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WELCOME JUDGE BALMFORD AND CHAIRMAN SUSAN CRENNAN Q.C.

VICTORIAN BAR NEWS

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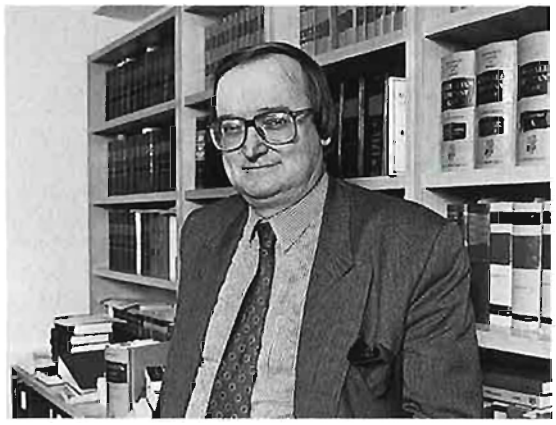
Cover:
The cover features Judge Rosemary Balmford, (right) the most recent appointment to the County Court, and the first female Chairman of the Bar Council, Susan Crennan Q.C., (left).
Photo by David Johns.

Welcome Peter White M.

Robert Dean M.L.A.



Michael Crennan

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*Executive Committee

EDITORS' BACKSHEET

WE WERE WRONG

THE EDITORS APOLOGISE TO DON Farrands whose book on *The Law of Options* was incorrectly described in the Winter issue of *Bar News* as *The Law of Opinions*.

We look forward with interest to the day when someone does write *The Law of Opinions*. It is, of course, true that much of the law is a matter of opinion.

Without wanting to enter the Great Mabo Debate, the variety of views there expressed by the High Court supports the last proposition. The media debate which that case has generated illustrates the Third Law of Legal Dynamics, that the strength with which a layman expresses a legal opinion is directly proportionate to the square of the ignorance of the layman.

THE COST OF JUSTICE

For some time there has been concern in the legal profession that the facilities given to and status afforded to members of the judiciary were less than appropriate. Now, budgetary cuts in the Supreme Court's finances mean not merely that the court can no longer afford to finance a reception to mark the opening of the legal year, but the court cannot afford to meet its own administrative costs.

Budgetary cuts affecting the Supreme Court have led to the issue of Practice Note No. 3 of 1993.

As from 6 September 1993, and subject to any contrary order of a judge or master, "no civil proceeding will be fixed for trial unless the solicitors for at least two parties have first filed a completed order form, ordering and agreeing to pay for the transcript of any oral evidence to be called at trial and any rulings given in the course of the trial or unless the solicitor for one of the parties has filed an agreement indemnifying the court against the cost of transcript for the use of the Judge".

While requiring litigants to pay for the judge's copy of the transcript may be an obvious and even desirable expression of the "user pays" principle, it is disturbing that this increase in the cost of justice to the litigant is brought about not in pursuit of any philosophical cause, but because the Supreme Court can no longer finance its own running costs.

The State of Victoria has paid very little out of its own pocket for legal aid over the last decade or so. Legal aid has been financed primarily by money derived from the profession and its clients, not from the Government. Now the running costs of the Supreme Court are to be subsidised by litigants.

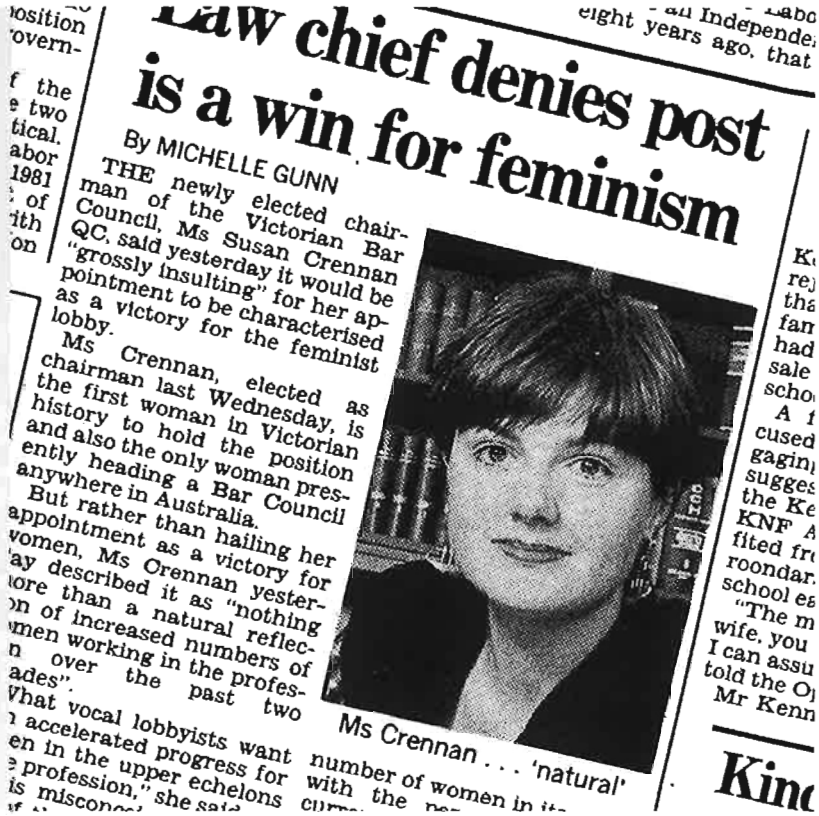
Perhaps the whole administration of justice system should be let out to tender. In an ideal competitive world (see discussion of the Hilmer Report in this issue) there should be a choice of courts so that we would obtain the economies of competition. Some courts might charge by the case, others would charge by the hour — the possibilities are endless.

