton's deposition given that Judge Street had granted a default judgment to the plaintiff. Wal-Mart's appeal before Joe Spurlock II, Hill and Lattimore JJ failed although the concurrence of Lattimore J was tinged with reluctant misgiving:

. . . The drivers of this unfortunate series of events appears to be the desire of skilled and strong-willed lawyers and [a] judge to prevail regardless of the imbalance between procedure and results. This does little to improve the standing of the civil justice system with the public.

I concur only because I must follow the law as it now stands.

Wal-Mart Stores, Inc. v. *Street*, 761, SW 2d 587 at 591-2 (1988).

Well might Australian lawyers (even those who participated in the epic Holmes á Court–BHP and Bond battles) envy Wallace Craig's windfall provided by Judge Street's appreciation of the geometric series.

Each equation . . . in the book (*A Brief History of Time*) would have halved the sales.

British theoretical physicist Stephen Hawking.

If we let P represent the proportion of female legal practitioners, and Q the proportion of male legal practitioners we will see that there is always Hardy Weinberg equilibrium between male and female legal practitioners. Thus, Hardy Weinberg principle, as expostulated by Ms. Barr of the New York Law School Law Review, is nothing more than a fancy way of stating that $1 \times 1 = 1$.

Whereas some taxation statutes incorporate mathematical formulae or equations the late Sir Richard Eggleston was gentleman enough to place them in appendices. Some law reviews are sufficiently bold (and perhaps imprudent) to include them in articles.

Consider, for example, equation A4 from Craswell, "Insecurity, Repudiation and Cure", 19 *Journal Legal Studies* 399 at 433 (1990):

or equation 13 from the very next article: Shavell, "Deference and the Punishment of Attempts", 19 *Journal Legal Studies* 435 at 436 (1990):

For a real humdinger you have to hand it to the economists like Keith N Hylton's equation 17 ("Costly Litigation and Legal Error under Negligence", 6(2) *Journal of Law, Economics and Organization* 433 at 443 (1990).

However the one that really grabbled me was contained in footnote 110 of "Note — the use of DNA Typing in Criminal Prosecutions: a flawless partnership of law and science?", 34 New York Law School Review 485 at 504 (1989). The footnote begins:

"The Hardy Weinberg principle is expressed algebraically as P2 + 2PQ + Q2 . . ."

and continues by asserting that when that expression equals one (or unity), there is Hardy Weinberg equilibrium between the qualities P and Q.

The first thing to note is that the fine print of the footnote has forced the printer to abandon superscripts and the expression should read:

As for the assertion regarding Hardy Weinberg equilibrium, when P + Q = 1 we will always have equilibrium because

Consequently, in reliance upon Josie Jo Barr's assertion we can confidently conclude that there is Hardy Weinberg equilibrium between those Supreme Court justices descended from Afghani free-range yak herders and those justices not so descended. If we let P represent the proportion of female legal practitioners, and Q the proportion of male legal practitioners we will see that there is always Hardy Weinberg equilibrium between male and female legal practitioners.

Thus, Hardy Weinberg principle, as expostulated by Ms. Barr of the New York Law School Law Review, is nothing more than a fancy way of stating that $1 \times 1 = 1$. It is apposite to dust off and trot out the well-known (but perhaps not sufficiently well-known) statement of Sullivan J in *People* v. *Collins*, 438 P 2d 33, 68 Cal Rptr 497 (1968):

Mathematics, a veritable sorcerer in our computerized society, while assisting the trier of fact in the search for truth, must not cast a spell over him.

Lest readers conclude that this rubbish can only be found in US Law Reviews their attention is directed to Volume 17, Part 4 of our own *Melbourne University Law Review* (the 1990 Law and Economics Symposium issue).

Let us conclude with an anecdote from the autobiography of the barrister's clerk who served Lord Carson and Sir Edward Marshall Hall.

There was one very deaf judge who was known throughout the Temple for his kindness. Since he was not only deaf but also absent-minded he shall be nameless here, for he fell into many errors. He once tried a commercial case which involved a mass of very complicated figures, which counsel on both sides did their best to unravel for his Lordship.

When he came to deliver judgment, he ended a long speech by saying: "I must come to the conclusion that the plaintiff has made out his case, and I find for him in the sum of £24 759/15/6. If my figures are incorrect, counsel on either side will, of course, correct me".

The judge cast upon counsel that benign and hopeful expression which is often assumed by deaf persons. Counsel stared at each other amazed. Then one of them burst out:

"Why, the damned old fool has added the date to these figures!"

There is none so alert as he that strives to hear, even if he be deaf. The judge leaned forward and said in an amiable voice:

"Dear me, so I have!"

A.E. Bowker, *A Lifetime with the Law* (1961) 110.

Mal Park

A THING ABOUT WORDS

IN THE PREFACE TO HIS GREAT Dictionary of the English Language (1755), Dr. Johnson wrote:

". . . am not yet so lost in lexicography, as to forget that words are the daughters of earth, and that things are the sons of heaven. Language is only the instrument of science, and words are but the signs of ideas: I wish, however, that the instrument might be less apt to decay, and that signs might be permanent, like the things which they denote".

Change in language provoked despair in Johnson, irritation in Fowler, and impotent rage in those many who would see the language fixed as it was when they left university.

Rapid and mindless change in usage and vocabulary certainly causes inconvenience: it disguises or distorts meaning where the true object of language is to convey meaning as clearly as human frailty allows. On the other hand, gradual evolution of language — even by the adoption of "barbarisms" — helps ensure its continued rigour. The English language is a perfect example.

