VICTORIAN BAR NEWS

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EDITORS' BACKSHEET

IN THIS AND OTHER RECENT ISSUES WE have adverted to the "uninformed" attacks by reformers, the media and politicians upon the legal profession and upon the judiciary.

Unfortunately, whether those attacks are informed or uninformed, whether they are prejudiced or impartial, the result has been and is continuing to be a lowering of the standing of the judicial system and of the judiciary in the eyes of the general populace.

As we have often pointed out, the legal profession and the rule of law provide a buffer — and in fact the only buffer — between the individual citizen and the power of the executive.

In a country, such as Australia, where the Westminster system of government prevails, where there is a strong two-party system, party discipline is firm and the government controls both houses of Parliament, the executive in fact controls Parliament.

This has two effects. It makes it all the more vital that the judiciary preserve its independence and be subject to no political pressure whatsoever, whether direct or indirect. It also means that (except in the Commonwealth sphere where legislation may be ultra vires the power of the Commonwealth Parliament) the executive can implement its intentions by changing the law. It can change the law retrospectively and there is no judicial power to declare the retrospective change ineffective.

In such circumstances a judicial pronouncement that the relevant Minister has no power to acquire particular land, to give particular directions or to alter the rights of any individual or group in the community has merely a "holding" effect, unless the moral weight to be attributed to the judicial pronouncement causes the executive to hesitate before introducing legislation to by-pass the judicial determination.

The moral weight of judicial determinations must necessarily be related to the perception which the community has of the judiciary and of the role of the judiciary in society.

In the Autumn issue we stressed that a judiciary so constituted as to be representative of the community as a whole would not, given equal degrees of judicial competence, responsibility and adherence to the rule of law, alter the law or the way in which it was applied. We stressed that the judiciary is not an elected body appointed to implement the views of particular groups or to represent particular groups but is there to apply the law, and responsible judges no matter what their origins or background will do just that.

More recent attacks upon the judiciary, however, give rise to concern that these attacks (although in our view they are uninformed and unjustified) have the effect of altering the public perception of the judiciary and of the judiciary's role.

We stressed that the judiciary is not an elected body appointed to implement the views of particular groups or to represent particular groups but is there to apply the law, and responsible judges no matter what their origins or background will do just that.

By popular acclaim the role of the judiciary as the third arm of government is under attack. In the interests of our existing system of government, in the interests of the rule of law and because of the pressing need to maintain a check or balance on the power of the executive, it is of vital importance that the emerging perception of the judiciary, as a cluster of conservative public school males living in the twilight of the Edwardian era, be debunked.

In our opinion this will not be achieved by appointing "media liaison officers" to the courts for the purpose of interpreting or explaining judicial decisions. Nor will it be achieved by judges debating issues with the press.

It will be changed firstly by lack of publicity, by the judiciary exercising unreasonable care to ensure that statements made in the course of trials or in the course of sentencing cannot, even when

taken out of context, be used as part of the ammunition in this orchestrated attack.

It will be solved in the medium term by a higher profile for judges in public issues involving law reform. For example, where a judicial decision applies the existing law currently to a fact situation to give a result which, as a matter of common sense but not as a matter of law, appears inappropriate and undesirable, any judicial unhappiness at the state of the legislation should be conveyed through the Chief Justice or Chief Judge not only to the executive but also to the media. A similar course should be followed (in appropriate cases) where a judicial decision is followed by retrospective legislation designed to alter existing rights. The judiciary needs to alert the public to the role which it plays in the protection of individual rights and to its concern for individual rights. These concerns need to be articulated to the media, not in the form of explanations, interviews or debates, but in the form of prepared statements as to the existing law and its defects.

In the long term the public perception will be changed by the perceived recomposition of the bench, provided that that recomposition takes place gradually and responsibly.

Of course, the composition of the bench is not as monolithic, "old public school boy", conservative and white anglo-saxon protestant as the press paints it. Perhaps there is scope for publicising the disparate economic religious and ethnic backgrounds of the members of the court?

The Editors

CORRESPONDENCE

Dear Editors

The *Bar News* is obviously ripe for picking by Stuart Littlemore.

Everyone knows that barristers formulate openings, final addresses and mid-evidence quips with a view to being acclaimed for cleverness in "verbatim". Then, having hatched the "verbatim" egg, a colleague says "I might send that to the *Bar News*" to which "the wit" responds (feigning modesty) "don't be silly — they wouldn't print that!" which really translates as "thank you — it saves me sending it under a false name"!

The last one which involved me however has a particular distinction. The *Bar News* has run it twice! Not only that, on both occasions it has carried all the mistakes that appeared the first time! If you are going to try for a third, may I be hired as a consultant?

Yours sincerely,
Lex Lasry

Dear Editors,

re: *Bar News* — Verbatim column.

In my contribution to the Autumn issue (St. *Clair Homes* v. *McNees*: Practice Court), your staff changed the spelling, from *"despondent"* to *"desponent"*, thereby depriving it of any humour and making it totally unfunny!!

Regards
Paul Collins

CHAIRMAN'S CUPBOARD

IN ITS REPORT NO. 47 — *ACCESS TO THE Law: Restrictions on Legal Practice* — published in May 1992, the Law Reform Commission of Victoria said (at para 33):

In the course of the public debate which followed the publication of the Bar's response, it criticised the Commission's proposals on the ground that they were not based on any "economic analysis" which showed that the Bar's practices added to the cost of legal services, or that the proposals to modify or abolish its rules would reduce costs. To meet that criticism, the Commission asked the Tasman Institute to conduct that analysis and prepare an independent report. The report was written by an economist who is a leading expert on occupational regulation, and a barrister who is a former member of the Bar Council.

This sounds very reasonable, published as it was in the month or so following the release of the report of the Tasman Institute itself. But what are the real facts?

It is now a very long time ago that the then Attorney-General, Jim Kennan Q.C, referred to the Law Reform Commission the question "of costs in the courts". It was in May 1990 that the Commission published its Issues Paper *Access to the Law*, and in July 1991 that it published its Discussion Paper *Restrictions on Legal Practice*. That paper, it will be recalled, critically examined various Bar rules, proposed that the Bar Council should review those rules, and either abolish or substantially modify them. The Commission also suggested that contingency fees be legalised and that lawyers be permitted to advertise.

In its response to the Discussion Papers forwarded to the Commission in October 1991, the Bar Council pointed out, amongst other things, that the reference from the Attorney-General was concerned with costs in the courts, and that the Bar rules referred to by the Commission either had no effect upon those costs, or in some cases operated to reduce them. The Bar Council's response was given wide distribution and its substance as well as its tenor provoked a lively debate between the Bar Council and the Commission. In November 1991 the Commission made available to the Bar Council, on a confidential basis, a draft Final Report, and the Bar Council responded to this in early December.

Documents obtained by the Bar Council under FOI legislation reasonably justify the conclusion that it was not until after all of the events referred to above that the Commission considered obtaining advice from an economic consultancy. The Bar Council requested access to a wide range of documents, identified by category, but very little was produced. There was no minute of the Commission itself resolving to engage the Tasman Institute. There was no written evidence of any approval by the Attorney-General of the engagement of the consultants under s. 15(1) of the *Law Reform Commission Act* 1984. The first documentary evidence of the engagement of the Institute is an undated document originating from the Institute, and addressed to the Commission, entitled *Proposal*. This was accepted by a letter from the Commission dated 24 February 1992. The Proposal sets out some of the reasons why the Commission appeared to want work done by the Institute, and it appears reasonable to infer that the Proposal was based upon discussions between the staff of both bodies, probably in February 1992.

The Proposal notes that the Commission had, in its Discussion Paper of July 1991, asserted that "many of the work practices of barristers in particular would, if abolished, lead to a reduction in the price of the provision of legal services, and therefore provide greater access to justice". It further notes that the staff of the Commission had stated that "the Victorian Bar Council has continually pointed to the Commission's lack of empirical evidence regarding this assertion". The Proposal proceeds to indicate that it had been pointed out to the Commission "by politicians of all persuasions that they would be more convinced of the Commission's arguments if there were some empirical research carried out to test this assertion". As a result, according to the Proposal, the Commission engaged the Tasman Institute "to provide research support services regarding it's [sic] proposals".

The Tasman Institute Proposal defined the task facing the Institute as "to ascertain whether the Commission's proposals will lead to a decrease in the price of services provided by barristers". The Institute said that it would carry out its task by undertaking the following exercises: first, an empirical analysis of the cost of certain legal services in Victoria by comparison of the cost of those same services in a jurisdiction where a fused profession exists, such as Western Australia; secondly, an examination of the US research on the effects that deregulation has had on the cost and quality of

legal services in that country; and thirdly, an application of some aspects of the theory of regulation and competition policy to the Commission's proposals.

In its Proposal, the Tasman Institute said that the research would be carried out by two people, Dr. Alan Moran, the Research Director of the Institute and Mr. Greg Barns, who was described as a barrister. It was estimated that 12 days' work would be involved, for which the agreed fee was $15,000, which included $700.00 for telephone and facsimile communications and mail expenses. It would appear that the 12 days' work was 12 man days' work, as the eventual invoice sent from the Institute to the Commission (dated 25 March 1992) claimed an additional $2,500 for other work, which was said to amount to 2.5 man days.

The Report was released on about 28 April 1992. On that day, its authors Dr. Moran and Mr. Barns spoke about the Report on no less than 5 separate radio programs. This was a remarkable feat of organisation on someone's part.

The Institute did report to the Commission on 25 March 1992. Its Report contained no empirical analysis of the cost of legal services in Victoria by comparison with the cost of the same services in a jurisdiction where a fused profession exists. It did contain, in one paragraph, a reference to a 1984 US Trade Commission Report which presumably stood as the research in that country on the effects that deregulation has had on the cost and quality of legal services in that country. It did venture into the theoretical areas of regulation and competition policy. In that respect the Report was subsequently criticised by Dr. Ian McEwin, who was engaged by the Bar to make an assessment of the Report. The only empirical research which, according to the report itself, was carried out by the Tasman Institute consisted of enquiries made of 10 solicitors as to whether certain simple Magistrates' Court police matters could be conducted more cheaply by the solicitors themselves than would be the case if barristers were briefed. Whether or not this research was reliable and/or accurate, it demonstrates at best what is possible, and what regularly happens, under present arrangements, and was, accordingly, of little value as a test of the proposals for change made by the Commission.

For the most part, however, the Tasman Institute Report amounted to little more than a regurgitation of the propositions originally put by the Commission in its issues paper, together with some fairly desultory historical observations concerning the origins and culture of the Bar (about which the Institute had not been asked to enquire and as to which it could scarcely claim to be an international authority).

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From the above short history of the involvement of the Tasman Institute in the reform of the Bar in Victoria, the following conclusions may be drawn:

1. The Law Reform Commission never had any evidence that the current rules and methods of the Victorian Bar added to the cost of legal services.
2. Although this was probably the most obvious investigation to make in response to the reference by the Attorney-General, the Commission carried out all its work, and prepared a draft Final Report, without making that investigation.
3. When eventually the nature of the investigation to be made was identified, either the investigation was not made at all or the results of the investigation did not warrant inclusion in the report of the Tasman Institute.
4. In its own Final Report, the Commission mentioned neither the fact that it had attempted to obtain empirical evidence on the relevant matter, nor the failure or the inability of the Tasman Institute to produce such evidence.

The Tasman Report itself, and Dr. McEwin's criticisms of it, are available through the Bar Council office for anyone who wishes to peruse them. Any barrister who thinks the Report inconsequential (however much its substantive content may justify such a conclusion) should realise that it is part of a much broader canvass. It was bound into a nice little booklet (in which it occupied 23 pages, including bibliography) and no doubt had wide distribution. It very soon found its way into the footnotes of the Trade Practices Commission's own Issues Paper with respect to its Study of the Legal Profession. There is a substantial risk that notwithstanding the failure of its authors to produce empirical evidence on the matters to which their attention was directed, its conclusions and recommendations (which were, coincidentally, largely the same as those published 18 months previously in the Commission's own Discussion Paper) may become indelibly engraved within the pages of the social engineers' handbook.

Chris Jessup

CCH UPDATE

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In the US the Australian Franchising Code of Practice is seen as something of a pioneering move.

That code, was, of course, the result of the recommendations of the Franchising Task Force and was launched on 1 February this year ... with an initial period of operation of two years, after which time it'll be reviewed.

The Code's aim is generally to improve and strengthen the franchise industry by, for example, dictating how members are to conduct themselves with each other, and requiring them to avoid unacceptable commercial or ethical standards.

Franchisees become subject to the code when, as they must, their franchisors include in any new franchise agreement a provision requiring that franchisee to act per the Code.

With the growth in franchising — and, what's more to the point, its anticipated growth in the future — the Code is clearly a commendable development. And, to help practitioners cope with its spread, our ***Australian Business Advisers Guide*** devotes a whole tab to franchising (which includes some very practical stuff — like, for example, the questions a franchisee may ask of the professional adviser).

■ ■ ■

Not so long ago the generally accepted meaning of the word "franchise" was the right to vote at public elections, and to be enfranchised was to be given the vote.

But if you look for "franchise" in *Halsbury* or any of the traditional legal dictionaries you'll find it refers to a royal privilege granted by the sovereign to a subject (eg the right to wrecks, or to treasure trove) ... then if you turn to an American dictionary you'll find that the term there was as it were republicanised by applying it to a special privilege, conferred by the government on an individual or corporation, which doesn't belong to ordinary citizens as a common right (eg the power conferred on a corporation to conduct a public utility).

That meaning was the origin of, and has evolved into, the latter day commercial term to describe the licence given by the owner of a trade mark or business name to permit someone else to sell the product or trade under that mark or name.

■ ■ ■

Our forthcoming ***CCH Macquarie Dictionary of Business*** gives this as the primary meaning of franchise:

> "A privilege granted by one organisation (the *franchisor*) to another (the *franchisee*) to sell, produce or use its products. Different types of franchises include a *product franchise*, which acts as an outlet for a particular product, with the franchisee often having exclusive rights over a particular territory; a *system franchise*, or *business format franchise*, which is authorised to conduct a business according to a system developed by the franchisor (as is common for fast food outlets and motels); and a *process franchise* or *manufacture franchise*, for which the franchisor supplies a critical ingredient or the know-how for a production process (eg soft drink manufacture)."

■ ■ ■

And ***The CCH Macquarie Dictionary of Accounting*** which, giving a shorter definition, adds "In accounting terms, a franchise is an *intangible asset* to the franchisor".

■ ■ ■

An interesting comment by Lord Byron in his *Detached Thoughts* was that "The impression of Parliament upon me was that its members *are* not formidable as *speakers*, but very much so as an audience".

■ ■ ■

Talk about coals to Newcastle ... We (ie CCH at North Ryde) have just printed on behalf of CCH Asia (our Singapore based affiliate) the ***Singapore Master Tax Guide*** for 1993.

On its opening Stop Press page, this handy 960-page guide to taxes in the island republic mentions the 1993 Budget which proposed the introduction of a GST at a rate of 3% from 1 April 1994. And as part of their GST package there's a reduction of the corporate tax rate from 30% to 27% to take effect from year of assessment 1994. This represents, the Budget said, a major step towards a long-term target of 25% corporate tax.

■ ■ ■

A piece of incidental information (not in the ***Singapore Master Tax Guide***) was the announcement by the Singapore Government at the end of May that their economic growth rate for the year so far is 7.1%.

■ ■ ■

With torts law differing in some areas between the States, the editor of our ***Australian Torts Reporter*** makes the point that we try to balance matters relevant to all States, with, on occasion, matters of concern to a minority of States. Take, for example, the distinction between libel and slander which retains its significance in Victoria, South Australia and Western Australia ... that significance being that whereas libel is actionable without proof of injury, slander is generally actionable only where special damage is alleged and proved.

There are four categories of slander which are actionable per se:

- words charging the plaintiff with having committed a criminal offence;
- words imputing that the plaintiff has a certain contagious disease;
- words imputing that a woman is unchaste or has committed adultery;
- words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him.

So when a television reporter asked Mrs Carmen Lawrence, the Premier of Western Australia,

> "Have you been made aware that the man at the centre of these allegations of sexual harassment in Parliament is the Speaker of the House, Mike Barnett?"

the WA Supreme Court held that Mike Barnett did not have to plead any special damage in the slander action he brought against the television reporter.[1]

■ ■ ■

Someone was recently quoted as saying: "You miss 100% of the shots you never take" which is not quite the same, but then not so far different either, from the comment of Seneca in the first century AD that "When a man does not know what harbour he is making for, no wind is the right wind."

■ ■ ■

1 *Barnett v Milner* (1993) Aust Torts Reports ¶81-218

If you're interested in seeing any of the publications noted on this page – or indeed any publication from the CCH group – contact CCH Australia Limited ACN 000 630 197 • Sydney (Head Office) 888 2555 • Sydney (City Sales) 261 5906.

ATTORNEY-GENERAL'S COLUMN

I WILL DEVOTE MOST OF THIS COLUMN TO providing you with an overview of the eight Acts from my portfolio passed by State Parliament in the Autumn Sittings, which concluded at the end of May. I will also mention briefly some of the measures which I hope to introduce in the Spring parliamentary session, beginning in September.

LAW REFORM

In March I announced the appointment of the Law Reform Advisory Council, to be chaired by the Chief Justice, and calling on the services of a number of eminent Victorians to co-ordinate law reform projects, and allocate funding to support them. While the main focus of the *Legal Profession Practice (Guarantee Fund) (Amendment) Act* 1993 was to make improvements in the structure and administration of the Solicitors' Guarantee Fund it also made provision for allocation of funds to law reform projects under the supervision of the Law Reform Advisory Council. This will ensure that the Victorian community has the benefit of sharply focused law reform research projects co-ordinated by an exceptionally well qualified advisory council. While the academic secretary will be paid for her work as secretary, none of the members will receive payment for their involvement in the council.

Other initiatives related to law reform include the continuing review of the *Equal Opportunity Act 1984* by the Scrutiny of Acts and Regulations Committee, and references to the Parliamentary Law Reform Committee on wills, insolvent companies and restitution to victims of crime.

ESTATE AGENTS

The Estate Agents (Amendment) Act 1993 amended section 15 of the *Estate Agents Act* 1980 to exempt genuine family companies from a provision relating to corporate licences which affected them unfairly, and also made some changes to the Act providing for investments of the money in the Estate Agents Guarantee Fund. These changes will allow greater flexibility in Fund investments while retaining a conservative portfolio and will improve returns to the Fund.

COMMERCIAL ARBITRATION

The *Commercial Arbitration (Amendment) Act* 1993 enables Victoria to compete without disadvantage as a place for the conduct of commercial arbitrations. It enacted amendments, mirrored in most Australian States and Territories, to provide a modern framework for the conduct of arbitrations, and which recognise the autonomy of parties in choosing arbitration for resolution of their dispute. In this instance, uniformity is highly desirable because of the national structure of much significant business activity, and the national scheme of corporate regulation through the Australian Securities Commission.

FREEDOM OF INFORMATION

The *Freedom of Information Act* 1982 has been in operation in Victoria since July 1983. The Act applies to departments of government and some hundreds of other "prescribed authorities". The 1993 amendment to the *Freedom of Information Act* extends the operation of the Act to the local government sector with effect from 1 January 1994. This represents a significant opening up of access to official information by citizens of Victoria, and represents a measure which the previous Government foreshadowed from time to time but was never able to achieve.

More general amendments to the *Freedom of Information Act* took up concerns expressed by government agencies administering it, and reports such as that of the Legal and Constitutional Committee of 1989. The Act includes a provision to enable agencies to decline to handle voluminous requests which would require an unreasonable diversion of the resources of an agency, and introduces a flat fee of $20 for initiating a FOI request, subject to waiver for impecunious applicants. There is also a provision enabling an agency to decline to deal with a request which merely repeats one which has previously been rejected on grounds upheld under the review provisions of the Act.

In the Government's view the amendments represent a considerable tightening up of the efficiency of operation of the *Freedom of Information Act*. By removing the unrealistically low $100

maximum cost ceiling from requests, some measure of actual cost recovery by Government agencies may be achieved thus relieving costs to taxpayers.

CRIMINAL LAW, TRIAL PROCEDURES, EVIDENCE AND SENTENCING

Four Acts from my portfolio passed by Parliament in the Autumn Session dealt with the criminal law, criminal trials and sentencing.

(a) *Evidence (Unsworn Evidence) Act* 1993

The *Evidence (Unsworn Evidence) Act* 1993 repeals the right of an accused person to make an unsworn statement or give unsworn evidence in criminal proceedings. I stated in my last column the Government's reasons for abolishing this historical anachronism.

(b) *Crimes (HIV) Act 1993*

The Coalition's Law and Justice Policy expresses concern about hypodermic syringes filled with blood being used as weapons in cases of robbery and assault. The *Crimes (HIV) Act* 1993 creates a new criminal offence to address this type of situation.

The criminal law, as it stood, did not adequately address intentional transmission of HIV. A charge of murder was unsatisfactory, as it could be five or ten years before the infected person actually died of AIDS or an AIDS-related condition, and the offender could be charged. Given medical opinion that death will certainly result in due course from HIV infection, it is not appropriate to charge an offender with attempted murder given the certainty that the victim will eventually die.

The offence has been carefully drafted. It requires knowledge of the existence of infection, causing by any means another person to contract HIV, and proof of intention for transmission of the disease to occur.

Because of the gravity of the crime the maximum penalty for the new offence is 25 years' imprisonment.

The definition of the *Crimes (HIV) Act* of "very serious disease" is at presented limited to "HIV within the meaning of the *Health Act* 1958". The HIV virus is currently the only one known with the specific characteristics of certain death as a consequence but with a typical delay of many years before death occurs. There is scope, however, for the definition of "very serious disease" to be widened in the future should use of this kind of threat of infection in committing a crime manifest itself in relation to a new disease with similar characteristics.

(c) *Crimes (Criminal Trials) Act 1993*

I am pleased to say that this Act passed through the Parliament with strong bipartisan support, and I gave an undertaking on behalf of the Government to monitor its effects in practice. The Act builds on work which was done under the previous Government, a fact which I acknowledged during the debate in Parliament.

The cost of complex criminal trials, fraud trials in particular, has become intolerable. The Act aims to reduce the length and cost of criminal trials by giving judges express powers to manage the conduct of the trial and to identify the issues at trial at an early stage.

In all criminal cases an early filing of the presentment will oblige the accused to file a general statement of defence.

The judge will have the discretion to apply the balance of the Act to particularly complex or lengthy criminal trials. The judge may, in a series of directions hearings, order and set the time frame for the filing of the prosecution case statement and the defence response. This disclosure process will facilitate the identification of the real issues at trial.

The Act will assist the jury's comprehension of the trial by providing for a more detailed opening to the jury, expanding the class of material that may go to the jury, and reforming the manner in which evidence may be given.

Members of the Bar will be aware of the decision of the High Court in *Dietrich* v. *R.*, concerning an accused who wishes to be represented but who is unable to afford presentation, or secure legal aid. That decision, which has resulted in the indefinite adjournment of such cases, has led to concern that accused persons will not be brought to trial in a significant number of cases.

This issue has been discussed by the Standing Committee of Attorneys-General (representing the States, Territories and the Commonwealth), and a Commonwealth Working Party, and independently considered by the State of Victoria. Ultimately the Government of Victoria decided to include section 27 in the *Crimes (Criminal Trials) Act* 1993. Section 27 provides that where a judge believes that an unrepresented accused will be unable to be guaranteed a fair trial without legal representation the judge may direct the Legal Aid Commission to fund representation for the accused person. This emphasises the confidence the Government has in the capacity of the judiciary to ensure that unrepresented accused persons receive a fair trial in our courts.

As with all legislation in this kind of area, the Government will monitor its operation in practice.

(d) *Sentencing (Amendments) Act 1993*

At the time I introduced this legislation into the Parliament I sent a letter to each member of the Victorian Bar, setting out the background and policy which lay behind the scheme of the Bill. I will

not repeat the substance of that letter here, but members of the Bar will recall that I invited each person who received the letter to let me have their views. I wish to thank the large number of barristers who responded to that invitation for contributing to ventilation of the important issues raised by the then Bill, irrespective of whether or not they expressed support for the Government's legislation.

I have stated clearly in Parliament that I will be monitoring the operation of the *Sentencing (Amendment) Act* 1993 to ensure that it implements the Government's commitment to bring sentencing practices and sentencing law into line with community expectations. The main focus of the amendments is on providing for two categories or offenders to receive increased custodial sentences, for concurrent sentences for multiple offenders (unless the court orders otherwise), and to provide a new sentencing option of indefinite sentences to ensure the protection of the community.

"Serious sexual offenders" and "serious violent offenders" are to receive increased custodial sentences. Two mechanisms are available to a court to ensure that these offenders receive the sentences expected by the community. First, the court is not required to have regard to section 10 of the *Sentencing Act* 1991, and it is stated clearly that protection of the community becomes the paramount sentencing consideration (among the others provided for by the Act) when determining the length of the sentence to be imposed on such offenders.

In dealing with concurrency, it is provided that where multiple offenders are concerned, the presumption is that their sentences will not be concurrent, unless the court so orders. This returns the position to that which applied in the State of Victoria up to 1985.

Regarding indefinite sentences, a court may impose an indefinite sentence upon application by the Director of Public Prosecutions, or of its own volition, where an offender is convicted of a serious offence or offences. The Act requires the court to look at a number of criteria to determine whether an indefinite sentence is warranted.

It should be noted that where an indefinite sentence has been imposed proper and regular review mechanisms are set in place. Prisoners serving indefinite sentences will be reviewed by the court when they have served the equivalent of the non-parole period that they would have received if an indefinite sentence had not been imposed. The sentence can be reviewed every three years.

When an indefinite sentence is discharged, the offender will be subject to a re-integration programme and will be under the supervision of the Parole Board for five years.

The amendments to the *Sentencing Act* dealt with a number of other matters including an increase to the maximum penalty for incitement and conspiracy to commit murder, treason and piratical acts to life imprisonment. For the avoidance of doubt the penalty for attempts to commit these offences is stated in the Bill to be 20 years. This overcomes concerns raised in the court system, and by the public, that a technicality in the operation of the *Sentencing Act* 1991 had reduced the maximum penalty for incitement to commit murder to five years.

Legislative "Work in Progress"

In the space remaining to me, I wish to foreshadow some of the measures on which I am currently working, and which should result in draft legislation later this year or early next year.

1. Building on the *Crimes (Criminal Trials) Act* 1993 and its likely influence on the length of trials and the costs of justice, work is being done on streamlining Magistrates' Court procedures in order to parallel in that high volume jurisdiction the developments which the criminal trials legislation initiates for the higher courts.
2. Victim Impact Statements, and the need to introduce them in a suitable form which properly recognises the rights and needs of victims, and balances those considerations with the other aspects of the administration of justice. I anticipate that draft legislation may be introduced later this year.
3. Classification of Films and Publications. Apart from introducing a new "MA" classification to which all Australian jurisdictions are committed, I am looking into appropriate ways of regulating the display for sale of obscene, demeaning or violent publications (not otherwise regulated under Commonwealth provisions) within Victoria. The focus is on the display of publications to children and does not involve any censorship in regard to the sale of publications.
4. The *Juries Act* is under review, as I mentioned in my last column. In particular, the implications of the recent High Court decision in *Cheatle* v. *R.* for the possible introduction of majority verdicts are under consideration. Irrespective of the outcome of that analysis, there are a number of other procedural amendments to the *Juries Act* with which I hope to proceed.

I conclude by inviting members of the Bar to feel free to draw my attention to legal issues which they feel deserve investigation by Government, especially where legislation might be streamlined and amended for the benefit of the people of Victoria and the general administration of justice.

Jan Wade MLA
Attorney-General.

ATTORNEY-GENERAL AT BAR COUNCIL MEETING

Standing: R.H. Gillies QC, A.J. McIntosh, R.J. Pithouse, P.D. Elliott, R.A. Brett, D. Dealehr, G.T. Pagone, C.F. McMillan, J. O'Bryan, A.G. Uren QC, D.F.R. Beach, J. Tsalinidis, J.E. Richards, W.R. Ray, P.A. Dunn, S.M. Anderson, M.B. Kellam QC.

Seated: R.K. Kent QC, The Honourable Jan Wade MLA, C.N. Jessup QC, S.M. Crennan QC, D.J. Habersberger QC.

Both the Attorney-General for the Commonwealth and the Attorney-General for Victoria, if members of the Victorian Bar, are ex officio members of the Bar Council.

It is, however, seldom that the Commonwealth or State Attorney-General exercises this right of membership or attends Bar Council meetings. On 27 May this year the Honourable Jan Wade MLA attended and participated at a meeting of the Bar Council. The photograph above records this event.

NEW COMMONWEALTH ATTORNEY-GENERAL

MICHAEL LAVARCH IS LABOR'S YOUNGEST-ever minister (31) and amongst the youngest-ever holders of a senior portfolio. He is a former solicitor from Brisbane.

Mr. Lavarch obtained his LLB at Queensland University of Technology in 1981 and went into private practice, at the same time becoming active in Labor politics. He also entered local government, and was elected to Pine Rivers Shire Council in 1982.

His political career has been steady rather than spectacular, although that has suddenly changed. He is regarded as being sensible and level-headed. Being young and new to the job, he will have a lot of learning to do, and won't fit (at least not soon) into the laid-back avuncular mould of Michael Duffy.

He has some parliamentary experience in legal matters, having chaired the House of Representatives Committee on Legal and Constitutional Affairs. That committee produced reports on the rights of shareholders and on the rights of women under the law. The latter led to changes being made in the *Sex Discrimination Act*. The committee has been conducting an inquiry into the use of plain English in legislative drafting.

Mr. Lavarch is understood to have had the strong backing of Wayne Swan (ALP Secretary in Queensland) and obviously enjoys the Prime Minister's patronage. His appointment gives Queensland virtually its first Cabinet-level minister since Bill Hayden.

Amongst his first tasks (in addition to the work on the move to a republic) are expected to be an overhaul of the *Family Law Act*, based on the recommendations of the recent parliamentary inquiry into the Act, and consideration of the need for a review of the Corporations Law (simplifying it and protecting shareholders).

FROM THE ETHICS COMMITTEE

IT HAS BEEN SUGGESTED THAT FROM time to time it might be helpful to the members of the Bar to know what kinds of complaints are being made to the Bar Council concerning the conduct of barristers, and perhaps for some general advice to be given either about those matters, or any other issues that may be of concern to the Ethics Committee.

This is the first article of this kind. It is not intended to be a full report of the Committee's activities of the sort that can be found in the Annual Report of the Bar Council, but rather an occasional note of matters of interest.

NEW RULES

The first point to note is that new Rules of Practice and Conduct came into force on 24 May 1993. They were developed during a long process of discussion and negotiation between representatives of the independent Bars throughout Australia, and were initially adopted by the Bar Council on 4 February 1993. After some further fine tuning they have come into force. All members of the Bar have been provided with a copy.

MATTERS OF INTEREST

A general survey of the complaints received by the Bar Council in the past year or so shows that a frequent cause for dissatisfaction is that a barrister has exerted undue pressure on his or her client to settle the case in which the barrister has been briefed. This has sometimes been coupled with a complaint that the barrister has not properly presented the client's case, either because the preparation was thought to be inadequate or because the barrister was allegedly incompetent.

The boundary between giving advice on the likely success or otherwise of the case honestly and strongly, and pressuring the client to settle, may not be an easy one to draw in the circumstances of

a particular case. Nevertheless, it must be remembered that whether or not to proceed with the case is the client's decision. It is necessary for counsel to give the client all the information necessary to make that decision, and it will usually be expected that an opinion about the likely outcome will be expressed. It may be necessary to express such an opinion forcefully, but the final decision must always be the client's.

Discussions about settling a case sometimes require a barrister to tell the client that the court is likely to take a particular view of the evidence or the witnesses, or approach the case with a point of view derived from experience. When giving this kind of advice it is necessary to bear in mind a barrister's obligation not to bring the system of justice, the court or the profession into disrepute. Rule 1.2 of the Rules of Practice and Conduct which came into force on 24 May 1993 sets out those obligations:

"1.2 GENERAL PRINCIPLES

A barrister must not engage in conduct which is:

(a) dishonest or otherwise discreditable to a barrister,
(b) prejudicial to the administration of justice, or
(c) likely to diminish public confidence in the legal profession or in the administration of justice or otherwise bring the legal profession into disrepute".

THE INVESTIGATION OF COMPLAINTS

The Committee has recently discussed how best to assist members of the public to understand what it does and how it goes about it. A brochure is in the course of preparation, based on the material prepared for the same purpose by the New South Wales Bar.

For some time the Ethics Committee has been following a procedure in the investigation of complaints which is designed to save time at meetings of the whole Committee while at the same time ensuring that complaints are investigated and dealt with as quickly as possible.

Most complaints reach the Committee from the Chairman of the Bar Council. Section 14D of the *Legal Profession Practice Act* requires that the Committee conduct an investigation of a complaint of a disciplinary offence. Some of the complaints received are about things that are not disciplinary offences, such as disputes about fees.

Once it has been determined that a complaint is about conduct that could amount to a disciplinary offence, the letter of complaint is sent to the barrister for comment. Usually any response is sent to the person making the complaint for his or her response to what the barrister has said. Information may be sought from others who may have information that could assist the Committee. The investigation to this point is conducted by two members of the Committee with the assistance of either the Secretary or the Assistant Secretary.

When all the necessary information is to hand, the panel prepares a memorandum for the assistance of the whole Committee. It is submitted to all the members with all the information gathered during the investigation. At one of its regular fortnightly meetings the Committee considers the matter and determines what course will follow: the complaint may be dismissed, a summary hearing may be held, or the matter may be referred to the Barristers' Disciplinary Tribunal for determination.

SOME STATISTICS

Since 1 January 1993, 27 complaints have been received by the Committee. Of the 23 complaints received in 1992 which were still under investigation at 31 December 1992, 13 have been completed. One summary hearing has been held. One case has been heard before the Tribunal.