The State of Victoria has paid very little out of its own pocket for legal aid over the last decade or so. Legal aid has been financed primarily by money derived from the profession and its clients, not from the Government.

It should be possible to devise a system which would cost the community nothing. Funds to pay for the administration of the legal system could be derived from successful litigants. The successful plaintiff could pay a percentage of the amount he had won — and a successful defendant could pay a percentage of the amount which he had not lost.

The time allocated to cases would reflect not their legal complexity but the quantum of the subject matter of the dispute.

. . . and now *The Australian* has given us a new Chairman!



Law chief denies post is a win for feminism

By MICHELLE GUNN

THE newly elected chairman of the Victorian Bar Council, Ms Susan Crennan QC, said yesterday it would be "grossly insulting" for her appointment to be characterised as a victory for the feminist lobby.

Ms Crennan, elected as chairman last Wednesday, is the first woman in Victorian history to hold the position and also the only woman presently heading a Bar Council anywhere in Australia.

But rather than hailing her appointment as a victory for women, Ms Crennan yesterday described it as "nothing more than a natural reflection of increased numbers of women working in the profession over the past two decades".

What vocal lobbyists want is accelerated progress for women in the upper echelons of the profession," she said is misconc

Ms Crennan . . . 'natural'

WHO CRITICISES THE JOURNALISTS?

In the Winter issue of *Victorian Bar News* we published an article entitled "Who Judges the Journalists?". Since then, SBS has broadcast a one-hour documentary entitled "Fear or Favour" by Iain Gillespie, in which he had the temerity to criticise the practices of the media.

In a preview published in the Melbourne *Herald Sun* on 15 September 1993 "GM" says of the documentary:

"It takes a very jaundiced view of the role of Australian journalists and questions, especially in relation to intrusion into civil liberties, journalistic ethics.

Gillespie, himself the subject of close media scrutiny when his two stepchildren were abducted by their natural father, accuses the media of manipulating news.

The great failure of the program is that it succumbs to exactly the sort of distortion of which it is being the accuser.

Taking the high moral ground, Gillespie asks leading questions, makes emotional and sweeping generalisations and has edited his interviews with people such as Mike Willesee, Carmel Travers and, in particular, Nene King — to present a point of view.

To be frank, 'Fear or Favour' made me angry. I found it one-sided and unfair, grossly misrepresenting the average journalist as untrustworthy and reinforcing a stereotype that it sought to question."

Unfortunately, Gillespie really seems to have it right. How right is illustrated by a piece on the "Hilmer Report" by Greg Barns in the *Financial Review* of 2 September 1993. That piece, entitled "Lawyers and the Threat of Hilmer," is reproduced in this issue.

Any logical, unbiased reader of that piece, who had not previously heard of the Hilmer Report, would be justified in believing that the Hilmer Report was concerned primarily with professional regulation and that a large part of its content was specifically devoted to the misdeeds of the legal profession.

The Hilmer Report is a report of some 385 pages concerned with the establishment of a national competition policy. It devotes less than five pages to a discussion of "the professions" including the legal profession.

The article is reproduced for the purposes of this month's competition. The reader who can identify the greatest number of emotional and sweeping generalisations and the like will win a bottle of Essoign Claret.

Our favourite is Barns' reference to "the constitutional curtain behind which the legal profession has hidden from Trade Practices Commission scrutiny". Good debating team distortion! But not accurate; and certainly not objective.

CORRESPONDENCE

Dear Sirs,

A VICTORIAN BAR CAR CLUB?

Whilst polishing the ashtray of the turbo Bentley of one of our darling members in the basement of Owen Dixon Chambers West (as reward for some "Devilling" I'd done) it occurred to me that members of this Bar own, or at least have possession of, a breathtaking range of motor vehicles.