Change in language also gives scope for minor fossicking and diversions for those who amuse themselves with such things. It is a commonplace that the meaning of a word may change over time. In some words, the change may be very dramatic. In a few cases, the meaning may reverse itself entirely. Thus, *obnoxious* originally means:

> *Exposed to harm, subject to a harmful or evil influence or agency (*OED 1991*; so used in the Law Times as late as 1891).*

The *Macquarie Dictionary* (2nd Edition, 1991) gives the primary meaning as:

> *objectionable, offensive, odious;*

and the secondary meaning as:

> *exposed or liable (to harm, evil or anything objectionable).*

Another well-known example is prestige: originally:

> *. . . juggling or magic; cheating, deluding, deceitful . . .* (OED 1991).

Now:

> *reputation or influence arising from success, influence, rank or other circumstances* (Macquarie 1991).

Other examples are panache and mere.

A more controversial example is tawdry. It is a contraction of *St Audrey* (St Aethelthreda) who, according to the Venerable Bede, died in 679 as a result of a growth on her throat. This she attributed to her early vanity of wearing jewellery around her neck. The monastery she established at Ely became the famous cathedral. A fair was held there each 17 October in honour of her memory. Gold jewellery was sold as *St Audrey's lace* and then *taudry lace* in memory of the supposed cause of her death. It was not necessarily cheap and showy, but it quickly gained that reputation. Despite an ambiguous quotation from Wycherley in 1676 ("taudry affected rogues, well drest") the *OED* admits only a pejorative meaning of the word; but it admits equally that taudry lace — the original expression — denoted real finery!

A word with several meanings is said to be polysemous (an expression adopted by practitioners of modern linguistics, not recognised by the First Edition *OED,* but first recorded in 1884 according to the Second Edition). The words discussed above, however, take their polysemic character to a hermaphroditic extreme. Commentators (Philip Howard, Tom McArthur and others) have tried to popularise *Janus word* as a description of this little linguistic curiosity. On the Humpty Dumpty principle, any word would do, provided we decide what it should mean. On the other hand, *enantiodromic* has a long and honourable history and seems to do the work for which *Janus word* was coined.

The enantiodromic word is only one species of polysemy. The creature has relatives who bear a striking but spurious resemblance. For example to *cleave* means:

> *to part or divide by a cutting blow, to hew asunder, to split*

and:

> *to stick fast or adhere.*

Although apparently the same word with opposite meanings, they are etymologically distinct,

having converged on a common form from separate origins. The first sense derives from the old English *cliofan*; the second from old English *clifan*. This branch of the family is the homonym.

Other, but less challenging, members of the family are homophones and homographs. They comprise pairs (or groups) of words which are entirely separate in meaning and etymology, but happen to look and/or sound identical.

Hence:

sow (spread seed); sow (female pig)
lead (conduct); lead (metal)
bear (carry); bear (animal)
swallow (ingest); swallow (bird), and so on.

Perhaps the most interesting form of polysemous word is the sub-species in which the one word bears two *current* meanings, which are diametrically opposed. Enantiodromic words show historical drift; this sub-species however maintains the two opposite meanings side by side. These are, of necessity, rare creatures and yet some of them pass unnoticed every day.

Thus:

fast: *firmly fixed in its place; not easily moved or shaken; settled, stable*

quick, *swift, moving quickly*

quite: *completely, wholly, altogether, entirely; to the fullest extent or degree*

rather, *to a moderate degree, fairly*

to sanction: *to ratify or confirm ... to make valid or binding*

to enforce a law (etc.) by attaching a penalty to transgression

to weather: *to subject to the beneficial action of the wind and the sun*

to change by exposure to the weather, to wear away, disintegrate . . .

to withstand and come safely through (a storm): *to sustain without disaster.*

This branch of the family has also been labelled Janus words. Possibly a more accurate, and already available, expression is *amphibolous* words.

Polysemous words lace our language, yet ideas can be unequivocally expressed. Context almost invariably provides the clue to enable the intended meaning of a polysemic word to be determined. It is a fascinating exercise — and a very difficult one — to construct a sentence of ten words or more which is truly ambiguous.

(Footnote: I am indebted to Ian Waller for stimulating my interest in enantiodromic and amphibolous words.)

Julian Burnside

A FAIRY TALE (continued)

NOW GATHER AROUND ME MY DEARS whilst I continue the sad tale of the VicBees. But perhaps before I do you had better bring the big box of tissues over here Georgie for it is indeed a very sad tale that I have to tell you tonight.

It is all doom and gloom around the hives of the VicBees and in and among the fields in which they seek out their pollen. There are many VicBees who are sent out to forage perhaps once a week or even less. Imagine their difficulties when they are required to expend much much more pollen to survive than they can collect on their infrequent trips to their fields. Imagine also if you can, how much worse it will be as the fields continue to shrink. One would expect that as the sources of supply dry up the numbers of VicBees would similarly shrink. Alas and alack — the laws of supply and demand do not apply to the VicBees. Instead the hives just keep producing more and more VicBees to share less and less.

Why don't the VicBees travel further and cast their nets wider you ask? Well many have ventured into fields never before visited by them. To their horror they have discovered that every field they try is shrinking whilst the population of VicBees therein grows. It goes without saying that the VicBees more recently entering a new field are hardly welcomed with open wings, as it were, by the regular foragers in those fields.

The news from further afield is hardly encouraging and has only added a pall to the doom and gloom. It appears that the SAGovBees have taken to the SABees with gigantic flyswats in a campaign to eradicate them completely. It appears that the campaign is based on a philosophy that no good can come out of the gathering of pollen by an SABee and that anyone else can more efficiently gather the pollen. One wonders what the flower owners will think when they find the smaller SABees replaced by swarms of bigger SolBees who refuse to forage alone and expect much more and much higher quality pollen from each flower. And what about the small fields especially those too small to be bothered with by the big swarms?