Rodney McInnes

CRIMINAL BAR ASSOCIATION REPORT

CRIMINAL BARRISTERS HAVE FOR YEARS fearlessly acted on behalf of both the State and individuals. They, independent of popularity and political favour, pursue the rule of law in our State as true professionals should. They justly prosecute wrong doers on the one hand and fiercely protect the rights of the individual on the other. Both roles are essential to the notion of justice in an adversary system and ultimately to a true democracy. Each role calls upon a high level of skill achieved by years of learning and practical experience.

Unfortunately the perception of criminal barristers by some ill-informed elements of the community is not a good one. Defence counsel seem to be regarded by many as lawyers who by trick and sleight of hand prevent the accused from being properly convicted and duly punished. The system that permits this, therefore, is seen to not support the victims of crime nor protect the broader community.

This poor perception is understandable. No one who is involved in the criminal justice system as

accused, witness, or victim could find it a pleasurable experience. Cross-examination, the advocate's tool for testing observation and credit, may be viewed as personally insulting or unnecessary to the subject witness. Sentences imposed by the courts are too low according to the victims of crime, and excessive according to the prisoner and his loved ones. Rules of evidence developed through logic and experience and fairness seem to enable barristers to "create the truth" and stop witnesses from telling everything to the court which they, the witness, know is relevant. All this causes many to be wary of the criminal justice system and to question its integrity and effectiveness.

Pressure groups within the community obviously regard their interest as paramount. This causes them to attempt to influence those who make the laws and those who administer the laws.

The system effectively balances all these competing interests to produce a just result.

Pressure groups within the community obviously regard their interest as paramount. This causes them to attempt to influence those who make the laws and those who administer the laws. Government and the legal profession have a duty to listen to community views and respond rationally to them. They must not change for change sake. They must not blindly, uncritically and urgently respond to ill-informed, emotional or partial views coming from those pressure groups. To do so would to ignore centuries of careful legal development, and for example, would lead automatically to the return of capital punishment.

Lawyers who operate within the system have a valuable contribution to make to this process. Change and development cannot take place effectively without proper consultation with experts in the area. The Criminal Bar is no exception.

Increasing criticism of the legal profession and in particular the Victorian Bar has led to a cynical disregard of barristers' views. The media frequently describe barristers as wealthy, influential and self-interested. It is easy and convenient to disregard views expressed by the Bar on that basis. That the quality of intellectual resource, integrity, professionalism and true service to the community can be so easily and tritely overlooked is a sad reflection not on the Bar but on those critics who follow that ill-conceived path.

The Criminal Bar is very concerned at many current events and proposed changes that will affect practitioners and individuals. These concerns are not based upon a cynical desire to self perpetuate. They are all related to an erosion of the rights of the individual and result in diminution in the quality of justice.

Parliament has in this session passed Bills of far-reaching significance without any consultation. They include the abolition of unsworn evidence (one wonders if the distinction between unsworn evidence and unsworn statements was understood at the time of this abolition), the *Sentencing (Amendment Act)* 1993 (reviewed elsewhere in this edition of the *Bar News*), and the *Crimes (Criminal Trials) Act* 1993. Another significant proposed Act is the Crimes (Amendment Bill) 1993. The Criminal Bar Association held a very well attended special general meeting where the membership passed unanimous motions about this draft legislation. The Bar Council fully supported our concern over the Sentencing (Amendment Bill) to such an extent that it held its first news conference in Bar Council Chambers. Many different community groups, including the Legal Aid Commission, the Council for Civil Liberties, the Law Council of Australia, the Criminal Bar Association and other community groups, joined together to raise unanimous concern over the Bill.

The Criminal Bar Association proposes to hold a seminar upon the effect of this legislation on both the individual and the practitioner. This will occur on a Saturday morning later this year on a date to be announced.

Some of the proposed changes are good (for example, introduction of defence opening addresses at the conclusion of the Crown's opening address). Many of the changes are, however, bad (for example) aggravating circumstances to a sentence constituted by a breach of the interlocutory steps in the trial procedure). The Committee has unsuccessfully attempted to draw the Government's attention to perceived flaws in these Acts prior to the passage of the Bills.

The total income of the Bar has dropped substantially in recent times. The Criminal Bar, always at the forefront of financial deprivation, has suffered considerably. Whilst the general recession is partially at fault, problems with Legal Aid have exacerbated this. Tendering for briefs, retained-counsel and a decrease in advocate expenditure seem to be the Commission's budgetary tools. Structure efficiency and cost-effectiveness seem to focus upon decreasing counsel's fees. The result is

that many defendants are either not represented or inadequately represented. These issues are under constant review by both the Bar Council and the Criminal Bar Association Committee. There is a real need in our community. Many defendants are forced to go to court unrepresented and therefore disadvantaged. The court system is of course also made less efficient due to these people who are not assisted in any way. We also have a large body of Magistrates' Court practitioners who have very little work to do. Our goal should be to get these two groups together for the benefit of the community. This can only be done with the very efficient use of available legal aid resources.

The people whom we represent usually have little independent standing to assert their civil rights.

The Committee has also discussed and acted upon, inter alia:

1. The high cost and poor quality of the Australian Criminal Reports.
2. The high cost of serviced books by Law Book Company and Butterworths.
3. Reporting of CCA cases.
4. Continuing legal education in the criminal area.
5. The abolition of unsworn evidence.
6. The abolition of unanimous verdicts.
7. Discovery in summary hearings.
8. Proposed Federal code governing principles of criminal responsibility.
9. Proposed arraignment day in the Supreme Court and the Bar's assistance to that.
10. Listing difficulties.
11. Pro bono assistance to the community and particularly to witnesses requiring assistance in the County and Supreme Courts.

The Committee has been active. We invite all practitioners to raise issues of concern to them with the Committee. We are practising during a period of change. The people whom we represent usually have little independent standing to assert their civil rights. We have a collective responsibility to maintain their rights and speak on their behalf whenever necessary.

W. Ross Ray
Secretary

REPORT OF THE NEW BARRISTERS' COMMITTEE

AS REPORTED IN THE AUTUMN EDITION OF the *Bar News*, the N.B.C. has been most concerned to become aware of its constituents' views on important issues affecting the Junior Bar. After much consideration and discussion with the Bar Council, the N.B.C.'s insistence that a questionnaire be distributed to the Junior Bar was finally approved. Most members of the Junior Bar will recall receiving a questionnaire dealing with such matters as the keeping of Chambers, scale fees and the publishing of information on candidates during Bar Council elections. The N.B.C. is pleased to report that the responses to the questionnaire was excellent. Approximately 40% of the Junior Bar responded. This is felt to be one of the best, if not the best, response to any sort of polling of Bar opinion in the history of the Bar. In total, 196 responses were received.

An official report is in the process of being prepared by the N.B.C., and will be submitted to the Bar Council to be tabled at one of its monthly meetings. Of course, any member of the Junior Bar will be welcome to see a copy of same. In the meantime, it is felt appropriate to indicate in this report the general results of same.

On whether barristers should be required to keep Chambers, 83 members responded "no", whilst 111 responded "yes". Many of those in favour of retaining Chambers cited "maintaining the collegiate system of the Bar" as the main reason. In addition, there were many complaints about the current rules as to sharing, and BCL's inability to enforce the rules relating to sharing, as well as other "rorts" conducted with respect to renting. Of those responding in the affirmative, the majority opined that there ought to be more flexibility for part-time practitioners, cases of hardship, and towards very junior members of the Bar (less than 2 years). What the N.B.C. found most interesting were the responses to Question A3 when compared to the above results. A majority of those responding were against the notion of BCL maintaining control of Chambers, with 93 saying that Chambers ought not necessarily be leased by BCL (and 100 saying BCL ought not be responsible for the selling of Chambers). In contrast, 82 said BCL

ought to be exclusively responsible for the leasing of Chambers, and 67 responded similarly in relation to the selling of Chambers. Of those 83 who responded in the negative to the first question, the overwhelming comment was that the rules were unnecessarily restrictive in that they did not allow one to take advantage of the competitive market. Some cited the high cost of rental in places such as Four Courts, and the fact that a mix of practitioners does not operate in all Chambers. There was even one comment that the mandatory keeping of Chambers may be in breach of the *Equal Opportunity Act* in that the current system discriminates against part-time practitioners with child care commitments (and therefore on sex and marital basis).

An overwhelming majority of those responding to the question "should Barristers have the option to purchase Chambers?" responded in the affirmative (125) as compared to 63 who responded in the negative. Not all wished to exercise the option, even though most felt it ought to be an option. Opposition to private ownership was cited as the main reason for those responding negatively, whilst some misinterpreted the question insofar as it canvassed an *option* rather than an alternative to the current system.

Questions B1 and B2 produced some very interesting results. Of the 196 responses 70 felt that scale fees ought not be retained, whilst 126 members felt that they ought be retained. Most supported its maintenance because of cut-throat price cutting, and the fact that there were no assurances that a solicitor would pass the savings on to the client. Others asked why should there be a minimum when there is no maximum. There is no Supreme Court scale and the fact that there are enormous variations between Legal Aid crime and family law scales compared to many other court scales was also cited by those against retention of the rule. On the other hand, 115 members, as compared to 81, answered that the rule making it an ethical offence to charge below scale ought to be abolished. When attempting to interpret these responses and rationalise the answers to question B1 as compared to B2, it would seem that the majority would want to retain scale fees, but only as a "benchmark", and not make it an ethical offence to charge below the "benchmark".

The last question sought comments to the publishing of tickets during Bar Council elections. It is clear the majority of respondents want information on candidates. Some pointed out other professional bodies such as the Law Institute which publish material on each candidate and enclose it with their ballot papers. Whilst some did not address the issue of tickets "per se", the majority of those who did (106) had either no objection, or thought them a good idea. Only 49 were opposed to the publishing of tickets generally on the grounds that allowing this practice would "politicise" the Bar.

You may well ask "well what does the N.B.C. now do with this information?". The N.B.C. proposes to present this information to the Bar as a whole at the upcoming "TalkFest", in the hope of generating full and open discussion and, hopefully, bringing about any necessary changes to the Rules. The "TalkFest" itself (another initiative of the N.B.C.) is currently under discussion, and it is envisaged that it will take place in the not too distant future. In the hope of attracting as many members of the Junior Bar as possible, the N.B.C. has asked the Bar Council to ensure that it is held over one day and that it take place somewhere in the Melbourne metropolitan region. This should significantly reduce the cost.

As I have previously said, the N.B.C. has taken a far more active role in the decision-making processes at the Bar. The necessity for this is borne out by the high (and qualitative) level of response to the questionnaire. A few doubted (and opposed) the necessity for such a questionnaire. Fortunately, while the wheels of democracy may turn a little slowly, they turn nonetheless, and the right of the N.B.C. to poll its constituents on pertinent issues was, rightly, realised.

More recently the N.B.C. also suggested to the Bar Council that some input by the Victorian Bar to the Senate Inquiry into Gender Issues and the Judiciary be arranged. The N.B.C. suggested the formation of the Committee to be known as the Equality before the Law Committee. We are pleased to see that this suggestion has been taken up by the Bar Council and that this Committee is now looking at preparing a submission to be Senate Inquiry. It is also encouraging to see that of the 7 committee members, 3 are from the Junior Bar.

In conclusion, we welcome Con Kilias, Susan Borg and George Irving to the N.B.C. and have thus far noted their great support and enthusiasm for the Junior Bar. They are three new members of the N.B.C. who welcome discussion and comment from the Junior Bar. Make sure you give it!

Elected members of the N.B.C.:

Carmel Morfuni	Clerk "S"
Rosemary Carlin	Clerk "W"
Carmen Randazzo	Clerk "W"
Chris Wallis	Clerk "P"
John Ribbands	Clerk "W"
Anthea MacTiernan	Clerk "R"
A. Hooper (Sec.)	Clerk "D"
Con Kilias	Clerk "P"
George Irving	Clerk "M"
Susan Borg	Clerk "D"

Carmen Randazzo
Assistant Secretary

WELCOMES

KATHRYN KINGS: NEW LISTING MASTER

ON 23 MARCH 1993 KATHRYN ELIZABETH KINGS was sworn in as the Listing Master following the retirement of Master Gawne. In accepting her appointment, Master Kings became the first woman to be appointed to a judicial position in the Supreme Court of Victoria. She also followed in the footsteps of her father, Judge Stan Hogg, who retired from the County Court bench in May after 17 years of service.

Master Kings comes to the Supreme Court with nearly 20 years' experience in the law, mostly in practice as a solicitor. Master Kings however has also done time in academia, tutoring at the Royal Melbourne Institute of Technology and acting as an examiner in Accounts and Family Law at the Law School at the University of Melbourne. She has also found time in her career to be an associate to a judge in the County Court.

Master Kings' experience in the law spans a broad range of areas. She completed her articles in 1973 at Gillott Moir & Winneke (which later merged with Minter Ellison) under Judge Tony Smith of the County Court who was then a partner. She was admitted to practice in Victoria in 1974.

After several years Master Kings, unfazed by the enormity of the change, moved to country Victoria. Far from a quieter life, Master Kings spent her years in the country running a mixed farm, working as a solicitor, completing her Master of Laws degree from the University of Melbourne and raising her son, Hamilton.

Returning to Melbourne, Master Kings commenced work at Mallesons Stephen Jaques in the mid-'80s in the commercial litigation department where she handled a range of commercial litigation including professional negligence, product liability and insurance claims. More recently prior to her appointment Master Kings practised in the emerging area of environmental law. Master Kings had a reputation for her determination and decisiveness at Mallesons overlaid, so say her colleagues, with a refreshing sense of fun and sometimes wicked sense of humour.

Master Kings has always found the time and interest to be involved in activities outside the law. Since 1987, she has been an active member of the Council of Wesley College in Melbourne and participated on numerous committees. She also has been a member of the Association of Independent Schools in Victoria.

Master Kings is a keen tennis player and enjoys gardening, reading and spending time (on and off the tennis court) with her husband David, a doctor, and 14-year-old son Hamilton.

We extend a warm welcome to Master Kings.

THE NEW MAGISTRATES:

BRIAN WYNN-MACKENZIE

ON 18 AUGUST 1992 BRIAN WYNN-MACKENZIE was sworn in as a magistrate.

Brian was born on 25 March 1947 in England at Cheltenham, Gloucestershire. In 1963 he commenced articles with the firm of Dowson Wadsworth & Co. in Nottingham on the not so attractive terms of a payment of five hundred pounds to his principal and on the condition that no wages would be paid for the first twelve months of work.

Not surprisingly Brian found those conditions difficult to accept and after two years he enlisted in the British Royal Marines. He completed his commission as a commando officer in May 1970 and was qualified as a fixed wing pilot. In the same year he migrated to Australia with a view to joining the Australian Army and to be trained as a helicopter pilot.

On arrival in Australia Brian's admission to the Portsea & Point Cook Officer Training Academies was delayed and he was forced to seek alternative employment. He took a temporary job with Blake & Riggall as a law clerk.

In January 1971 Brian left Blake & Riggall and commenced his officer training with the Australian Army but after four months decided that perhaps law was not so bad after all and returned to Blake & Riggall as a law clerk.

In 1973 Brian accepted a position with the law firm of Max Beck & Co in Bendigo, where he practised for six months prior to returning to Melboume and commencing employment with Mid-

dletons, as a law clerk in its shipping and insurance departments.

While working full-time, Brian completed the RMIT articled clerks' course and was admitted as a barrister and solicitor on 1 December 1981. He has the distinction of becoming a partner in the firm on the very same day as his admission.

In 1984 Brian was appointed head of the litigation department of Middletons Oswald Burt (as it was then known) and in 1990 became chairman of partners, supervising the management and administration of the firm. In that capacity Brian was directly involved in the negotiations and subsequent merger of the firm with the Sydney firm of Moore & Bevins in 1991.

Between 1987 and 1992 Brian was also a part-time member in the general division of the Administrative Appeals Tribunal. He is currently completing a master of laws degree by course work at the University of Melbourne. Brian's undoubted administrative and managerial skills, together with his extensive experience with litigious matters and his infectious sense of humour (shades of Darcy Duggan), make him a formidable addition to the magisterial ranks.

WILLIAM DESMOND MARTIN

WILLIAM DESMOND MARTIN (DES) WAS appointed as a magistrate in March 1993. He has gone back to his roots. His Worship was educated at St. Patrick's, Ballarat and University High School. His Worship completed his LLB at the University of Melbourne in 1970. He attained an LLM in 1978. He is married with three sons.

His Worship has had a varied career in the law. His Worship was a Clerk of Courts in the then Law Department from 1957 to 1966. In 1966 he joined the then Crown Solicitor's Office and moved to the Office of the Solicitor to the Insurance Commissioner. In 1970 he rejoined the Crown Solicitor's Office. For three years he was the Prosecutions Officer and undertook the preparation on behalf of government departments and instrumentalities of a wide range of prosecutions and appeared almost daily in Magistrates' Courts throughout Victoria.

In 1975 he was appointed Assistant Solicitor to the Commissioner for Corporate Affairs. In 1976 he returned to the Crown Solicitor's Office as a Principal Legal Officer and was appointed an Assistant Crown Solicitor in 1981. As an Assistant Crown Solicitor he advised on proposed off-shore borrowing programmes, financial accommodation and joint venture programmes entered into by the State of Victoria and its instrumentalities. It is a pity that the Government did not seek this type of advice after 1985.

From 1985 he was the Assistant Victorian Government Solicitor in charge of litigation. He was one of two Legal Officers responsible for advising on and the conduct of constitutional litigation on behalf of Victoria. He has an excellent reputation as a constitutional lawyer. At the office farewell the present Solicitor-General and his two predecessors attended.

His Worship's administrative skills, his sound knowledge of the law and his integrity equip him well for his new career. His old colleagues and his many friends at the Bar wish him well.

JOHN MARTIN MURPHY

JOHN MARTIN MURPHY HAS LONG HAD an ambition to be appointed as a magistrate in Victoria. His ambition has been fulfilled. "Murph" had (and has) unique qualities for appointment. He had already acted as a magistrate in the Northern Territory and the Australian Capital Territory. One could say that he is one of the more experienced magisterial appointments in recent years.

His parents were on the land at Echuca where he was born in 1944. He is the youngest of four children. Many will recall his brother Graham who served as a magistrate in north east Victoria and other places and has recently retired.

His Worship was educated at the Brigidine Convent in Echuca and then as a boarder at St. Bedes Mentone.

He joined the court's branch of the Law Department in 1962 and served for twelve years in that capacity. It is said that he sat as a bench clerk to every magistrate in the State. As a member of the relieving staff of the Court's Branch, he visited all the courts in Victoria except six.

Between 1973 and 1974 he worked at the Crown Solicitor's Office in Melbourne and came to the Bar in 1975. He enjoyed reading with Judge Howden and later was one of the original inhabitants of Four Courts Chambers. His contemporaries there recall that he was a very conscientious and

diligent member of counsel whose dry sense of humour and genuine friendliness made him a very valued member of those chambers in those days.

He was always keen to be involved in the life of the Bar, and for two years from 1976 he was the Assistant Secretary of the Victorian Bar Council.

His Worship practised extensively in the Magistrates' Court in both the criminal and civil jurisdictions. As his practice developed he was frequently briefed to prosecute for the Crown and was often to be found in circuit courts. It is rumoured that he is looking forward to being appointed to a country area.

The Bar congratulates John Murphy on his appointment and wishes him a long and successful career.

GEOFFREY M. HORGAN

ON 29 MARCH 1993, GEOFFREY M. HORGAN was appointed a magistrate. Geoff signed the Roll of Counsel in 1973, at which time he commenced to read with John Hanlon, now Judge Hanlon.

Geoff has, over his years as a member of the Bar, had a very wide and mixed practice which has qualified him well to exercise the increased, and increasing, jurisdiction of the Magistrates' Court.

For more than two years he was junior counsel assisting the Royal Commission which was appointed in 1979 to investigate the many allegations of misfeasance by the Housing Commission in relation to its purchases of land. That Royal Commission is now long forgotten and the misfeasances alleged now seem relatively trivial, but the Commission did investigate issues which were, or seemed to be, important at the time.

On his return from this adventure, Geoff developed a significant practice in the running down area and then, in 1990, resumed his role as a defender of the public interest — he was involved for an extended period in representing the Attorney-General and the people of the State of Victoria before the coronial inquiry into the shooting of a number of persons by the police.

Since his return from this exile at the Palace of Death, Geoff has been engaged in prosecuting alleged miscreants.

His practice has thus given him wide experience on both the civil and criminal sides.

A more interesting aspect of Geoff Horgan is, however, not his legal experience, but his personal interests. As well as being a devoted husband and father of six children he has two passions — painting icons and model aircraft.

He has a considerable reputation as an artist being responsible for painting icons ("a representation. . . of some sacred personage, as Christ or a Saint or Angel, itself venerated as sacred") which have been installed in various Eastern Orthodox Churches in Melbourne and interstate. He is also a qualified pilot of model aircraft.

The Bar welcomes his appointment and trusts that the burdens of his new office will not preclude him pursuing his indulgences.

MAX CASHMORE

THE BAR IS PLEASED TO ACKNOWLEDEGE the appointment of James Maxwell Brooke Cashmore to the bench of the Magistrates' Court of this State. His Worship signed the Roll of Counsel on the 6th day of May 1968 and read in the chambers of Mr. John Fogarty as he then was.

His Worship rapidly developed a busy practice particularly in the field of Criminal Law and was ever a doughty opponent. In the midst of the many attributions of meaning to the word "shrewd" in the *Shorter Oxford Dictionary* the reader finds "clever or keen witted in practical affairs, astute, penetrating, sagacious in action or speech". Those who know or were opposed to Max Cashmore will readily recognise his possession of these qualities.

He is one of a family of high achievers who no doubt derive great satisfaction from his appointment.Only recently has he abandoned his bachelor freedom and he is now happily married, a father of two young children and presents as a model of respectability, a status no one would have dared predict during his early years at the Bar.

His Worship takes with him to the bench a well rounded urbane personality and those who appear before him need have no fear on the score of compassion. His long acquaintance with the Sport of Kings will have provided him with a window to the souls of those poor wretches whom gambling has caused to fall by the way side. It remains to be seen whether the demands of office will enable him to reduce his long enjoyed single figure golf handicap or continue to collect trophies on the tennis court. The writer suspects he will find a way!

He was a conscientious, energetic and well respected member of Counsel. He undertook the organisation of Bar golf days for many years and the breezy column he wrote for the *Bar News* was always well received. His appointment carries with it the hearty endorsement of his peers and the Bar wishes him a long and successful career on the bench.

GRAEME HICKS

GRAEME HICKS WAS SWORN IN AS A MAGISTRATE on Friday, 28 May 1993.

Shortly prior to the jury returning a verdict in Hicks' last trial (27 May 1993) Judge Spence said that his pending appointment was the Victorian Bar's loss.

That sentiment has been echoed in all quarters of the legal profession in this State.

During his time at the Bar he developed a reputation for advocacy and thorough preparation of the highest order.

His Worship's quick analysis of any legal problem and knowledge of the law saw a constant stream of people seeking his advice.

His Worship has appeared in many of the major criminal trials in the last decade, also appearing regularly in the Full Court. He served on the Ethics Committee and was always available to guide any person who needed help.

Graeme Hick's practice has been almost exclusively in the criminal jurisdiction where a number of readers have benefited from his knowledge and wisdom.

He has been lucky his wife Maureen and two children have been supportive and understanding of his career at the Bar and also of some of His Worship's more peculiar habits; for example, eating fish and chips in bed on Friday afternoons while sipping the odd glass of champagne.

His Worship has had more hobbies and interests than Brendan Murphy's conspiracy theories in .05 cases.

He actually confesses to one major flaw in his character, he is a fanatical Collingwood supporter and has to admit under skilful cross-examination to driving to Horsham to watch a practice match and back in the one day.

His Worship was educated at Melbourne Grammar and then the University of Melbourne. He was a bright law student and took out a Masters of Law in 1977.

He was a fine tennis player and footballer in his younger years. He has had some luck with race horses. He has owned two horses, *Holsan* and *Excited Angel*, who between them have won four group two races and three group three races.

The appointment of Graeme Hicks to the bench has ensured the community will continue to receive the benefits of his legal knowledge and wide experience. All who know and respect him wish him well in this new phase of his career.

FAREWELLS

Judge Hogg

ON 29 APRIL 1993 MEMBERS OF THE LEGAL profession attended in the County Court to farewell Judge Hogg on his retirement from the Bench. His retirement comes after 42 years practice as both a barrister and solicitor including the last 17½ years as a member of the County Court. Upon the occasion of His Honour's appointment in 1975, the *Bar News* observed "His Honour's characteristic quiet courtesy and industry will stand him in good stead in his new office". In welcoming him to the bench the then chairman of the Bar Council, Mr. McGarvie Q.C. said "Your career has been distinguished by good manners, quiet strength, patience, hard work and reliability". These qualities as Mr. McGarvie predicted were carried on into His Honour's work in the County Court. His Honour established a reputation as a judge of unfailing courtesy to all who came before him be they counsel, witness or jurors. His approach to judicial office, while not universally popular, seems to have had a lot to recommend it. His Honour has been described by one of his brother judges as "incapable of being rude or nasty to anyone; a model of christian charity with a strong public and social conscience". Outside of court hours His Honour has been a keen and active Rotarian. His charity even extends to the support and membership of the Footscray Football Club! For some considerable time His Honour has been (and remains) a keen student of French having pursued that interest at the Alliance Francaise.

It is reported the closest Judge Hogg ever came to embarrassment in the discharge of his judicial responsibilities was an occasion when his tipstaff (in his ever fastidious concern for his Judge's well being), having made sure His Honour was comfortably set up in Chambers after Court had adjourned, unfortunately overlooked the jury who were still locked away in the jury room. He did however remember this fact on alighting from his train much later that evening! Apparently His Honour had stressed to his tipstaff that he must be very careful about the security of the jury room and this was the tipstaff's explanation for his unfortunate oversight!

The Bar wishes His Honour a fulfilled and happy retirement.

CRIMES SEXUAL OFFENCES LEGISLATION

Sentencing (Amendment) Act 1993

THERE HAVE RECENTLY BEEN SWEEPing and profound amendments to the *Sentencing Act* 1991. The original Act was assented to on 25 June 1991 but did not come into force until 22 April 1992. It had, therefore, at the time of the drafting of the amending Bill, been in operation for less than 12 months and, at the time of the introduction of the amendments into the House, just over 12 months. There is no evidence which would indicate the original Act produced sentences that could generally be considered inappropriate in all the circumstances. The Director of Public Prosecutions for the State of Victoria has appealed sentences imposed under the *Sentencing Act* 1991 both successfully and unsuccessfully.

Despite much vocal opposition to the proposals the Government was single-minded in its determination. Unfortunately, this attitude has resulted in the Government turning a blind ear to much sensible criticism. The Bar Council is to be congratulated for the strong public stance it took in opposing the Bill.

The *Sentencing Act* 1991 resulted after a period of serious consideration, consultation and discussion by a wide variety of groups, many of whom had disparate views. Its genesis was the work done by the Committee headed by Sir John Starke Q.C., which commenced in October 1985 and reported in April 1988. Thereafter that Report was reviewed by a Committee chaired by Mr. Frank Costigan Q.C., that Committee reporting in September 1989. Both those Committees received much assistance from a variety of bodies and the consultation and discussion continued, finally resulting in the *Sentencing Act* 1991. There was no such discussion or consultation prior to the introduction of the Sentencing (Amendment) Bill. The amending Act fundamentally alters the way in which sentences are to be imposed in this State in a number of different ways, particularly having regard to the provisions of the *Sentencing Act* 1991. The major differences are:

(i) the introduction of indefinite sentences;
(ii) the abolition of the principle of proportionality in sentencing so far as "serious sexual offenders", "serious violent offenders" and "persons convicted of serious offences" are concerned;
(iii) the requirement for courts to impose cumulative sentences on "serious sexual offenders" unless otherwise ordered.

The proposals with respect to "serious sexual offenders", "serious sexual offenders" and indefinite sentences for persons convicted of a serious offence are unnecessary.

The High Court has laid down civilised, sensible and reasoned principles of sentencing over recent years. In particular reference is made to *Veen* v. *The Queen [No. 1]* (1979) 143 C.L.R. 458 and *Veen* v. *The Queen [No. 2]* (1988) 164 465. The Court stated that a sentence should not be increased beyond what is proportionate to the crime to extend the period of protection of society from the risk of recidivism by the offender. But it is permissible for the sentencing discretion to be exercised having regard, amongst other proper matters, to the protection of society. These decisions recognise protection of society is of legitimate concern for a sentencing court, but it should not be the paramount concern, and regard has to be had to other relevant sentencing principles. Section 5(1) of the *Sentencing Act* 1991 (before these amendments) set out the common law principles laid down by the High Court.

In the case of "serious sexual offenders" and "serious violent offenders" the legislation states the court "must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed" and to achieve that purpose may impose a sentence which is disproportionate to the gravity of the offence. In the case of the imposition of an indefinite sentence, the court is required to impose such a sentence "if it is satisfied, to a high degree of probability, that the

offender is a serious danger to the community . . ." (s.18B). Such a provision again permits the imposition of disproportionate sentences.

Further, these provisions effectively permit a court to impose a fresh penalty for a past offence or offences. It is not appropriate to impose a further penalty on an offender for an offence for which he or she has already been sentenced.

The effect of these amendments will be to increase the prison population. It is estimated that it will increase by between 500 and 1,100 people within the next four to ten years.

In the Second Reading Speech the Attorney General relied upon part of the judgment of Justice Deane in *Veen* v. *The Queen [No. 2]* as justification, in part, for indefinite sentences. She then continued, "This Bill provides a scheme of preventive restraint for the protection of the community *while not being limited to offenders with a mental abnormality*" (emphasis added).

The decision of Justice Deane in the case to which the Attorney-General referred was a dissenting decision. Justice Deane was of the view the sentence was excessive, would have allowed the appeal and would have sent the matter back for resentencing. It is clear from the passage quoted by the Attorney-General and the passage immediately following thereafter that Justice Deane was dealing only with people who were of concern *by reason of mental abnormality.* As Justice Deane said in that passage, "to increase a sentence of imprisonment by reason of a propensity flowing from abnormality of mind, to commit further offences is to punish a person for that abnormality of mind and not for what he has done."

The judgment of Justice Deane relied upon by the Attorney General provides no support for preventive restraint of persons not suffering from a mental abnormality. By reason of what was stated in the Second Reading Speech, *the legislation is clearly intended to cover people who do not suffer from a mental abnormality.* Also it needs to be remembered that it is extremely difficult for even the best experts to attempt to identify persons who may or may not be likely to be a danger to the community. This is because of the great difficulty in confidently ascertaining who such people are.

The Bill is in part based on Queensland legislation. The Queensland legislation is less draconian:

(a) with two minor exceptions, indefinite sentences can only be imposed in Queensland with respect to offences for which the maximum sentence is life imprisonment;
(b) in Queensland the "nominal sentence" is required to be reviewed by the court after 50% of it has been served;
(c) the court is required to review the indefinite sentence every two years;
(d) with the leave of the court a person may make an application for a review of indefinite sentence at any time.

None of these safeguards are contained in the Victorian legislation.

The effect of these amendments will be to increase the prison population. It is estimated that it will increase by between 500 and 1,100 people within the next four to ten years. That would be an additional burden on the community of at least $25m to $50m per year, based on the current average cost of housing a prisoner of $50,000 per annum. [That figure is the average and many of the increased prison population will be "security prisoners", where the cost of confinement is greater than $50,000 per annum.] Additionally, already there are insufficient "security prisoner" beds in this State. It is understood the provision of each "security prisoner" bed costs, at current levels, between $150,000-$200,000 per bed. The Government does not appear to have made any allowance for these additional financial burdens on the community. On the other hand the Government actually intends to close a number of prisons. This will exacerbate further the problems that already exist in the remaining prisons.

In the end it must be remembered that in the majority of cases a prisoner will be returned to society. It is therefore in the interests of society that everything within reason be done to ensure the prisoner will not re-offend. In the end, reformation (so there is a real reduction in recidivism) must be a, if not the, primary objective of the criminal law. There are no provisions in this legislation which will do anything to provide the essential services and funding that will result in positive reformation. Again, the Government has not made any provision for financial assistance in this regard. Further, it cannot be said that the prisons in this State are conducive to reformation, nor do they provide (in most cases) basic decent accommodation for those confined in them. It is time the root cause of criminal behaviour was considered rather than merely locking people away.

At the end of 1992 the average daily prison population in New South Wales was approximately 50% more than that of Victoria: 100.6 persons per 100,000 head of population as against 73.2 per

100,000 adult population. The rate of imprisonment in New South Wales has climbed quite dramatically since the late 1980s when it introduced the so-called "truth in sentencing". At that time the rates of crime in New South Wales and Victoria were comparable. The latest figures indicate they still are comparable and no benefit has been enjoyed by the community in New South Wales as a result of the imposition of heavier sentences.

An accused is likely to endeavour to do everything he or she can to avoid conviction, thereby lengthening the duration of trials.

It is likely the legislation will result in more trials and longer trials. This comes about because a person who falls within one of the three particular categories with which this Bill is concerned will be more likely to fight a trial in an endeavour to avoid the heavy sentencing options which will follow upon conviction. For the same reason an accused is likely to endeavour to do everything he or she can to avoid conviction, thereby lengthening the duration of trials.

The amendments may well lead to greater evils than those which they aim to overcome. In America legislation of this type, which particularly isolates out some classes of repeat offenders, has had the effect of those offenders resorting to even greater violence by murdering the victims of their crime to remove a potential witness to their crime. This has been particularly so in sexual cases.

Experienced barristers who practised in crime during the time when capital punishment was still the mandatory sentence for those convicted of murder were, and are, of the opinion that accused often were acquitted of murder simply because the jury did not wish to be responsible for the passing of the death sentence. It is likely that in some cases perverse verdicts will result where the jury are concerned that if the accused is convicted, he or she will suffer unfairly as a result of this proposed sentencing legislation.

If the Government is of the view that sentences imposed for a particular crime or crimes are inadequate, then it should have notified that view to the courts in the proper manner by increasing the maximum penalty for that crime or crimes. The *Sentencing Act* 1991 requires the sentencing court to have regard to the maximum penalty prescribed for the offence; s.5(2)(a).