"Breathtaking" does not necessarily mean "$$$ bucks $$$". I have the joy of owning a $600.00 1949 Series I Land Rover which, judging from the blue smoke it belches, is a real eye-turner (especially with the RTA). Many of the Junior Bar have possession of similar gems from automotive history. The Senior Bar seems to embrace the other end of the automotive spectrum with commendable vigour.

The diversity of "personalities" at the Bar is reflected by the vehicles we drive.

We could challenge Mallesons to a real competition. Up your jumpers with footie, bring on the Porsche jokes.

I can see the trophies now:

"most pretentious"

"most original"

"most likely to break down"

"most unroadworthy"

"ugliest"

We could even challenge the constabulary to a "smash-up derby".

There are some more subtle reasons for forming such a club. Vic Roads, in their infinite wisdom, recognise that vehicles of over twenty-five years of age are entitled to significant discounts on their registration fees. This registration is known as "Club Registration".

Club registration is hundreds of dollars less than normal registration. However vehicles with club registration can only be used on club events for "official activities".

I anticipate our first "official activity" under regulation 506(4) of the Road Safety Regulations 1988 to be a one-year economy run.

Bombs to Bugattis, Rollers to Rust-Traps!

Other members of the Bar who share my enthusiasm or who are even mildly interested in the suggestion can contact me on 8890.

Arnold Dix

Dear Sir

Response by the Attorney-General to the article of the Chairman of the Criminal Bar Association in the *Victorian Bar News*, Winter 1993, on the *Sentencing (Amendment) Act*.

Although this is not the place to offer a complete response, Brind Zichy-Woinarski's review of the *Sentencing (Amendment) Act* should not be allowed to pass without comment

The amendment brings about a major shift in the philosophy and operation of the *Sentencing Act*, but its impact is focused on a very limited subject — the disposition of the most serious of offenders.

Neither the Government nor the community share Mr. Zichy-Woinarski's satisfaction with past sentencing outcomes. Further, the raising of maximum sentences in the past has proved itself to be a very inadequate tool for changing the length of sentences handed down in the courts. This Government entered office with a promise to bring sentences into line with community expectations, and the *Sentencing (Amendment) Act* is the means by which we will fulfil that promise.

It is misleading to suggest, as Mr. Zichy-Woinarski does in referring to four protections contained in the Queensland legislation's indeterminate sentence provisions, that "[n]one of these safeguards are contained in the Victorian legislation." The first "safeguard" limits the operation of indefinite sentences in Queensland to those offences already subject to life terms. Reference to this "limitation" however obscures the fact that the Victorian provision applies to a significantly smaller class of offences than its Queensland counterpart.

The second and third safeguards regulate the review of indeterminate sentences. In Queensland, sentences are to be reviewed at the expiry of a nominal sentence, and every two years from that date. Mr. Zichy-Woinarski cannot be unaware that the Victorian legislation includes comparable provisions, even if our nominal sentence is framed as a nominal non-parole period, and our review period is three years rather than two. Any reader relying on the Zichy-Woinarski article would not have the benefit of the same information.

It is true that the Victorian legislation does not include an equivalent of the fourth Queensland safeguard, which allows a prisoner to apply for a

review, with leave of the court at any time. The decision was made that such a right could not, on balance, be justified, and we stand by it.

The Government recognises that our sentencing reforms will have an impact on prison populations. We accept the increased financial burden that will follow, on the basis that it is appropriate that community protection be given higher priority than financial concerns. I would like to emphasise however, that the main impact of these reforms will not be felt for eight to ten years. This gives us a favourable margin of time to consider appropriate responses. Further, any prison population figures based on the assumption of numerous indeterminate sentences being handed down are likely to be greatly overstated. The Queensland experience bears out this Government's expectation that such sentences will be exceptional rather than commonplace.

I would like to address two further assertions contained in Mr. Zichy-Woinarski's article. The first is that increased and indeterminate sentences will increase the peril to victims, as offenders seek to silence potential witnesses. I have seen no statistics that support this claim. Equally importantly, the assertion advances a completely unacceptable criterion for sentencing — the mollification of offenders. Government cannot be involved in peering into offenders' minds to gauge the level of jeopardy they are willing to accept. It is difficult to see how victims would be advantaged by such an exercise.

The final assertion is that juries will respond to cumulative and indeterminate sentences in a manner analogous to their response to mandatory capital punishment for murder a generation ago — with a reluctance to convict because of the perceived unfair suffering awaiting the accused. This analogy derives support from neither established fact nor logic. There is no reasonable analogy between capital punishment and longer or indeterminate sentences. This Government's reforms will have the effect of bringing sentences into line with community — and thus jury — expectations, rather than exceeding them.