And if that were not bad enough! It appears that the NSWGovBees are building their own massive flyswats. They too have announced plans to eradicate NSWBees. Rather than await the delivery of

the flyswats they have started by introducing measures to prevent the growth of SilkyBees.

To top it all off — just when the VicBees had thought they had seen off the menace of the ReformBees they have reappeared or perhaps reincarnated as ComAGBees. The latter claim to be different from the former but they look alike and they certain sound alike. As one wise philosopher once said: "If it looks like a ReformBee, if it flies like a ReformBee and if it buzzes like a ReformBee it must be a ReformBee."

Oh woe are the VicBees. Is there a future ahead for them? It looks so bleak . . . oh Georgie . . . pass me those tissues . . . I can't go on. Sleep well my dears and dream not of those big flyswats coming down on those dear little VicBees.

(To be continued — perhaps).

THE CHILDREN'S CHRISTMAS PARTY

EVERY YEAR SEES EVEN THE MOST POE faced of our fellows abandon the stance of superiority which they endeavour to maintain in front of clients and instructing solicitors and degenerate into obsequious parents, subservient to the whims of small children. This year the children's Christmas Party took place in the Botanic Gardens on what has become a typical Melbourne summer day: sunshine and rain. Father Christmas (disguised as Phil Dunn) arrived before the rain set in and performed superbly. Some of his throw away witticisms may not have been understood by the children who flocked around his knees. But his primary audience, the parents (for whose benefit the children's party is actually staged) really enjoyed them.

In distributing his pearls (cultured or synthetic?) Phil was ably assisted by Santa's helper, Mark Derham. Unfortunately our photographer was unable to obtain a photo of Santa or his helper in full flight. Small children — and parents — kept putting their heads in the way. We must ask Phil to cut off his moustache for next year's event. One observant young lady said: "He's not the real Father Christmas. He's got a browny moustache

Déjeuner sur l'herbe

underneath that beard". The occasion, as always, generates a *fin de siécle* atmosphere, although this year the rain shortened the festivities. Many picnic lunches and rugs were hurriedly, repacked and gathered up as the rain become heavier. But no one left before Santa had distributed all his presents and departed on his four-wheeled sleigh.

The parents very much appreciate the efforts of Phil and his helper, and the work done by the other organisers (Spry, Thompson, Brett, Maclean, Santamaria and Holley), to make this annual event possible. As the Bar grows its continued cohesion depends very much upon informal across-the-board contacts. The Children's Christmas Party is perhaps the most valuable of these.

Sânta arrive.

C' est moi.

"Il pleut!"

VERBATIM

County Court of Victoria

Coram: Judge Higgins
Lobez and J.A. Dixon for two co-accused
Moore prosecuting

An application by Lobez for a separate trial of her client was granted. She left the court, removed her court attire and returned to watch the trial of the co-accused from the back of the court.

Some time later his Honour raised with the Prosecutor the question of when the trial of Lobez's client could commence. His Honour said he would be reluctant to set it down in the absence of counsel for that accused.

Recognising her cue Lobez approached the Bar table (tentatively) in her mini dress: "I seek leave to appear before your Honour . . . um . . . disrobed".
His Honour: I'm sorry Ms. Lobez I didn't recognise you like that".
[*Historical Footnote*
Supreme Court of Victoria
Coram: Full Court (Lowe J. Presiding Judge)
Tolhurst (rushing in breathless and unrobed)
"Will your Honours permit me to undress you, arobed?"
Lowe J.: "That is a somewhat unusual application, Mr. Tolhurst:. We are, however, prepared to hear you"].

County Court of Victoria

Coram: Judge Dyett
R. v. *Komleljanovig*
Lasry prosecuting
Parsons for the accused

Accused: I don't know what the point is to argue about it your Honour. I'm not familiar with the point I should perhaps be arguing with but I don't know, can he do that?
Mr. Lasry: Your Honour, can I perhaps assist.
His Honour: Yes.
Mr. Lasry: I think the argument against it, if I may say so, is that it would be pointless because the jury won't understand — they may never understand what the witness is talking about and it may lead them to guess about what was said by Mrs. Wallace and that in the end instead of attending upon the evidence they will be wondering if they pay attention to the evidence, they will be wondering what Mrs. Wallace told him and what it was that was so important that then led him to make contact. That would be the argument I think I would be putting if I were on the other side of this case. On the other hand . . .
His Honour: If you were the judge and you had to make a ruling, how would you rule?
Mr. Lasry: No question about it. I'd rule in my own favour and I would award costs and congratulations.

User Friendly Legislation

The Commonwealth Attorney-General's Department has recently made recommendations to the Trade Practices commission suggesting that legislation be drafted in more "user friendly" terms for use by the layman. It is a policy which the Department has been (spasmodically) implementing for some time.

The following definition appears in section 3(1) of the *Petroleum Retailing Marketing Franchise Act* 1980 (Cth):

"'Parent', in relation to a person, means a person of whom that person is a child".

Australian Industrial Relations Commission

Coram: Deputy President Williams
Application by Confectionery Workers and Food Preservers' Union of Australia
24 November 1992
A. Watson for the Applicant

L. Freeburn and V. Eames for the National Union of Workers
C. Platt for Arnott's Biscuits Limited

His Honour: Do I take it from what you've said then Mr. Freeburn that the recommendation arising out of the meeting under the orifices of the A.C.T.U. Is partially acceptable to the N.U.W.?
Mr. Freeburn: Yes.

County Court — Practice Court

Coram: Judge Murdoch
St. Clair Homes v. *McNees*
Summons for Final Judgment.
12 February 1993

Defendant in person files Affidavit in Opposition. After 26 pages and 56 paragraphs, Defendant's Affidavit concluded as follows:

"Sworn by the said deponent at Melbourne this llth day of February 1993".