W. Brind Zichy-Woinarski
Chairman, Criminal Bar Association

ACCESS TO JUSTICE

OVER THE LAST THREE OR FOUR YEARS concern expressed in the newspapers, by the politicians, and by law reformers has been loud and strong: "The cost of justice is too high!"

Unfortunately, the real thrust of much of the comment and suggested reform is directed not at the cost of "justice" but at the cost of legal administration and litigation. The two issues are not necessarily the same. Emphasis on the "efficient processing of components fed into the legal sausage machine" ignores the fact that the efficient processing of cases does not necessarily result in justice.

Most of those agitating for a reduction in the cost of justice belong to the "caring" and "sharing" section of the community, who in a different context say "No matter what the cost we should ensure that our forests are preserved and that our environment is not polluted".

In a free democratic society governed by the rule of law rather than the rule of men, most lawyers consider that access and availability of justice to all is more important than the cost.

This does not mean, of course, that we should not take steps to reduce the costs. It does mean that the concerns which are being voiced emphasise the wrong aspect of the question.

The question is not "what does justice cost?" rather it is "how do we provide access?" How much I have to pay for the service only becomes a relevant question when (apart from the question of cost) I can have access to the service.

The public is concerned primarily with access. The sick, the commuter and the news-watcher do not ask — What do surgeons earn? How much are train drivers paid? What does it cost to send a news team to Sarajevo? They ask how can I have access to the operation, the transport or the news? Whether the people who provide the service operate at a huge profit or a devastating loss may be relevant to the question whether they can continue to provide the service; but it is otherwise irrelevant.

The same principle applies to the provision of justice.

One of the most important questions when one talks about access to justice or, for that matter, access to medical treatment, is how the distribution scheme operates. How does the child seriously injured in Boort, or the farmer threatened with eviction in Wycheproof, get access to the appropriate medical treatment or the appropriate legal advice?

The local general practitioner or the local solicitor may not have the expertise to handle the problem with which he is presented. However, under our present system the general practitioner at Boort would refer the patient to the Royal Children's Hospital or to an appropriate specialist surgeon and/or a specialist physician. The Wycheproof solicitor can refer the matter to a member of the Victorian Bar.

In determining to whom the problem of the Wycheproof farmer should be referred, the solicitor can choose from 1,200 practitioners all of whom specialise in litigation and some of whom are recognised specialists in relation to property law. His choice will be determined by his diagnosis of the problem (including its degree of difficulty), his assessment of the particular skills of individual barristers, and the amount which he thinks it is appropriate to pay for the service required.

If the difficulty of the case and the amount involved require the services of a Queen's Counsel expert in the area, he will choose a Queen's Counsel. If the degree of difficulty is considerably less, or if the amount involved is relatively trivial, he may choose a very junior barrister who has the expertise to deal with the matter at the appropriate level. Just as in medicine specialist surgeons are not normally employed to lance a boil, so in legal practice Queen's Counsel are not employed to deal with simple matters of no great significance.

To abolish specialist surgeons would not improve the provision of medical services (but probably the reverse), nor would it of itself reduce the cost of those services. Equally, the abolition of Queen's Counsel would not improve access to justice, nor would it of itself reduce the cost of legal services.

When the brief to advise is delivered to the barrister, he will not merely apply his own mind and skills to the problem. If he has any doubt at all about how to handle the problem, he will undoubtedly discuss it with one or more of his colleagues. He may in fact obtain the unofficial assistance of someone much senior to him in the profession who is expert in the area. The client will not pay for this unofficial assistance.

The Victorian Bar, like the Bar in other States, provides the small solicitor's office, whether operating in the suburbs, the country or the city, with access to a range of resources which cannot be carried within that solicitor's office.

It provides similar services to the solicitors in the mega firms. In theory, however, and often in practice, those firms carry most of this expertise within their own office. What they do not carry within their own office is the experience and knowledge of litigation honed by constant application. Even litigation partners in the big firms do not appear constantly in court. They do not have the same judgment and touch in the courtroom as does the man or woman who constantly stands on his or her feet in court.

Like a staff officer, the solicitor can ensure that the logistics work; the solicitor can work out the general plan (although this may equally be done by the barrister), determining the objective of the exercise and the precise way of getting there. What he cannot do is determine how to cope with the unexpected, how to improvise, and how and when to depart from the plan in order to realise on opportunities which emerge in running. This is the role of the front line soldier.

Even litigation partners in the big firms do not appear constantly in court. They do not have the same judgment and touch in the courtroom as does the man or woman who constantly stands on his or her feet in court.

If there were no separate Bar it is probable that some individuals in the big firms would develop the same expertise as is possessed by the experienced barrister. The clients of the big firms would have access to the equivalent of three, four or (perhaps) five barristers.

This would not be the case for clients of the small firms. Practitioners in small firms would have the choice of doing the job themselves or referring the client to one of the big firms.

Over a decade ago (1982) the New South Wales Law Reform Commission brought out its *First Report on the Legal Profession* dealing with *General Regulation and Structure*. That Report dealt with the strict separation of functions as then existing in New South Wales. The Report found a number of disadvantages flowing from that divided structure. In effect, it said that the legal distinction between barrister and solicitor in that State was undesirable, that all lawyers should be given the same training and should be qualified to perform the same function.

The Report reached the following conclusions (para. 3.81):

"(i) In view of the diverse needs and preferences of lawyers and their clients, the structure of the profession should not restrict the style in which practitioners may practise, unless the need to do so is clearly demonstrated. Freedom of choice in this respect encourages flexibility, diversity, competition and innovation.

(ii) The style in which barristers presently practise is appropriate for many practitioners, and the use of such a practitioner can be beneficial for many clients. It should continue to be a prevalent style within the profession and there should be no discrimination against it.

(iii) But there are other styles of practice which are better for some practitioners, and which are of greater benefit to many clients, than the style of a barrister. This applies to those types of work which barristers presently do, namely advocacy and advisory work on the instructions of another practitioner, as well as to other types of work.

(iv) The present divided structure of the profession involves a combination of, on the one hand, legal and official distinctions between barristers and solicitors, and, on the other hand, restrictive practices at the Bar. This combination substantially restricts practitioners' flexibility and freedom of choice in relation to the style in which they practise.

(v) The restrictive nature of the present divided structure applies particularly to practitioners who wish to practise in the same fields and in the same style as barristers, save that they wish to practise in partnership or to do some types of work without the intervention of an instructing practitioner.

(vi) In order to remove any undue restrictions on these and other styles of practice, each of the existing legal and official distinctions between barristers and solicitors should be examined in order to consider whether it is justified.

(vii) If unjustified distinctions between barristers and solicitors are removed, restrictive practices at the Bar will be less likely to constitute unreasonable restraints on practitioners. Practitioners who do not wish to comply with the practices will have greater freedom to practise outside the Bar.

(viii) Nevertheless, these restrictive practices should be carefully re-considered to see whether they are contrary to the public interest, and, if so, whether they should be relaxed or abolished, either voluntarily or otherwise.

(ix) In considering the impact of these restrictive practices on the public interest, it is necessary to recognise the important role which the Bar plays in nurturing a

group of practitioners who, generally speaking, have a valuable degree of independence, accessibility and expertise".

That Report was the product of a long and detailed analysis of the operation of the New South Wales profession.

I draw particular attention to points (ii), (vi), (vii) and (ix). They, in effect, recommend the system which has existed in Victoria for 100 years — subject to reviewing some of the Bar's restrictive practices (and many of these have been considerably changed since the Report was written).

I commend a reading of the full Report to those who have a genuine concern for the maintenance of our legal system and who believe that the structure of the profession, whether in NSW or Victoria, should change. The report may help define the limits of desirable change.

It is important that we accept change where it is necessary or desirable. However, any steps designed to abolish or weaken the role of the Victorian Bar will restrict the man in the street in his access to the best legal services. This is an important factor to consider when considering any change: "What is its effect on access to justice?"

At the present time in Victoria there is no reason why any person who wishes to practise in partnership as an advocate and to accept briefs direct from the public should not do so. Such a person is not eligible to join the Victorian Bar but he or she may practise as such an advocate as a member of the Law Institute of Victoria.

Access to justice requires the continuation of a strong and viable independent Bar consisting of members who act in a consultative role to the legal profession and who practise as sole practitioners. Direct briefing will create conflicts of interest where they do not at present exist, as will practice in partnership. The latter will also reduce the range of expertise available to any litigant.

If direct briefing comes to Victoria then barristers will need to develop a range of support services which they do not at present need; they will find their independence and objectivity adversely affected; and, in a jurisdiction where the Bar enjoys no monopoly in relation to rights of appearance, there will be little incentive for the next generation, receiving their briefs directly from accountants or real estate agents, to practise other than as solicitor advocates.

In the long run, the independent Bar would disappear, as the de facto distinction between barrister and solicitor disappeared. This would adversely and irreparably affect the ordinary man's access to justice.

Gerard Nash

HAY MAKING AND HORSE HAIR

The Independent Bar and Regional Victoria

THE UTILITY OF A STRONG INDEPENDENT Bar to solicitors in regional Victoria has been of great importance in the administration of justice in the past, and it continues to be so notwithstanding the great changes in the law over the last ten years or so or the coming of the electronic age.

Not so long ago, superior courts were groaning with the sheer weight of personal injury cases (with lists of matters awaiting trial in the hundreds or thousands) and this factor alone ensured that a good cross-section of the Bar spent a significant amount of time on circuit. Accordingly, helpful professional relationships and generally warm friendships developed between counsel and solicitors in regional Victoria which ensured that advice was only a telephone call away should the need arise.

The advent of new systems for compensating accident victims, and the greatly increased jurisdiction of the Magistrates' Court in criminal matters, has meant that the need for counsel to attend for the hearing of matters in which they have been briefed outside the city of Melbourne has been significantly diminished.

Despite this, the utility of the association remains, and is perhaps stronger because of these developments. The characteristics of the relationship between regional solicitors and the Bar are influenced by a number of factors. Firstly, it seems clear that the more remote the solicitor and his client are geographically, the stronger their personal and professional relationship. In the litigious setting this is something which gives rise to the potential for the client not to receive dispassionate objective advice about his or her chances of success. Accordingly the Bar is relied upon heavily by solicitors in this situation to take a fresh look at proceedings, to settle the paperwork which may often be drafted with more enthusiasm than realism, and finally to conduct the case in whatever form.

Secondly, the largest firms in country Victoria have between 10 and 20 partners, the vast majority practise as sole practitioners or in partnerships of less than four solicitors. The breadth of legal expertise available to the client from a particular firm is limited by the interests and experience of the firm's members.

Without the resource of an independent Bar to the members of which reference can be made for advice and assistance, the quality of legal service provided by the profession as a whole to its clients would be severely curtailed.

Thirdly, the economic imperatives of the legal aid system in particular and the cost-conscious legal consumer in general mean that the briefing of counsel is now often far more economical than is the attendance for hearing by the solicitor handling the matter. This is particularly the case in the Magistrates' Court, where the successful solicitor advocate relies upon a high volume of matters at a particular court on a particular day to justify the amount of time spent away from the office at court and to meet the overheads being incurred at that office. In the past solicitors have shown a marked reluctance to refer clients to another solicitor for a particular matter, out of fear of "client pinching".

It is noteworthy that those occupying high judicial office consistently support the continuation and expansion of circuit sittings of courts.

In short, a strong independent Bar, providing as it does the widest possible variety (in terms of gender, ethnicity or language, age, breadth of legal experience, and availability) of counsel ensures that people who live outside metropolitan Melbourne are not disadvantaged in terms of the delivery of legal services.

It is noteworthy that those occupying high judicial office consistently support the continuation and expansion of circuit sittings of courts. A by-product of this is the continuation of the strong relationship between the Bar and regional Victoria.

The structuring of the Bar along lines other than those which at present exist (as, for example, the establishment of chambers in solicitors' offices) would not only serve to undermine the Bar's independence but, perhaps more importantly, the confidence with which regional solicitors presently use the services offered by the Bar.

Mark Woods
Solicitor, Traralgon

OVERDUE FEES AND THE DEFAULT LIST SYSTEM

APPLICATIONS HAVE BEEN RECEIVED BY some members of the Bar to have solicitors placed on the Default List. It is apparent that some confusion exists as to the procedure for collection of fees and the procedure for placing solicitors on the Default List.

There are two committees involved. There is the Default List Committee consisting of C.M. Jessup Q.C., the Chairman of the Bar, and Mrs. S.M. Crennan Q.C., the Senior Vice-Chairman of the Bar. There is also the Overdue Fees Committee consisting of H. Jolson Q.C. (Chairman), J. Ruskin, Ms C.F. McMillan and G.B. Wicks.

The current system (which is undergoing review) provides for the two committees to perform different functions. The Default List system works as follows:

A barrister whose fees remain unpaid three months after the date of rendering his account by his Clerk may give particulars in writing of that fee, together with details of all attempts made to recover the fee, to the Executive Officer of the Bar, Mrs. Anna Whitney.

The Executive Officer is then required to refer the letter and the details to the *Overdue Fees Committee*. That Committee is required to ascertain from all clerks all outstanding counsel's fees owed by the solicitor or solicitors for periods in excess of three months in respect of counsel who have not opted out of the fees collection system.

If the *Overdue Fees Committee*, in its discretion, determines that further steps should be taken, it may then write to the solicitor requesting payment of all outstanding counsel's fees.

In the event of the solicitor failing to respond either satisfactorily or at all to the letter, the *Overdue Fees Committee* may recommend to the *Default List Committee* that the solicitor or solicitors be placed on the Default List.

The *Default List Committee* is required to report to the Bar Council on the complaint and the Bar Council may resolve that the solicitor or solicitors show cause before a committee comprising five members of the Bar Council why such solicitor should not be placed on the Default List.

After giving the solicitors the opportunity to show cause why the solicitor should not placed on the Default List, the Committee shall report to the Bar Council and shall recommend either that the solicitor be placed on the Default List or not and the Bar Council may, in its discretion, resolve to place such solicitor on the Default List.

In the event of a solicitor being placed on the Default List:

(a) No barrister shall be permitted to take a brief from that solicitor without payment of an agreed fee to be paid at the same time as delivery of a brief to counsel or, in the case of a brief to perform paper work, prior to re-delivery of the complete brief to the solicitor;

(b) The solicitor will be informed in writing within seven days of that decision;

(c) Each member of the Bar and all clerks will be informed accordingly.

At any time after any solicitor has been placed on the Default List, such solicitor may make application to the Bar Council to be removed from such List and the Bar Council may appoint a committee comprising five of its members to consider the application.

The Bar Council may, in its discretion, at any time resolve to remove the name of the solicitors from the Default List.

Attention is also drawn to the then-Chairman's memorandum to the Bar of 27 June 1989:

"Some members of the Bar have made application to have solicitors placed on the Default List before they have taken sufficient and adequate steps to recover the fees themselves. As I emphasised in an earlier circular, the scheme is not a substitute for the obligation of each barrister to collect his or her own fees. The Default List is there only for the solicitors who can be described as "shockers" and who fail over a longer period of time to pay fees, despite demands. I suggest that before any barrister seeks to take advantage of the Default List procedure, he or she sends at least two letters of demand, followed by a letter threatening legal action, and then a letter from a solicitor.

If there is any dispute concerning a fee, then the Default List procedure is not appropriate and the barrister should take proceedings to resolve the dispute."

Members of the Bar are also referred to the agreement with the Law Institute of Victoria in December 1962 concerning collection of fees by counsel. The agreement is reproduced at pp. 90 and 91 of Gowans *The Victorian Bar*.

The following resolution of the Bar dated 25 March 1992 concerning collection of fees directly from clients should be noted:

"(1) The solicitor who retains counsel has the primary liability for the payment of counsel's fees, and accordingly it is the general rule that counsel should seek to recover unpaid fees from the instructing solicitor, and not directly from the lay client.

(2) Without the permission of the Ethics Committee it is improper of counsel to seek to recover unpaid fees directly from the lay client except

(a) where the solicitor is bankrupt or has made arrangement of composition with his or her creditors or is insolvent;

(b) where the solicitor is deceased and his or her estate is insolvent;

(c) where the solicitor cannot be served with legal process; or

(d) where counsel is unable to recover unpaid fees from the solicitor after having obtained a judgment in respect thereof.

(3) It is improper for counsel to seek to recover unpaid fees directly from the lay client where the lay client has previously paid or provided the amount of such fees to the solicitor who retained counsel unless the lay client is entitled to recover the amount of the fees from the Solicitor's Guarantee Fund pursuant to S.64 of the *Legal Profession Practice Act* and the barrister is not so entitled."

The procedure described above, whilst under review, should be followed by counsel who are having difficulties in collecting fees from their instructing solicitors.

If there are any questions, please do not hesitate to contact members of the Overdue Fees Committee and the Default List Committee.

Henry Jolson
Chairman
Overdue Fees Committee

CHRIS JESSUP SPEAKS AT READERS' DINNER

27 May 1993

Attorney-General and Chairman with Marie-Jeanne Pierre, Malaki Unagui and William Akuani

WHEN I COMMENCED TO PREPARE THIS speech some days ago, I wondered of the readers: "Why have you decided to come to the Bar at this particular point in history?"

Obviously not to make money, because on 11 February *The Age* said that some barristers earn less than tram drivers and that the bottom third of the Bar is being decimated.

Obviously not because you aspire to judicial office because a spokesperson for the Legal Aid Commission is reported in the *Australian* for 16 January as having suggested the Government look to academia in its quest for more female judges — but then again who would want to be a judge nowadays only to become part of that group of persons referred to by Ms Tricia Rhodes of the Victims of Crime Assistance League as "a bunch of old dinosaurs"?

If you are a woman, obviously not to pursue your career on your merits because an anonymous judge is reported in the *Herald Sun* of 20 May as having said that nearly half of the Supreme and County Court benches were prejudiced against women.

There is no security of employment at the Bar: if there is no work, there is no pay. If something goes wrong, the buck stops with the barrister who made the mistake. The Nuremberg defence does not apply.

Obviously not to do interesting legal work because the large firms keep all of that for themselves and you know that you will at the Bar be able to do only that work which the solicitors find difficult, tedious or unprofitable.

Obviously not to have some control over your own working life because you know that barristers must work when the court lists demand it, regardless of family and other social arrangements, and must then suffer the inconvenience of having the case called off at the last minute because there are not enough judges to hear it. Indeed it is the lot of the barrister to be sent away on every occasion that he or she is well-prepared, and to be called on every time he or she is under-prepared.

Obviously not to be part of a profession which commands public respect because we increasingly find the Bar (and the Bench) the subject of ridicule and caricature in the media.

Obviously not to be free of rules and regulations because you have joined an occupation which is regulated not merely by Government legislation but also by a detailed self-imposed code of conduct and practice.

Your reasons must be as mysterious, personal and varied as in the case of those who joined the Foreign Legion.

But certain things are clear.

Your decision to practise as a barrister did not inevitably lead you to join the Bar. You might well have done the first but not the second. Very few, however, make such a choice.

For someone like you who wishes to be a barrister, there are considerable advantages to doing so as a member of the Bar. You will by now have a clerk (male or female), which means that your administrative overheads will be modest and proportionate to the income you in fact earn. You will not need to employ accounting and clerical staff before you know whether you are going to make any money at all. You will by now have a master (as in the case of the Supreme Court, male or female) who will look after your early professional needs, answer the many practical questions that you will have and provide you with access to a professional library. You will have no rent to pay at all for the next 6 months, and then you will have access to chambers in a professional environment without any "up-front" costs other than the limited debentures which will already have been explained to you.

But in most respects you will be entirely "on your own". Your colleagues at the Bar can help you when you have a problem, and provide a professional and administrative environment which is conclusive to successful practice, but only you can do the work and earn the money. You will have to pay rent, to take out PI insurance, and to pay Bar subscriptions. There is no security of employment at the Bar: if there is no work, there is no pay. If something goes wrong, the buck stops with the barrister who made the mistake. The Nuremberg defence does not apply.

I mention these things to emphasise the assumption which existing members of the Bar make about newcomers to the Bar, i.e. that they are joining in difficult times, but are doing so with their eyes open.

Notwithstanding these almost morbid reflections, it remains true that the Bar is a fine profession — for someone who wants to be a barrister, the only profession. Despite contemporary difficulties, of all those who have signed the Bar Roll in the last five years, only 8% have to date had their names removed from that Roll.

Raymond Lopez welcomes his son to the Bar

It also remains true that the Bar is an irreplacable resource for the community as a whole. The Bar as it has grown up in Victoria constitutes a pool of skilled specialists always available to solicitors — city or country, large or small.

We often hear of the high incomes made by some at the Bar. The remarkable thing is that the very top legal minds in Australia whose services are sought after by the largest corporations upon problems in which millions of dollars are at stake are members of the same organisation, having chambers under the same roof, sharing the same clerk and bound by the same rules of conduct and ethical conventions as are the barristers whose practices are suffering greatly in the recession and who are, let's be frank, eking out an existence upon legal work which is modest in its flow and humble in its substance. Whatever their individual circumstances, however, all are equal within the four walls of the Bar itself. No member of the Bar has any inherent or moral claim to superiority over any other. No-one is anyone else's boss. This has always been so.

You will be judged solely on your merits, not only by your professional peers but perhaps more importantly by the Bench before whom you appear and the solicitors and clients by whom you have been briefed. That is the Bar which you have joined. The challenges are great. The rewards are fickle. On behalf of the Bar Council, may I wish you all the best of luck.

RULES OF CONDUCT AND PRACTICE

ON 24 MAY 1993 NEW RULES OF CONDUCT and Practice for barristers commenced operation. The Rules were made by the Bar Council on 29 April 1993 as rulings on matters of professional conduct and practice under rule 27 of Counsel Rules and for the purposes of section 14B(c) of the *Legal Profession Practice Act*. They replace all previous rulings of the Bar Council on such matters.

The Bar Council also approved certain Guidelines concerning conduct and practice and they are published with the Rules as a separate section under that heading. The Guidelines are not binding as rulings but in some areas circumstances could arise in which non-compliance might be relevant on the question whether a disciplinary offence had occurred.

The Rules result from work done at this Bar commencing in 1988, and since 1991 by the Australian Bar Association and its constituent bodies. Chris Jessup Q.C. described this work in a previous article in *Bar News* (Winter 1991) and thereafter the work continued. On 16 November 1991, by which time a draft ABA code had been prepared, the ABA adopted a protocol for the coming into operation of the rules and guidelines and their amendment. Following further drafting and consultative processes, at a meeting held in Melbourne on 21 November 1992 the ABA endorsed a standard set of rules and guidelines entitled the Australian Bar Association Code of Conduct as suitable for adoption by constituent bodies which may make local variations as appropriate.

The intent of the constituent bodies of the ABA

is reflected in the statement in the introductory notes to the Rules that "As far as possible, it has been attempted to secure uniformity as between the Rules of the various Bars." In the result the Bar Council adopted the ABA rules with some local variations. The format in which the Rules are published indicates where those variations occur.

The Rules are an achievement of the utmost significance for Australian barristers. It could be said that the major achievement has been to make such an ambitious project bear fruit. In another and perhaps more significant way the ABA Rules recognise that with allowances for necessary local differences, the various Bars (and barristers) belong to a single national profession which endorses the fundamental object stated in rule 1.1 "that barristers act independently, recognise and discharge their obligations in relation to the administration of justice and give to clients who choose them services of the highest standard unaffected by personal interest".

It is recognised that the Code of Conduct may require amendment having regard to experience, continued reflection and developments in practice. That is the case with any set of rules including our own rules or rulings which have previously applied. Thus, the November 1991 protocol provides for amendments and, as noted, a constituent body can adopt local variations to the ABA Rules.

To ensure that the ABA "core code of rules" keeps up-to-date, the protocol includes a procedure for amendments to the ABA "core code". This requires local variations to be notified to the ABA and constituent bodies, and includes a scheme for notifying proposed changes to the ABA "core code" which in the absence of compelling urgency, shall be dealt with at the second meeting in each year of the ABA.

The Bar Council has established the Rules of Conduct Committee as a committee for ongoing advice upon the Rules. Any suggestions which barristers may have concerning the Rules should be addressed to the Bar Council or the Committee, the members of which are Hansen QC (Chairman), Nash Q.C., Brett, Cavanough, Colbran and J. O'Bryan.

In some respects the Rules change prior practice. This article identifies some, but no doubt not all, of the Rules which involve changes of practical significance. A general canvassing of the Rules is not intended.

CHAMBERS

Rule 2.2 deals with the obligation to keep chambers. The rule is in two parts, first requiring Victorian practising counsel and Crown Prosecutors to practise from chambers, and secondly requiring that the former category "shall not practise from chambers other than those provided by Barristers' Chambers Limited". This makes clear that a barrister must have chambers provided by BCL, an obligation which may have been implicit, but was not explicit, in the prior rule 34.

VISITING SOLICITORS' OFFICES

Visiting solicitors' offices has given rise to contention and numerous requests to the Ethics Committee over the years. The former, position was, prima facie, that it was improper for a barrister to attend the office of a solicitor. Of course there were exceptions to that and, generally speaking, the Ethics Committee would grant permission to attend where prejudice might otherwise be caused to a client and in other proper cases. See Gowans, *The Victorian Bar*, pages 48-49. The general approach was to prohibit subject to exceptions or permission.

Rule 2.6 relaxes the former position. It permits a barrister to attend a solicitor's office without prior permission in certain situations, being those most commonly encountered. In particular the rule permits a barrister to do so "where it is necessary for the proper performance of the barrister's duties as such". In all cases the barrister must assess whether the occasion of a proposed visit is within the rules; if in doubt the wise course is to seek guidance from the Ethics Committee, as the barrister's judgment in attending could be questioned subsequently by the Ethics Committee. In situations not expressly dealt with a barrister requires permission to attend a solicitor's office.

It is to be noted that this empowering provision, rule 2.6(b), is subject to the rules concerning touting and advertising in Chapter 12 and rule 2.6(c), the provisions of which are designed to preserve the actual and perceived independence of the barrister. Rule 2.6(c) prohibits visits which suggest the barrister is a partner or employee of the solicitor or has a professional relationship other than as an independent member of the Bar consulted in respect of a particular matter, that the barrister has a standing general retainer from the solicitor, or that the barrister's services are available solely or more readily through the solicitor.

CONFLICT OF INTEREST BETWEEN CLIENT AND SOLICITOR

In cases where a barrister forms the view that there is a conflict of interest between the client and solicitor rule 3.7 guides the barrister as to how to act. Paragraph (a) provides that the barrister should advise that it would be in the client's interest to instruct another solicitor. The rule states the manner in which the advice should be given.

PROMPT PERFORMANCE OF PAPERWORK

Rule 3.10 requires that a brief to do "paperwork" be performed and returned "with due expedition". In the past there have been differing

attitudes as to whether tardy performance of a paperwork brief could constitute a disciplinary offence. The new rule dispels any doubt.

INSTRUCTIONS

With few exceptions a barrister was forbidden to accept instructions from any person other than a solicitor; see rules 3 and 4 of the Re-Statement of Basic Rulings (Gowans, *supra,* pages 16-7) An exception existed in the case of "non-contentious business", a category which was hard to define. It is thought that in practice little advantage had been taken of that exception.

Rule 4.1 has abolished the exception of non-contentious business. It provides, subject to certain exceptions, that "in any matter, whether contentious or otherwise", a barrister shall be instructed by a solicitor.

In fact rule 4.1(a) is helpful in clarifying who may give instructions for extra-State work and rule 4.1(b) contains exceptions such as briefs by patent attorneys, defence force work, voluntary legal advice and in an emergency.

CAB-RANK RULE — PAPERWORK

The cab rank rule is expressed in rule 4.2 which makes it clear that the rule applies to briefs to appear and "to advise or to draw pleadings or any other document in a field in which he or she professes to practise". Hitherto there may have been doubts whether the rule extended to "paperwork". Having regard to the obligation to provide paperwork with due expedition it would be wise for a barrister at the time of accepting a brief to assess the time in which he or she may be able to do the work and advise the solicitor if a possibly undue time may be involved.

REFUSAL OR RETURN OF BRIEF

A fertile field for the Ethics Committee has been when and in what circumstances a barrister should not accept or retain a brief. Guidance is now provided by rule 4.4 which prescribes the circumstances in which a brief must be refused or no longer retained, and by rule 4.5 which prescribes circumstances in which a barrister may decline a brief. Rule 4.4 is mandatory, rule 4.5 is discretionary and contemplates "such other circumstances as may be permitted". In case of doubt, application should be made to the Ethics Committee, which also has power to modify the application of a rule. Subject to that, the approach taken by the Rules differs from prior practice in that the relevant circumstances have been codified and placed into two broad categories.

CONFLICTING ENGAGEMENTS

The return of briefs often gives rise to significant dissatisfaction with the Bar. Rule 4.6 addresses this area by referring to a barrister's obligations and providing how to resolve the problem of conflicting engagements.

CONFERRING WITH A WITNESS IN THE BOX

A significant change for Victorian barristers has been made by rule 8.2, which relates to conferring with a witness in the box. Gowans (*supra*, page 75) described the former Victorian position thus: "There is no rule which forbids counsel to speak to a witness under cross-examination, but counsel must use his discretion and take great care not to influence the witnesses evidence". This position differed from that in other States; see Communications with Witnesses Before and During their Evidence by Mr Justice Steppard (1987) 3 *Aust Bar Rev* 28, pages 36-37.

Rule 8.2(a) reverses Victorian practice by prohibiting conferring with a client or witness under cross-examination until the cross-examination is concluded. Rule 8.2(b) provides however that if a barrister deems it necessary to confer he or she shall inform the opponent before the conclusion of the cross-examination.

FEES

Chapter 13 relates to fees. Rule 13.1 provides that in the absence of an agreement a barrister may render a fee which is proper and reasonable in all the circumstances.

It sometimes happens that a barrister wishes to renegotiate a fee, for instance where the brief is far heavier or more complex than had been thought or a long time has passed since the fee was agreed. Rule 13.3 deals with this situation and its terms should be carefully noted before a request is made for an increased fee.

This article is long enough without mentioning other rules. The Rules should be read and understood as a whole, as they are binding and breach may constitute a disciplinary offence. Brief reference may be made to other parts of them.

Chapter 7, Particular Duties in Criminal Cases, is a compilation of the duties of a barrister when prosecuting or defending in a criminal matter. The rules do not change practice. Rule 7.1 states duties when prosecuting and rule 7.2 states duties when defending. The retainer rules (Chapter 9) have been simplified and brought up to date. Chapter 10, Legal Advice Centres, collects the rules relating to work in such centres, in which connection see also rule 4.1(b)(iv). The present rules concerning advertising and public appearances are now, to some extent, in different form; see Chapter 12. Overall it is thought that barristers will find the form and structure of the new Rules convenient and helpful.

Hartley Hansen

WHO JUDGES THE JOURNALISTS?

ON THE 24TH OF MAY 1993 *TIME* MAGAzine ran an article headed "POLITICIANS, LAWYERS AND BANKERS LOSE PUBLIC RESPECT". The article was based on a Morgan poll which asked 1,178 people the question: "How do you rate the honesty and ethics of Australia's professionals?"

The article stated:

"Only 41% of the public (down 21% since 1983) think bank managers have "very high" or "high" standards of ethics and honesty. Comparable figures for lawyers are 32% (down 9%), federal politicians 11% (down 8%) and state politicians 11% (down 9%)".

The article printed a table of Ethics/Honesty Ratings in percentage terms of some 22 "professions". What the article failed to note was the significance of the position of journalists in the table. From 1983 to 1993 journalists ranked second bottom above car salesmen in the public scale of ethics and honesty. From 1983 newspaper journalists' ratings had gone from 11% to 7% in 1992, and lo and behold, had risen to 8% in 1993. TV reporters were not rated in 1983 but received 14% approval in 1992 rising to 15% in 1993. This is to be contrasted with lawyers who in 1983 had a rating of 41% going to 34% in 1992 and 32% in 1993. Therefore, although the lawyers' ranking is going down, as pointed out in the article, they are rated four times more highly than newspaper journalists and over double T.V. reporters. Perhaps the drop can be attributed to the relentless media campaign against the legal profession. However there does not seem to be any alarm on behalf of journalists about *their* poor perception in society. Indeed it would appear that they regard their low esteem with bravado.

It is time that the journalists had a good look at themselves. In recent months there have been numerous television programmes and newspaper articles attacking the legal profession and lately the judiciary. The low point of this so called journalism was the recent *Investigators* programme on the Australian Broadcasting Commission. It was extremely objective reporting to have cartoonists depicting lawyers with money in their pockets between shots of a few disgruntled clients. Unbiased "Tandberg", then of the unbiased *Age* newspaper, really brought a touch of objectivity to a programme which purports to devote itself to an examination of the legal profession. Perhaps this programme should devote its time to a special survey of journalists, their practices, worth and relevance to society as a whole. Even some examination of their cost effectiveness would be very interesting.

The press has recently turned its attack from barristers to judges. These are some of the marvellously objective headings used to attack the judiciary. The *Sunday Telegraph* of 16 May 1993 — "JUDGES WOMEN HATERS"; *the Herald Sun* 20 May 1993 — "BENCH BIAS; JUDGE"; *the Herald Sun* 18 May, 1993 — "RAPED, BUT WHY SHOULD I HIDE". These papers together with the *Age* newspaper in Melbourne then went on to recount the same stories of three judges in rape cases. Three judges out of hundreds of sexual cases heard by the court.

As Greg Lucas in his letter in the *Age* newspaper of 19 May 1993 pointed out, Mr. Justice O'Bryan was quoted out of context and was refer-

ETHICS/HONESTY RATINGS (%)

"How do you rate the honesty and ethics of Australia's professions?"