The Government accepts that the amendments to the *Sentencing Act* 1991 will continue to be of interest and debated, both in the community and in the legal profession. We encourage this. It is unfortunate that the contribution to this debate by the Chairman of the Criminal Bar Association has not have been framed in a more balanced manner.

Yours sincerely,
Jan Wade M.P.
Attorney-General

Sir,

Burnside's article, "A Thing About Words", in the last edition of *Victorian Bar News* was most interesting. He wrote that "The process of change in language includes the drift of meaning, the invention of new words, and the obsolescence of existing words". That is quite true, of course, and change thus occurring is a necessary and inevitable concomitant of a living language.

Quite a different matter, though, is the usurpation of the place of one living language by another, over a very short period of time, due entirely to an aggressive and overbearing cultural onslaught. Australia, and these days, Great Britain, too, is particularly susceptible to linguistic domination by the United States of America. American, after all, is a species of English. Our television, cinema and popular radio are all subject to the overwhelming global influence of the American culture, and this has its eventual effect.

"Eventual", though, need not suggest after a long period of time. Many Americanisms have spread like the plague — or a better simile might be that certain linguistic cane toads or Patterson's curse have been introduced and run riot, often destroying or driving out the existing organisms. Few people these days "think" or "believe" or "suggest" (even when expressing an informed, educated opinion); few say "maybe", "perhaps", "doubtless" or "I suppose". Instead, they pepper their sentences with "I guess" — once a dead give-away that the speaker was an American. Overnight, shops were abolished and replaced with "stores". "Cookies" is even the description now on many packets of Australian manufactured biscuits. Films long ago succumbed to "movies".

These are just a few examples of a large problem: a problem, though, which is mainly confined to vocabulary. English was already the dominant language in America before the huge influx of European peasantry and proletariat in the nineteenth and twentieth centuries. They had to adapt and conform up to a point, but, partly to make things easier for a population a very large proportion of which did not speak English well or at all, and who were, in addition, very often uneducated, Webster (the compiler of the dictionary) and others vigorously promoted phonetic spelling. Besides, they thought it made sense, anyway. To date, American spellings have not been widely adopted here, although 'donut, 'program' and 'color' are to be seen. The application of their received phonetic spellings, however, even in America, often appears arbitrary and inconsistent. One can read in a catalogue of implements: "ax and hoe". Why has hoe retained its "e"? Similarly, "traveler" loses an "otiose" "l" but "occasionally" keeps it.

It is somewhat surprising, then, that Americans should, in some instances, be so enamoured of the relative polysyllabic difficulties of "elevator", instead of our "lift"; or "apartment", instead of "flat", and of "automobile", instead of "car".

Unfortunately, the misuse by Americans of perfectly good words, still part of our living language, has gained ground here. It is unfortunate because it is not part of the natural growth of the language, but is simply the wholesale supplanting of accepted, everyday meanings by alien ones. Moreover, it is often the product of ignorance. Nothing will now save "billion",: to us, it was a million million, but everyone now uses it in the American way to mean a thousand million. It is important to know which is meant, though, when one is speaking of stars or atoms as well as of money. Some Americanisms are just wrong: for example, they use the word "protest" transitively (e.g., "to protest the decision") , when they mean to protest *against*. This misuse results in almost the opposite meaning to the one intended, but we hear it on Australian news broadcasts all the time. At other times, the ill-informed misuse of words by Americans is amusing, as when an aeroplane pilot says to his passengers, "Sorry for the delay, we'll be in the air momentarily".

Finally, American pronunciation is not too entrenched here yet, although the annoying 'nood' for nude ('newd'), and 'research' with an aggressive emphasis on the first syllable are frequent.

Yours faithfully,
M.E. King


NORTHERN TERRITORY NEWS

CABBIE IN SEX ASSAULT PAGE 2

60c (COUNTRY 70 cents)

DARWIN: Thursday, July 15, 1993

Phone 44 9900 CLASSIFIEDS: 44 9999

Lawyer shot: hero honored

THE CHAIRMAN'S CUPBOARD

AS THOSE WITH A SENSE OF BAR HISTORY know this column used to be styled Chairman's Message until Harper Q.C., rebelled against the solemnity of sending messages to the constituents, reached into the Chairman's cupboard, gave everyone a drink, thereby hit upon a new title for the column, and produced a column more avuncular than solemn. We remain grateful to him.

In turn, however I have a problem with the connotations of "cupboard"; the opening thereof is not for me redolent of a few relaxing scotches mulling over the Bar. Rather, it suggests exposing tasks neglected and requiring a deft slamming shut before the tumbling out of objects obliges a dedicated "clean-up".