County Court of Victoria

Coram: Judge Byrne
M. Tinney to Prosecute
M. Quinlan for Defence
DPP v. *Taylor*
19 August 1992

The following extract is taken from evidence at a trial involving an accidental shooting (apparently with a "pen pistol") of a tattooist at work in Inky Rick's Tattoo Studio.
Quinlan (cross-examining witness): "As we have heard from Mr. Clarkson that as a tattooist he finds it, when people strip to be tattooed at that shop, they often unload a weapon from amongst their personal belongings"?
Witness: Well, I can't speak for what Mr. Clarkson said.
Quinlan: How many times have you been to the shop altogether, up till the point of this incident?
Witness: 10/15 times. It has been a general practice for me to hang the gun up or so to speak and the jacket or what not.
Quinlan: Have you yourself ever, I don't know whether I asked you this, owned a pen pistol?
Witness: I have actually, yes.
Quinian: Did you have one prior to this incident?
Witness: No, I didn't.

Lugg & Mostert v. *Alcoa & Ors.*
Coram: Hedigan J
Kendall Q.C. and C. Blanden for Plaintiffs
Stanley Q.C. and I. Robertson for First Defendant
D.B.X. Smith for Second Defendant
B. Collis for Third Defendant
Gorton Q.C. and R. Williams for Fourth Defendant

Discussion between Kendall and Plaintiff about ointments rubbed on Plaintiff's sore neck.
His Honour: "I am sorry, I might have missed that. Was what is rubbed in identified or not? It is something like Deep Heat or Dencorub or something is it?
Plaintiff: "Dencorub, yeah, that's what its called your Honour".
Smith: (From some distance along bar table) "Try Goanna Oil!"
Kendall: "Do you recommend it do you?"
His Honour: "Perhaps he drinks it!"

(Day 3 cross-examination of second Plaintiff)
Smith: "What type of things are not that clear in your memory?"
His Honour: "You must be Irish Mr. Smith!".

Supreme Court of Victoria

Coram: Harper J
27 October 1992
City of Collingwood v. *State of Victoria and Collingwood Football Club*

Harper J: Both the Acting Solicitor-General (Mr. Finkelstein Q.C.), who with Ms. M. Sloss appeared on behalf of the State of Victoria, and Mr. Goldberg Q.C., who with Mr. S. Wilson appeared on behalf of the Council, placed much reliance on the structure of the Act. Each sought to draw comfort from the same provisions. And although the conclusions which each managed to draw were the opposite of those of the other, each was almost equally persuasive — thus bringing to mind the lament of Captain Macheath, the highwayman of *The Beggar's Opera*, when confronted by two competing claimants for his affections (Act 2 Scene 13):

"How happy could I be with either
Were t'other dear charmer away".

For all that one is confronted by two charmingly persuasive counsel, a decision must nevertheless be made. Macheath's preferred choice was the gallows. This not being an option open to me, I turn to an examination of the *Constitution Act* 1975.

A Sick Interrogatory

Interrogatories served on a party to a recent motor car collision case included the following far-reaching and perhaps open-ended question:

"25. (i) At approximately 10.00 p.m. on the evening prior to the collision;

(ii) At some other, and if so what, time prior to the collision;

did the defendant vomit?"

BAR COUNCIL AIDS VICTIM SURVIVOR PROJECT

THE BAR COUNCIL LAST YEAR DONATED the sum of $5,000.00 towards the costs of the Court Network Victim Survivor Project. As a result the funding shortfall has now been met and the project can proceed. Set out below is an extract from a letter from the Executive Director of Court Network to the Chairman of the Bar Council:

"I am now indeed delighted to advise you of great success in securing the necessary funds to proceed with Phase II of the Court Network Victim Survivor Project. Please see the enclosed copies of the letters from The Sidney Myer Fund and the ANZ Trustees on behalf of the James Reginald Hartley Trust. The latter having agreed to meet the funding shortfall between The Sidney Myer Fund and donations from The Profession.

There is no doubt in my mind that your strong endorsement of the program provided a compelling and persuasive force in the granting of these funds. I will have pleasure in noting the Victorian Bar Council in the project's publicity and am sincerely grateful for your interest and support".

THE SPRING OFFENSIVE

THE LAW INSTITUTE OF VICTORIA HAS produced a Report entitled "Mediation in the Spring Offensive 1992". The Report is (appropriately) subtitled "An Initiative of the Supreme Court of Victoria".

The Report points out that the Spring Offensive was proposed by the Chief Justice to reduce the back-log of cases awaiting trial. To achieve this purpose a steering committee, chaired by Mr. Justice Beach, was established to settled procedural details and oversee the court's administration of the program. In July and August 1992 five judges reviewed 762 cases. Appropriate cases were transferred for hearing to the County Court, fixed for hearing in the Supreme Court or referred to a special callover of cases to be held in the first two weeks of September 1992. At the special callover those cases which were considered suitable were referred to mediation.

The mediators — a panel nominated by the Law Institute and the Bar Council and composed equally of barristers and solicitors — agreed to give their time without charge.

THE STATISTICS

The statistical results as shown in the Report are as follows:

762 cases were reviewed. Of these
147 were transferred to the County Court;
115 were settled or otherwise dropped out;
500 went to the September callover.

Between the time of the review and the time fixed for callover some matters settled and the Listing Master added other matters. As a result:

The Law Institute's "Spring Offensive 1992"

595 cases were called over in September;
74 of these were settled at or prior to callover;
303 were fixed for hearing in November;
218 were referred to mediation.
Of the 218 cases referred to mediation
104 settled at mediation;
114 were fixed for hearing in November and December.