Figures represent total % of respondents who said "high" or "very high"

	1983	1992	1993
Pharmacists	*	79	78
Doctors	64	69	65
Dentists	61	66	62
School teachers	55	62	61
Engineers	53	58	56
Police	53	53	54
University lecturers	52	55	53
Accountants	47	47	46
Bank managers	62	44	41
Lawyers	41	34	32
Company directors	*	20	18
Business executives	18	17	16
Stockbrokers	*	15	15
TV reporters	*	14	15
State M.Ps	20	10	11
Federal M.Ps	19	10	11
Insurance brokers	*	12	10
Estate agents	11	9	10
Advertising people	9	9	9
Union leaders	8	8	9
Newspaper journalists	11	7	8
Car salesmen	3	3	2

* Not included in poll

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ring to the contents of a pre-sentence report. His comment was limited to the trauma during rape. Not a widespread comment to the effect that the victim was not traumatised because she was unconscious during the attack, as quoted in the newspapers.

Further fun has been had by the press in trying to categorise the members of the Supreme Court in Victoria. It seems a crime to be a white male who went to a public school. Of course the articles in the *Age* newspaper seem to miss the point; that many of the judges did not come from such background. Indeed the reporting was of such a sloppy nature that the journalist could not even get the photographs of the judges correct. It appears that Mr. Justice Ormiston is now the retired Mr. Justice Kay.

The low point of this frenzy of reporting on the judiciary was an article in the *Sunday Age* of 16 May 1993. It is by a person called "Richard Glover". Some of his objective witticisms are as follows:

"How interesting that our Courts provide such uniform examples of these fossilised remains; nearly all men, nearly all old, nearly all Anglo-Saxon, and nearly all still making judgments that show the fat finger of sexism and racism weighing heavy on the scales of justice.

Journalists seem incapable of accurately reporting what happens and is done in a court room. Instead they push emotional views of the victims of crime and scream out for longer sentences. Of course when the Victorian Parliament's legislation on indefinite sentencing takes effect they will start screaming again

During his formal address at the opening of Parliament this month the Governor-General Mr. Hayden said the government considered achievement of greater cultural, gender and ethnic diversity in the judiciary an important issue.

This column agrees and hopes our few more modern Judges will excuse this Special Edition Judges Joke Book, written with the aim that their less agreeable colleagues can be booted, flung and laughed out of Court."

There follow some brilliant schoolboy jokes, such as:

"Why is an Australian Court like a football game?
— Because it is always the no hopers who end up on the Bench.

What do people address Judges as "The Bench"?
— Because they're both as sensitive as a block of wood.

Why are Australian Judges prejudiced against women?
— Because they never met any at Melbourne Grammar".

Really Mr. Glover, Just Who Are You?

Are you a Conservative, are you a Liberal, or are you Undecided? Let's find out about *your* background. The *Sunday Age* could run an article on the various journalists who write about the topic of the law. We could have pen profiles of their schools, backgrounds and political leanings. This would make for a jolly good read. Perhaps such an article could be followed up with some terrific one-line jokes which are not sexist or racist. Such witticisms as:

"What is the definition of impossibility?
— A journalist getting the facts right."

These scribblers seem to forget the role of the judiciary in our society. Or perhaps that could be rephrased as the role of the judiciary in our ever-being-changed society. It is quite clear that any remnants of the Westminster system of government are being rapidly demolished. The press fail to see the judiciary as the third arm of government. They would be quite content to see it being absorbed as an arm of the executive staffed by public servants, social workers and other non-lawyers. Just so long as it was gender bias-free and supported the political views of the present federal regime.

The press will turn around and say it has a code of ethics. This is treated as a joke. There is the Press Council. This is a toothless tiger which nobody respects. It is of no concern to the press that it regularly gets its facts wrong. Journalists seem incapable of accurately reporting what happens and is done in a court room. Instead they push emotional views of the victims of crime and scream out for longer sentences. Of course when the Victorian Parliament's legislation on indefinite sentencing takes effect they will start screaming again. This time they will paint pictures of the prisoner's family and how terrible it is that he/she has been locked up for 300 years! You can't win with them; and they don't care. Perhaps it's time that *The Investigators*, *Four Corners* and the newspapers themselves could have a good look at the journalist trade. It should be of great concern to them that they get an 8% honesty rating with the public of Australia!

Paul Elliott

TENTH COMMONWEALTH LAW CONFERENCE

THE 10TH COMMONWEALTH LAW CONFERence took place in Cyprus from 3 May to 7 May this year.

The conference venue was the Cyprus Convention Centre in Nicosia. The conference hotels were located at Limassol, Larnaca and Nicosia.

As every schoolboy knows Nicosia is the capital of Cyprus and has since 1974 been a "divided city" partly occupied by the Turks, partly occupied by Greek Cypriots, with a buffer zone patrolled by a U.N. peace-keeping force between the two.

The conference brochures advised the innocent traveller that it was only a short distance from Limassol or Larnaca to Nicosia and that shuttle buses would run between the conference hotels and the conference centre.

We opted to stay at Limassol in the belief that a small town on the sea coast "a short distance" from Nicosia would provide for interesting "pottering".

Limassol and Nicosia seemed to at least one Australian conference-goer to be more than a "short distance" apart.

It may be that in using the expression "a short distance" the conference organisers were trying to adjust their standards of distance to the reported standards of their Australian agents. Larnaca is approximately 50 kilometres from Nicosia and Limassol is approximately 75 kilometres from Nicosia.

It turned out that our hotel was not in Limassol but some 15 kilometres out of Limassol — on the beach, with splendid views, and surrounded by considerable building works and about three other resort-type hotels — so no pottering through the back streets of an old town.

With the Turks' occupation of Famagusta, a considerable sum of money has been spent in turning the beaches near to Limassol into a tourist resort. If the Turks were to withdraw and Famagusta once again became generally available to tourists to Cyprus, many businessmen who have invested millions in the continuing developments near Limassol might find their investment less than profitable.

Our distance problem was exacerbated by the fact that the "shuttle buses" ran twice in the morning and twice in the evening. One could catch a bus in to the conference centre at (depending on the hotel) approximately 7.30 a.m. or approximately 10.30 a.m. If one caught the 7.30 bus one was in plenty of time for the first session. If one caught the 10.30 bus one arrived (effectively) at the morning coffee break. In the evening there was a choice of buses leaving at 4.30 p.m. or 11.30 p.m. In order to catch the 4.30 bus it was necessary to skip the last session which (depending on the Chairman) finished at somewhere between 5.30 p.m. and 6.00 p.m.

Logistics dictated that we hire a car. We had, in any case, intended to do this for the purpose of indulging in two days' sightseeing before the conference started. But we had not intended to have a car for the whole of our stay.

Singapore Airlines, the official carrier, organised a special flight from Singapore direct to Larnaca Airport. The airport at Nicosia has been closed since 1974. Travelling from Melbourne via Adelaide by Singapore Airlines, there was only about 1½ hours between flights at Singapore. The flight was pleasant and the service good.

A group of weary Australians and New Zealanders arrived in Larnarca at 4.00 a.m. on Saturday morning. First impressions were good. Immediately through immigration we were met by a representative of Louis Travel Services; he handed each delegate an envelope and advised each of us which bus to board; Customs formalities were speedy; and within twenty minutes of landing we were boarding the buses.

Nicosia Old Town for tourists

We sat talking sporadically on the buses at Larnaca Airport until just after 6.00 a.m., when the buses commenced the short drive to (in our case) Limassol. Twenty minutes through the streets of Larnaca and its outskirts and forty minutes on the freeway found us at our hotel.

We had arranged for a car to be delivered to the hotel on our arrival. There was no car there; but the desk clerk advised us that normally cars were delivered about 9.00 or 9.30 a.m. Having slept well on the plane we showered and waited for our car.

By 10.00 a.m. we were telephoning Louis Tourist Services. The main office did not answer. The Limassol office said that they knew nothing about it and we would have to talk to the main office. One hour and six phone calls later — and amid rising domestic tension — we were able to speak to someone at Louis Tourist Services who blithely assured us that the car would be available — on Sunday afternoon.

Protests that this would leave us stranded for 1½ days resulted in a promise that the gentleman at the other end of the phone would try to find a car, but he said this would be difficult because "Today is the 1st of May". If he could not organise a car, he said, he would ring back in five minutes.

Forty minutes later I rang him back and was told that he was just about to ring me. He had not been able to contact anyone from any of the car companies and could not provide a car until midday Sunday at the earliest.

I hung up and rang Avis. The local Avis operator said he could deliver a car by midday. It was delivered at 11.50. It was not the most exciting car — a Mazda 323, clean and serviceable, but no longer in the first flush of youth.

This was the beginning of an adventure.

Cyprus is a beautiful island. Rugged and in places very desolate along the coast. Rugged and beautiful inland. It abounds with historic monuments left by the Greeks, the Romans, the Crusaders and the Venetians. Except for the freeways, the roads are narrow and winding and curve between cliff wall and precipice without providing any illusion of safety in the way of crash barriers.

Speed limits and lane markings in Cyprus appear to be purely advisory. Most drivers seem to have their cars under relative control. Cars generally, but not always, travel in the direction in which they are pointed.

The "nothing coming" policy which applies to Cyprus traffic makes driving both safer and simpler. It is safe to pass on continuous double lines near the crest of a hill or approaching a blind bend — there will be nothing coming in the other direction — this principle applies equally on the narrow gravel mountain roads; a fortiori at the higher levels where there is likely to be fog and a 1,000 foot drop.

Cloister of the Venetian Monastery

Amongst the places which should not be missed by any tourist are the following:

Limassol Castle, where Richard the Lionheart married Berengaria during one of his slight detours on his way to the third crusade. The castle is not well signposted and, on the day we were there, was occupied almost exclusively by German speaking tourists. It provides a very good example of Norman fortified architecture in very good condition. Obviously there has been some internal restoration but externally the castle appears to have deteriorated very little in 800 years.

The Monastery of Kykko. To enter the cloisters of this monastery is to be imbued with a sense of peace and tranquility which I suspect stems more from the quality of the architecture than from the piety of the monks. A very modest charge of 60 cents Australian is made for entry into the museum. This is a very small room containing relatively few artifacts. But the quality of the contents (including an illuminated twelfth-century Bible) makes a visit a must.

About two kilometres up the road from the monastery is the tomb of Archbishop Makarios, the first President of Cyprus. It is surprising for its simplicity — it contrasts in every way with the picture I had of the man when he was living.

About 100 yards from the tomb is a spot called Throni, a memorial building open to the four winds. On a fine day the view in all directions must

Limmasol Beach from the Hotel

be breathtaking. Unfortunately when we were there the mountain was in cloud, and the rain was turning to sleet. As we drove back through the ski resort of Troodos light snow was falling, even though in Limassol the sun was shining and the tourists were sunbathing and swimming.

The Ancient Harbour of Paphos. This commendation is based on repute rather than experience. We reached Paphos at the tail end of our driving on the Saturday afternoon and, from jet lag and lack of research, did not realise that somewhere between the main road and the ocean there was an ancient harbour to be found. It is alleged to be very beautiful.

Kolossi Castle at 15 km. west of Limassol, given to the Knights of St. John in 1205 and their headquarters from 1291 until they moved to Rhodes in 1310. It is an interesting example of medieval architecture with the outline of what seems to be the original garden still discernible. Kolossi Castle is much better signposted, but less well-preserved and (I thought) less interesting, than Limassol castle.

The Venetian Monastery at Ayia Napa is totally and utterly peaceful. Its quiet courtyards are cheek by jowl with a strip of tourist food joints and souvenir shops. The transition on passing through the gateway provides a genuine and dramatic escape to the past.

The Roman Amphitheatre, Temple of Apollo and other Roman buildings excavated at Curium. On the day we were there our time-travel fantasies were spoiled by a sound stage which had been superimposed on the floor of the Amphitheatre for one or other of the live theatrical performances for which the Amphitheatre is regularly used. The mosaics (partly restored) in the Temple of Apollo can only be described as exquisite.

On the road to Páphos a short distance west of Curium there is a sign to the Roman Stadium. There is not much to see. But it is worth the stop just to note the dimensions of the stadium. The proportions are quite different certainly from what I would have expected.

Nicosia Old Town near the Buffer Zone

The neolithic village excavated at Khirokitia dating back to 5,800 BC. Apparently long before the Pyramids were built there was a village of circular stone houses sited so as to be protected by a loop of the River Maroni. The excavations reveal that the houses were about 8 feet in diameter, only a matter of feet apart and some of the walls still standing are between 4 and 5 feet high and extremely thick. The guidebook suggests that one family may have occupied more than one of the circular rooms. However, one has the impression that, except in relation to approximate age, anything written about the neolithic village is pure conjecture.

The old town of Nicosia. As mentioned earlier Nicosia is a divided city and the old town has the buffer zone running through it. Under the terms of the cease-fire reached in 1974 no alterations may be made to any of the buildings within 100 metres (or perhaps it is 200 metres) of the buffer zone. The result is that, particularly on the Turkish side, many of the buildings in the old town are mere skeletons or consist of two walls pock-marked with bullet holes.

The literature we received upon arrival indicated that the Turkish half of the island (including that part of the old town occupied by the Turks) was "inaccessible due to Turkish occupation". This is not strictly correct. It is possible to walk through the check point in Nicosia into the Turkish controlled one third of the island.

The advice from a friendly Australian policeman with the U.N. is that after crossing into the Turkish zone one should negotiate a fare for the

day with a driver (apparently readily available just inside the Turkish zone) and spend a day visiting such sites as the ancient sea port of Syrenaica. Unfortunately time and conference commitments prevented us doing this.

Throughout the conference almost every Cypriot speaker — including one who gave a paper on Professional Ethics — managed to advert to the Turkish invasion, to the fact that Nicosia was the only divided city in Europe, and to the need for international pressure to compel a Turkish withdrawal.

The sand was heavily populated by (mainly) English tourists in various states of pallor, pink and suntan and — to a large extent — topless, irrespective of the quality or quantity of the body which was being exposed.

U.N. peace keepers have been in Cyprus since 1964 and they have included Australian policemen whose task originally was to endeavour to control ethnic violence between Turk and Cypriot. Turkey claims, whether rightly or not, that the invasion which took place in 1974 came about to protect the lives of Turks living in Cyprus.

The U.N. still monitors a small group of Turkish villagers living in the "Greek" part of the island. Clearly the solution is not a simple one.

Included in the area taken by the Turks in 1974 was the beach resort of Famagusta. Our Cypriot hosts told us that it was now a ghost city. In fact, it appears that one of its suburbs has remained a ghost suburb (possibly because of the fighting, damage and its proximity of the buffer zone) but only the one suburb.

One is encouraged to go to a spot in the Greek Cypriot area to look out over the buffer zone to the city of Famagusta. It is not worth the visit. It does mean, however, that one is close to Ayia Napa which has "proper" sand beaches.

The beaches around Limassol are grey sand — the sort of sand that one found amongst the ti tree at the top of the cliff when I was a boy. The sand at Ayia Napa and also at Famagusta is proper golden sand.

When we were there the sand was heavily populated by (mainly) English tourists in various states of pallor, pink and suntan and — to a large extent — topless, irrespective of the quality or quantity of the body which was being exposed.

Food in Cyprus was a disappointment, not because of the quality of the local food which was magnificent (Cypriot Moussaka leaves Greek Moussaka for dead) but because of the difficulty of obtaining it. The menus available in the hotels and in many of the restaurants and tavernas appeared designed to persuade the English tourist that he had not left home. Pie and chips; chicken and chips; fish and chips; hamburger and chips; pizza and chips! All of these were readily available, as was a standard English dinner. The local food can be obtained, however, and it is definitely preferable.

For me one of the highlights of the conference was to hear the Chief Justice of Pakistan stand up, at a session in which the speakers were talking about the role of the judiciary in controlling the actions of government, to point out in simple language that in all of the discussion the speakers were proceeding on certain assumptions: that the government will abide by the views of the judiciary; that the Constitution has not been suspended; that judicial power is a reality. He pointed out that it is where the judiciary does not know that it has power and where constitutional rights have been abolished or suspended that the moral power of the judiciary is most important. There are some rights, he said, which are so fundamental that they cannot be abolished.

The other highlight of the Cyprus visit was to accompany a U.N. patrol on a patrol down the buffer zone in Nicosia. The buffer zone is in some places up to 50 kilometres wide. Through Nicosia it seems to be between 5 and 15 metres wide. This diversion happened accidentally because I was drinking at the right time with the Advocate-General of the Australian Defence Forces who was at the conference wearing (metaphorically) both his judicial robes and his naval uniform. He had organised to go on the patrol and could take with him up to seven others.

The trip through the buffer zone had no exciting highlights. But it gave an opportunity to see the war damage still in its 1974 state. At one point in the buffer zone is the entrance to a car warehouse which still holds its 1974 Toyota cars - brand new cars, unused, with engines long seized and tyres perished. The futility of the whole exercise — the hate, the patrols, the bitterness, the futures foregone — came through very clearly.

Perhaps the Flower Children of the '60s were right.

Gerard Nash

DIRECT PROFESSIONAL ACCESS TO THE BAR

THE COUNCIL OF THE QUEENSLAND BAR has recently relaxed the rules which limit the persons from whom members of the Queensland Bar may accept instructions. Instructions may now be given in "non-contentious" matters by members of certain professions, but only where the professional intermediary is acting on behalf of a client. The Queensland initiative followed a similar step in the United Kingdom.

The Bar Council requested the Rules Committee to report on whether Direct Professional Access, as the phenomenon has been rather inaccurately described, should be allowed in Victoria. The Committee unanimously recommended against such a development in Victoria.

At first blush this recommendation may seem to be contrary to the economic interests of members of counsel who are suffering the joint blows of a shrinking work base and of an increased number competing for available work. I have been asked to explain.

First, it is appropriate to note that until the Bar Council resolved to adopt new Rules of Conduct (from 24 May 1993) members of the Victoria Bar were permitted to accept briefs to advise or to draw documents in non-contentious matters without the intervention of a solicitor.

These Rules permitted a barrister to advise or draw documents on behalf of a lay client in non-contentious cases provided that the instructions to do so are delivered directly by the client. The Rules however expressly prohibited the acceptance of instructions on behalf of a client through an intermediary other than a solicitor. Obviously there could be no objection within the old Victorian rules to a client obtaining the assistance of another professional in relation to the instructions he or she gives to the barrister.

The new Rules of Conduct, except in very limited circumstances, prohibit a barrister from advising, drawing or settling documents or appearing on behalf of a lay client unless a solicitor is involved. The prohibition applies in both contentious and non-contentious members.

The Rules Committee was not asked to comment upon the new Rules of Conduct but nevertheless a preference for the old Victorian practice was expressed by many of its members. The Committee considered that a clear distinction can and should be drawn between contentious and non-contentious matters. This distinction is ignored by the new Rules of Conduct.

In 1888 the Attorney-General (Sir Richard Webster Q.C.), as leader of the English Bar, advised (1888) 85 LT Jo. 176:

"It is essential to keep in view the distinction between contentious and non-contentious business. With reference to contentious business, in my opinion neither before nor after litigation is commenced should a barrister act or advise without the intervention of a solicitor. One very grave reason for this rule is obvious. In contentious business, which frequently affects the rights of other persons, it is most important that the facts should be, as far as possible, accurately ascertained before advice is given. For this purpose, as a barrister cannot himself make proper inquiry as to the actual facts, it is essential that he should be able to rely on the responsibility of a solicitor as to the statement of facts put before him.

"As regards non-contentious business, the case is, in my opinion somewhat different. It is scarcely possible to state the rule in a way which will be absolutely accurate under all circumstances but speaking generally, there is in my opinion no objection to a barrister seeing and advising a lay client, without the intervention of a solicitor upon points relating to the lay client's own personal conduct or guidance or the management or disposition of his own affairs or transactions. I only desire to add that great care should be exercised by members of the Bar who do advise lay clients to abstain from advising upon matters which are in effect of a contentious character."

In 1955, the rules were changed in England when at an Annual General Meeting of the Bar on 11 July 1955, the Attorney-General said:

"While it is not a breach of etiquette for a barrister to give advice free on legal matters to a friend or relative, or to poor persons, it is wrong for a barrister to do non-contentious legal work for clients in the course of his profession for fees without instructions, save in particular cases, such as, for example, advising a foreign lawyer on non-contentious matters in which no litigation in this country is contemplated or in progress".

In 1979 the Benson Commission was appointed to consider a number of issues including the question of direct access to barristers by clients and/or by professional intermediaries.

The Benson Commission reported that the rule requiring the involvement of a solicitor had been adopted so as:

"To ensure that barristers are free from hour to hour distractions and that the specialist matters with which they deal are presented to them by a lawyer who has already identified the issues and sifted the relevant facts rather than by the lay client himself who can only present his problem as a whole. The object is not to put the barrister at a distance from his client but to ensure, so far as possible, that his specialist skills are efficiently used, that he has the time necessary to concentrate on them and that he remains sufficiently detached from his client to be able to give him advice which is wholly objective (paragraph 17.27).

The Benson Commission recommended against direct access to counsel by clients because the Commission saw any relaxation as a threat to the two cardinal principles which it regarded as inviolate, namely the maintenance of a two-branch profession and of the Bar's exclusive rights of audience in the higher courts.

The Commission reported that:

"We do not think that it would be possible to maintain an effective two-branch profession if barristers received clients directly and in order to compete effectively with solicitors, had to run offices organised in the same way and subject to the same disciplines. The advantages of the present arrangements would be lost."

Having decided against direct access to counsel by lay clients the Benson Commission considered whether the same rules should apply to professional intermediaries acting on behalf of clients. They considered certain professions, including chartered accountants, but concluded that there should be no modification of the present arrangements.

In its response to the far-reaching proposals of Lord McKay for reform of the legal system, the view was expressed by the English Bar that it is of the essence of practice at the independent Bar that:

(1) Barristers devote themselves entirely to the presentation of cases in Court and to specialist advice.

(2) Barristers do not have the facilities or staff to deal on a continuing basis with lay clients or to take witnesses' proofs or to prepare files of document for use in court.

(3) Barristers are able to keep their fees to a level below those of solicitors because of the limited overheads that they need to incur.

The response argued strongly that the division of the profession should be retained and that barristers should not be entitled to accept briefs either from lay clients directly or through intermediaries other than solicitors.

Nevertheless the UK Bar Council ultimately resolved to allow what came to be called "Direct Professional Access". The context of that decision is not irrelevant. The decision was taken at a time of, and probably in response to, the perceived intrusion of solicitors upon the monopoly which which the Bar had hitherto enjoyed of advocacy work in the higher courts.

In considering the reference from our Bar Council the Rules Committee identified some central questions:

(1) Would a professional intermediary be competent to discharge in full the responsibilities resting upon an instructing solicitor in the types of matter proposed to be open to such intermediaries?

(2) If not, can the necessary tasks be undertaken by the barrister?

(3) If so, should they be undertaken by a barrister?

These questions immediately reveal that in general terms, the proposal may necessarily involve a subsequent change to the role currently undertaken by barristers. Such a change may be acceptable, but it is important to recognise that that is what would be involved.

The UK Bar Council ultimately resolved to allow what came to be called "Direct Professional Access". The context of that decision is not irrelevant.

Insofar as the instructing professional intermediary may be found to be incapable of fulfilling the role of instructing solicitor, then it would fall, ad hoc, to the barrister to do the things which would otherwise be done by the solicitor or (if it is possible at the particular stage of the proceeding) to insist upon the engagement of a solicitor. But it cannot be assumed that it will, in all such cases, be practicable for the barrister to insist upon the engagement of an instructing solicitor. The point may arise at a late stage in proceedings where a conflict arises between the prejudice which a client will suffer through the late involvement of a solicitor on the one hand, and the prejudice which will be suffered if the barrister remains without that assistance. In such cases the pressure on the barrister may be intense and indeed may require the barrister to reach a decision which the client regards as being antithetical to his or her interest. The danger this poses to the confidence of the client in the barrister is obvious.

The Commitee's report analysed the role which the instructing professional intermediary would be required to fulfil — the role now performed by an instructing solicitor.

Amongst other things a solicitor:

(a) has a general (but not necessarily detailed or specialised) understanding of all areas of the law;

(b) receives instructions from a client who may be assumed to be wholly ignorant of the law;

(c) is able to identify whether the client has a legal problem and if so, into what (if any) specialised category it fits;

(d) advises the client whether counsel's advice is required, and if so, from whom that advice ought to be obtained (of course, in many cases counsel's advice will not be required and solicitors will then advise clients as to appropriate courses of action, including letters of demand, dealings with government instrumentalities or whatever the case may require);

(e) advises the client (whether or not upon receipt of counsel's advice) whether court action should be taken (or defended) and, if so, in what court and whether counsel should be briefed for the purpose, and if so, which counsel;

(f) in an appropriate case, prepares a brief to counsel which contains concise instructions and copies of such documents as are relevant and necessary for the purpose;

(g) prepares and causes to be issued all relevant court documentation, and receives such documentation from the other side.

(h) engages in the necessary correspondence and communication with the other party or other party's legal representatives;

The Committee considered that the provision of these services required both appropriate skills and adequate office arrangements. The former are acquired by experience and training within solicitors' offices, the latter by investment in the necessary systems, including word processing, supervisory systems, accounting systems and secretarial assistance. The functions listed above were regarded as critical to the proper provision of legal services to the public.

The Committee considered it to be naive to suggest that these tasks can be fulfilled by a professional intermediary. In practice the responsibility for the performance of these tasks would fall upon the barrister. There can be little doubt that the barrister would have to be regarded as the "solicitor of record".

The Committee thought that these services cannot be provided by a barrister without fundamentally distorting the nature of the services which barristers now provide. Further, in the Committee's opinion, barristers are generally speaking not administratively equipped to shoulder the responsibility involved in the provision of these services.

If members of the Bar were permitted, or required, to perform the work of solicitors incidental to matters in which they have been retained by a professional intermediary, they would to that extent be in practice as solicitors. If a member of the Bar has a file in chambers in his or her capacity as a "solicitor" in that sense, that barrister would be a solicitor in relation to that file. This would impose a number of duties on the barrister including the heavy responsibility of monitoring the progress of the file, of ensuring that correspondence is attended to, of attending to the necessary lodging of court documents, of ensuring that time limits are not overlooked, and of having the necessary telephone consultations with other parties, witnesses, consultants and the like. These functions cannot be provided by barristers without distorting the services which barristers now provide.

The undertaking of these responsibilities would, the Committee considers, have at least four important consequences:

(a) The barrister would cease to be a specialist. Even if the barrister continued to practise in a specialised area of law, he or she would no longer be a specialist in the provision of legal advice and advocacy services. The barrister would inevitably spend more time discharging the general functions of a solicitor and less time in the more narrow practice of a barrister.

(b) The barrister would tend to intrude upon the relationship between solicitor and client, rather than providing a supplementary or supportive service. Conflicts of interest would arise. In the case of the barrister, there would be a conflict between the need of the barrister, acting as a solicitor, to satisfy the client's total needs in relation to matters in which he or she is retained and, on the other hand, the inevitable recognition that a real solicitor would be required. In the case of a solicitor there would be a conflict between the need to advise the client that the client should secure the best available advice and the solicitor's own recognition that a client referred to a particular barrister may never return, even for solicitors' services.

(c) The barrister would be chosen by the professional intermediary who is likely to be less qualified than a solicitor to decide upon an appropriate choice of counsel.

(d) The barrister would develop a client base just as solicitors do. The existence of such a client base would lead to a narrowing of the availability of barristers to a wide range of clients *and would jeopardise the independence of mind which is the essence of the Bar's role.*

The real suggestion is that a barrister may act as a solicitor. Yet the barrister will, by training, experience and the relative availability of office staff and equipment be unable to perform such a role. Such a system would lead to a decline in the efficiency of barristers' practices. This efficiency is the main factor in keeping the Bar's overheads to a very low level by comparison with those of solicitors, Further the committee concluded that the existing relationship between barristers, solicitors and clients is a valuable one and one which serves the public interest. Finally, the Committee considers the proposal does risk compromising that independence which ultimately provides the justification of the profession.

Michael Colbran

THE BAR DINNER

Speech of Mr Junior Silk

YOUR EXCELLENCY, YOUR HONOURS, ladies and gentlemen.

It is a great privilege for me to propose this evening's toast to our honoured guests. It is an honour of which I am barely worthy. Contrary to what many of you appear to think, my friend Simon Wilson is this year's youngest silk. I am the more junior of us only because of the lateness in life of my call.

This year's guest list is also decidedly different to those of recent years. Apart from the new Chief Administrator of the Northern Territory, it includes two Members of Parliament from opposite ends of the political spectrum; a multicultural judicial knight with an abiding interest in hospital administration; one of the few Solicitors-General of whom it may truly be said that his stature exceeds his size; the Victorian Supreme Court's first listing mistress; and even two of our own number who have been honoured for their services to the law. What this year's list does not include is any new judicial appointments.

The fact is that there have been no new judicial appointments in the last 12 months and, so far from there being any increase in judicial numbers, the demise of the Accident Compensation Tribunal, and the decommissioning of a number of its members, has meant that the decrease in the size of the judiciary is likely to rival Burnside's computer-modelled figure for the decrease in the size of the Bar.

Because of the absence of new judicial appointments there was some talk earlier this year of inviting as our honoured guests some of the more notable old judicial appointments in order to make up the numbers. I do not know if there was anything in the suggestion but I have given the matter some thought.

It seems to me that one possibility was to invite the erstwhile members of the Tribunal as a sort of wake to mark their fall from grace. Indeed I can only attribute their absence from the guest list to some sort of sensitivity on the part of the organisers about any show of solidarity in the face of unprecedented interference with the independence of the judiciary.

Another possibility may have been to invite the judge who took time to explain to the press assembled in his court His Honour's experience that what starts as "no" often finishes up as "yes". All I can tell you about that one is that His Honour was certainly luckier in love than was I.

A further possibility could have been to invite the judge who so assiduously rushed from his court at 4.20 p.m. each week to make the weekly class in feminist legal theory. I do not know what to say about that one except perhaps to observe that not all diamonds are forever.

However, without doubt the hottest contender would have to have been the judge, if it were a judge, who so courageously sent the anonymous note to the *Herald Sun* on what he perceived to be the white Anglican misogynist superiority complex of some of the brethren. The only difficulty with that one was that who ever did the dastardly deed is yet to own up to the act. We did not know whom to invite.

In the result our first guest in order of precedence is His Honour, the Honourable Austin Asche Q.C., formerly the Chief Justice of the Supreme Court of the Northern Territory and now the recently appointed Chief Administrator of the top half. Unfortunately, His Honour is unable to be present this evening and, because his past achievements as a barrister and a judge and his wide range of extra-curricular interests were recently chronicled in the *Bar News*, I propose to say nothing in detail of them. I do wish to say, however, that His Honour's past achievements mark him out as a man admirably qualified to discharge the important duties which his new office entails. If I may say so, we may be confident that he will bring to his new office that special degree of ability and dignity which should be the hallmark of any vice regal appointment

In order of precedence the next of our guests is the newly-appointed Attorney-General, the Honourable Jan Wade M.L.A. But, in chronological order of appointment, the former Attorney-General and now leader of Her Majesty's opposition for the State of Victoria is logically to be dealt with first. I trust therefore that the Attorney will not take it as a mark of disrespect if I adopt that course.

Mr Junior Silk, Geoff Nettle

James Kennan Q.C. practised at this Bar principally as a common lawyer, and many would say that marks him out as a man better able than the whisperers to get to the nub of a matter. At the same time our guest pursued a career in politics, and other para-legal activities, contributing much to the establishment and development of the Fitzroy Legal Service. In 1987 Kennan was appointed

as one of Her Majesty's Counsel, some three years after he was appointed Attorney-General of this State, and he continued as Attorney-General, on and off, up until the last general election in 1991.

In the role of Attorney, Kennan's achievements were significant. In the field of law reform he was responsible for a welter of legislation. He has also been credited with the introduction of the plain English so much appreciated by the judges of the Appeal Division; with the development of a Town Planning approvals system so much preferred by some friendly house proprietors to what they perceived to be the parochial and self-centred whims of municipal councils; with the mass transfer of a large part of the practising legal profession to the ranks of the Magistracy; and with the establishment of a WorkCare system in which for such a short time the erstwhile members of whom I have already spoken played an important part. During Kennan's term as Attorney-General, the Supreme Court was substantially renovated and the Supreme Court Library was also allocated the funding necessary for it once more to function as it was designed to do. Perhaps most importantly, however, the leader of the opposition made the County Court into the principal trial court and gave to it a jurisdiction in equity far greater than that of any other District Court in Australia.

Of course not all legal reforms of the previous government were the work of the Honourable Member. He was for a time outed from the office of Attorney-General by an architect by the name of McCutcheon, and it was McCutcheon, not Kennan, who saw to the installation of the diminutively sized Bar tables in both the Supreme and County Courts. One assumes the idea was to reduce the capacity to handle paper and thereby shorten trials and reduce the costs of justice. I take leave to doubt that it worked.

But the honourable leader of the opposition was never a man to be outdone. Thus after a brief foray into public transport, and the shortlived introduction of the highly acclaimed scratch tickets and the decoration of the streets of Melbourne with a static display of tram cars of some months' duration, our guest fought and won a faction fight of numbers which would do justice to the New South Wales right, re-took the office of Attorney-General and with that reasserted himself in the high ground of curial architecture. Finally, Kennan followed up the coup with the imposition upon the exterior facade of the County Court of a bold statement of architectural brutalism. It is of a kind never before seen in this city. As an exercise in what the architects call functionalism it makes the Georges Pompedou centre in Paris look positively puerile. And, now, notwithstanding a change in government, like one of the seven wonders of the world it seems destined to last at least for a thousand years.

To say as much is not to detract in any way from our guest's other achievements as Attorney-General. His achievements in the area of law reform are judged by many, including some of his political opponents, to have been immense. The fact that they were made bodes well for the quality of the opposition which it is now his duty to provide.

Of course, there is for every action an equal and opposite reaction, and whilst to some all law reform is progressive, a somewhat more cautious view has it that the best law reform consists of the repeal of previous law reform provisions. Right or wrong, the point is that views are likely to differ and it is perhaps for that reason that our new Attorney-General, the Honourable Jan Wade, finally burst the bubble of Professor Kelly's law reforming empire and set sail on a different course.

It was McCutcheon, not Kennan, who saw to the installation of the diminutively sized Bar tables in both the Supreme and County Courts. One assumes the idea was to reduce the capacity to handle paper and thereby shorten trials and reduce the costs of justice.