The immediate past Chairman has left a Chairman's cupboard in excellent shape, his one and not insignificant failing being he never stocked it with Guinness. Chris Jessup has been a magnificent Chairman of the Bar. He led the Bar Council with great determination and was unstinting in meeting the claims of Bar Council business on time and mind. He achieved a great deal and in particular worked tirelessly in support of the principle of judicial independence when occasions called for such support and also concentrated on fundamentals which will ensure the preservation of an independent Bar which is important less for its own sake than it is for the administration of justice.

He, in combination with others, developed the idea of a Bar Conference which will come to fruition on 24 October next. The conference will provide an occasion for the Bar to concentrate on those matters which are essential for the preservation of a strong and independent Bar in Victoria.

It should be noted the Legal Aid Commission has decided against engaging retained counsel to do all the County Court and Supreme Court criminal work. The Criminal Bar as a whole is ready to meet these needs and the Legal Aid Commission should welcome the flexibility of properly matching a case with appropriate counsel, which could not have been guaranteed under a retained counsel system.

Legal aid in civil matters is as difficult to deliver in Victoria as it is in other States. The Bar must consider whether the legal profession as a whole can help the community in this respect. That will be a major task in the coming year.

Susan Crennan

Finally, perhaps I should mention that a number of people have suggested to me I should not be Chairman of the Bar but adopt some other style. Whatever happened to an understanding of the difference between *vir* and *homo?* It was always clear the dropping of Latin from the school curriculum would have drastic consequences for the English language. It will save me repeating myself to state that chairman is a generic term and to me it includes a man or a woman. When Milton referred to 'Man's first disobedience' he most certainly included Eve and from henceforth, for a year anyway, the Chairman's cupboard will most certainly include Guinness.

Susan Crennan

CCH UPDATE

STANLEY LEAVER
LLM
CCH Australia Limited

It's over 20 years since A P Herbert died, but the legacy of his wit enables us still to imagine what sort of case for his *Misleading Cases* he'd have woven from a recent ATO ruling.

Haddock in the dock claiming that his nefarious activity had been a once-only occurrence. "A mere isolated incident, m'lud, with no element of a business present ... in consequence of which the income therefrom is non-assessable."

And to support this argument?

Taxation Ruling TR 93/25, which as our ***CCH Tax News***[1] reports goes thus:

> "The tests for determining whether receipts from illegal activities are income are the same as for legal activities: where a taxpayer systematically engages in an activity and the elements of a business (repetition, regularity, view to a profit and organisation) are present, the proceeds have an income character. The assessability of the proceeds from isolated illegal transactions will depend on the facts of each case."

■ ■ ■

And if conjecture on how APH would've treated a legal point begging for his sort of treatment has been raised before on this page, we plead in defence a comment by Sir Alan himself:

> "There is no reason why a joke should not be appreciated more than once. Imagine how little good music there would be if, for example, a conductor refused to play Beethoven's Fifth Symphony on the ground that his audience might have heard it before."

■ ■ ■

When she disposed of her property the vendor sought to persuade first the Taxation Commissioner, then, when that failed, the Tribunal, that her profit on the sale wasn't taxable because this she claimed had been her principal residence.

Problems arose from the fact that (a) while she'd owned it she'd lived in other places as well, (b) she owned other properties, and (c) she owned this property partly for income-earning purposes.

The Tribunal wasn't convinced and found against her, saying that this particular property didn't seem to have been her principal residence.

All of which constitutes a reminder that the cold hand of the CGT provisions extends out into conveyancing matters and thus our ***Australian Capital Gains Tax Planner*** (from which, of course, the report of this case is taken) is the type of publication that is of assistance to ... well, the likes of conveyancers and others in general practice.

■ ■ ■

Australian manufacturers and suppliers of services whose goods or services are available across the Tasman should be advised that as from April next year the NZ *Consumer Guarantees Act* will come into effect. It arms consumers with rights of redress against retailers, manufacturers and suppliers of services, and establishes a set of guarantees which will be implied into all contracts for the supply of consumer goods and services ... guarantees which are broader than and, of course, replace those implied by the old Sale of Goods legislation there.

One of the guarantees (as reported in CCH's ***New Zealand Business Law Guide***) is that "manufacturers will ensure that repair facilities and spare parts are available for a reasonable period after the goods are first supplied to a consumer (although this guarantee may be excluded where reasonable action is taken to notify the consumer that such facilities will not be provided)."