It seems, however, that the mediation process achieved greater success than is indicated by those figures:

"The court has indicated that a number of cases which had been the subject of unsuccessful mediations eventually settled before or early in the hearings which followed in November and December. It is not possible to objectively assess the long term effect of the mediation in these matters although it can be assumed that in most cases the mediation contributed to the eventual settlement".

COMPULSORY MEDIATION?

The Report canvasses the feedback from those who participated in the mediation process and suggests that there should, perhaps, be compulsory mediation:

"There is a great deal of literature and research available on identification of disputes appropriate for mediation. With the possible exception of probate cases, it is difficult to conclude from the Spring Offensive data that any particular category of case is more or less appropriate for mediation. Certainly cases in which numerous parties are involved would be logistically more difficult to mediate, but overall savings should be far greater. It is also possible that in cases of this nature, parties may be more amendable to third party assistance in view of the difficulty of otherwise promoting joint discussions. The data did not indicate that cases involving multiple defendants had any less chance of settlement than matters involving a single plaintiff and defendant.

A surprising feature of the data was the number of trained mediators, primarily solicitors, who favoured compulsory mediation. It is one of the basic principles of mediation theory that the disputants should only participate by agreement. It is likely that those who favoured compulsory mediation took into account the obvious difficulty a litigant has in suggesting mediation in the course of legal proceedings without fear to compromising his or her negotiating position. It is also fair to suggest that few legal practitioners have experienced the benefits of mediation and underestimate its possibilities. In the Spring Offensive, the parties and their legal representatives were fully informed about the mediation process and alternatives and could stop the process at will. Whether voluntary or compulsory mediation prevails, there will still be the problem that some parties are prepared to attend discussions only for the purpose of fishing for information that might be gleaned from their more genuine opponents. Experienced mediators may be able to discern a fishing expedition when it occurs but mediation training, unfortunately, is not likely to resolve the problem.

Assuming that any compulsory mediation programme endorsed by the Supreme Court would reflect these safeguards, compulsory mediation seems a sensible compromise of principle, providing the mediator is sufficiently experienced to recognise a non-productive situation and bring the process to an end. Voluntary agreement to attend mediation has in the past achieved very disappointing levels of participation. Indeed, the experience of the Law Institute in a programme of free mediation offered to disappointed applicants for legal aid attracted only three cases out of offers made to disputants in several hundred matters. American research indicates some benefits and few harmful, measurable effects from compulsory mediation".

A PERMANENT OPTION?

The Report concludes:

"The Spring Offensive acknowledged the possibilities of mediation as an addition process available in the administration of justice. The results of the experiment justify serious consideration. Too often innovation is rejected on the basis that it does not offer a complete resolution of the problems identified. Mediation will never settle all disputes or even most disputes which are likely to come before the Supreme Court. However, it does offer the possibility of resolving some of the disputes in a timely and cost effective manner that virtually guarantees user satisfaction. On this basis it should be considered a permanent option to be encouraged in certain cases at an appropriate time".

MOUTHPIECE

A GROUP OF BARRISTERS ARE OUTSIDE the doors of a suburban Magistrates Court waiting to get on. They are a quite heterogenous group especially in terms of experience.

Bill: (To the group at large) "How's it going?''

Bert: "Alright"

Bart: "Not too bad all things considered."

Brad: "Things could be worse"

Bill: "Yeah. I reckon its gonna get worse."

Bert: "It's bad for everyone."

Bart: "I don't mind admitting that this is the only brief I have had all week, and I haven't any for the rest of the week."

Bert: "It's much the same for me — I've had three briefs in the last fortnight and one of them was a Legal Aid plea."

Brad: "What about you Beryl?''

Beryl: "Wicked."

Brad: "And you, Barry?"

Barry: "No complaints, all things considered." (Barry then moves off to talk to his client)

Bill: "I have heard some terrible stories"

Brad: "People being kicked out of Chambers for not paying their rent."

Beryl: "And others being sued by the book companies."

Bart: "And the Banks.''

Bill: "I cannot even pay my last provisional tax bill."

Bert: "Me neither. And I am holding off my typiste!"

Bart: "I am doing my own typing."

Beryl: "It isn't just us you know. I have heard stories about some silks who have not had a brief in months."

Bart: "And some senior Juniors who are really struggling."

Bill: "Have you noticed. There are a lot of fairly senior Juniors who are back in Magistrates Courts again. Reckon they haven't been here for yanks."

Beryl: "I was asked only last week by one of them what an arbitration was."

Bert: "I had to explain about the costs 'cap'."

Bill: "How many more would be here if they hadn't lost their way. I'd say that there'd have been not a few who went up to Russell Street to do a Civil matter."

Bart: "No one is game to leave the Bar either."

Beryl: "Apart from those applying for the Magistrates' positions."

Bert: "I heard there were 244 applications including three silks."

Bart: "I heard 278 applications."

Bill: "I heard six silks."

Beryl: "And then there was the Listing Master's job."

Bill: "Tons of applications —silks as well."

Brad: "But apart from those lucky to get an appointment where do people go."

Bill: "I suppose it is better to hang around until a job comes up — you look better saying you are a practising barrister than to tell them you are on the dole."

Beryl: "Even getting one brief per week pays better than the dole.''

Bart: "I am not so sure — especially if you take account of Chambers rent, books, telephone and the other overheads."

Bill: "Well I reckon I am better off hanging on."

Bert: "Everyone seems to think that."

Bart: "Even as they slowly sink between the waves."

Bert: "I am alright!"

Beryl: ''Me too!''

Brad: "It isn't as bad for me as some."

Bill: "I am staying."

Bert: "I am not complaining."

Bart: "Me neither."

Beryl: "There are hundreds worse off than me."

A few days later — a different Court and a different group.

Doug: "How's it going?"

Daryl: "Alright."

Bart: "I am OK, but I reckon that Bill, Bert and Beryl are struggling."