There have been suggestions made that the end of the Law Reform Commission's art works and cocktail parties was the result of conspiracy between Attorney and Bar. But like so many of the unhappy allegations made these days about the Bar, and its role in law reform, that suggestion is instantly dismissible. As I understand the law of conspiracy, which is admittedly not a very safe guide, there must be prima facie evidence of an alleged conspirator's involvement in a conspiracy, which is directly admissible against him, before the acts of his co-conspirators can be used to convict him. Here, if I may say so, all the evidence directly admissible against the Bar points the other way.

To begin with, our self-interest, which we know at least from reading the press is our principal guiding light, is in favour of legal reform. Because we all know that every time the reformers attempt to rectify a problem they create another one sufficient to generate work aplenty for many. If you doubt that proposition remember the *Constitution (Supreme Court) Act* and if you then still doubt it, ask Jack Hammond during one of his daily peram-

Geoff Nettle and John Kaufman

bulations through the Essoign Club. Furthermore, the results of the revolution have been anything but regressive. Professor Keily's law reforming empire has been replaced by an in-house committee of parliamentarians. It is seemingly led by our colleague Victor Purton. And I am assured that Purton almost daily delights the Attorney, and indeed the Premier, by circulating to all members of the opposition Purton's views on the pressing need for law reforms to which the government has not yet turned attention. Finally, and most importantly, anyone who knows anything of the record of the Honourable Attorney will recognise that it does not allow for any possibility of conspiracy with the Bar. Her achievements have been made despite any consultation with others and not because of their complicity.

The Honourable Jan Wade is the first woman to be appointed Attorney-General of Victoria. Like her predecessor she is a member of this Bar and she is the product of a diversity of calling. What sets her apart from her predecessor, however, is that our guest is now the woman, and not a man, to whom the profession must answer.

In the period of our history in which the Attorney has come to occupy that position it is unfortunate, but it is the fact, that she has had to be better than most of her male counterparts simply in order to succeed. But she has succeeded, not only to the office of the first law officer of the State, but also in each of the roles that paved her way to so high an office. The Attorney read in the chambers of J.D. Phillips (as he then was) but even before her call to the Bar the Attorney had achieved a measure of professional success and, in the period which has followed, she has excelled in capacities as demanding as parliamentary counsel, the first female Commissioner for Corporate Affairs and the Chairman of the Equal Opportunity Board.

If the content of the Attorney's recently published interview of Hansen Q.C. is any guide, it bodes well for sustained and creative continuation, as first law officer, of the strengths which the Attorney has demonstrated in those previous roles. It also leads one to conclude that she has the strength to resist the strident din of populist demands for so long as she remains as Attorney.

We welcome the first lady Attorney-General of the State of Victoria. May she be an example to those who will follow.

Our fourth guest in order of precedence is the Honourable Mr. Justice Sir James Gobbo, for whom little introduction is called. Sir James is a judge of the Supreme Court, and many other things besides. But like one of the great judges of history, it may also be said of Sir James that he is a man for all seasons.

I say that because in the spring of Sir James' existence he excelled as a Rhodes Scholar and as an oarsman at both Melboume and Oxford Universities. Indeed, despite Arthur Adams' disagreement, most would accept that Sir James was largely responsible for the fact that the crews of which he was a member almost never lost a race. Furthermore, despite the demands which his commitment to rowing placed upon His Honour's time, he took his degree at Oxford and, after a year of fairly pleasant existence in a flat on the Kings Road, Chelsea, he was called to the London Bar. He returned to this country and his practice burgeoned. He taught and wrote upon the law of evidence. He mastered land valuations. He took silk and was later appointed a judge of the Supreme Court. And to the great relief of some others, he took charge of the list of cases dedicated to that most fascinating subject of land valuation. At the same time he worked tirelessly for the people of the country of his birth. He was created a Knight of Malta and he received the Order of Merit of Italy.

Then, in the summer of his existence, Sir James was knighted by our own Queen, significantly for his services to what at that time was just coming to be described under the name of multiculturalism.

Now, multiculturalism, like motherhood, is a many-splendoured thing and one hesitates to define it. But as I understand the basic idea it amounts to the recognition amongst educated Aus-

tralians that there is more to life than that which emanates exclusively from the British Isles. So the importation and promotion of other countries' cultures is recognised as a worthy cause. When multiculturalism is thus viewed from the perspective of the informed the award of a knighthood may be seen as a fitting recognition of Sir James' contribution to the advancement of Australian culture. But, I am bound to say that it was also truly remarkable. In effect, Sir James was probably the first man ever to receive an imperial award, from a British Queen, for services towards the ending of the Empire.

Sir James has shone yet again, as a man for yet another season, by his creation this year as a Companion of the Order of Australia.

For most men and women such an achievement would surely have been more than enough. But even as the seasons have begun to change, from summer to autumn, and Australia has moved from its long cherished system of imperial awards to their indigenous replacement, Sir James has shone yet again, as a man for yet another season, by his creation this year as a Companion of the Order of Australia.

The magnitude of that achievement should speak for itself. But for those for whom it does not, I advance three thoughts about its significance. The first is that, whilst Sir James' latest honour is of the home-grown variety, it is possible to discern by reference to the old tariff that Sir James' new honour ranks many places above the earlier knighthood and only marginally below the knighthood of the Order of the Thistle conferred on Sir Robert Menzies in 1963. Consequently, it should be apparent to all that Sir James has not only improved on his previous performance but also to the level now reserved by the Commonwealth for the highest of high achievers.

The second thought is that His Honour has managed to qualify for this second great honour, while discharging his duties as Supreme Court judge, and yet while most of his brethren toiling daily in the same field of endeavour as he have failed sufficiently to impress a government of either persuasion to warrant the award of even one honour, imperial or indigenous. Sadly, our greatest judge was correct in the observation that in Australia we are not accustomed to according judges the same high precedence as they are accorded in other countries. Happily, Sir James is an exception.

The third thing of note is that whereas Sir James' earlier honour was pre-eminently for services to multiculturalism, and thus essentially in the field of imported commodities, this new honour is in part for services to hospitals, and in particular maternity hospitals, and hence for services to the production of Australian-made products.

Ladies and gentlemen, Sir James Gobbo truly is a man for all seasons: scholar, athlete, lawyer, jurist, multiculturalist and philanthropist. Rightly is he created a Companion of the Order of Australia and warmly do we acknowledge his success; so much the more so because it is a second time.

Our fifth honoured guest is Douglas Graham, Queen's Counsel, the newly-appointed Solicitor-General for the State of Victoria.

Accordingly to a recent edition of the *Bar News* he is the very model of a modern Solicitor-General; possessed of the quality of generalship. I am not sure which model of modern Solicitor-General the editors had in mind. After all there were some fairly fundamental differences as between the last three or four. And I was equally a little uncertain as to the way in which the term "generalship" was intended to be taken. I recall a notion that the best of generalship is thought to reside in those who, although very intelligent, are also inherently lazy. It is possible to suppose that that is not what the editors intended.

There was also another reason to doubt the wisdom of the editors. Contrary to the assertions of the *Bar News*, Graham was not an associate to the High Court's great equity lawyer Sir Frank Kitto, but rather to Sir Victor Windeyer, the High Court's great legal historian. And whether a training in legal history will be of much assistance to our new Solicitor-General may be open to doubt. I know little of these things myself but I am told by those who say they do that the High Court has rewritten so much of the law in the last ten years, and then rewritten so much of that which they just rewrote, as to make legal history count for very little.

But, there are some reasons to agree with the *Bar News*' conclusion. In the first place, Graham comes from a family steeped in legal tradition, albeit only as solicitors, and whilst that does not necessarily say anything about our guest's skills as an advocate, it is consistent with the thorough research and pragmatic application of legal principle for which he has long been noted.

In the second place our guest has a sense of

Lillian Lieder, Colin Lovitt and Rose Weinberg

humour about him which I suspect is more likely to find favour with Their Honours of the High Court than did the earthy approach of some others gone before. For example, it is difficult to imagine Douglas Graham describing the quality of his opponent's submissions in the same monosyllabic terms as was the wont of one of his predecessors.

In the third place, whilst the Solicitor-General did command a very considerable equity practice at the Bar, there was a period in which the bread and butter resulted from a series of forays into the town planning jurisdiction and some training from Douglas Gifford. It is little known outside the inner circle of the town planning fraternity, but I am reliably informed by one of them, that in the town planning jurisdiction the use of written submissions plays a particularly important part.

Unlike other lawyers, town planning lawyers mark an additional fee for each of their written submissions, so the more written submissions the bigger the fee will be. Needless to say, with the aid of Gifford's instruction our guest was quick to appreciate the economic significance of written submissions and in the result he rapidly became one of the most prodigious producers of written submissions. The consequent speed and ease which our honoured guest can now produce a written submission, or at least (as in my experience) get one of his juniors to do the job for him, marks him out as a man well suited to meet the recent call of Chief Justice Mason to the extended use of written submissions in the High Court and perhaps also for the consequent retreat from the hitherto sacrosanct dialectic discussion.

Like the best of Solicitors-General appointed over the last 300 years, the new Solicitor-General is drawn from the ranks of eminent counsel and he is noted for his dedication and ability.

Unlike Solicitors-General of ancient times our guest will perform different duties for the Crown than he performed for his clients in private practice. And unlike Solicitors-General of ancient times, he will not make great profits. But like the best of Solicitors-General appointed over the last 300 years, the new Solicitor-General is drawn from the ranks of eminent counsel and he is noted for his dedication and ability. In these things, which are much, he is in truth the very model of a modern Solicitor-General.

Ms Katherine Kings is the newly-appointed

Listing Master of the Supreme Court of Victoria. Before her appointment she spent some 20 years in practice as a solicitor. She began her life in the law as a clerk articled to Mr. Tony Smith of Messrs. Gillotts, now His Honour Judge Smith of the County Court. She spent a period in practice as a solicitor in rural Victoria. She spent a further period as an associate to His Honour Judge Hogg of the County Court. And she concluded her career as a solicitor as a senior associate with Mallesons Stephen Jaques. In the last role she was responsible for some important environmental litigation and for some very well-publicised litigation alleging valium dependence. She is known by those who have worked with her to be a dedicated and thorough lawyer. She holds a Master's degree in Law from the University of Melbourne. She is highly skilled in the use of computers in their application to the law.

Given a background of that kind one might have confidently predicted that our guest would have a fair understanding of how a Listing Court is to be run. After all she must have heard, as often as any of us, that Masterly asseveration that all the judges available are changing lists in four days and thus your case of five days has no chance of a start this year. She must certainly have heard, as many times as any of us, that Masterly rebuke that the Court is not concerned with the convenience of counsel and therefore not concerned with the fact that those counsel who were retained and have been preparing the case for months are unavailable to appear on the date to be fixed. She must surely have heard and therefore will know that Masterly platitude that there are 1000 counsel available across the road and that therefore no counsel is indispensable. Perhaps, most importantly, because she was a solicitor, she should know that a case is to be struck out of the list when the hapless articled clerk sent to the callover arrives a minute or two late or that the case is to be sent to the bottom of the list notwithstanding the panic-struck plea of the clerk when he ultimately arrives.

But despite all these advantages it seems that our guest does not yet know how to behave as Listing Master. There are signs that things are changing. There is talk of new efficiency and reasonableness and time saving. It is said that the days of four appearances in the Listing Court in order only to be marked not reached are giving way to faxes and telephone calls which make useless appearances unnecessary. It is reported that the new Master actually listens carefully to opposed applications when she hears them and that where the occasion requires it produces reasoned reasons for decisions. It is even said that the new Master may be susceptible to the argument that the undoubted abilities of the 1000 waiting across the road are not necessarily regarded by the client as a satisfactory substitute for the many months of preparation in which he has invested.

Whether these changes will last for long is something which only time will tell. But I for one dare to hope that they will. I applaud the changes already made. May there be many more like them to come. I welcome the first lady Listing Master of the Supreme Court of Victoria.

Years ago, I too was employed as a solicitor, and it was then that I first learned of S.E.K. Hulme Q.C. At that time, as now, Hulme was widely known as a leader of the Commercial Bar and an intellect of immense proportions. Hulme's opinions were frequently sought.

She is known by those who have worked with her to be a dedicated and thorough lawyer. She holds a Master's degree in Law from the University of Melbourne.

Anyone who has read Hulme's opinions will be aware of the learning and precision from and with which they are constructed. They will also understand why even the largest firm of solicitors in this country, with all their resources and talent, still seek Hulme's advice. Sir John Young used to say that the reason solicitors take a matter to counsel is because the matter is important. But in the case of matters taken for Hulme's opinion so much may be assumed. Almost invariably the real reason why solicitors take matters to Hulme for opinion is because the matters are so difficult that only Hulme and very few others are likely to know the answer.

Of course Hulme is not without human frailty and he does not suffer fools gladly. I and others have seen written on more than one of Hulme's opinions an apology for the poor quality of the wine spilt upon them in the course of their fevered construction and I and others have been the recipient of more than one disingenuous apology from Hulme for Hulme's alleged inability to understand the meaning of what were admittedly illogical propositions advanced to him for comment. For all that the results are worth it.

Hulme left the shores of this country in 1953 as a Rhodes Scholar bound for Magdalen College, Oxford. He excelled at Oxford and, together with Sir James Gobbo, he stayed on in London for a year to be called to the London Bar.

Jim Kennan and Bob Kent

Chris Jessup and the Governor

I am told that when Hulme returned to Melbourne he was still much in the mould of the duffle coated crypto-bodgie variety of Oxonian of the mid-1950s. But he read in the chambers of the late Sir Keith Aickin, from whom he learnt assiduous attention to every piece of work which came his way, and it is to be inferred that somewhere or other he learnt to dress in the style becoming a rising young junior of the Equity Bar. He was widely briefed as a junior in commercial, equity and constitutional cases and he even appeared as junior to Sir Garfield Barwick in the only case in which Barwick appeared as the Attorney General. His practice as a junior grew rapidly and he took silk in 1968.

It is idle to speculate about things which might have been. I therefore say nothing as to the contribution which Hulme might have made as a judge. It was to the surprise of many that he was not appointed.

As a silk Hulme has had few equals in the areas of income tax, stamp duty and that other form of fiscal exaction which used to trouble the more affluent so much as they approached the ends of their lives. He was the master of section 260 of the *Income Tax Assessment Act* right up until the post-Barwickian revisionism of the early 1980s. He knew and probably still does know more about the taxation of mining enterprises than any other lawyer. At different times he has been pre- eminent in company law and corporate insolvency and corporate reconstruction. He is still pre-eminent in state revenue law.

It is idle to speculate about things which might have been. I therefore say nothing as to the contribution which Hulme might have made as a judge. It was to the surprise of many that he was not appointed. But he took a different course. More lately in his career he has devoted considerable amounts of his time and abilities to positions on the boards of a number of public companies. Even more lately he has entered into trade on his own account with the production of a range of boutique wines. Many of you will know that they are flogged unceremoniously in fliers distributed through the clerking system. Given present economic circumstances, I suspect that fewer of you will know that some of them are actually sold to the punters at the fantastically inflated prices at which they are offered for sale.

For a brief period at the commencement of this decade Hulme also had a dabble in the ex parte jurisdiction, and on behalf of National Australia Bank he even managed to get a receiver appointed, ex parte, to Alan Bond's group of companies. I dare say that even Ron Merkel would only dare to dream of such audacity and certainly the Appeal Division described the order as the most momentous ex parte order ever made by an Australian court. But Hulme soon tired of such frivolities, as one might have expected he would. Hulme may nonetheless still content himself with the thought that the beer baron the subject of the order came ultimately to be exposed, much as Hulme had argued that he should be.

Hulme is a great barrister, a great leader and a great lawyer. But above all he is a gentleman in whose company it is always a pleasure to be. He is also a colleague who steadfastly maintains the example of having very little to say which is adverse to other colleagues and nothing at all to say which is adverse to the bench before which he appears.

Hulme is our honoured guest this evening because Her Majesty recently recognised the contribution to the profession made by Hulme which so many of us have for so long taken for granted. In the last Queen's Birthday Honours list he was created a Member of the Order of Australia. It is a fitting recognition of his services to the law.

I come then to the last of our guests, Ron Castan Q.C., who I am told has become a grandfather for the first time today. It has often been said of Castan that he is one of the more enigmatic characters of this Bar. He is of course well known as an advocate. He is much admired as a champion of civil liberties. And it is well known that he has frequently appeared pro bono for the cause of the underdog. But it is perhaps less well known that, lately, in the role of arbitrator of the never ending saga of the Bass Strait oil wells dispute, Castan may have found a source of remuneration comfortably adequate to replenish any shortage of funds borne of earlier deprivations.

In an earlier stage of his existence Castan lived in Carlton; holidayed on a kibbutz; rode a bicycle when others travelled by car; and, as chairman of the Council of Civil Liberties, upheld the cause of freedom. Now he lives in Kew; holidays in the Otways; and occasionally accepts a brief from the Commonwealth when the going for the Commonwealth gets more than usually rough, but for the most part Castan provides the benefit of his services as an arbitrator in many and varied causes.

Castan's greatest cause, however, was undoubtedly *Mabo* v. *Queensland.* For by his triumph in *Mabo* he gave heart to the forgotten race of our peoples, albeit heartburn to the mining houses of Collins Street, and rise to the prospect of a mass outflow of revenue in the form of compensation payments sufficient even to trouble the Commonwealth Government.

Depending upon one's point of view, the decision in *Mabo* may be seen as a paragon of national contrition, a profound recognition of the legitimate expectations of the indigenous people of this nation, or a judicial policy statement of unprecedented proportions. But regardless of which view is taken of it, it is inconceivable that even as little as ten years ago it might be decided in the way in which it was. Judicial attitudes had to be changed and it is evident that they were. Castan's role as counsel for Mabo must surely count as significant in the result which was achieved.

Whether Castan's success results from his scholarship, a rare degree of insight born of Talmudic tradition, his many years under the banyan tree as an arbitrator of internecine squabbles, or even from his qualities as a civil libertarian, is beyond objective assessment. And, in the end, it is probably of no great consequence. What is important is that Castan's achievements are many and significant. He is a leader of the profession and, if I may be permitted to say so, he is a leader of his community.

This year Castan was also created a Member of the Order of Australia for his services to the law. It is an award which has met with universal applause. We too congratulate him on his appointment.

Ladies and gentlemen, that brings me to the end of all that which I have to say about our Honoured Guests. But as I began by reference to the quality of this year's guest list I wish to conclude with reference to the quality of this year. It does seem to me that, apart from the quality of the guest list, there is not much about this year to commend it.

Depending upon one's point of view, the decision in *Mabo* may be seen as a paragon of national contrition, a profound recognition of the legitimate expectations of the indigenous people of this nation, or a judicial policy statement of unprecedented proportions.

Never before this year have we as a profession been subject to such virulent criticism as now. Never before this year have our courts been subject to the sort of uninformed abuse which has now gained popular currency. Surely, in this fourth year of economic recession, and in the midst of the excesses of criticism which hardship is bound to produce, we have come as a profession to the depths of our winter of discontent.

It is therefore my hope, and my belief, that when this time next year arrives, and the junior silk rises to propose this toast, we as a profession shall have turned the corner which must inevitably come; our son of York will have risen; and the clouds which are now lowered on our house will in the depthless bosom of the ocean be buried. If our Bar and our Bench as we know them are to survive, and they must, we must all believe that will be so.

Accordingly, your Excellency, your Honours, ladies and gentlemen, I give you this year's toast to this evening's Honoured Guests.

Geoff Nettle

SPEECH IN REPLY TO THE TOAST "THE GUESTS OF HONOUR"

S.E.K. Hulme, A.M., Q.C.

YOUR EXCELLENCY, MR. CHAIRMAN, ladies and Gentlemen,

Mr. Junior Silk has mentioned that both Jim Gobbo and I were called to the English Bar. I remember well the night we learned that we had qualified. The results of the Bar Examinations appear in *The Times* newspaper, so shortly after midnight on the day of publication we were at the office in the East End of London where a copy could be obtained. After the usual heart-stopping blunders, we found our names.

Buses had long stopped, and we had no money for taxis. It was a lovely night. We set out on the long walk home to Chelsea.

You would be amazed at how many young ladies will offer to make your acquaintance, if you walk down Piccadilly at one o'clock in the morning with Jim Gobbo. They seemed to know we were happy with life, and unhesitatingly they offered to celebrate with us. Poverty provides admirable protection in such circumstances, and we pursued our homeward trek.

Jim was of course a well-known lover. At some function for the Oxford crew he had met a film starlet. Sophisticated and heady stuff that, for simple university students, but very nice too. And so he found it. Of course sometimes even Jim Gobbo could run into competition. One night his telephone call was answered not by Jill but by her mother. "Jill's out tonight, Jim", she said, "Gary came in unexpectedly." They had just finished filming a picture that "Gary" had a part in — *High Noon*.

Actually I don't really know how I come to be speaking to you tonight at all. When the Chairman asked me whether I would like to do so, what I actually said was that I wouldn't. He said that he was seeking judicial preferment, and to him that meant I really did want to speak. When I still wasn't absolutely convinced, he used violence. Not too much, of course. Nothing beyond what could fairly be expected in the reasonable hurly burly of everyday life between barrister and barrister. Which he assured me was now allowed.

So I find myself doing what the Chairman tells me I wanted to do all along. Any misunderstood woman is welcome to join the club. As Mae West said: "Give a man a free hand and he'll run it all over you."

It is fair to add that sometimes the man may not really be at fault. There can be mistakes and misunderstandings. At the turn of the century the Regius Professor of Medicine at the University of Oxford was Sir John Burdon-Sanderson, a very great doctor. At a rather stately dinner party one night he exclaimed very loudly: "It's happened!'' Anxious inquiries brought the answer "I am paralysed. I have been pressing my knee for several minutes, and there is no sensation in it at all." The dignified woman sitting next to him intervened quietly: "*My* knee, Sir John."

Which somehow brings to mind the incident that took place about the same time, in Oriel College. On his first night at dinner a new and teetotal Fellow sat next to the Provost. At the end of the meal the Provost passed him the decanter of port with the words "A glass of port now? Do you all the good in the world." "Mr. Provost, I would sooner commit adultery than drink a glass of port." "Wouldn't we all, my dear fellow, wouldn't we all? But all I can offer you tonight is a glass of port."

An earlier Chairman was very different to Chris Jessup. He was very helpful. That was Maurice Ashkanasy, in 1953.

An earlier Chairman was very different to Chris Jessup. He was very helpful. That was Maurice Ashkanasy, in 1953. I was about to sail (all except the very rich or the very important went overseas by ship in those days) and told Ash that I intended to come to the Bar as soon as I returned from Oxford. Ash suggested that I sign the Bar Roll before I went. Accommodation at the Bar was very short, and went by seniority on the Bar Roll. I could return from Oxford with two or three years of waiting for a room painlessly achieved. And while abroad I would have the dignity of being a practising barrister. Good advice, as Ash's advice usually was. (I add that when the time came the Bar Council abided by the advantage which Ash's advice had created for me, but resolved that in future people would not be allowed to sign the Roll until just before they came to the Bar.)

The always astute Ash had done a similar kind of thing for himself a decade and more earlier. In 1940 he took silk just before he went off to the war. He returned in 1945, not only safe, but a quite senior silk.

In the end I returned from England late in 1956, and began reading with Keith Aickin, of whom I say more below. So although the Roll gives me seniority from 1953, I am not really anything like as senior as that. The most I can claim is that I date from the last few weeks of 1956.

I want to say a little about things at that time. If you ask me why, I can only refer you to the answer the eighty-year-old lady gave when the priest asked her why she was confessing to an act of adultery committed fifty years earlier. "It's nice to talk about it again."

On the south-east corner of William and Bourke Street, where the BHP building now stands, was Menzies Hotel. The bluestone building on the north-east corner was owned by Goldsborough Mort and was still an active wool-store. Throughout the day semi-trailers came down the lane next to the store, and drove out into Bourke Street, bringing wool in or taking it away. Wool is a magnificent insulator, and on a hot day a lovely wave of cool air could be felt as one walked up the lane past the open loading-bay.

On the east side of Menzies Hotel stood the Bar's main home, Selborne Chambers. It was a long thin two-storey building, running on a split-level from Bourke Street through to what is now called Little Collins Street all the way along. At that time the part of Little Collins Street out the back of Selborne Chambers was called Chancery Lane, in honour of the legal precinct which then surrounded it.

The plan of Selborne Chambers was simple. There were swing doors to the street at each end, opening into a long wide corridor which let you walk straight through. Rooms opened off to the side; on one side at the Bourke Street end, and on both sides further along. The first floor was the same. Outside these first-floor rooms ran a balcony from which one could look down on the ground floor corridor, and indeed could talk to people passing there. All windows looked out onto the walls of neighbouring buildings. Everything was pretty dingy. A French oil industry engineer out here for an arbitration looked around the building, and with the air of one who knows about these things said "So nostalgique. It is exactly like a Middle East brothel."

Quite apart from the architecture, the description was not altogether inappropriate. After all, each inhabitant did have a single room. Each inhabitant was for hire. Each sought to satisfy in his room the needs of clients who came to him. Each had a man who looked after him and a number of other inhabitants who earned their living the same way he did. And each regarded himself as a member of one of the oldest professions in the world.

I interpose that I use the masculine intentionally. With the exception of the magnificent Joan

SEK Hulme, Jenkinson J., Sir Daryl Dawson and Sir Sydney Frost

Rosanove, whom I pleased by always addressing her as "Ma'am", the Bar was entirely male.

Not all barristers were in Selborne Chambers. Equity Chambers, a prewar breakaway establishment complete with clerk, was thriving. In addition there were two new outcrops to help cope with the post-war surge in the size of the Bar. These were Saxon House, down Chancery Lane from the back of Selborne Chambers, and Eagle Star Chambers, in Bourke Street. These outcrops had no clerk, so Selborne Chambers remained the administrative centre for everyone except those in Equity Chambers. Selborne Chambers held two clerks. One was Jim Foley; the other was a partnership between Arthur Nicholls and Perce Dever.

I read with Keith Aickin in Eagle Star Chambers, and then spent a few weeks in Selborne Chambers in the chambers of Mr. Percy Joske Q.C., M.P., whose days were spent mainly in Canberra. With the benefit of Ashkanasy's advice and my time in England, I then got a small room of my own in Eagle Star Chambers. From the twenty or so barristers who occupied the sixth floor in that building, Keith Aickin would go to the High Court, John Young, Richard Newton, Peter Murphy and Dick Fullagar would go to the Supreme Court, Alan Mann would become Chief Justice of the Supreme Court of New Guinea, and Bill Martin and Leo Lazarus would go to the County Court.

I would like to say something tonight of two people practising as members of this Bar at that time.

The choice he made at the break between listening to speeches and going back to his hotel room to watch the Test match on television will surprise no one who knows him.

Some of the present Bar know nothing of John Starke, and most know only the rather daunting judge who spent a generation doing work which brought satisfaction no doubt but little outright pleasure.

I would like to think that the Bar of today knew something of the great figure that was Mr. John Starke Q.C., and of the great respect and affection that the Bar had for Mr. John Starke Q.C. when he was one of themselves, doing the work he revelled in. Those of you who noticed Sir John's presence here earlier tonight need not fear embarrassment. I am not talking in front of him. The choice he made at the break between listening to speeches and going back to his hotel room to watch the Test match on television will surprise no one who knows him.

He was of course the son of his father, Sir Hayden Starke, a member of the High Court from 1920 to 1950. That was a distinction each of them would cheerfully have forgone, at any rate until very late in Sir Hayden's life.

In the decade leading up to 1920 Hayden Starke became the dominant figure at the Victorian Bar. From 1914 he refused to apply for silk, because other barristers were away at the 1914-1918 war. So he dominated the Bar as a junior, until in 1920 he became the first junior ever appointed to the High Court. (There has only been one other, Mr. Edward McTiernan, appointed in political circumstances in 1930.)

Hayden Starke had, said Sir Owen Dixon on his death, "a forensic power as formidable as I have seen." And certainly he was not an easy man at any time in his life, in court or out of it.

On one occasion a judge had made a criticism which Starke considered unjustified. At that time barristers and judges travelled by train and tram, just like people, and in the late afternoon judges were wont to walk through Selborne Chambers on their way from the Courts down to Flinders Street Station, the only station in the central area. The judge concerned passed through Selborne Chambers later that day, and on his way called into the lavatory. He found himself standing next to Starke. Like a good judge, he half-apologised. "All a bit unfortunate, Starke. Hope there's no hard feelings." Starke looked at him unsmiling, unplacated. "That's just the kind of bastard you are. Insult a man in open court, and apologise to him in a piss-house."

It was Sir Garfield Barwick who told me of a brush Starke had with the High Court of the time, sitting in Melbourne. The hearing of the first case listed for the day ended prematurely, and the second case was called on. Counsel for the appellant was absent. A frightened solicitor said that Mr. Starke had been briefed. The Court adjourned while Mr. Starke was sent for. Mr. Starke came up from Selborne Chambers, the Court resumed, and the case was called on. Mr. Starke announced his appearance, and sat down. The Chief Justice, Sir Samuel Griffith, intervened. "Mr. Starke. The Court is waiting." Mr. Starke announced his appearance again, more loudly. "You do not take my point, Mr. Starke. The Court has been kept waiting, and expects an apology." But an apology was not what the Court got. What it got was: "This Court is paid to wait. I am not."

Sir Garfield told me the story twice. The prob-

lem of what in the ultimate the court could actually do in such circumstances fascinated him. Was it contempt, to keep a court waiting? If not, was it contempt not to apologise? Or was it all merely rude? Whether or not one thinks the court would turn out to be powerless, I would not recommend that any junior take it upon himself to find out. It is better to stay on hand, and if something does go wrong, it will be certainly be quicker and it may be safer to apologise.

It hardly comes as a surprise to learn that in his late years Sir Hayden Starke became, so far as is known, the only father who ever walked into a clerk's office and demanded to see his son's fee book. It will surprise no one who ever met him that he got it. It is pleasing to record that Sir Hayden was also surprised: at how well his scapegrace son was doing.

Barbara Walsh and Mara Catalano

JOHN STARKE

The warning is given that this section involves the use of a certain amount of language more often spoken than written. The true stories of Starke must be told or not told, but not bowdlerised. If bad language may offend, please switch to another channel.

Starke had the most tremendous position at the Common Law Bar. If there were five eye-witnesses to the murder, all policemen, and two confessions, one set to music, it was clear to anyone that you had to brief Starke. And though a significant part of his practice concerned crime, he could be found wherever cars crashed very badly, or the actions of jockeys were misunderstood, or bridges fell down, or aircraft crashed.

Michelle Quigley

Outspoken and superficially fierce even among friends, the Bar knew that Starke would do anything for other barristers. If every member of the Bar had been arrested one night for drunken driving, I fancy that two-thirds would have rung John Starke. There was no Ethics Committee or Disciplinary Tribunal at that time, and any barrister charged with an offence was brought before the Bar Council. Starke appeared for about half of them. Never under any circumstances would he criticise in front of anyone else the work of his junior. To the Instructing Solicitor and everyone else he took total responsibility for everything that was done. The custom of the Bar was that while a case was in court the leader paid for his junior's lunch. Stephen Charles and I were Starke's juniors in the King Street Bridge Inquiry, which went for some six months. Starke bought lunch every day. Often enough it was only an apple, for that was all he usually ate, and he thought it was good for us too. But whatever we had, he insisted on buying it. It being the custom for those who had good libraries to allow books to be borrowed (with a note left behind) by those who did not, Starke walked out of his chambers to go to London to the Privy Council, leaving his door open and the light on. It is no wonder the young revered him. It is tragic that he left the Bar before the days when television cameras found a goldmine in the approaches to the law courts. He would have been a star.

Like his father, John Starke had a tremendous courtroom presence. It was his openly stated object

to dominate whatever proceeding he was in. He started every case with courtesy, but he could become annoyed, he was at all times utterly fearless, and drama was never far away. After a series of incidents and rulings of which Starke disapproved, a judge ordered an adjournment. As the judge was swinging his chair around to get up and go, Starke turned to his junior Peter Coldham. "Fuck'n little twerp", he said. A wiser judge would have kept on going. This one turned back. "What was that, Mr. Starke?" "Just commenting to my junior on a matter relevant to the case, Your Honour" came the answer, with a glare of defiance. The judge thought about it and wisely surrendered, outmanoeuvred in one move. The asking of the question prevented him from acting on anything he might think he had already heard. The answer truthfully put the comment in a field where no judge could inquire further.

Donna Bakos

One remembers an incident in the South Australian Royal Commission into the conviction of the aboriginal Max Stuart for the murder of a young girl at Ceduna. During final addresses Starke applied for evidence to be re-opened to permit him to call a recently discovered witness, a taxi-driver. The taxi-driver was present during the application. The application was rejected. Sir Mellis Napier, presiding, told Starke that he need not be upset at the refusal, saying that while the application had been proceeding he had had the opportunity of observing the taxi-driver, and he did not think that evidence from him would have taken Starke's case any further. The comment offended everything Starke stood for. Passionately angry, he let fly. "Let it be recorded, that in Adelaide, in 1961, for the first time in the six hundred year history of the common law, a witness was disbelieved before he opened his mouth."Of course Starke could sometimes be subtle. I appeared as junior to Hubert Frederico (senior: the retired County Court judge, not his Family Court judge son), in a case involving vending machines. John Starke was on the other side. Our Instructing Solicitor had supplied a bag of round lollies, so we could demonstrate the working of the machines to the judge, Sir Edmund Herring.On the morning of the second day Starke was opening the defence. Lord Justice Pearce of the English Court of Appeal was visiting Melbourne, and by Herring's invitation was sitting on the Bench alongside him that morning, to see how things were done in the Antipodes. When things seemed less interesting than they might have been, Starke turned to face our end of the Bar table. "Mr. Frederico", he boomed, "Can I have your balls please?'' Herring began to be embarrassed, but Lord Justice Pearce was delighted, so Herring decided he was too.