■ ■ ■

Under the headline *Share and Share Aren't Alike*, our ***Human Resources Update***[2] reports that employee share ownership schemes are beginning to attract employer and employee interest because new types of schemes overcome previous shortcomings and tax disadvantages. Our report explains that the main difference between "new structure" share schemes (also known as employee share savings plans) and other employer-funded share schemes is that the employee is offered the opportunity to invest in a number of investment options other than the company's shares. Put simply, the employer contributions are paid to a separate company which may invest it in a range of investments. Or the employee can withdraw the money and pay tax on it just like any other remuneration. The advantage to employees is that the investment risk is spread and they can select from a range of investments suitable for their circumstances

■ ■ ■

And talk about appropriate headings, how's the title we gave to a case report in the summary to our ***Directors Manual***. The case was a report of the court's treatment of two corporate offenders, the Messrs G L & R C Shelley. Their company R & G Shelley Pty Ltd had sunk, leaving a deficiency of over $9m with little likelihood of a dividend to their creditors

We went to their namesake for the appropriate tag and came up with:

You with the unpaid bill, Despair —[3]

■ ■ ■

A great English advocate used to tell his students the story of the young man seeking to become a missionary who had failed the exam in scripture several times. Eventually the examining panel, taking pity on him, decided to ask just one simple question.

It was "Can you tell us who Saul was?"

"Yes. He was a King of Israel."

"Excellent. Thank you. That is all."

And at the door of the examination room the candidate added, "His other name was Paul."

The moral? Never vouchsafe what you are not asked.

■ ■ ■

1. Rulings, draft rulings, and determinations issued by the Australian Taxation Commissioner are reported into our ***Australian Income Tax Rulings***.
2. The summary that accompanies each loose-leaf report to our ***Human Resources Management***.
3. From *The Invitation* by Percy Bysshe Shelley.

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.

NEW BAR COUNCIL MEMBERSHIP

BAR COUNCIL 1993–4

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Seated: L–R; Jeanette Richards (Honorary Secretary), Murray Kellam (Honorary Treasurer), Hartley Hansen Q.C. (Senior Vice-Chairman), Susan Crennan Q.C. (Chairman), David Habersberger Q.C. (Junior Vice-Chairman), Francine McNiff, Graeme Uren Q.C., Susan Morgan.

Absent: Brind Zichy-Woinarski Q.C., Julian Burnside Q.C., Ross Ray, Penelope Treyvaud.

ATTORNEY-GENERAL'S COLUMN

The Standing Committee of Attorneys-General

IN THE BREAK BETWEEN PARLIAMENtary sessions, I attended the most recent meeting of the Standing Committee of Attorneys-General ("SCAG") held in Darwin in June. It therefore seemed opportune at this time to acquaint members of the Bar with the SCAG process.

SCAG is a Ministerial Council of all Australian Attorneys-General, with occasional participation by the New Zealand Attorney-General. SCAG meets three times each year, and within a three-year cycle will usually have met in each Australian State and Territory.

The SCAG meetings provide and frank and confidential environment in which Ministers can:

- develop complementary or uniform legislative proposals. For example, developing a national approach on the portability of intervention orders to ensure that people (primarily women) protected by an intervention order do not lose that protection when they travel interstate;
- monitor co-operative arrangements between States, Territories and the Commonwealth. For example, ensuring that the arrangements for the interstate transfer of prisoners are operating effectively;
- co-ordinate the national response to current legal issues. For example, ensuring that there is a coordinated response to the decision in *Sykes* v. *Cleary*;
- exchange information on State and Territory and Commonwealth initiatives. For example, the cost of and access to justice is a regular SCAG agenda item, giving all Ministers an opportunity to compare regional initiatives;
- assess best practices in terms of legislative reforms. For example, SCAG acts as a clearing house for cost of justice reforms which can be assessed in light of a broader federal context;
- co-ordinate non-legislative proposals. For example, SCAG Ministers co-ordinate the technical work that needs to be done in anticipation of the taking of evidence interstate by video link.

SCAG meetings are attended by a majority of Ministers. Where a Minister is not able to attend, a senior departmental officer is generally nominated to represent the particular Minister.

SCAG is serviced by an Officers' Committee comprising officers from each participating jurisdiction. Generally, officers meet 4–6 weeks before each SCAG meeting to settle an agenda, the papers required to facilitate discussion and recommendations for future action.

Any Minister can add an item to the SCAG agenda, provided that no other Minister objects to its inclusion. A Minister proposing an item for the agenda will usually support it with a paper outlining the issues, options and a proposed course of action.

Working parties are frequently established in relation to particular agenda items which require intensive development or particular State, Territory and Commonwealth co-ordination. For example, a working party was established to look at the implications of the High Court's decision in *Dietrich* v. *R.*

SCAG is supported by the Special Committee of Solicitors General, which gives Ministers specialist advice from time to time. SCAG is also supported by the Parliamentary Counsels' Committee, representing all jurisdictions, which drafts uniform or model legislation as agreed upon by Ministers.

SCAG has overseen the development of some important legal initiatives in Australia. In more recent times SCAG settled on a national scheme to ensure the portability of intervention orders between jurisdictions. The necessary State and Territory legislation is now being progressively introduced. SCAG is also resolving the occasional inconsistencies between access orders and intervention orders. In cases of such inconsistency, I argued strongly and successfully that the outcome should always fall in favour of the person who obtained the intervention order (usually the custodial parent) rather than the person who caused the state of affairs necessitating an intervention order (usually the non-custodial parent).