Another day and another Court

Alex: "How's it going for you?"

Bill: "Me! OK. Fine. "

Alex: "There seem to be a lot of people barely keeping afloat."

Bill: "Yeah. I know what you mean. Only a week or so ago, Bart and Barry were telling me that they are in real trouble."

Alex: "That's interesting. I think that almost everyone is in trouble but no one is putting their hand up to say it's them."

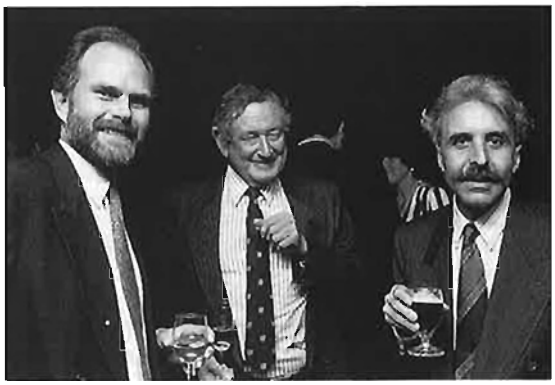
Bill: "I'm not in trouble."

Alex: "Me neither.''

And so the wheel keeps turning. Endlessly, inexorably grinding on.

THE FLBA ANNUAL COCKTAIL PARTY

Jane Ackman and Ian Duffy.



Mark Wilson, Pat Pender and John Salamanca.

THE 1992 ANNUAL COCKTAIL PARTY OF the Family Law Bar Association was held at Seabrook Chambers on 27 of November 1992. Once again members of the Association and their guests were treated to a night of many highlights including the high turn out of Family Court Judges, Family Court Registrars, Magistrates and members. Perhaps, though, the highlight of the evening was the amiable speech given by Noel Ackman Q.C. Introduced as the first silk plucked from the ranks of full time Family Law practitioners for a very considerable time his speech ranged over many topics of considerable interest to those in attendance. Whilst it is hard to compare Noel to a Kelvin Templeton, or a Peter Moore or even a Tony Liberatore we could not avoid the analogy with a Brownlow Medal acceptance speech as he inter alia thanked his coach (Abe Monester Q.C. — his master); his parents, the umpires (AKA the Family Court Bench), his team-mates (his many readers), the commentators (his colleagues) and even the general public (his clients).

Once again a good night was had by all and optimistically a better year was universally looked forward to.

Kiki Politis, Clive Rosen and Jeremy St.John.

Clare Gray, Ian Mawson and Noel Ackman Q.C.

LAWYER'S BOOKSHELF

Administrative Law

Michael Harris and Vicki Waye, editors, Federation Press, 1991

This book is a useful review of aspects of administrative law, an increasingly important area for all practitioners.

Each of the nine contributors has provided a chapter under one of the three parts: Judicial Review; Statutory Review and Reappraisal and Reform. Topics include The Impact of Administrative Review on Commonwealth Public Administration, Freedom of Information as an Instrument of Discovery and The Australian Ombudsman, Aspects of Judicial and Administrative Review, and the role of Tribunals are also examined.

David Baker, widely published in the area of tort, opens the book with his chapter "The Availability of Judicial Review in the Nineties". This well resourced article is a review of the progress of administrative law to the date of publication, provided an overview of the development of judicial review from the enactment of the Administrative Decisions (Judicial Review) Act 1977. Baker introduces questions of locus standi, Crown liability and the question of reform. The current state of health of the principles laid down in *Anns* v. *London Merton Borough Council*[1] is discussed (liability in tort of public bodies), with detailed examination of the various post-*Anns* formulations of members of the High Court bench.

The contributors review law, procedure, policy and the attitudes of the various tribunals to the issues that arise under their subject areas. In addition, tactical tips on the use of Freedom of Information in litigation are offered by Paul Villanti. Vicky Waye provides a theoretical discourse on the concept of justicability. The issue of the status and practice of tribunals is aired in the chapters by Peter Bayne, TJH Jackson and MC Harris.

While the list of contributors features academics, practitioners include Eugene Riganovsky, currently South Australian Ombudsman, Denis O'Brien, senior associate in the Canberra office of Minter Ellison and Paul Villante, solicitor in the fields of administrative and telecommunications law with the Australian Telecommunications Authority.

The content of the contributions is generally fresh and elucidative. This is a collection of commentaries, not a test book.

Di Phelan

1. [1977] 2 ALL ER 492

Powers of Attorney in Australia and New Zealand

Authors: Berna Collier and Shannon Lindsay
Publisher: The Federation Press 1992
pp vii–xxxiii, 1–427

Powers of Attorney in Australia and New Zealand is a welcome text, being the first Australian work to deal extensively and exclusively with powers of attorney. Published at the end of 1992, this book provides a detailed analysis of the common law and of the statutory framework for each state and territory in Australia, as well as for New Zealand.

The topics examined in this book include the nature of powers of attorney and the formalities required (chapter 1), the extent of an attorney's authority pursuant to his or her power (chapter 2), the legal capacity of donors and attorneys (chapters 3 and 4), enduring powers of attorney (chapter 6), protection of attorneys and third parties (chapters 8 and 9), the relationship between donors and donees and problems arising where multiple donors and/or donees exist (chapters 7 and 10), termination (chapter 11) and conflict of laws (chapter 15). Powers of attorney are also examined in the context of succession law (chapter 13), the Corporations Law (Cth.) (chapter 14) and stamp duty implications (chapter 16).

The authors have conveniently included in the appendices all relevant statutory provisions, for example the *Medical Treatment Act* 1988 (Vic.), the *Instruments Act* 1958 (Vic.) and sections 73 and 74 of the Property *Law Act* 1958 (Vic.). A few specimen forms and clauses can also be found in *Powers of Attorney in Australia and New Zealand*, making it unnecessary to look further than this text when drafting or advising on powers of attorney.