A typical table

I have said that Starke was fearless. Only once did I hear him claim lack of nerve. At one point he was angry with more of the Winneke family than usual. The matter involved John Winneke. I asked Starke whether he had made his disapproval known to John Winneke. "Christ no", he said, "Didja see what he did to fuck'n Mithen?"[1]

Being so often involved in cases where the testimony of police officers was likely to be crucial, Starke repeatedly faced the problem of making the jury see that what looked like and probably was a good decent policeman might in fact be telling lies. He developed a speech which followed a mythical

Mary Stavrakakis

policeman's career through from the young man in the Police College to the experienced officer in the witness box, showing how the acquisition of power, and the desire that crime be punished, and loyalty to fellow officers, could combine to make the telling of this lie to achieve this conviction seem proper. The speech was refined by repeated use.

When Starke was appointed to the Supreme Court, his friend Bill Martin organised a dinner for him. It was held in the old Hotel Australia, and there were about thirty of us. Several are here tonight. After nice things had been said, Starkie replied. I remember him saying that everyone going to the Bench says we will all remain friends just as before, and that in fact that does not happen. That it never is quite the same, after one has crossed the road, and one has to accept that. He paused, and then said "Last time." Thirty or so friends heard that speech for the last time. It was delivered stone-cold, with no surrounding context of a particular case. One knew how effective it had been. That night, one could see why.

And one knew too, that in delivering it that one last time, John Starke was saying goodbye to us, and to a part of himself, as he shut that door on the friends and the work and the life he loved, to turn to where he perceived that duty lay.

KEITH ARTHUR AICKIN

Keith Aickin came to the Bar in 1949. That was almost a decade later than it might have been, for he had been with Sir Owen Dixon in Washington during the war, and he served with the United Nations for some years. He read with Mr. Alistair Adam, who more than once was heard to complain "I've got the cleverest young man in Melbourne reading with me, and no one will give him a brief." And indeed at a pretty busy time for the Bar, Aickin did for much longer than most people sit in chambers with little of his own work to doNo doubt being a decade out of touch with his contemporaries did not help. Added to which he was very reserved. He was not quick to make friends. When he did so he made lasting ones, though there were large areas from which even good friends stayed away. He was a very private person.

Inactivity could not last. His beautiful mind, clever, penetrating, analytical, quick, coupled with great knowledge of the law, great industry, and great ambition, could not be held back. When work came it was done quickly and well, and more work followed. Very soon he was being briefed as junior in large matters. And very soon he passed beyond that. If his intended leader became unavailable, the solicitor could bring in another leader if he chose. But from the start Aickin would never suggest that he do so. He was always willing to continue alone; or with a junior, if two heads were required. The ambition and the confidence were matched by the ability. By 1953 he had appeared as a junior in the Privy Council and was regularly appearing on his own in the High Court. He took silk in 1957, after eight years at the Bar.[2]

1. As years pass the point of the answer may become lost. During a football match played at the Melbourne Cricket Ground, onlookers became aware that Mr. Laurie Mithen of the Melbourne Football Club was lying on the ground. Investigation showed him to be unconscious. The only person in the vicinity was Mr. John Winneke of the Hawthorn Football Club, who when brought under observation was standing a yard or so away, whistling quietly. The question of what had happened to Mr. Mithen remains a mystery. No umpire saw anything. The match was being watched by numerous football commentators and some 80,000 spectators, but I am not aware of any commentator or spectator who claims to have actually seen anything happen. Mr. Winneke has never made any admission. Certainly it appears that Starke had his own views. It is noticeable that when asked whether they think he would do such a thing, Mr. Winneke's best friends are inclined to avoid answering.

2. The period may be compared with the following as taken from *Who's Who*: Marks and O'Bryan JJ. 17 years; Kaye J. 16; Brooking and Fullagar JJ. 15; Murray, Murphy, and Ormiston JJ. 14; Young C.J. 13. In those years the next quickest after Keith Aickin seem to be H.E. Mr. Richard McGarvie and myself, 11 years. Aickin's eight years is Bradmanesque in its departure from the parabola formed by the figures of all other players.

Michael Rozenes and Jeanette Morrish

SEK Hulme, Ron Castan and Sir James Gobbo

After some years as a silk Keith Aickin declined the first offer he received of appointment to the High Court, preferring to stay at the Bar and to serve on the boards of a number of public companies (BHP, Comalco, P. & O., Mayne Nickless). It was marvellous how he fitted his commitments together, and combined them with a large opinion practice also. He became one of the handful of appellate advocates who have acquired an Australian-wide reputation and at any rate in certain sections of the public, fame: one of the line of say Mr. Owen Dixon, Sir Edward Mitchell, Mr. Robert Menzies, Sir Garfield Barwick. The line has not been added to since Aickin accepted the second offer of the High Court, though Mr. Murray Gleeson of Sydney might well have joined it had he not become Chief Justice of New South Wales. At the time of his death Sir Harry Gibbs justly said:

"It is in no way disrespectful of Sir Keith's contemporaries to say that by the time of his appointment to this Court he was the most distinguished barrister in Australia."

Adept and courteous as Aickin's approach was, it was not all done with gentleness. His arguments spared no one, and toes were trodden on from time to time. Whatever the rights and wrongs (a good lawyer likes to hear both sides), one former opponent and friend has not quite forgiven him, thirty years on, for failing to intervene while the opponent was building a substantial argument on a decision of the Court of Appeal, not realising that under a different name the decision had been overruled by the House of Lords. Instead of intervening, Aickin watched the erection of the whole house of cards, and when he came to argue demolished it with one quick blow.

With Sir Frank Kitto on the High Court there was difficulty more than once. For whatever reason Kitto found it easy to be annoyed by Aickin. Sometimes this arose from Sir Edward McTiernan raising a point the rest of the court had dealt with the day before. Aickin always acted on the basis that every judge's vote was of equal importance, and he would stay with McTiernan for as long as seemed to him desirable, even if Kitto was getting very impatient indeed. On other days there were no doubt other causes.

Once at least a trap was laid. In 1966 Aickin was arguing a Section 92 appeal. The case concerned a substance he repeatedly pronounced "margarin". Kitto tumbled into querying the pronunciation. "When I was young we called it margarine." Aickin happened to have with him Fowler's *Modern English Usage*. Very deliberately he read the relevant passage.

"The pronunciation marj instead of marg is clearly wrong. It was nevertheless prevalent before the war, when the educated classes had little occasion to use the word."

Which left Kitto, for that day, just where Aickin that day enjoyed seeing him.

Aickin finally went to the High Court in 1976. He died in 1982, in tragically unnecessary circumstances, too soon to have made a judicial contribution reflecting his rare talent. One is left to mourn, more greatly every day, his absence from the High Court in the turbulent years since 1982.

In the case of both Starke and Aickin, the great achievement was as barrister; as advocate. Fame as an advocate is a fragile thing, a vague legend among the ranks of the continuing Bar, less and less of whom, after even a few years pass, have a personal recollection. I trust that it has not been inappropriate to refurbish, at a dinner of the Victorian Bar, a little of the story of the two towering figures which that Bar produced in my time as a barrister.

And I thank you, Mr. Chairman whom earlier I most unjustly slandered in the cause of an easy laugh, for the honour you and the Bar have done us all, in inviting us to be your guests of honour tonight.

A JOURNALIST GOES TO THE BAR DINNER

THE FOLLOWING DIARY EXTRACTS WERE obtained by the Bar after a successful application under the *Freedom of Information Act*. The Bar has been aware for many years that there have been undercover operations and leaks organised by leading newspapers; this confirms all suspicions — only the names and sources have been suppressed . . .

EXTRACTS FROM THE DIARY OF MS X, CADET JOURNALIST

1 JUNE 1993

Wow! I'm going to be a Mole. The Sub-Editor, (Society, Sport and Law) called me in. She wants me to go under-cover. To pretend to be a junior barrister at the dreadful Bar Dinner! Wow! Evidently the paper has a friendly barrister who will pretend that I am a reader which is like an apprentice-type thing. The barrister will get me a ticket and I am supposed to blow the whistle on the barristers' secret society known as the Cosa Bastra! Gee whiz! I don't know much about these baddies, but the paper is sending me on a crash course with our legal reporters, also they are buying me a little short black dress, 'cos that's what lady barristers wear to these do's.

3 JUNE 1993

Boy oh boy! Are these blokes shockers!!! I've had a real intensive bone up from our senior reporters. (Mainly in the pubs, ha ha!!) The blokes told me that there will be hundreds of these barrister jokers plus all these sexist judges at the World Trade Centre. All I've got to do is sit at my table and record what they say, *plus* the really bad right-wing sexist-racist speeches that go on for ages.

Now I've got to be careful, 'cos these lawyers are all right wing, sexist, racist, and went to public schools, which of 'cos are not public but private. Gee, I've never met a public school boy, I'm a little bit scared!!

5 JUNE 1993: 5.30 p.m.

Like I'm a bit freaked out! They've got me done up in the little black dress, and I've had hours with the hairdresser, and the barrister has told me about knives and forks, and not to say much, 'cos he thinks no-one will think I'm a reader like if I open my mouth too much. I've got butterflies! I'm supposed to meet him at 7.00 p.m. there. He's warned me that these are real slippery dudes! I hope I can pull it off!!

5 JUNE 1993: 7.00 p.m.

What a shock! Nobody told me that barristers were so multicultural. I went into this great big room at the Congress Centre and like Wow! It turns out that they are all mostly Philippinos! There is a band and Cory Aquino is there. Gee! I had a real beaut time. Four men asked me to marry them — and then I found out I was in the wrong place! This was the Miss Philippino Contest, the Bar Do was next door! I had to rush!

7.30 p.m.

The barrister was real uptight-like. He thought I I'd chickened out, and he was the one who had stuck his neck out to expose these right-wing capitalists. I calmed him down, and next thing we were sitting down. Wow! There were lots of females, I thought they had brought their wives! But I was wrong, it seems there are quite a lot of female barristers, but they are all repressed, and down-trodden, and picked on, like the working class. All I could see was this nice looking lady, who everyone said was called A.G., and like she seemed surrounded by girl barristers all night, being real nice and cheesy like. Some big fat bloke said they all wanted a job as a judge or something. He said I should have a go. I reckon I'd be better than him!

8.30 p.m.

I just got the recorder going. Geez can these blokes talk. They're all talking about cases, or whose gone broke, or how great they are. There was some bloke talking about what everyone is wearing. He asked me what designer I've got on. I said K-Mart, and my barro kicks me under the table and says I am a real funny girl and that it really is an Anthea Crawford, Armani Valentino

Tsalinidis, Wentworth, Billings, Symon and Phipps

Simon Wilson and Paul Elliott — style.

dress! The other bloke says it looks like I made it myself. I reckon he's real cute. In fact, I drank some of this white wine, which wasn't lexia, and I reckon most of these dudes are pretty cool.

9.30 p.m.

Some old guy with white hair, and a funny type way of talking is the M.C. I had some of the red wine, which was not lambrusco type, and I thought that the whole show was a bit like my sister's wedding at Camelot in Chadstone. Well this bloke is the chairperson or something like that, and he tries to crack some jokes, and some of the blokes say rude things about him and then next on is this real spunk. Everyone says he is Mr.Junior Silk but he looks too big to be a jockey. Man is he far out! Like he's got a great punk hairdo and specs straight out of the *Rockey Horror Show.* Frank N. Furter eat your heart out! Boy oh boy does he fang everyone! Even little me could work that out. Geez I got a shock though when he got stuck into the premier Jim Kennan. He's a real good bloke cos' he offered me a job later in the night, at the Fantom of the Opera Galah Performance.

10.30 p.m.

What a talkfest! Two older type gents tell jokes about Oxford and London and the grey fella gets up and has toasts to the Queen. I didn't want to get up, 'cos I don't believe in Queens, but the barro made me. The food is great! Just like the pumpkin soup and lamb that gran cooks up after a rally. But all these blokes do is whinge about it. I can't believe it. Some joker is talking about King and country, and the war, and some joint called Sellburne Chambers.

11.30 p.m.

This fella with a stud in his ear is talking to me. I like him! He wants me to go to Silvers or some oldies' disco like that. He reckons he's gender free or something. He's a spunk. But the boring barro I'm with says no. He keeps talking about monopolys, and trade practices, and micro-economics and guilds and things. He's a drag even though he reckons he's cool and lives in North Fitzroy.

12.00 a.m.?

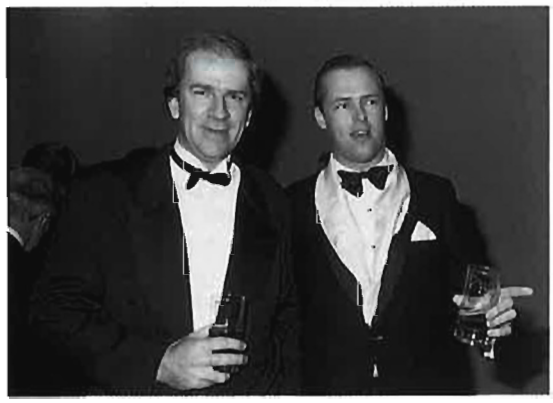
I'm crook. All the girls in the loo are moaning about how they can't afford a new dress. Some nice chick keeps telling me she's not wearing curtains, but her dress is a hair loom. I got out of there and ran into the rest of them in their dinner suits. Seems most of 'em aren't making a crust, and every-one wants to put 'em out of business. I feel sorry for some of them. Obviously they haven't been able to afford a new monkey suit since the '60s. Then this old judge fella tells me about the Westminster system of government, and protecting poor people from politicians, and it seemed to make sense to me.

Getting the joke

12.30 a.m.

Geez I love that port drink. Blokes are running all round the room. They're real friendly. I'm feeling a bit wonky. Got to go. The lights are goin. I'm

Bob Douglas and Phil Dunn. The weight watchers



Ian Jones and Gerard Meehan

off to the disco. I just love barros. I think I'm in love with a tall young one.

7 June 9.30 a.m.

I told the sub-editor what barros are all about, and judges, and how great they are, and how they're not all rich, and arrogant, and wasps and there are lots of women, and that I'm engaged. She was not impressed and told me to change my ways or I'll be out.

This is her headline for my article!

BARRISTERS' RIGHT WING RORT

At the 1993 Bar Dinner the fat cat barristers and the sexist judges feasted while society starved. Our own undercover journalist reported on the outrages of .....

Gee, did I write that! Anyway Gerard is taking me out to Lynch's next Friday, perhaps I could go back to school and do law??

Lois Lane

VERBATIM

County Court of Victoria

Coram: Judge F.B. Lewis
23 April 1993
The Queen v. *White and Gowar*
McNiff prosecuting
Tehan and Lindner for co-defendants

Tehan: No weapons were thrown from the car, were they? . . .
Witness: You know — oh weren't they? Were you there? You sound like Perry Mason, but you're not as good looking, but there again. This is what Morphine does to you . . .
His Honour: Mrs. Parker . . . ? . . .
Witness: It gives you a fine sense of humour.
Tehan: You intended to confront the people in the green car did you not? . . .
Witness: Pardon?
Tehan: You intended to follow the people in the green car, did you not? . . .
Witness: You're a sick man.
Tehan: My wife would like to hear that, but . . . ?
Witness: I thought I needed medication, you definitely need something.

County Court of Victoria

Coram: Judge Byrne
16 April 1993
Air Repair Services Pty. Ltd. v. *N. & C. Finance & Investments Pty. Ltd.*
R.H. Miller for the Plaintiff
J.D. Wilson for the Defendant

Mr. Miller: (looking for documents on the Bar table): Could your Honour excuse me just for a moment.
Mr. Wilson: (having trouble retaining fluid): Your Honour, while my friend is looking for some documents — I find myself personally indisposed - would it be possible to stand the matter down for a moment or two?
His Honour: Yes, certainly,
Mr. Wilson: Thank you.
(short adjournment)
The transcript reads:

Mr. Miller: Could your Honour excuse me just for a moment?
Mr. Wilson: Your Honour, while my friend is looking for some documents — I find myself personally a disgrace — would it be possible to stand the matter down for a moment or two?
His Honour: Yes, certainly.
Mr. Wilson: Thank you
(short adjournment)

Federal Court of Australia

Coram: Black CJ, Northrop & Sheppard JJ
Australian Health Insurance Association Limited v. *Esso Australia Ltd.*
Ritter QC and ? for the Appellant
Burnside QC and O'Callaghan for the Respondent

The issue before the court was whether Esso was carrying on a health insurance business contrary to s.67 of the *National Health Act* 1953. Burnside had referred to a number of authorities of state courts in the USA. Questions were raised by the Federal Court as to the standing of those US courts. The following exchange then took place:
Mr. Burnside: Yes, and the New York Court of Appeals in particular I understand to be very well regarded. I am not sure if one can say that about the Louisiana courts but then they are dealing with different problems.
Sheppard J: I do not know anything about it and I did not know what you just said which is interesting.
Mr. Burnside: Yes, it is — Louisiana throws up some very interesting problems for the American law students.
Northrop J: I would think of a purchase, I think a Louisiana purchase. They bought it, did they not, the States?
Mr. Burnside: Yes, they did. There is actually a splendid story about that, a conveyancing story.
Black CJ: We love conveyancing stories, Mr. Burnside.
Mr. Burnside: Yes, well, it is generally not a rich field for humour but a purchaser of a block of land in Louisiana was pressing by his attorney for more and more requisitions on title and the vendor was having difficulty satisfying him that he could showa good chain of title and in exasperation eventually sent a letter which said that the State of Louisiana was acquired by purchase in 1803 from the Republic of France. The Republic of France had it by conquest from the Kingdom of Spain. The Kingdom of Spain had it by discovery of one of its authorised agents, Christopher Columbus, a Genoese sailor. Columbus was in his turn authorised on his voyage of discovery by Queen Isabella of Spain who had the authority of his Holiness the Pope. The Pope, said the letter, is the Vicar on Earth, of Jesus Christ. Jesus Christ is the Son of God and God made Louisiana.
Northrop J: Very good chain.
Mr. Burnside: About as good as you can get. Now I seem to have thrown myself off the track a bit. Perhaps if I can come forward to the New Testament.

Supreme Court of Victoria

Coram: Ormiston J
4 May 1993
Kentcliffe Pty. Ltd. v. *Carlsam Pty. Ltd.*

His Honour (dismissing the plaintiff's application for an interlocutory injunction): "Since the matter must ultimately come to trial if the plaintiff persists in proceeding, it is undesirable that I give a concluded view etc etc . . .

Supreme Court of Victoria

Coram: Fullagar J
January 1993
Adams v. *Wendt & Anor*
Perkins for Appellant
Birrell for First Respondent
Lancy for Second Respondent
(Appeal from a decision of Maugham M refusing an adjournment (inter alia) by reason of unavailability of counsel)

Fullagar J: Finally, in case it matters, I think I may virtually take judicial notice of the fact, as well might the Magistrate, that in the current economic circumstances there are available on any given day in the chambers of Melbourne's junior barristers many industrious young men and women, of some experience, who are only too anxious to get their hands on a brief in the Magistrates' Court and to work on it, especially in the weekend or even overnight.

Supreme Court of Victoria

Coram: Master Evans
National Australia Bank Limited v. *Arthur*

Mulvany: "Master, it is as if I was standing on the bridge of the Titanic . . . There's not an iceberg in sight . . ."
Master Evans: "Perhaps you have something in common with the Captain . . ."

Supreme Court of Victoria

Natwest Australia Bank Limited v. *Tricontinental Corporation Limited & Ors*
Coram: McDonald J.
Myers Submissions p. 3813

Mr. Myers: . . . If that is what is going to be said afterwards it is a very serious allegation, it should be put, and it is an allegation which can be rebutted in other ways if it is put, and Mr. McPhee very carefully did not put it. "Willing to wound but not to strike".
His Honour: You have said that again and I was trying to find it the other day but I could not (inaudible).
Mr. McPhee: Mr. Villeneuve-Smith, Your Honour.
His Honour: Not, it has a —
Mr. Myers: It is from Shakespeare.
His Honour: No, it is Saint somebody. I know the source of it, Jim Edwards will tell it to me, because it was one of Barry J's favourite pieces in his judgments.
Mr. Myers: Very apt for the present case, Your Honour, too.
His Honour: I was thinking of it the other day and I was trying to come to the source of it. I think I will have to go beyond Mr. Villeneuve-Smith for it.

Myers' Submissions: p. 3815
His Honour: Yes, Mr. Myers?
Mr. Myers: If Your Honour pleases, just one last submission, Alexander Pope said those words.
His Honour: When?
Mr. Myers: Not a saint but a pope, Your Honour.

Miscellany

Extract from a case reported in an unidentified newspaper, apparently at about the turn of the century, discovered in a desk drawer.

"Judge Molesworth on the bench in the Insolvency Court, hearing the particulars of a case in which the liabilities are set down at half a million and the assets at nil, is a very different person from Judge Molesworth in the witness box at the Hawthorn Police Court giving evidence with regard to the loss of a bag of oats. In the former case he is terse, logical, incisive, correct. In the latter the drama unfolds itself like this:
Police Sergeant: Take the Bible in your right hand. The evidence you shall give in this case as between our Sovereign Lady the Queen and the prisoner at the bar shall be the truth the whole truth and nothing but the truth so help you God. Kiss the book. Your name is Hickman Molesworth, I believe, and you are a judge in the Insolvency Court.
Witness: Yes. But permit me to say that I —
The Bench (patronisingly):

Kindly answer the questions put to you, and avoid as much as possible the introduction of irrelevant matters.
Witness: I was merely going to say, Your Worships, that this man has been in my employ for a considerable time, I think since the year that Gladloth won the Cup — or was it Bravo's year? — and during the whole of that time I never —
The Prosecuting Sergeant: I was not asking you what year Bravo won the Cup. I want you to tell the Bench, as far as you can recollect, under what circumstances —
Counsel for the Prisoner: Your Worships, I must protest against this unfair attempt to trap the witness into admissions. You can see for yourselves that he is completely ignorant of the procedure in a court of justice, and is evidently desirous of saying all that he knows about the matter. Please go on with your statement, sir.
Witness: I recollect that when the accused was saddling up my roan cob for the meet of the Findon Harriers last Friday fortnight I asked him what sort of a day he thought we were likely to have, and he said . . .
The Bench: Have the goodness to speak up, sir, and remember that we wish to hear what you have to say.
Witness: The accused said that if we got a fox at Epping at this time of the year he would eat him, and I said.
The Bench: If you continue to prevaricate in this gross manner, sir, we shall be under the painful necessity of committing you for contempt.
Witness: But,Your Worships.
The Bench: Case dismissed".

Failure to Pay a Debt of $0.00

A member of the Bar received a registration certificate in November 1993 requiring payment of a registration fee of $0.00. He wrote to the Ombudsman in the following terms. Re: Motor Vehicle C52705

In the month of October last year I received a demand from Vic Roads for the sum of $0.00 in respect of this motor vehicle. I paid them the sum of $0.00. About a month later they again demanded the sum of $0.00 and I again paid them the sum of $0.00.

I have now received a third demand for the sum of $0.00 and a notice that my vehicle is unregistered and uninsured until I pay a third amount of $0.00. Could you please put a stop to this nonsense.

Enclosed is a copy of the offending document (I am keeping the original so that I can dine out on it).

Yours faithfully,

As a result of that letter he received a reply from the Ombudsman in the following terms:

Re: Motor Vehicle C52705

Upon receipt of your letter of 1 April, I contacted the Roads Corporation and enquired as to the cause of the problem you experienced with the registration of a trailer. I have now been advised that the situation was the result of:

(a) an administrative error when the problem was not corrected after an incorrect notice (private registration) had been issued for the trailer in October 1992 (following transfer of ownership) and returned with the advice that the trailer was eligible for farm registration; and

(b) a systems fault which had not surfaced previously but which resulted in the types of invoices forwarded to you.

A correct certificate has now been prepared and forwarded to you and the Corporation's systems analyst is working to ensure that there is no recurrence of your experience. I trust that this advice clarifies the matter for you.

Yours sincerely,

The Emperor's Clothing

John Bowman, recently returned to the Bar, had a conference in regard to a WorkCare matter with a plaintiff who was accompanied by her cousin Charlie, the family legal advisor. The plaintiff expressed some concern about the rigours of the court process and wondered about the outcome. Charlie, full of confidence, piped up:

"Don't you worry Mary, you will get justice and a good go because there's a whole lot of new judges. They got rid of the old lot."

Counsel for the plaintiff made no comment.

Muzak Master

The appointment of Barry O'Keefe as the new Chief Judge in the Commercial Division of the Supreme Court of New South Wales has brought with it a new user-friendly approach to the administration of justice in that State which might well be copied here. "Muzak" has been introduced into the vestibule of the Court building, the purpose being to calm litigants before being set adrift upon the storm seas of litigation. O'Keefe C.J. in Comm. D told Santamaria J.G. that he had been permitted to introduce Muzak by Chief Justice Murray Gleeson on the condition that Gleeson C.J. would choose the discs to be broadcast. The repetitive protest — too much we think — of Edith Piaf's "Je ne regrette rien'' supplies some degree of verisimilitude to what might otherwise be dismissed as a bald and unconvincing narrative.

LUNCH — NIP'PON KINGS

IT HAS ALWAYS BEEN A MOST DIFFICULT decision — where to go for lunch. Even when the price range and the type of cuisine are resolved the choice can still be hard. For instance, after an exhaustive, elimination process you have set your heart on cheapish, handy, Japanese cuisine.

The choice then becomes *Hanabishi* or *Torimatsu*. They are both reasonably priced, around the corner on the Western side of King Street between Little Bourke and Lonsdale Street (or for the more lunchminded between "King Cons'' and "Kays on Kings''). They are both sushi bars and they both have a range of "lunch boxes'' priced in the $15-20 range. In both cases the lunch boxes are well presented, colourful and, for most people, sufficient for lunch. But there the similarities end.

At Torimatsu it is almost always easy to get a table, albeit that the senior waitress may appear quite dogmatic about precisely which empty table you can occupy, whereas at Hanabishi you either book, turn up well before lunch or arrive unbooked and after 1 p.m. prepared for an upstairs seat if such is available. Fridays are usually booked out at the latter establishment.

At Hanabishi the waitresses are demure but have a difficulty with English. At Torimatsu the waitresses have a good facility with English but can be rather curt.

The service at Hanabishi is generally unhurried to the point of being oh so slow — especially upstairs where one would hesitate to repair if due back in Court at 2.15 p.m. By contrast, if you dine at Torimatsu you can be sure of being back in Court well before 2 p.m. especially if you arrive just after 1 p.m. Whilst it can be quite a time-consuming process getting the bill at the former and even paying it, at the latter it is more often than not brought out with the main course and whether you have eaten or not there is an insistence on it being paid by 2.15 p.m. because "we now close cash register''.

Hanabishi has a substantially larger menu but few if any daily specials. Torimatsu, on the other hand, has a smaller menu supplemented by a rather

Hanabishi

Torimatsu

tatty typed list of daily specials some of which come and go from time to time. Torimatsu tends to be just a little cheaper and the serves a fraction larger. It is BYO whilst Hanabishi is licensed with a not too expensive wine list. The food at both establishments is excellent, well presented, colourful and very good value. The only criticism that could be made is that Torimatsu's gyosha (Japanese dim sums) can be rather well cooked on the bottom to the point of being a little too brown. Then again the main courses, especially the cooked dishes, are so substantial as to obviate the necessity for starters except for the more gluttonous amongst us.

At Hanabishi one can linger on after eating — drinking tea, consuming alcoholic beverages, conversing or doing whatever one does to pass time until loins are girded for the return to the pink palace and the comforting, welcoming arms (metaphorically speaking) of one's clerk. You will not be tossed out of Torimatsu at 2.15 p.m. but you may come to feel a little after that time that your imminent departure would not be unwelcome particularly as your waitress, the other waitress and the whole of the kitchen staff have sat down at a nearby table to a lunch to which each of them is devoting their entire attention. After all, you will have sorted out your bill a little earlier on!

So, if you have made an early decision and booked, want a longer, slower, more demurely served, slightly smaller, little more expensive lunch go for Hanabishi. If you have made a later decision, need to be away a bit more quickly, want to bring your own booze, desire a larger cheaper lunch and believe that service is not everything Torimatsu is for you.

Whichever you choose will provide good food at good value and, in the main, food that you can easily convince yourself is healthy, low in cholesterol and low in carbohydrates.

The decision is not an easy one but then you are trained, skilled, experienced and adept at making the hard decisions, aren't you? Or as someone whose name temporarily escapes me once said: "Life ain't meant to be a bed of roses" or words to that effect.

Hanabishi Japanese Restaurant
187 King Street, Melbourne, 670 1167
Torimatsu Japanese Restaurant
179 King Street, Melbourne, 670 9683

Bon Appetit!
Graham Devries

LAWYER'S BOOKSHELF

Brewer's Dictionary of 20th Century Phrase and Fable

Edited by Market House Books Ltd. (David Pickering, Alan Isaacs and Elizabeth Martin)
Cassell Publishers Limited,
1991 pp. i-ix, 1-662
R.R.P. Hard Cover $45.00

If it ain't broke, don't fix it. It takes a brave editorial board to set out to replace the venerable Dr. E. Cobham Brewer's *Dictionary of Phrase and Fable* which has a pedigree of fourteen editions from 1870 to 1989. In fact, the editorial board did not set out to replace the original Brewer's. Because of information explosion — the information unleashed in this last decade of the 20th century will exceed that of the first nine decades — the editors decided that the time was ripe for a separate Brewer's confined only to modern phrase and fable. Thus, on their own admission, the editors do not suggest that reference librarians throw out their old Brewer's and replace it with this brand new text. Rather, the two should stand side-by-side: the original for phrase and fable dating from antiquity and this latest volume as a supplement to the original to bring the ancient up to date.

It is with deep regret that this reviewer reports that the editors have failed. While their motivation was admirable, their execution is lacking. Should readers consider this to be a harsh judgment I plead that my criticism is mild to what would be expected from a reviewer such as Federal politician and ex-Pick-a-Box champion Barry Jones whose inquisitive and acquisitive mind would unerringly home in and detect all the errors and blunders that the editors have permitted to spoil this book. There is no scope for errors in a reference work. Undetected and uncorrected errors will, in time, become received truth for future generations. If we do not protest today when a current periodical *The Australian Magazine* describes Yankel Rosenbaum as dying in New York from gunshot wounds when in fact his death resulted from stab wounds, can we complain if those who follow perpetuate the error?

Consider the cross-referencing of entries in the text: the page 224 heading *Gehazi* merely directs the reader to *Marconi Affair* — a perusal of that entry (p.304) leaves the reader well informed on the Marconi affair but no wiser regarding Gehazi whatever it, he or she may be. Similarly, at p.129, *Culebra Cut* see *Panama Canal* is unhelpful, there being no reference to the Culebra Cut in the *Panama Canal* entry (p.461). However, if the reader is fortunate enough to stumble upon *Gaillard Cut* (p.219) he or she will learn that the eight-mile cut through the Culebra Mountain on the south-eastern section of the Canal was first named the Culebra Cut and later renamed after the engineer (David Gaillard) supervising the work. Worse still, the page 196 entry for *Feynmann diagram* refers the reader to a non-existent entry for *Quantum Electrodynamics*.

Spelling or typographical errors abound. Perhaps the reader should be thankful that Gene Kruper is not described as a drumma in Benny Goodman's bank (p.327). At a time when Warren Beatty's movie was current the editors succeeded in inserting an "e" in Dick Travey (p.149) and on p.441 the Western Australian bordertown Eucla becomes Euda — it is perhaps easy to visualise the two letters "cl" being compressed into a single "d". Between pages 12 and 478 Yassir Arafat loses one of the esses in his given name and on p.71 we learnt that counsel for the defence in the Brighton Trunk murder case was Norman Birkott; this reviewer would have preferred Nerman Birkett if we must suffer spelling errors or typos.

The volume contains a number of internal contradictions — the entry for *FDR* (p.193) informs us that Roosevelt was elected as U.S. President on three occasions while *22nd Amendment* states that he was so elected four times (p.622). Under the entry for *third man* (p.606) we are told that the film "The Third Man" (directed by Carol Reed) was made in 1949 and are directed to the cross-reference *Lime, Harry*. By consulting the cross-reference we learn that the film was made in 1942 and was set in post-war Vienna. If that be the case, then post-war Vienna can only be post-World War 1. What is Harry doing dabbling in black market penicillin prior to the drug becoming available in 1943? How did Orson Welles and his cronies make a movie on location in Nazi-occupied Austria?

An appreciation of alphabetical disorder sets in when the reader sees that the entry for *Martian invasion* scare precedes that for *Marshall Plan:* p.386.

Throughout the book there is a sense of wit displayed, e.g. *noovelle cuisine* (p.438) is described as "a highly expensive way of not getting enough to eat". The preoccupation with wit is, however, overdone by frittering valuable space on such evanescent nonce coinages as *Oink* (one income, no kids), *Oik* (one income, kids), *Rumple* (rural upwardly mobile professional) and *Pippy* (person inheriting parents' property) fashioned after the legitimate and accepted *Yuppie* and *Dinkie*. Such entries gain space at the expense of, for example, Prague spring referring to the short-lived flirtation of the Czechs with liberal socialism in 1968. This is definitely the book for those who wish to learn about Gary Glitter and Glam Rock; those desiring to look up the Entebbe Raid or the 1973 Yom Kippur War must look elsewhere.

It is interesting to compare the entries for *Buckley's hope* in the new volume with that from the 12th (or Centenary) edition (1970):

> Australian slang for little or no chance at all, not a hope in hell. Often shortened to Buckley's. Buckley, apparently, was an escaped convict who, after 32 years on the run, gave himself up in 1955 to the authorities and then died the following year.
>
> *(20th Century Dictionary of Phrase and Fable*, 1991)

compare with:

> An extremely remote chance. One explanation of the phrase is that it comes from a convict named Buckley who escaped in 1803 and lived over thirty years with Aborigines. The second explanation derives it from the Melbourne business house of Buckley and Nunn - hence the pun, "There are just two chances, Buckley's or None".
>
> *(Dictionary of Phrase and Fable*, 12th ed., 1970).

One can only express the regret that the present editors did not consult the earlier editions instead of starting out afresh.

The item in Bob Millington's "News Diary" (*The Age*, 9 March 1993) discusses fully the origins of the phrase.