Less recently, a national scheme to facilitate the forfeiture of illegally-obtained assets was developed by SCAG Ministers. The Victorian expression of that agreement is the *Crimes (Confiscation of Profits) Act* 1986. SCAG also developed the national scheme for the reporting of and exchange of information arising from suspect cash transactions.

SCAG is an appropriate forum for the expression of competitive federalism, where best practices can be expounded and shared between jurisdictions and uniform or model legislative proposals developed where appropriate.

As an expression of competitive federalism, SCAG is particularly useful when considering the legal profession and issues surrounding access to justice.

I have not and do not intend to support proposals for national or uniform legislation for uniformity's sake. If a proposal has clear benefits for Victoria in the context of a national scheme, then I will consider giving it my support. However, one of the benefits of our federal system is its dynamism and diversity, which can be too easily suppressed by the weight of slavish adherence to uniformity.

As an expression of competitive federalism, SCAG is particularly useful when considering the legal profession and issues surrounding access to justice. Within a broadly similar system of justice, each jurisdiction has developed idiosyncratic structures for regulation of the profession and promoting access to the courts, each with its own strengths and weaknesses. The many different issues which have been raised under the general topic of access to justice and which have generated so much public concern are not susceptible to simple solutions. The ability to draw on the experience of other Australian jurisdictions is an essential element in developing policy responses, identifying flaws in proposals and answering criticisms that a proposal is unworkable. While it would be a dull programme which was unleavened by fresh ideas, a competitive federal structure promotes properly-considered change building on past experience.

Recently, SCAG Ministers' attention has been drawn to wide-ranging reforms or proposed reforms to the profession in South Australia, Tasmania and New South Wales. This is of particular interest to me. In my second reading speech on the *Legal Profession Practice (Guarantee Fund) Act* 1993 I foreshadowed that the Victorian profession will be reviewed later this year. Some of the changes, such as the appointment in Tasmania of an independent non-lawyer to protect clients' interests and monitor complaints, have existed in Victoria for some time. In New South Wales, a Legal Services Commissioner is established with a similar function. The breadth of the powers of these officers over the profession's disciplinary structures can vary considerably, and these initiatives in other jurisdictions offer the opportunity for re-evaluating the Victorian Lay Observer's powers.

The difficult question of professional regulation has been widely considered with a variety of responses being developed, all of which involve the profession to some degree but which display different approaches to the involvement of professional associations, which in some instances are not recognised at all. The profession's distance from its disciplinary structures, including the investigation and prosecution of offences, is one of the issues which will need to be addressed.

Integral to any consideration of access to justice issues is the role of the Legal Aid Commission in each jurisdiction. Nowhere is innovative thinking more needed than in the development of efficient legal aid services in the context of strong budgetary constraints. I note that the Victorian Commission is exploring a number of new approaches, including franchising and the use of retained advocates. I also am aware of Bar Council criticism of some of these proposals and of the Commission's cost effectiveness. I have written to the Chairman confirming that consideration of the matters raised by the Bar will be a key part of the forthcoming review of the Commission. I anticipate that the review will examine the different approaches taken by governments and legal aid bodies in other jurisdictions to maintain and develop services when faced with similar problems to those of the Victorian Commission.

Comparative information on other legal aid bodies' practices proved useful in answering criticism of the predicted effect on the Legal Aid Commission of section 27 of the recently passed *Crimes (Criminal Trials) Act,* which addressed the problems raised in *Dietrich's case.* The provision was criticised as allowing a court to over-ride a refusal of legal assistance under the expensive cases guideline or upon application of the merit test. A check of other jurisdictions' criteria revealed that most did not have either an expensive cases guideline or a merit test and that the effect of such an order would merely place the Commission's service provision in this area on the same basis as most other jurisdictions.

The *Crimes (Criminal Trials) Act* is a good example of the creative dynamic inherent in our federal structure. Its genesis lies in the recommendations made to a special meeting of the Attorneys-General on complex criminal trials. The recommendations were considered by the profession throughout Australia. Victoria was the first to develop the recommendations into a legislative framework which will now be able to be monitored and applied with suitable refinements by other jurisdictions seeking to address this common problem.

The characteristics of some legal issues require that they be addressed at a national level rather than as solely a State issue. Victoria will continue to benefit from participating in SCAG and I hope that the Standing Committee will continue to be a forum for the interjurisdictional exchange of ideas and, where appropriate, the adoption of common approaches to problems. I am always open to submissions from members of the Bar that certain matters are appropriate for the SCAG agenda.