Anna Megalogenis

Butterworths — AXS 1993

64 pages

Butterworths have published what they describe as a pocket guide to legal research. The guide is

available upon application to Butterworths and is free.

This publication is essentially an index and cross-reference to the various Butterworths publications including loose leaf services, journals, reports and books.

The indexing is by general subject matter and by reference to specific legislation. The index refers the user to relevant Butterworths publications.

Although this publication is at a "price" that will suit all budgets, it only refers to Butterworths publications and consequently is of limited value as a research aid. Further, the index refers only to the publication and not to specific volumes or page numbers. Indeed one suspects it is more a marketing tool than a realistic or practical research guide.

P.W. Lithgow

Family Property Proceedings in Australia

Author: Dorothy Kovacs
Publisher: Butterworths, 1992
pp v–xxvii, 1–317

Dorothy Kovacs has presented a comprehensive analysis of the legal issues concerning matrimonial and de facto property disputes in this excellent and well researched text.

Nearly half of *Family Property Proceedings in Australia* is devoted to the constitutional and jurisdictional problems which have arisen since the enactment of the *Family Law Act* 1975 and the creation of the Family Court of Australia. The attempts to give the Family Court unlimited jurisdiction in relation to matrimonial property, the effect of the High Court's 1976 decision in *Russell* v. *Russell* and the subsequent amendments to the *Family Law Act* are detailed. The central issue of "matrimonial causes" and the problems of identifying it are also examined, as are possible solutions to dual jurisdiction, including staying proceedings, cross-vesting, referral of powers and (shock, horror!) constitutional amendment.

The non-jurisdictional chapters of this text concern:

(a) the division of assets where superannuation benefits are involved (chapter V);

(b) sections 86 and 87 maintenance agreements, their progressive undermining by amendments and judicial interpretation, and the numerous avenues available to overturn them (chapter VIII);

(c) the decision of property under section 79 of the *Family Law Act*, the continuing role of matrimonial and economic misconduct, despite the abolition of the fault enquiry; the contribution enquiry and the difficulties associated with it, as well as non-contribution considerations (chapter IX); and

(d) injunctions and section 85 orders (chapter X).

Property rights arising out of de facto relationships are examined in quite some detail in the last chapter. The legislative framework in Victoria and New South Wales is analysed and compared with the *Family Law Act* and common law principles concerning trusts and the equity of acquiescence are analysed at length.

A thorough and detailed text, Dorothy Kovacs is to be commended for her latest work, *Family Property Proceedings in Australia.*

Anna Megalogenis

Environmental Protection and Legal Change

Edited by Tim Bonyhady (1992,
The Federation Press, RRP $28.00)

One of the major changes in community values over the past two decades has been the growing concern to protect the environment.

Tim Bonyhady has edited a book which explores the ways in which the law has responded to the need for environmental protection.

In the past values were different, and it is inevitable that the law reflects this. The book provides some striking examples. The only reference to conservation in the Australian constitution is contained in section 100:

> The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a state or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

It seems that "conservation" in this context means "storage for use", quite a different meaning from that employed by who used the constitution to stop construction of the Franklin Dam.

Sometimes traditional legal concepts have proved inadequate vehicles for the new values they are being asked to express. When, after numerous midnight demolitions, the Bjelke-Petersen government of Queensland finally introduced heritage legislation into the Queensland parliament, it was said that the new *Cultural Record Bill* "rested on one of the great concepts upon which Western Civilisation is built, that foundation stone of personal freedom and protection against personal excess — the principle of private property." In accordance with this principle, the Act provided that items could only be listed on the Register of the Queensland Estate with the consent of the owner or occupier, who then was required to seek permission before doing anything which would destroy or damage the item. Not surprisingly, to date only one building (owned by the Commonwealth) has been listed under the Act.

The book examines the issues on a broad topical basis. The most significant chapters are those on the

constitution, by Professor James Crawford, Tim Bonyhady's own chapter on property rights, and Professor David Ferrier's analysis of problems associated with the use of criminal law against environmental offenders. The sweeping scope of the text reflects the ubiquitous impact of the change in environmental values.

The environment is no respecter of State, (or even national) boundaries. Attempts by various state governments to deal with environmental concerns have often been frustrated by neighbouring states, and even by constitutional constraints, with South Australia's recycling laws being challenged as interfering with interstate trade. Issues like these are dealt with thoroughly in Professor Crawford's paper dealing with the Constitution.

In the field of property rights, there are significant issues as to what interference with the owner's ability to use land is reasonable for the general good of protecting the environment, an area which is controversial in relation to the issue of the appropriate compensation to be paid. (In Gippsland, there was considerable popular local support for a landowner who drove his low loader into a government car and destroyed it when the occupants of that car were seeking to enforce regulations aimed at saving native bushland from clearing.) With a range of views as to the appropriate level of control for landowners, different legislative schemes (even within a single jurisdiction) have adopted different positions, and the result is a patchwork of inconsistent provisions.

Professor Ferrier examines the inherent conflict in employing criminal sanctions against polluters, on the one hand, whilst trying to maintain cooperative supervision of their operations, on the other.

The ability of community environmental groups to use the courts to protect environmental values has been severely constrained by the traditional concepts of standing, and the courts are in danger of being seen as irrelevant where a narrow view of standing prevails. This issue is explored in several of the essays.

Environmental protest has attracted a great deal of interest and some legal innovation. There have been several examples of actions taken pursuant to section 45D of the *Trade Practices Act* against environmental protest groups. Since the Franklin Dam dispute, it has become a regrettable practice of courts, in violation of traditional civil liberties, to permit the use of bail as a cheap and easy method of obtaining injunctive relief to prevent people entering certain areas. In some cases, persons who refused bail on conditions which they considered unjust have been held in custody for substantially longer than they could have done upon conviction.