Other entries are laughable: the *Lost Generation* is defined as those young men who lost their lives in the Great War and is illustrated by a Gertrude Stein quotation wherein the shocked survivors of the war are described as the lost generation. Solzhenitsyn's *Gulag Archipelago* is described as a novel and the Tomahawk cruise missile is described as a ballistic missile. Other entries such as *ghost basket case*, *Four-on-the-floor and heliskiing* are liable to raise a wry smile.

Of course, one can always learn. I've been a victim of NASA public relations and consequently believed Teflon non-stick to be a direct spin-off benefit from the US space programme. However, *Brewer's* informs me that it was invented in 1938 and developed for use in 1954 thus predating the Space Age. Can I have faith in this information given the egregious mistakes, errors, blunders and typos that litter the book in abundance? These errors are "like the thirteenth stroke of a crazy clock, which not only is itself discredited but casts a shade of doubt over all previous assertions" — per Lord Light, LCJ, *R.* v. *Haddock* (1935) *Uncommon Law* 24 at 28.

This is not a text to be used by those swatting up for an appearance on *Mastermind* (unless of course, the aspiring entrant is privy to inside information that the judges rely on the same text). Consequently, until an improved 2nd edition is published, readers are recommended to look to the last (14th, 1989) edition of *Brewer's Dictionary of Phrase and Fable* which is still being sold alongside this newer and disappointing pretender. Perhaps the last word belongs to Collins Booksellers which, earlier this year, was selling *20th Century Dictionary of Phrase and Fable* at $16.95.

Brian Briefless

The Money Trail: Confiscation of Proceeds of Crime. Money Laundering and Cash Transaction Reporting

Editors: Brent Fisse, David Fraser and Graeme Coss
The Law Book Company Limited,
1992 pp. v-xxxviii, 1-451
RRP: Soft Cover $90.00

The 1980s witnessed a flurry of legislative enactments concerning the confiscation of profits and other crime control strategies. Among the legislation passed was the Commonwealth's *Cash Transactions Reports Act* 1988, the *Proceeds of Crime Act* 1987, amendments to the *Customs Act* 1901 and various State Acts, including Victoria's *Crime (Confiscation of Profits) Act* 1986. These Acts, with their emphasis on drug offences and white-collar crime, form the basis of Australia's money trail laws.

The Money Trail provides a critical and detailed examination of these laws, both in the context of their application and in contrast to the legislative strategies adopted by other legal systems. It is a compilation of essays, written not only by lawyers and scholars but by people who work in the areas of enforcement administration, prosecution, and banking and finance and who can therefore assess money trail laws from different perspectives than those of legal practitioners or theorists.

Some of the articles contained in this book include *Lawyers, Guns and Money: Economics and Ideology on the Money Trail* by David Fraser, *Forfeiture, Confiscation and Sentencing* by Arie Freiburg and Richard Fox, *Equity and the Proceeds*

of crime by Patricia Loughlan, and David Chaikin's *Investigating Criminal and Corporate Money Trails*. Kevin O'Connor examines the relationship between the *Cash Transactions Report Act* 1988 (C'th) and the *Privacy Act* 1988 (C'th) and Brent Fisse and John Thorton look at the Federal and State laws concerning confiscation of the proceeds of crime. Finally, there are four chapters devoted to the money-laundering laws of England the United States.

Anna Megalogenis

Annotated Trade Practices Act

Russell V. Miller
14th Edition
the Law Book Company Limited
1993

The review of the 10th edition of Miller's Annotated Trade Practices Act published in the *Victorian Bar News* stated that:

"Ever since the publication of the first edition, this short book has proved itself invaluable to practitioners in the area."

The 14th edition is, like earlier editions, invaluable, but at 661 pages can scarcely be described as short.

Since the 13th edition was published there have been two major amendments to the legislation, the *Trade Practices Amendment Act* 1992, which introduced new provisions imposing direct liability on manufacturers of defective goods for personal injury and property damage caused by the goods, and the *Trade Practices Legislation Amendment Act* 1992, dealing with merger regulation. While no cases had been decided under these provisions at the time the 14th edition was completed, Miller includes a useful discussion, based on cases decided under the old merger provisions, of how the new Section 50 is likely to be interpreted. There is also a succinct explanation of the purpose of the new Section 51AA, dealing with unconscionable conduct, and its relationship to the former Section 51A (which has been retained as Section 51AB), neither of which is obvious to the naked eye.

As the number of reported cases on the *Trade Practices Act* continues to multiply, a guide such as Miller is indispensable to the lawyer who needs an overview of an unfamiliar aspect of the legislation in a hurry. For example, the way in which the 50 pages of commentary on Section 52 are structured gives the reader instant guidance to the relevant cases, regardless of whether he or she is interested in aspects of the statutory definition (e.g. *Trade or Commerce*), issues of evidence (*Consumer Surveys*) methods of communication (*Advertising*) or subject matter (*Sale of Business*).

The commentary largely consists of brief abstracts of the cases, rather than textbook-style discussion of general principles, and there is little attempt to deal with inconsistencies between the cases. Whilst this approach is consistent with the purpose of the work (and prevents it from being three times its present size and price), as a result, it may not be obvious that overruled cases have not been deleted from the text. For example, the decision in *Jobbins* v. *Capel Court Corporation Limited* 1989) 25 FCR 226 (which was overruled by the High Court in *Wardley Australia Limited* v. *Western Australia* (1992) 66 ALJR 339) is cited as authority for the proposition that where an applicant complains that misleading conduct induced him to enter in to a disadvantageous contract, the limitation period commences at the date of entry in to the contract. It is not clear from the very general summary of *Wardley's* case that the two dealt with the same factual situation and are not consistent. However, his was the only such slip I detected.

Annette Rubinstein

The Employment Revolution

J.J. Macken
The Federation Press, 1992
pp. iv-vi, 1-138
R.R.P. $25.00

Indirect Discrimination in the Workplace

Rosemary Hunter
The Federation Press, 1992
pp. iii-xxvi, 1-334
R.R.P. $45.00

Environmental Protection and Legal Change

Editor: Tim Bonyhady
The Federation Press, 1992
pp. v-xxii, 1-233
R.R.P. $25.00

Business Ethics and the Law

Editors: C.A.J. Coady and C.J.G. Sampford
The Federation Press, 1992
pp. iii-xii, 1-212

These recent releases by the Federation Press are concerned with some of the more topical areas of the law in the 1990s.

Jim Macken's *The Employment Revolution* is a short and concise study of the dramatic changes to employment practice now in progress both in Australia and internationally. Macken examines the resulting legal changes to the law of employment, in particular the changes to the nature of contracts of employment, as well as the possible directions the common law may take as a result of this employment revolution. Time is also devoted to the changing forms of management structures and peak councils, as well as to unionism and tribunals.

Rosemary Hunter's *Indirect Discrimination in the Workplace* examines in detail a specific aspect of the changing law of employment-workplace discrimination. The focal point of this text is the patchwork of equal opportunity laws in Australia and their particular application to the so-called built-in head winds, which, in spite of the legal recognition since the 1970s of indirect discrimination, still inhibit the employment opportunities of certain classes of people. These classes are identified as migrants, Aborigines and those with disabilities. Rosemary Hunter's work is a major one, devoted not only to the legal and procedural aspects of indirect discrimination, but to the philosophical and sociological ones as well.

Environmental Protection and Legal Change is a compilation of essays on seven areas of the law which play fundamental roles in the shaping of Australian environmental laws - the Constitution, administrative law, property law, torts, criminal law, civil liberties and industrial law. These essays were first canvassed in an environmental law seminar held at the Australian National University in Canberra in 1991. Included in this text are essays by Justice Cripps of the New South Wales Court of Appeal and Justice Wilcox of the Federal Court.

Business, Ethics and the Law, another compilation of essays, is the result of a working group established in 1991 by the Centre of Philosophy and Public Issues (and later joined by the National Institute for Law, Ethics and Public Affairs). This working group considered the future of business ethics in the context of "the potentialities and associated problems of ethical business practice". In particular, the problems of how to introduce higher ethical standards, how to regulate business activity and how to prosecute breaches are examined.

This work contains three sections. The first comprises three essays on how business ethics can be approached. Among the authors are two American professors — Robert Solomon and Father John Langan. The second section examines the role of law and regulation in business ethics. Frank Costigan Q.C. and Professors Baxt, Braithwaite and Gunningham are the contributors to this section. The third section concerns the ethical context in which businesses operate. Amanda Sinclair, Professor Coady, Christine Burnup and Professor Charlesworth have written essays on this theme.

Anna Megalogenis

The Law of Opinions

Donald J. Farrands
The Law Book Company Limited, 1992
pp ix - xxxiv, 1-168
Hard Cover: $45.00

Don Farrands' The *Law of Options* was published at the end of 1992. As the title suggests, this text concerns the law of options in Australia as found in common law and legislation, both Commonwealth and State. It is a small work (there are only 6 chapters), but is nevertheless a detailed and thorough one.

Do not be fooled by the first chapter, which bears the title The Nature of Options. This is not an introductory chapter, designed to fill in space. It is a comprehensive analysis of options, dealing with such topics as the kinds of options recognised by our legal system, their use, whether their form determines their nature, the consequences of characterisation, the "standing controversy", the rights of pre-emption, options over shares and the creation of property upon grant.

Subsequent chapters concern the required elements for a valid option (chapter 2), the assignment of options (chapter 4) and the exercise of options (chapter 3). The final two chapters are devoted to issues of stamp duty and taxation, in particular capital gains tax, as found in the *Income Tax Assessment Act* 1936 and the *Stamps Act* 1958 (Vic.).

Anna Megalogenis

Handbook on Damages

Adrian McInnes Q.C.
Publisher: The Law Book Company Limited, 1992
pp. v-xxiii, 1-133

Essays on Damages

Editor: P.D. Finn
Publisher: The Law Book Company Limited, 1992
pp. v-xxvii, 1-233

The Law Book Company Limited recently released two new works on damages, Paul Finn's *Essays on Damages* and the *Handbook on Damages* by Adrian McInnes Q.C.

Paul Finn's book contains a series of essays by prominent members of the legal profession in Australia and New Zealand. These essays first

appeared in September 1991 at a seminar on damages at the Australian National University. Among the topics are Damages under the Trade Practices Act by J.D. Heydon Q.C., Damages of Purely Economic Rights by Jennifer Stuckey-Clarke, Interest as Compensation by Professor Davis of the A.N.U. and the Effects of Insurance on the Law of Damages by His Honour Mr. Justice Derrington of the Queensland Supreme Court.

Adrian McInnes' book is a brief but concise commentary on many of the principles governing the law of damages. General principles are discussed, as well as specific principles in relation to contracts, torts, personal injury, death and the *Trade Practices Act* 1974 (C'th). There is also a brief commentary on the effect of taxation, although no mention is made of the possibility of capital gains tax applying to awards of damages in commercial matters. Nevertheless, the extensive reference to case law and the small, readable nature of this work make it a welcome companion to every brief bag.

Anna Megalogenis

The Law of Torts

John G. Fleming
Eighth Edition
Publisher: The Law Book Company Limited, 1992
pp. v-lxxi, 1-732
Hard Cover $115.00 Soft Cover $85.00

The eighth edition of John Fleming's now classic text was released in Australia at the end of 1992. First published in 1957, *The Law of Torts* quickly assumed near-biblical status amongst university lecturers. It has now been updated again to include recent amendments to Commonwealth, State and British legislation and nearly 500 new cases.

All the familiar topics, including trespass, interference with chattel, negligence, strict liability, nuisance, products liability and misrepresentation, can still be found in this latest edition of the book. Some matters have been completely revised, while others have remained the same. The chapter on dangerous premises, for example, has been changed substantially to incorporate amendments to the *Wrongs Act* 1958 (Vic.) and the landmark 1987 High Court decision in *Zaluzna* v. *Australian Safeway Stores*.

This book is essential reference for practitioners and students alike. If you don't already have a copy, or have a 1960s or 1970s version of the text, it is certainly a worthwhile investment to obtain this updated edition of *The Law of Torts*.

Anna Megalogenis

Constructive Trusts

Malcolm Cope
The Law Book Company Limited, 1992
pp. v-xxxiii, 1-1011
Price: Hard Cover $175.00

Malcolm Cope's *Constructive Trusts* is a massive effort — 27 chapters and just over 1000 pages of fine print and principles, thoughtful analysis and detailed law. The focus of this text is the development of the law of constructive trusts in England and Australia. In particular, the author examines liability for breaches of trust where property has been disposed of or where profits, benefits or gains have been received. remedies of a proprietary nature are not detailed in this work for, as Professor Cope admits in the preface, this area is sufficiently dealt with in other Australian texts on trusts.

The book is divided into eight parts. The first part, titled "The Nature of the Constructive Trust", is an examination of the various theories expounded in Australia, England and the United States on the nature of trusts. Two theories in particular are highlighted - the institutional theory and the remedial theory.

Parts 2 to 5 are devoted to the acquisition of property in the context of constructive trusts. Part 2, which takes up nearly half the book and contains 7 chapters, examines acquisition by a fiduciary. The liabilities of fiduciaries and of strangers who are constructive trustees are detailed. Part 3 contains only one chapter. It examines acquisition by mistake, fraud, duress or undue influence and any resulting liabilities. Part 4 concerns acquisition on death, including the case where the acquirer is the murderer of the property owner. Secret trusts and mutual wills are also discussed at length in this part. Part 5 examines acquisition of interests in land under oral agreements or trusts. Its only chapter (chapter 14) deals with the Statute of Frauds, the doctrine of part performance and the case of *Bannister* v. *Bannister* [1948] 2 All ER 133, where the technique of the constructive trust was first used to prevent unconscionable denial of a beneficial interest in property.

Part 6 is headed Unconscionable Insistence on Legal Rights, Unconscionable Conduct and the Constructive Trust. It discusses such principles as estoppel in equity (chapter 15), proprietary estoppel (chapter 16), promissory estoppel (chapter 18) and relief against forfeiture (chapter 20).

Part 7 looks at equitable ownership in the context of property disputes between spouses, both married and de facto. Unjust enrichment and unconscionable conduct are also examined in relation to such disputes.

The final part, titled Other Instances of Liability to Account for Property in Equity and the Constructive Trust, is concerned with particular

instances of constructive trusts. They include trusts arising when vendors of property enter into contracts which are specifically enforceable.

Constructive Trusts is thoroughly researched and very detailed. It is a splendidly presented work, and despite its size is easy to use with its index, a properly cited table of contents at the front of the book and at the commencement of each part. There is also a detailed bibliography for those who wish to look further than this already comprehensive work.

Professor Cope has created a gem of a book, well worth the investment.

Anna Megalogenis

Supplement to Understanding Company Law

P. Lipton and A. Herzberg
4th Edition
The Law Book Company Limited, 1992
pp. 1-90

This supplement deals with the *Corporations Legislation Amendment Act* (No. 1) 1991 (C'th), the *Corporations Legislation Amendment Act* (No.: 2) 1991 (C'th), the *Corporations (Unlisted Property Trusts) Amendment Act* 1991 (C'th) and the Corporate Law Reform Bill 1992.

The first Act changes the accounts and reporting requirements of the Corporations Law and provides significant reforms to the insider trading provisions. The definitional sections are explained as well as the substantive and punitive sections.

The second Act deals with the legislative changes to the prospectus provisions. A comparison is made of the old and new provisions.

The third Act provides for certain non-excludable provisions in trust deeds in respect of managers buying back unit holders to investments, and contains certain exemptions to the buy-back redemption notice period.

The Corporate Law Reform Bill 1992 probably has the widest application to the management of companies. The Bill seeks to introduce an objective duty of care and diligence on company officers and also provides guidance with respect to the standard of care and diligence required of them. Loans to directors and asset transfers are also the subject of the Bill. However, the most interesting changes which are proposed are to Section 592 of the Corporations Law, which in certain circumstances makes directors personally liable for debts incurred whilst a company is insolvent. The authors argue that the new provisions cast an even greater burden upon directors in that the new section refers to the directors having a suspicion that the company is insolvent, rather than the current Section 592 which refers to reasonable grounds to expect insolvency. Furthermore, the new provision omits any reference to a defence based upon the debt being incurred without authority or consent.

The Bill also deals with examination of company officers by liquidators, the duties of receivers and administrators and their respective liabilities. The Bill also provides a scheme for attacking "unfair preferences", which is currently dealt with by reference to Section 122 of the *Bankruptcy Act*. Changes are also proposed to the winding up of a company, and the Bill also impacts upon the distribution of the property of a company amongst unsecured creditors.

The supplement contains a useful summary of the new legislation and the Bill, and can be easily crossed-referenced to the main text.

Leslie M. Schwarz

1992 Australian Corporations and Securities Legislation

Third Edition
C.C.H. Australia Limited

This three-volume set contains all of the relevant legislation and regulations relating to corporations.

Volume one contains the *Corporations Act* 1989 and the Corporations Law.

Volume two contains the Corporations Regulations and legislation and regulations relating to Close Corporations, the Australian Securities Commission and foreign acquisitions and takeovers.

Volume three contains the various State Rules of Court; however, in Victoria, the Supreme Court (Corporations Law) Rules 1990 have been superseded by the Corporations Rules 1992, which will obviously be included in the next edition.

The Australian Corporations Law Guide provides a very good commentary on a number of important matters relating to the Corporations Law, including transactions involving shares, fund raising, charges and takeovers. The powers of shareholders and the duties of directors and other officers are also clearly discussed. The final chapters deal with receivers and reconstructions, winding up and reform proposals.

This service was useful when looking at the basis statutory framework relating to corporations and is far less expensive than the loose-leaf services.

Leslie M. Schwarz

Halsbury's Laws of Australia

Volume 6

Halsbury's Laws of Australia adds a truly Australian dimension to the conventional work, *Halsbury's Laws of England*. It is no longer an Australian extension series (as were the *Australian Supplements* to the conventional series); rather, it is

written from a modern Australian perspective, as have been a number of recent Australian texts.

The sixth volume of *Halsbury's Laws of Australia* contains the subjects of contracts and coroners. In form, the work resembles its English counterpart; clearly stated propositions are supported by detailed, well-researched footnotes, revealing a wealth of Australian authority.

As the author of the title *Contact*, Associate Professor Carter has produced a work of great utility.In some respects the text closely follows an earlier contract text in the preparation of which the author participated.[1] However, that observation does not do justice to the work done by the author in an area of law in Australia which is undergoing substantial change. Those who use the new work have the benefit it of the extensive revision, re-casting and updating that the author has undertaken; they also have the benefit of his formulation, and re-formulation, of relevant principles.

The author has included an impressive summary of the principles of promissory estoppel developed in and after the decisions in *Legions* v. *Hateley* and *Waltons Stores (Interstate) Ltd* v. *Maher*; a brief, but useful, treatment of letters of comfort and honour clauses; a note on restitutionary claims for unjust enrichment; a careful note on agency principles under the Corporations Law; a worthwhile note on privity of contract since the *Trident General Insurance* case; and more.

Those practising, or studying, the law have been fortunate that, in recent years, comprehensive texts concerned with the modern law of contract in Australia have been published. The introduction of an up to date loose-leaf treatment of that subject is a welcome, if predictable, further development, and Associate Professor Carter may be justly proud of his contribution to the *Australian Halsbury* to which all practitioners and students need access.

Mr Waller was the State Coroner, New South Wales, and was well qualified to write the Chapter entitled *Coroners*.

The author points to the differences in local statutes which deal with the important role of coroners; summarises the powers and duties at common law of a coroner; provides an outline of rules of practice and procedure in coronial proceedings; and he makes reference to the, albeit few, recent cases concerning who may appear in, and final addresses in, coronial proceedings.

Again, those who have *Halsbury's Laws of Australia* are fortunate to have a work which, in one volume, contains a most useful and up-to-date summary, and comparative analysis, of the law in Australia concerning coroners.

G.R.R.

1. *Lindgren, Carter & Harland:* "Contract Law in Australia" (1986, Butterworths).

Current Criminal Cases

The immediate success of this new publication has confirmed the existence of a gap in the information market for those practising in criminal law.

Current Criminal Cases, which provides monthly summaries of all appellate and first instance judgments, sentences and significant rulings of the Supreme Court of Victoria, has attracted growing interest — and increasing subscriptions — since the first issue was released in February. For the first time, barristers and solicitors practising in the area of criminal law have prompt access to helpful information about recent activities in the Supreme Court. The publication's editorial committee is confident that *Current Criminal Cases* will come to be regarded as an indispensable part of the profession's criminal law library.

The publication had its origins in an attempt by several senior members of the Criminal Bar to pool their "ad hoc" efforts in a co-operative arrangement. David Parsons and Mark Taft had been writing summaries of some Supreme Court cases each month for publication in the *Law Institute Journal*. Nick Papas had recognised the potential usefulness of the wider availability of such summaries and was trying to find the time to develop the idea. They realised the advantages to be gained by combining the information and disseminating it further through a regular publication. The Chief Justice was asked if he could see benefit in such a publication and his response was positive.

The Chief Justice asked Mr. Justice Hampel to chair a series of informal meetings between Parsons, Taft, Papas, Bill Morgan-Payler and Pat Tehan. An editorial committee was formed, the Leo Cussen Institute agreed to add the publication to its list of resources, and a new publication was born. Mr. Justice Hampel agreed to become chairman of the editorial committee and involved his associates, Sandra Davis and now Nick Frenkel, in administrative and editorial duties as well as in contribution of summaries.

A survey of the mailing list reveals that subscribers to the publication are not restricted to members of the Criminal Bar. A considerable number of County Court judges have availed themselves of its services, as have a number of magistrates. Members of firms of solicitors with a criminal practice, including those in country areas, have been eager to make use of this resource, as well as legal libraries. There has also been healthy interest from legal communities interstate.

Mr. Justice Hampel comments:

'The criminal law has become more complex over the years and there is no indication that the trend will change. Recent and proposed changes by legislation in respect to substantive law, sentencing as well as practice and procedure are likely to have a great impact on the practice of criminal law.'It is therefore essential that the

profession is informed as quickly and as fully as possible on the various decisions of the Supreme Court at first instance and in the Court of Criminal Appeal. It is no longer possible to rely on the grapevine for reliable information. Only a few cases are reported and other periodic publications are not nearly as complete or informative. This publication is helping the profession and the courts to keep in touch. 'Many thanks are due to the various contributors of the summaries for their commitment, time and unremunerated labour.''

The contents of the publication are compiled by an editorial committee of seven members of the Criminal Bar under Mr. Justice Hampel's chairmanship, from material supplied by a variety of contributors, including members of the Bar, judges' associates and some solicitors who practise as advocates. Cases are presented in a standard format designed to allow easy and rapid access to the particular type of information sought by the user. A set of catchwords identifies the main issues raised by each case.

The editorial committee and publishers intend to release issues of *Current Criminal Cases* eleven times each year, as well as an occasional extra "flyer" to disseminate information about matters or urgent interest. Interest has been shown in purchasing the publication on disk, and this option is being considered for future issues.

The annual subscription to *Current Criminal Cases* is $150, with a 15% discount available to groups of ten or more orders. There will be an annual index, and a binder is supplied. People interested in subscribing should contact the Leo Cussen Institute at (03) 602 3111.

CONFERENCES — THE WAY THEY WERE

THE PHOTO BELOW WAS TAKEN AT THE Southern Command Legal Conference on 20 February 1966. Readers are invited to identify well-known members of the Bar and other prominent lawyers camouflaged, and in some cases partly hidden, under the peaked caps.

A prize of a bottle of Essoign claret is offered.

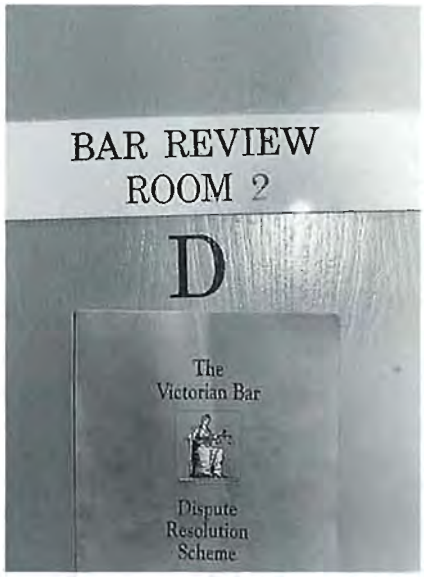
The identities will be revealed in the Spring issue.

MEDIATION CENTRE OPENS

THE HONOURABLE JOHN HARBER PHILLIPS, Chief Justice of the Supreme Court of Victoria, opened the Bar's Mediation Centre in Four Courts Chambers on 15 March 1993. The Mediation Centre located on the first floor of Four Courts Chambers provides facilities for mediation which are available to mediators generally. But it is hoped that a large part of their use will be by mediators who are members of the Bar.

All members of the Bar were invited to attend. Some fifty or so did attend, together with representatives of the judiciary (including Chief Justice Black, Chief Justice Nicholson and Chief Judge Waldron), and representatives of the Law Institute attended. Also present was Senator Barney Cooney, Chairman of the Cost of Justice Inquiry, who was no doubt delighted to see the Bar moving further in the direction of mediation and cost-cutting.

Mediation being such a dry matter, the guests subsequently repaired to the Chairman's room to slake their thirst.



The Script Room

At the Mediation Centre, Black CJ, with Senator Barney Cooney

OPENING OF VICTORIAN BAR MEDIATION CENTRE

Monday, 15 March 1993

MR. CHAIRMAN OF THE BAR, YOUR HONours and other distinguished guests, ladies and gentlemen.

This afternoon I had an earlier engagement in Lonsdale Street and I found it convenient to come here via Owen Dixon Chambers West. At the portal of that tower of learning I came up against a large sign, in stark black and white. It read: "NO HAWKERS, PEDDLERS AND CANVASSERS ALLOWED". I was taken aback by this because, as Chief Justice, I presently follow all three of those occupations. Some of you will know of my affection for Dr. Johnson and his famous dictionary. "Peddling", according to the good doctor, is "the dealing out in petty quantities or trifles". Having heard that, you will readily understand that my peddling activities relate to my administration of the budget allowed to the Supreme Court by the Government. I will be engaged in the other two occupations as I speak to you this evening, for Dr. Johnson defines a canvasser as "one who solicits adherence to causes" and a hawker as "a loose fellow who stands about crying out".

There are a multitude of disagreements about our justice system. But on one matter, all agree. This is that the two principal problems are cost and delay. In some quarters the judiciary and the profession are portrayed not only as the prime causes of these problems but as being indifferent, through complacency, and/or unwilling, through self- interest, to obtain their removal. I do not believe this represents the truth. Let me both prove my case and commence my hawking and canvassing.

Last year a group from the judiciary and the profession studied the criminal process in the Magistrates' Court. It was found that of those persons who reserved their plea when committed for trial for indictable offences 80% later pleaded guilty at the door of the court after their cases had been prepared as defended cases by both the DPP and the Legal Aid Commission. It was decided that much earlier identification of these pleas of guilty was necessary and a group of solicitors from the DPP and the Legal Aid Commission started to work on cases in the Magistrates Court from the time the persons concerned were charged— a much earlier involvement than previously. Before this took place the number of reserve pleas averaged 37 per month. In the month after the solicitors started, December, the figure fell to 15; in January it was 5 and in February 6. If that pattern continues it will mean that every month the unnecessary preparation of at least 30 indictable cases will be avoided. If looked at in yearly terms, the figure would exceed 350 cases and the savings in time and expense can properly be described as very significant.

Again last year, the Spring Offensive at the Law Courts, which involved 20 senior barristers and 20 senior solicitors acting as mediators without fee in cases referred to them by the judges, saw over 650 cases disposed of between September and December and the unacceptable backlog in the civil list removed. Of those sent for mediation, namely 218, over 50% were settled and many others settled immediately after mediation. It should be noted this exercise was performed on cases that had been in the list for a considerable time. In future we must work to bring mediation to bear on suitable cases as soon as the issues are defined and before costs start to mount up.

In future we must work to bring mediation to bear on suitable cases as soon as the issues are defined and before costs start to mount up.

In the Supreme Court this term there is occurring in the criminal list what some call "the summer war". I call it caseflow acording to "the Cato principle." You will recall that Marcus Cato was the Roman jurist who kept on repeating that economical advocacy is, by definition, good advocacy. The judges have been conducting mentions hearings for all the cases and have become somewhat more involved in their conduct while, of course, continuing to stand in an independent position between the parties. So far this term 18 cases involving charges of murder or attempted murder have been completed. Generally speaking, the mentions system and consequential directions have halved both the numbers of proposed witnesses and the estimated length of the trials. Let me give

you some individual figures. In one case, of estimated 4 to 6 weeks duration, and with 96 witnesses proposed, the trial took 13 days with 31 witnesses being called. In another, 36 witnesses were reduced to 10, and hearing days reduced from 20 to 11. In yet another, 36 witnesses were reduced to 13, and hearing days reduced from 8 to 4. The co-operation of the members of the profession involved has been outstanding.

The Victorian Bar's specially designed mediation centre follows in logical progression from the Spring Offensive. That offensive demonstrated that for many, but by no means all, cases, mediation is a valuable means of resolving disputes. It is speedy,

inexpensive and free of the traumas of the courtroom. These findings are justified by the excellent report on the offensive prepared by the Law Institute of Victoria under the direction of Ms Carol Bartlett. The settlement rate of just over 50% in the Spring Offensive can be compared with the American national rate— and mediation is very common there— of 41%. You know, we all thought that we were doing something entirely new, in part, because the Spring Offensive differed somewhat from previous exercises in other Australian jurisdictions. But we were not doing anything new. When reading Pausanias recently, while researching the Greek jury system, I discovered that under the laws of Solon in ancient Athens, a group of judges and magistrates known as "The Forty" sent complex cases to public mediators for resolution.

Some of the benefits of mediation were brought home to me during a conversation last November at a social function. A man approached me and told me he had been a litigant in a case in the Spring Offensive. I asked him about the experience. He told me that his case had settled, he thought to the satisfaction of both parties, shortly after the mediation. He said that at the end of the mediation he had obtained, for the first time, an entirely objective view of his case and he believed his opponent had done the same. Equally importantly, and I gathered he was a man with some experience of litigation, he told me that the mediation had been entirely free from trauma and strain.

I commend the Bar and its leaders on this new initiative and congratulate them on the work that has been done on it. It must advance the cause of speedy, economical justice. With great pleasure I declare the Victorian Bar Mediation Centre open.

MOUTHPIECE

In the County Court of Victoria

AT APPROXIMATELY 10.20AM ON OR about a day late in the month a swarm of Counsel are gathering together in Court 32. Two of their number have established themselves at the Bar table and appear entrenched thereat. As each member of Counsel enters the Court, massive brief under arm and occasionally with a solicitor in tow they go through the following ritual as they enter their appearance on the Tipstave's list of reserves. After the usual pleasantries upon the briskness of Melbourne's weather and the stuffiness of the Court's air:

Counsel: "Is His Honour part heard?"
Tipstaff: "Yes".
Counsel: "Will the matter go all day?"
Tipstaff: "It appears so".
Counsel: "How are the other judges placed?"
Tipstaff: "I don't know."
Counsel: "I suppose we'll just have to wait and see?"
Tipstaff: "I guess so."

This ritual is repeated approximately 20 times and although the tipstave appears to tire of his role in it he remains courteous to the very end. He does seem to exhibit some signs of relief when the Judge enters to perform his part of the ritual.

Having been through the appearance entering ritual each member of Counsel, in turn and apparently oblivious of those who have immediately preceded him or her, approaches the Counsel entrenched at the Bar table. There is usually an exchange of pleasantries about the weather with differing degrees of familiarity between participants although all affect knowing the others when it is patently obvious in some cases that that cannot be so, or worse still names are forgotten and lapses of memory ill disguised.

Approacher: 'Are you in the part heard case?"
Approachee: "Yep.''
Approacher: "Going all day?"
Approachee: "Yep, and all day tomorrow."
Approacher: "Do you know what is going on in the other Courts?"
Approachee: "Wouldn't have a clue!"
Approacher: "Just thought I'd ask. No harm in asking. You never know. I suppose I'll just have to wait and see."
Approachee: "Mmmmm''

The approachee goes back to reading the documents he or she has been trying to read for some time. It is fair to say that the ritual proceeds with less and less grace, at least on the part of the approachee, as time passes. Occasionally the approachee is substituted by the member of Counsel entrenched at the right-hand end of the Bar table. Sometimes that member of Counsel tries to save the approachee from involvement in the ritual by the engagement thereof in conversation. Inevitably that is as unsuccessful as the reading-the-document ploy!

Having been through the Bar table ritual each member of Counsel then repairs to the rear of the Court to join the growing gaggle of Counsel huddled for mutual comfort by the door. Either of the following rituals is performed by the new member of the group with each existing group member:

Ritual A:
Joiner: "Which matter are you in?"
Joinee: Gives a number between one and ten.
Joiner: "I am in number [a number larger than that of the Joinee]. What's happening to your matter?"
Joinee: "I think it's going ahead although there is no one here yet for the other side".
Joiner: [Body language exhibiting great hope] "So it could be unopposed?"
Joinee: "I wouldn't think so."
Joiner: "One could always hope."
Joinee: "One could."
Joiner: "If it runs how long will it go for?"
Joinee: "That will depend on the other side."
Joiner: "Do you know what is going on in the other Courts?"
Joinee: "Wouldn't have a clue although I heard somebody say that they thought that Court 37 may become free during the day."
Joiner: "That would be a bit of a help I suppose."
Joinee: "I guess I'll just have to wait and see."

There is no response.

Ritual B:
Joiner: "Which matter are you in?"
Joinee: Gives a number between one and ten.
Joiner: "I am in number [a number lower than that of the Joinee]".

Thereafter the parties take the opposite roles to those in ritual A, with the joiner showing a marked disinterest in the joinee's matter.

After the joining ritual is complete the joinee becomes part of the door group and participates in either ritual A or ritual B, as the case may be, with each member of Counsel as they enter the Court on their way to the appearance-entering ritual. Those members of Counsel who are properly cognisant of the appropriate way of doing things ensure that they avoid engagement with the door group and commence with the appearance-entering ritual affecting an air of urgency or exhibiting a demean-

our not unlike that of a certain rabbit in *Alice in Wonderland*:

"I am late. I am late."

Having participated for some little time in the joining ritual members of the door group then engage in the pairing-off ritual:

Counsel 1: "Which matter are you in?"
Counsel 2: States a number between one and ten.
Counsel 1: "We're opposed."
Counsel 2: "What do you think of our chances of getting on?"
Counsel 1: "Not very good."
Counsel 2: "It seems so."
Counsel 1: "None of the reserves got on yesterday."
Counsel 2: "I don't think any settled either."
Counsel 1: "How long do you think it'll take?"
Counsel 2: "Two to three days, would you agree?"
Counsel 1: "Safer to say three to four days."
Counsel 2: "Personally I think that's a bit much but if you say so."
Counsel 1: "Have a chat later?"
Counsel 2: "We'll have plenty of time.

At the conclusion of the pairing-off ritual, which usually occurs just after 10.30 a.m., the Judge enters the Court and shortly after the Court is opened begins the calling-the-list ritual.

As each matter is called and each member of Counsel approaches the Bar table the following checklist is followed by the Court:

Is this a cause or a jury?

What sort of matter is it?

How long will it take?

Can you guarantee that it will finish by the end of this week?

Are there any negotiations?

If the answer is "cause" Ritual C is followed and if it is "Jury", Ritual D.

Judge: "Can you guarantee that it will be finished by the end of the week?"

Participating Counsel will then go through the mating ritual. They return to each other and exchange a series of shrugs, nods, winks and the like. If it is Monday or Tuesday the answer is almost inevitably "We believe we can." If it is later in the week the response is usually in the negative. If it *is* a positive response the Judge will go on with the remainder of the ritual. If it is negative or not answered he will usually abandon the ritual with the words "I suppose I'll have to mark it part heard." The ritual requires Counsel to respond with unbridled unenthusiasm.

Ritual C

Judge: "Are there any negotiations?"
Counsel: "Not yet. But we would appreciate a little time to talk."
Judge: "It looks like you'll have plenty of time to talk."
Counsel: "We are indebted to you sir."
Judge: "Don't go away unless you give my Tipstave your number."

Ritual D

Judge: "Are there any negotiations?"
Counsel: "No."
Judge: 'Will there be any?"
Counsel: "No"
Judge: "No?"
Counsel: "It's a personal injuries matter. TAC made an offer as required at the conciliation conference. It was refused. There will be no discussions."
Judge: "That is the case?"
Counsel: "Yes, Your Honour."
Judge: "So be it. If there are no negotiations there are no negotiations."
Counsel: "Yes Sir"
Judge: "Don't go away unless you tell my tipstave your number''.

Occasionally a less experienced member of Counsel in a matter towards the bottom of the list will attempt to engage the Judge in the following ritual:

Counsel: "Er., um, ah, Your Honour?"
Judge: "Yes!"
Counsel: "Would your Honour be prepared to mark our matter 'not before 2.15'?"
Judge: "I don't think that would be appropriate."
Counsel: "If Your Honour pleases."
Judge: "You can go if you please but you take your chances if you are not here when a Court becomes available."
Counsel: "I think we'll stay, Your Honour."

The swarm of Counsel then somewhat untidily and unhappily file outside the Court and gather in motley groups engaged in desultory chit-chat.

Shorter rituals are observed at 2.10 p.m. First of all there is the truncated joining ritual:

Joiner: "Have you heard anything?"
Joinee: "No."
Joiner: "Doesn't look too promising?"
Joinee: "It doesn't."
Joiner: "We'll have to wait and see."
Joinee: "I suppose so."

They then exchange somewhat bitter and/or disheartening comments about the vicissitudes of life at the Bar and the agonies of not being reached.

At 2.15 p.m. the not-being-reached ritual is performed by the Judge.

Judge: "I'll mark all the reserves matters 'not reached'. You'll get a date with priority. I suggest that those of you with the priority matters today approach the Listings people and see what you can get."

The Listings ritual goes something like this:

Registrar: "I can give you a third priority in about 8 weeks time."
Counsel: "Why not a first priority a bit later on?

Otherwise we'll go through the same shebang again, and again."

Registrar: "I can't. I haven't any free dates for the next three months''.

Counsel: "Why not after three months?"

Registrar: "Can't be done".

Counsel: "It just takes a stroke of the bureaucratic pencil."

Registrar: "Can't be done! The Chief Judge has instructed me not to list *any* matters; for *any* reason whatsoever, more than three months away."

Counsel: "Mutter, mutter. We'll just have to take the third priority."

These rituals are religiously performed for between 18 and 20 days each month except in July, December and January. It is anticipated that they may soon be part of bus tours for those Japanese tourists who are not in Melbourne long enough to attend upon the fairy penguins at Phillip Island.

CRIMINAL BAR DINNER

THIS YEAR'S CRIMINAL BAR DINNER WAS (as always) a suave and elegant affair. Some of those who attended will find it a night to remember. Others will find it very difficult to remember.

The venue for the dinner was "Jim's The Original Greek".

The editors were not present. They believe that if the Criminal Bar Dinner is to receive adequate publicity in the future their attendance as honoured guests is essential.

No one who attended the dinner appears willing to put pen to paper to describe the events of the evening. It may be that this displays wisdom and unaccustomed caution. Much of what went on at

Before the Greek dancing

Phillips CJ and Mrs Phillips

Casey and Fitzgerald

A criminal bar practice

Judge Barnett, Rob Webster and Bill Morgan-Payler

the dinner will remain forever shrouded in mystery.

The food was apparently Greek served in traditional Greek style. The wine was at first believed to be Retsina but turned out to be Chateau Remy van de Wiel.

The major events of the evening were speeches by the Chairman, Woinarski, and his Honour Judge Walsh and an exhibition of Greek dancing by a hitherto unknown international celebrity, his Honour Mr. Justice Hampel. This was followed by much smashing of plates.

The editors look forward to attending.

A FAIRY TALE (continued)

GATHER AROUND ME MY DEARS AND WE will continue the sad tale of the VicBees.

I think I have previously told you about their biggest hive. You know; the tall, pink one — that's right! The one that the VicBees gave away to some big wasps on condition that the wasps made VicBees give them lots of honey whenever they wanted to use the hive. The wasps couldn't believe the good news! They got more honey than any other hive owner and better still, as the hive got older and other hives cost less honey the wasps got even more honey.

Every now and then the chief VicBees would go along to the wasps and see how much honey they wanted for the use of what once was a VicBee hive and the wasps would ask for heaps and heaps of honey. The chief VicBees would then go away saying that it cost too much honey and it wasn't fair. They would tell the other VicBees how greedy the wasps were and how they were going to go back and give the wasps what for. Each time they would return to the wasps and would tell them they were not going to get nearly as much honey as they asked for. The wasps replied, each time, that maybe they would take just a little less honey than they had asked for. So the chief VicBees went back to the other VicBees and said "See we did a good job for you. We don't have to give the wasps as much as they asked for." The VicBees would clamour "It is still too much! It costs more than any other hive we know. Ours gets more expensive each year and all the others get cheaper. What's more the other hives are newer and nicer." There would be a lot of wailing and gnashing of feelers. The Chief VicBees would get angry and say to the other VicBees "We had to give in any way because we promised the wasps heaven and earth and we must keep our promises. Anyway, years ago you didn't object when we made the promises."

Well this year it has been the same as on previous occasions except that the some of the VicBees who did not like the end result decided to organise a meeting to discuss their own approach to the wasps. Of course, the meeting would be quite predictable. All the VicBees' meetings are the same. There are some, who are not the chiefs, who do not agree with what the chiefs do and then there are the chiefs who do not like being criticised and who say that it is always easy in hindsight to say what should have been done and that in any case all the VicBees agreed with the earlier decisions.

The meeting was cancelled when the chief VicBees said they would go back to the wasps and tell them they would have to accept less honey. They met and the wasps said no and the chiefs wrung their hands and said, "We did all we could but a promise is a promise."

In the meantime, the chief VicBees had got for VicBees a share in another hive. There were some VicBees who said the same old things and that it was "the same old story" — the chief VicBees had agreed to pay more honey than was necessary or than if another hive had been chosen'. There was more fun when it came time to allocate spaces in the hive to VicBees. It was decided that "The first shall be last and the last shall be first" and then it became a little of "the not quite last shall be almost first and the first shall be not quite last". A few more variations were tried and somehow every space was filled and most VicBees seemed happy about it. That was quite a "red letter day" although no one celebrated.

Less successful was the attempt by the chief VicBees to use their bombsite/hole in the ground/valuable investment/site with extreme potential and position, position, position. The VicBees were asked if they would like to rent a space to keep their wings when not in use. The rent seemed very high. The interest in the scheme was not so high but those who were interested waited in breathless anticipation. And they waited and they waited. No one was told anything but it appears that the MCCBees, who seemed to know all about such things, or at least think they do, told the VicBees that it wasn't on. It seems that the MCCBees prefer the ambience of a rough debris and weed-filled site to a black, flat site marked out in orderly little boxes.

I do not know if I told you that the VicBees went on a shopping spree sometime after they bought the bomb site and bought an old ready-made hive instead. It did need a lot of work done on it but it was claimed to be a bargain. Of course, there was those VicBees, and there are always

those VicBees, who said that it cost too much and that they knew much better deals than that. You know, it is quite funny — they never come forward before decisions are made and they never push themselves forward to help in the decision-making but they are so skilled and experienced and always so ready to indulge in public and private carping critiques.

Apart from that, life for VicBees has become harder and harder and some are getting leaner and leaner. It is said that there is only enough pollen to cater for 60% of all of the VicBees and that it will soon be a matter of all VicBees having insufficient pollen for their own needs unless somehow there is a vast reduction in the number of VicBees very soon. All VicBees agree (and it is the only thing they agree upon) that there should be a lot less of them but no one seems to think that it should be he or she who ceases to be a VicBee or knows how to achieve that most worthwhile end. Ah "end"! I think that should be the end for tonight.

Be good little dears, brush your teeth, hop off to bed, have happy dreams in these most unhappy times and perhaps there will be more to tell you of the VicBees on another night.

To be continued . . .

A THING ABOUT WORDS

THE PROCESS OF CHANGE IN LANGUAGE includes the drift of meaning, the invention of new words, and the obsolescence of existing words. It is interesting to survey a list of words once disparaged by the arbiters of language as not proper English words. In 1818, Dr Todd published a revised edition of *Johnson's Dictionary*, the first edition not supervised by Johnson himself. It draws on an annotated folio edition which had been owned by Horne Tooke, the politician and pamphleteer. Tooke had compiled a list of words found in *Johnson's Dictionary*, which he regarded as "false English". This list is reproduced in the Todd edition. It includes such curiosities as abditive, acatalectic, conjobble, dorture and warhable.

However, it also includes justiciable, fragile, mandible, mobile, cognitive and horticulture. How the fortunes of words can vary!

Most of the words which perish disappear leaving no trace except in the dictionaries. Some others leave a reminder of their former existence, in a variant modified by a prefix or a suffix.Gruesome, noisome and cumbersome are all in daily use. Oddly enough, *grue, noy* and *cumber* all existed once but have fallen from use. *To grue* is to feel terror or horror, to shudder, tremble or quake. *To cumber* is to overwhelm or rout; also to harass, distress or trouble. *To noy* is to trouble, vex or harass; it is an aphetic form of *annoy.*

Uncouth occasionally gives rise to the jocular *couth.* In fact, *couth* exists with the meaning you would suppose. It survives in Scottish dialect as *couthie*, "knowing proper manners or behaviour". It is derived from the German *kennen* — to know, which also survives in English ("beyond our ken") and dialectical Scottish ("do ye ken John Peel?").

P.G. Wodehouse used *gruntled* as a humorous opposite of *disgruntled. Gruntle* came first. It means to utter little grunts. As a noun, it is the contented grunting sound made by happy pigs; it is also a pig's snout. A pig whose nose is actually or metaphorically out of joint is aptly described as *disgruntled.*

Why did we let to *inkle* slip into oblivion? Its relative *inkling* still flourishes in idiom. To *inkle* is to communicate in an undertone or whisper, to give a hint of something. A perfect word and a useful purpose — it ought to be revived.

On the other hand, *incipient* is not the negative of anything; it comes directly from the Latin *incipere* which means to begin. Likewise *inchoate*, which comes from the Latin *inchoare*, which also means to *begin.*

In [1951] Ch 595 at 607, the word *cohate* is used as the opposite of *inchoate.* This solecism is exposed by Megarry in *Miscellany at Law* at page 33 and the treatment is expanded, and the scorn redoubled, in *A Second Miscellany at Law* at pages 160-161. It is ironic, then, that the correct form of the original Latin is *incohare*, so *cohate* at least shows an intuitive grasp of a hidden truth, even though it is wrong on other grounds.

Another curious victim of the process of change is *whelm.* The OED records that some — but not all — of its senses are obsolete. Those which, at least according to the dictionary, are in theory still current include:

> *to throw (something) over violently or in a heap upon something else so as to cover or crush or smother it, and*
>
> *to cover completely with water or other fluid so as to ruin or destroy, to destroy or submerge.*

The second sense makes *overwhelm* seem tautologous, although the facetious "underwhelm" remains inherently contradictory.

Julian Burnside

AVOCA COURT HOUSE

THE RESTORATION OF THE AVOCA COURT House has featured in one form or another in the winter and summer issues of 1992 and in the autumn issue of 1993.

The renovations are now complete.

The latest newsletter of the Avoca and District Historical Society states:

"The old Court House, once unloved and neglected, now loved and refurbished, was officially re-opened as a Local and Family History Resource Centre on Saturday 17 April 1993 by Mr. Brian Clothier, Deputy Chief Magistrate of Victoria, before a very large crowd".

Avoca may evoke memories of the nearby beautiful Pyrenees Ranges, the wineries and the main High Street with a middle town common and the charming buildings of the golden era. This Court House is an opening to the past and holds many records for your research. The Court House is located beside the police station on the left side of High Street as one enters Avoca from the south.

In *Avoca — The Early Years* Marjorie and Betty Beavis point out at p.18 that:

"Before the Court House was built sittings were held at the Lord Raglan Hotel, but owing to the frequent intrusion of drunken miners, proceedings were often disturbed, and in 1857 or 1858 it was decided to build a Court House".

I attended the re-opening together with my family. Avoca is one of our ancestoral towns. I have learned from my mother's diligent research that family research is important now in order to preserve our history (and ease the workload for future generations). It would have been most helpful if ancestors had consistently left journals and diaries. Much research time including registry searches would thereby be saved.

I am however enjoying trips to cemeteries and country towns and I do thank my mother, a member of the Avoca and District Historical Society, for referring me to their newsletter article about the dash to save the Court House furniture from auction and the *Bar News* for reporting the story.

I suggest that the Bar consider forming a Court House History Committee to assist in preservation of former and present Court Houses and their records.

The opening of the Court House was described in Newsletter No. 103 of the Avoca and District Historical Society.

That special day which this Society has looked forward to, and worked so hard towards for four years, dawned bright and sunny on Saturday, 17 April. The lovely big trees in High Street, Avoca, gave welcome shade as several hundred people gathered to join in the celebrations to mark the re-opening of the old Avoca Court House as the permanent home of the Avoca and District Historical Society. Members and their families and friends mingled and enjoyed a BBQ lunch before taking up their positions, either in the parade or to view the procession.

Members are to be congratulated on their attention to detail with their lovely costumes. What a bevy of beauty were the ladies in their crinolines and pretty bonnets and other fashionable chapeaux. The group was very representative of the area's population of the 1850s, from the clergy to the well-dressed businessman to the Chinese. Several miners were noticed in the parade. They had come into town from their claims at Lexton, Moonambel, Percydale, and the foothills of the Pyrenees. This latter fellow looked as though he had recently had a very good find and had bought himself the smartest outfit in town, complete with bowler hat worn at a jaunty angle. And there, bringing up the rear as always, was a Chinese coolie accompanied by the new chum, carrying "his" swag, just passing

through on "his" way to Percydale. This character would have to be the best disguise of the day, for underneath it we found Hilda Higgins! Another well-known identity in town for the occasion was Glen Mackereth, whose costume featured bowyang trousers.The parade moved off at 2 p.m., led by the skirl of the bagpipes of the Victoria Police Pipe Band and their drummer seated astride "Gendarme". Alas, the gold escort wagon, well-guarded by troopers, did not get very far — a trace broke and we all came to a halt. Fortunately, no bushrangers were around that day to take advantage of the fact that everyone's attention was directed to the repair task in hand. With the halt, any semblance of order among those in the parade was lost, so that we tended to arrive at the Court House in groups, just as our ancestors would have in 1858.

Official guests were conveyed to the Court House in a lovingly restored phaeton whilst President Graeme Mills arrived in a gig. Outside the Court House, our President welcomed the large crowd in attendance and introduced the official guests. Cr. Robert Vance told how Major Mitchell was impressed with the area in 1836 and named it for the Vale of Avoca in the County of Wicklow in Ireland. White settlement commenced shortly afterwards. With the gold rush in 1854, a camp was set up in the vicinity of the present Court House, with a police residence, gold sub-treasury, gaol, etc. Avoca became a municipal district in 1859, a Roads Board was set up in 1862, and it was proclaimed a town in 1864. Today, it is an agricultural and wine area and the Council has recently appointed a team to do a heritage study to assess and suggest ways of preserving our rich heritage.

Our President then gave a history of the Society from its founding by Helen Harris, with less than 20 members in 1984, to nearly 300 today, making it one of the largest societies in the State. The aim of the Society is to embrace all aspects of history - local, social and family. To the Society, every individual and every record is important. Our index system now holds about 55,000 cards.

In 1988, the Society took out a long-term lease on the Court House, which was then a very derelict building, with restoration estimated at $20,000. In only four years, much has been done because of popular support, donations of time, materials and cash. Without them, this project would never have been achieved. The inside has now been completed and the Court House will again be a hub of activity as people find out what happened inside this building 100 years ago.

The Deputy Chief Magistrate, Mr. Bryan Clothier, who had the honour of opening the building, said that a lot could be learned from the past. He commended the little people who look into the families of the little people who made the history of this country.

The Court House opened in 1858 and became a very busy place, as 100,000 temporary visitors came to the area in the gold era. As numbers in population dwindled, so did the number of cases heard in the Court House and the building was closed in 1979.

In declaring the Local and Family History Resource Centre open, Mr. Clothier said it was a testament to those who love their country, those who love their history and those who love their family.

He then unveiled the plaque and the Union Jack was unfurled to the roll of drums. Our President extended sincere thanks to everyone involved in

the exciting day and the Court House was opened for visitors to inspect it before adjourning to the Shire Hall for afternoon tea.

All our official guests said they had looked forward to this day as much as the members of the Society and all enjoyed the occasion immensely. Mr. Neil Comrie, our Police Commissioner, had a particular interest in the old Court House as this was where his grandfather, Trooper Comrie, had given evidence on many occasions.

The wording on the plaque reads: *This Court House, originally opened in 1858, was officially re-opened as a Family and Local History Resource Centre on the 17th April, 1993, by Deputy Chief Magistrate Bryan Clothier after restoration by the Avoca and District Historical Society.*

The success of an occasion like this is due to the generous assistance of many people and the Society expresses its grateful appreciation to each of its members who assisted in any way at all. Indeed, it was a wonderful community effort and we think the following people for the part they played in this very special day for the Society.

We thank our official guests for their attendance; they included Mr. Bryan Clothier, Deputy Chief Magistrate; Mr. Neil Comrie, Chief Commissioner of Police, Cr. Robert Vance, Shire President, Mr. Dick de Fegley, local Member of Parliament, Miss Jane Lennon, Director of the Historic Places Branch of the Department of Conservation and Natural Resources, and Dr. Leonie Foster, Director of the Royal Historical Society of Victoria.

We are also grateful to Mr. John Egan, of Redbank, and the Redwell family for their gifts to the Society, both of which are now on view in our new display cabinet at the Court House. Mr. Egan has presented the Society with the original Court House seal whilst the Redwell family has given a gavel with an interesting history:

"The gavel offered to the Society by the Redwell family is in lieu of their ability to actively participate in the work of the restoration of the Court House. Although recently produced, the gave has historical significance to the Percydale and Avoca district.

"When David Redwell (the first of the Redwell family) arrived in Percydale from Forest Creek, it is said he carried a walking stick made from a cherry tree. He is reputed to have planted the stick in the ground and from which a cherry tree grew, to be the start of a very fine orchard at the Redwell property at Percydale, some of which exists until this day.

The specific tree in this story died just a few years ago and is rapidly deteriorating. However, some of the wood has been salvaged and it is this wood that has been used to produce this gavel.

It is hoped that the gift is suitable for the Court House restoration and will be of some value to the Society."

Richard Brear

FAREWELL: LEGAL BEAGLE (1986-1993)

IT WAS WITH WISTFUL REGRET THAT I read the announcement in *Brief*, the journal of the Law Society of WA, that LB (as he is affectionately known) has retired from the partnership of Reynard, Flook and Beagle and the legal profession. Consequently, his exploits (forensic and otherwise) will no longer be reported so ably by Larry Kent in the pages of that August publication. I am unable to speak for others but in my case it was always the first page I turned to as each new copy arrived and was put on display in the Supreme Court library.

Commencing as a sole practitioner in August 1986 we followed avidly the career of the "Hound of Justice" (as he is also known) and marvelled at his exploits — both defending and prosecuting those who fell afoul of the criminal law in addition to practising in the matrimonial and commercial fields. He also participated on the periphery in the WA Inc. Royal Commission (what WA practitioner didn't have his paw in that pie?). LB did not hesitate to share his practical experience with us — particularly with regard to touting and ambulance chasing. He was a leader of the profession — pioneering TV advertising of his practice and being featured on the cover of *Brief* in December 1986. We watched his practice grow as he took on employees and eventually founded the leading firm of Reynard, Flook and Beagle. We shared the exhilaration of his victories and suffered with him at the claws of the bench: Judges Dogg and Owl and Magistrate Katt.

Away from the profession he was canine, suffering from endearing and common foibles — squeamishly declining to become a blood donor and continually battling to quit smoking. A convivial party-goer (or gay dog in the old-fashioned sense of the word), LB was sufficiently strong-willed to eschew social frivolity when it threatened to interfere with his enjoyment of cultural pursuits and stayed home to watch "The Simpsons" and "LA Law" on the telly.

We'll sure miss you LB.

Brien Briefless

YOUNG LAWYER AWARD

THE YOUNG LAWYER OF THE YEAR award (anomalously made every two years) was initiated in 1987 during the Australian Legal Convention in Perth.

The 1993 awards will be presented in Hobart during the Australian Legal Convention in September.

The objectives of the awards are to encourage and foster young lawyer organisations and individual young lawyers throughout Australia to establish and institute programmes for the benefit and assistance of the profession and/or the community and to provide recognition of the programmes initiated. Awards are made under three categories: professional issues; community issues; and individual contribution to the profession and the community.

Any inquiries regarding the awards should be directed to the AYLS Section Administrator at the Law Council (telephone (06) 247 3788).

The closing date for nominations is 31 July 1993.

CONFERENCES

THE 28TH AUSTRALIAN LEGAL CONVENtion will be held in Hobart between 26-30 September 1993. The convention brochure and registration form have been distributed with the Law Council's publication *Australian Lawyer*. The Convention Secretariat may be contacted on (03) 387 9955. An advertisement for the Convention appears elsewhere in these pages. The Bar's Administration Office can also provide details.

The 13th LawAsia Conference will be held in Colombo, Sri Lanka from 12-16 September 1993. The theme of this year's conference is "Asia on the Leap — The Role of Law". Particulars and registration forms may be obtained from the Bar's Administration Office.

The Australian Lawyers Conference sponsored by Gillis Delaney Brown, Wisewoulds and Dues-

burys will be held in Hong Kong from Saturday 16 October to Saturday 23 October. The conference brochure states that it will "focus on important current issues in Commercial, Family Law and Litigation.' Speakers include the Attorney-General for New South Wales, the Honourable Mr. Justice Rogers, the Honourable Justice Peter Nigh, the Honourable Justice Brian Treyvaud. The conference is being arranged by Creative Conference Management (02) 692 9022.

The Annual Conference of the Maritime Law Association of Australia and New Zealand will be held at the Sheraton Hotel, Melbourne, Victoria from 6-11 November 1993. Persons interested in attending should contact the conference organiser Ms Cindy Last of K.K. Conference Management Services, 627 Chapel Street, South Yarra, Victoria, 3141 (03) 826 2788.

The Union Internationale Des Avocats will hold its 37th Congress in San Francisco from 29 August to 2 September 1993. Inquiries in relation to the convention may be made of KREBS Convention Management Services, 555 DeHaro Street, Suite 200, San Francisco, CA 94107-2348. Fax (415) 255-8496.

The Society of Public Teachers of Law will hold its Annual Conference from 7-10 September 1993 at Queen Mary and Westfield College, London. Topics to be covered include "Professional Responsibility and Large Law Firms, Ethics and Criminal Justice and Professional Responsibility in a Changing Legal World and Professional Codes and Rules."

The Australian Institute of Criminology will hold its National Conference on Juvenile Detention in Darwin from 9-13 August 1993. Inquiries about the conference may be made of Glenys Roussell (06) 274 0224.

The Australian Institute of Criminology has called for papers/expressions of interest for an International Symposium on Offender Management to be held at the Edith Cowan University in Perth, Western Australia on 14-15 October 1993. Inquiries should be made of Sally-Anne Gerull on (06) 274 0230.

The Australia and New Zealand Association of Psychiatry, Psychology and Law will hold its 14th Annual Congress from 7-10 April 1994 at The Esplanade Hotel, Fremantle. Persons interested should contact Tony Fowke, care of Minter Ellison Northmore Hale, fax (61-9) 221 1434.

VICTORIAN BAR CRICKET

Victorian Bar *v.* NSW Bar

ONCE AGAIN THE VICTORIAN BAR XI ventured north to Sydney on the Labour Day weekend to do battle with its NSW counterparts. In these recessionary times fears were held that the Victorians would be unable to field a team. Accordingly there were notably absentees in Gillard QC and Connor.

A Saturday morning flight, followed by a quick check in at the Sebel Townhouse thereafter saw the team disperse to various parts of Sydney for lunch and other less commendable activities.

On the Saturday night the NSW XI entertained the Victorians, and Middleton's girlfriend, at the

Andrew Donald and fiance

The teams

Phil Trigar in mourning with Sydney friends

Ross Middleston and Sydney friend

"Old Mill" Restaurant, Glebe. We dined in grand style and consumed some fine Hunter Valley wines. Some were more satisfied than others. And those that were not, notably the young recruits, sought further gratification at the "Test Tube Factory", Kings Cross where neat alcohol is dispensed by way of a large syringe into the open mouth.

Not surprisingly the skipper had great difficulty in assembling the team on the Sunday morning for the match. In truth, the less said about the match the better.

NSW batted first and made 4 for 227 after 40 overs. As one would expect Harper J and Cavanough bowled conservatively and economically and Donald bowled with flair but expense.

The highlights of the Victorians' bowling occurred towards the end of the innings. A vocal section of the crowd commenced to chant "Sumo" in response to which the skipper handed the ball to Wilson.

It must be said however, that any resemblance between Wilson and his namesake, Mervyn Hughes, stops at the mouth. But nothing will stop "Sumo" from talking about his 1 for 22 which will, no doubt, be added to his endless list of legendary sporting achievements.

The Victorians were all out for 110, with Southall getting 21, Ritter QC 23, Harper J 12 and Elliott 12, who towards the end of his innings became incapable of running, got Bill Gillies as a runner and was promptly run out, Wilson having called for a quick single. Thus Gillies gave away his own wicket and Elliott's for a total of nought! The only other innings worthy of mention was a slashing 6 not out by Trigar, including a glorious drive for 4, prompting calls for his promotion up the list. Captain Middleton made a duck and took no wickets.

We were again privileged to be the guests of the NSW Bar and enjoyed a magnificent social event for which our hosts deserve our thanks.

Bar 1st XI Cricket *v.* Mallesons Stephens Jaques

THE BATTLE OF THE TITANS AT THE PARK

Forty-four doughty warriors launched into the pleasant sunshine on Sunday, 21 March in the annual Bar *v.* MSJ cricket matches at Como Park.

On the smaller ground, the 2nd XI contest saw leather smote often and far, off the willow, by MSJ, who finished with 294 (off 9 bowlers). The Bar's score of 130, after lunch, showed glimpses of skill from Dennis Gibson, thought from Burrows, a gutsy innings from Shatin and an Elliott top score of 20 (thanks to his runner).s

To the south, the Bar 1st XI batted first, hoping perhaps to smear the ball first into the early morning dewy outfield. On a slow wicket the openers were anchored by light and keen bowling. Finally, with Bromberg (20), Kenyon (22) and Connor (27) hitting with style and authority, the Bar edged and creaked to a lowly 118 off 38 overs without real conviction and some disappointments. Later a dry wicket and keen eyes saw wayward bowling from the Bar duly clobbered. The brakes went up how-

ever with a deep set field and steady bowling from Cavanough (2/36 off 8) and Radford (3/35 off 8). At the close and cruising, MSJ were 6/119 off 25 overs.

As in '92, MSJ thus conquered in style.

The motto for the Bar is, practise *with Phil Opas Q.C.* at the MCG each Friday and more matches. The MSJ jousts are always encounters of a pleasant kind, in one of Melbourne's most beautiful parks. Our thanks to Connor, Shatin and Phil Opas Q.C. (for MSJ).

Bar 2nd XI *v.* Mallesons Stephen Jaques

4TH ANNUAL CRICKET CHALLENGE

Sunday 21 March was to the Bar's 2nd XI what Saturday 13 March was to John Hewson's Coalition. Disaster in spades.

The game started well with MSJ losing its first wicket for only 5 runs. Unfortunately the second did not fall until MSJ had scored 95 runs. Thereafter the number of voluntary retirements by MSJ batsmen exceeded the total of the wickets taken by the Bar's bowlers whilst MSJ scored a batting record for Bar — MSJ games.

There was one moment of glory for the Bar when David Habersberger took a brilliant one-handed catch on the boundary which, if it had not been held, would have gone for "6". Bill Lawry would have become hysterical if he had seen it. That was the good news. The bad news was that Habersberger injured his right leg when he took the catch. That meant the end of his bowling and, in a sense, also the game, because he was the best of the Bar's bowlers, having taken 1/15.

Of the other dozen or so catching chances given to the Bar, only John Birrell's excellent slips catch off David Habersberger's bowling was taken.

Apart from a sharp spell of fast-medium bowling by Malcolm Strang (1/35), and some accurate slow-medium bowling by David Myers (0/25), the best that can be said about the Bar's bowlers and fieldsmen is that they made a greater contribution to the scoring of runs whilst bowling and fielding than they did when batting.

The Bar's innings started slowly but, for one fleeting moment when the score was 3/70, it looked like a miracle might happen. However, it was a mirage. As soon as the score reached 70, wickets fell repeatedly leaving the Bar at 8/77. A rear-guard effort by injured Co-editor of *Bar News*, Paul Elliott (20) and Ernie Burrows (14) helped take the score to 130. Ernie's downfall came when he was stumped by Phil Opas whose age is such that he saw Bradman's first innings at the M.C.G. Paul was caught and bowled by an MSJ employee whose name is preceded by the letters "Ms".

Only two other members of the Bar, Denis Gibson (17) and Michael Shatin (15), reached double figures.

At the end of the game, and with only 130 runs, the Bar's 2nd XI had not got within cooee of the 294 runs scored by MSJ.

The only comfort for the 2nd XI was that it scored more runs than the Bar's 1st XI. Shades of the "Live and Sweaty" pre-Barcelona Games song "As long as we beat New Zealand".

Victorian Bar *v.* Law Institute

TO ARRANGE A CRICKET GAME AGAINST the Law Institute is risky business.

Melbourne's inclement weather resulted in three games in a row being washed out. At last on a Sunday in March 1993 the Gods smiled on us, and the 1992 game against the Law Institute got underway. On the previous Sunday the Bar played Mallesons Stephen Jaques. The Bar performed badly in the warm-up game. The call went out for reinforcements for the big game. We needed bowlers. John Jordan and Geoff McArthur answered the call.

The day was overcast and threatening and there was moisture in the wicket.

Jim Ryan, the opposition captain, very sportingly agreed to bat first on what turned out to be a slowish and slightly popping wicket. The Law Institute's openers were very watchful in the first 5 overs. The wicket was difficult and impeded any stroke play. Ross Middleton, a surprise opening bowler (has promised to buy three lunches for the skipper), got the first wicket when he caused a ball to rise abruptly (it was really the wicket that did the work) and the catch was taken in slips. Geoff McArthur followed up by bowling a former member of the Bar, Ian Dallas, who in the past has dominated these games. Geoff McArthur ended up with the excellent figures of 1/8 off 8 overs.

The real star for the Bar was John Jordan. Bowling very well flighted, slow wobblies he obtained the marvellous figures of 4/14 off 8 overs. Andrew Donald also bowled well obtaining 2/13. Tony Cavanough managed to bowl three overs before breaking down with a side strain. The years are catching up!

One of the highlights of the Law Institute's innings was the run out of Steve Harris by a brilliant throw from Neville Kenyon.

After 33 overs the Law Institute were all out for a mere 58 runs. This was without doubt the lowest score the Institute has ever made against the Bar. David Neal and Dennis Gibson put on 21 for the first wicket and at 2/28 we were cruising. Peter Collins, a young member of the side of considerable talent, and Neville Kenyon put on 48 runs for the third wicket and we comfortably passed the Law Institute with two wickets down. Kenyon made 24 and Collins was retired for 25. In 40 overs the Bar made 4/104 and we basked in a comfortable and very satisfying victory.

The Bar team's performance was excellent. The side bowled and fielded with determination and dedication; all round a great effort.

The team was:

E.W. Gillard Q.C. (Captain), Chris Connor, Ross Middleton, Tony Cavanough, John Jordan, Tony Southall, Dennis Gibson, Geoff McArthur, Andrew Donald, Neville Kenyon, Peter Collins, David Neal.

EWG