Environmental Protection and Legal Change is an important book. Not only does it deal with the law's impact on the environment, but shows ways in which the legal system itself is affected by a major social change.

Brian Walters

Drugs, Policy, Fact, Fiction and the Future

Russell Fox AC QC and Ian Mathews AM
Publisher: The Federation Press, 1992
pp iii–vii, 1–270

Drug Law in New South Wales

Peter Zahra and Robert Arden
Publisher: The Federation Press, 1991
pp iii–xx, 1–336

It is no longer an offence to try to kill yourself. You have the right to torture yourself, swear at yourself in private, remove unwanted hairs. You can poison yourself and others with nicotine, caffeine and alcohol. You can take medically prescribed drugs, even if they cripple you or shorten your life. But the law says you cannot harm yourself with prohibited substances. You cannot use cannabis, though Queen Victoria and Bill Clinton happily did. You cannot grow cannabis in your back yard, though George Washington did. In fact, you cannot be found in the possession of any prohibited substance, for to be found is to risk severe penalties, which in some cases could mean life imprisonment.

Drugs, Policy, Fact, Fiction and the Future is a fascinating study of the policies (or the lack of policies) of drug legislation in Australia and overseas. The historical, social, political, economic and medical reasons and/or rationales behind the prohibition of some substances and the acceptance of others are examined at length. The underlying theme throughout is the vital need for a radical change to our laws. Contributory writers discuss the different approaches taken in England, the Netherlands and Switzerland, and the authors themselves suggest a model for reform in Australia.

Drug Law in New South Wales steers clear of the politics of drugs legislation. This is purely a practice book, useful to the Victorian lawyer for its examination of the law at the federal level and of the rules of evidence and procedure.

Anna Megalogenis

GOLF

Bench and Bar against Solicitors

Judge Jones tees off on 1st.

THE BENCH & BAR TEAM CONTESTED THE Sir Edmund Herring Trophy at Kingston Heath Golf Club on 22 December 1992. The Bench & Bar team comprised a number of barristers together with a good representation from the Bench. Among the judiciary participating were Mr. Justice Hase, Mr. Justice Eames and Judges Keon-Cohen, Jones and Hassett. Senior counsel included Strahan and Jolson.

Rice takes shelter.

Judge Keon-Cohen and Ian Dunn hold off the rain.

Unfortunately Melbourne's entirely predictable summer weather continued and the golfers were deluged. In addition the course was holding considerable quantities of casual water giving the effect that "The Lakes" had been transferred to Melbourne. The field of around 70 players battled on through the rain which was accompanied by thunder and lightning to add to the afternoon's entertainment.

Judge Jones figures out how to dodge the casual water.

The solicitors managed to avoid the puddles more carefully than the Bench & Bar team and regained the Sir Edmund Herring Trophy for the first time in several years. Despite the inclement weather everyone agreed it was an entertaining day and the Bench & Bar team looks forward to December 1993 when the trophy can be returned to its rightful position in Bar Council Chambers.

Rice handing Trophy to Malcolm Howell and Rod Smith.

Rice still smiling as Keon-Cohen J. tees off.

CONFERENCES

THE AUSTRALIAN INSTITUTE OF CRIMINOLOGY will Host the following:
19–21 April: Criminal Justice Planning and Co-Ordination — Canberra
4–6 May: Migrants and the Criminal Justice System — Melbourne
15–18 June: Second National Conference on Violence — Canberra
6–8 July: Law, Medicine and Criminal Justice — Queensland
9–13 August: National Conference on Juvenile Detention — Darwin
31 August–2 September: Environmental crime — Tasmania
19–21 October: The Way Out — Designing the Way: Education and Training for offenders — Perth
23–25 November: Crime in the Workplace.

THE INTERNATIONAL BAR ASSOCIATION will Host the following:
25–28 April: Seminar on Globalisation of Mutual Funds, Bermuda
16–17 May: Seventh Conference on International Audio-Visual Law: The Producer and Personal Rights, Cannes, France
26 May: 1993 Tenth Annual Seminar on International Franchising Law, Washington
19–22 May: Tenth Annual International Financial Law Seminar, Amsterdam
26–29 May: Fourth Annual Seminar on Telecommunications services and Competition Law in Europe, Rome
28–31 May: Second Biennial International Criminal Law Seminar: The Alleged Transnational Criminal, Madrid
June 1993: Eastern European Conference Forum Fourth Conference, Moscow
July 1993: Second West African Regional Conference, Nigeria
9–10 October: Seminar for Officials of US State, Latin American and Caribbean Bar Associations, New Orleans
10–15 October: Section on Business Law and Section on General Practice Biennial Conference, New Orleans
17–19 November: Asia Pacific Forum, Hangzhou China.

THE LAW ASIA CONFERENCE 1993
Will take place in Columbo Sri Lanka from 12–16 December 1993.
Pre-Registration Forms may be obtained from John Heeley, Secretary-General, Law Asia, G.P.O. Box A35, Perth, W.A. 6001.

THE FOURTH GREEK/AUSTRALIAN INTERNATIONAL LEGAL & MEDICAL CONFERENCE
Will take place in Rhodes from 23–28 May 1993.

THE TWENTY-EIGHTH AUSTRALIAN LEGAL EDUCATION CONFERENCE
Is being held in Hobart 26–30 September 1993.

THE AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW
Will hold its 1993 Administrative Law Forum in Canberra on 15–16 April 1993. The topic for the Forum is "Administrative Law and Public Administration: Happily Married or Living Apart under the Same Roof?"
Information in relation to the Forum may be obtained from Ms. Jenny Kelly on (06) 251 6060.