Jan Wade M.L.A.
Attorney-General

COMMON LAW BAR ASSOCIATION REPORT

SINCE THE LAST ANNUAL MEETING ON 21 May 1992 there has been considerable activity on the part of the Committee.

The introduction of the Accident Compensation (WorkCover) Bill saw the Committee involved in an enormous amount of work designed to prevent the abolition or erosion of common law rights, and hopefully to restore some rights which had previously been removed by the original accident compensation legislation. This involved an elaborate process of lobbying individual M.P.s. Two detailed commentaries (or submissions) on relevant aspects of the Bill were prepared by David Beach and submitted to the Minister; in addition this material was distributed to many M.P.s and other interested groups. The Association is most grateful to David for the tremendous amount of work and skill devoted to these submissions.

Ultimately the Bar Council took up the issue on behalf of the C.L.B.A., and engaged Winneke Q.C. as its official spokesman. This intervention and support is greatly appreciated by the Association. It cannot be doubted that the work of the Association, and the subsequent involvement of the Bar Council, led to many positive aspects of the final legislation, although regretfully full common law rights were not restored.

The Chief Justice has raised with the Bar Council the issue whether the administration of interrogatories in the Supreme Court in the future should be by leave only. The C.L.B.A. was requested to make its comments regarding this matter. The Committee reported to the Bar Council that interrogatories serve a number of important purposes in common law actions and recommended that the right to administer them as advised should be retained.

Fees have been a matter of concern and particularly the attempts by the Transport Accident Commission to force the acceptance of briefs at fees less than scale. At present consideration is being given to the Legal Aid Commission proposal to introduce the concept of "fee caps".

The Juries (Amendment) Bill 1993 is at present occupying the Committee's attention. This Bill includes a provision to abolish civil juries in the County Court, save for actions "relating to a charge of fraud or a claim in respect of libel, slander, malicious prosecution or false imprisonment". The C.L.B.A. is firmly committed to the retention of civil juries. They are unique in that they reject what the community regards as an appropriate standard of care in given situations, and what it regards as being the proper award of damages to compensate a plaintiff for the effect that that person's injuries have had upon his or her life. Not only do jury verdicts define the parameters within which damages are awarded, they provide guidance to judges as to

community standards and values. Further, they constitute a hedge against the "idiosyncrasies" of individual judges.

A submission prepared by the Committee has been endorsed by the Bar Council and forwarded to the Attorney-General. A copy has also been sent to the Chairman of the Attorney-General's Bills Committee. We are hopeful that we will have success.

The horizon would be unfamiliar if it presented no threats to the common law jurisdiction. In November 1992, Treasurer Dawkins, pursuant to s.7 *Industry Commission Act* 1989 directed the Industry Commission to inquire into workers' compensation in Australia. One specific aspect of this reference requires the Commission to report on:

"the relationship between workers' compensation and other related arrangements such as accident liability insurance, remedies available in common law and the regulation of workplace safety by Governments".

The horizon would be unfamiliar if it presented no threats to the common law jurisdiction. In November 1992, Treasurer Dawkins, pursuant to s.7 *Industry Commission Act* 1989 directed the Industry Commission to inquire into workers' compensation in Australia.

The Commission in its Draft Report (23 August 1993) states that in its view the common law system does not provide proper incentives for employers and workers to reduce workplace injury. At page 84 of Volume 1 the Commission indicates that its "preference for compensating for permanent impairment and pain and suffering is to rely on uniform payments based on a common Table of Injuries, rather than allowing access to remedies at common law". It recommends "THAT ACCESS TO COMMON LAW BE ABOLISHED".

The seriousness of these statements has led to the immediate convening of the Law Council of Australia Common Law Rights Committee, on which the Chairman is the Victorian Bar representative. The gravity of the matter indicates that it should be handled at a national level if at all possible. Public hearings on the Draft Report will be conducted around the country between 27 September and 28 October. The Commission is due to present its final report by March 1994. Obviously the Law Council, or those constituents which oppose this recommendation, will have to be represented at these hearings.

Social activity has not been ignored. On Friday, 28 August a well-attended dinner, arranged by Wodak and Forrest, was held at the Victoria Club. Those who attended were treated to a cocktail of anecdotes by that irrepressible raconteur Coldrey J., to whom we are greatly indebted. On 29 April a very successful cocktail party was organised by Forrest and Curtain; so successful that it contributed significantly to the attendance (or more accurately, the lack of it) in Chambers in Latham the following day.

The Annual General Meeting will be conducted on 16 September and a dinner will be held at the Victoria Club on either 15 or 22 October.

David A. Kendall

WELCOMES

Her Honour Judge Balmford

JUDGE BALMFORD

THE EIGHTH COURT WAS PACKED ON Tuesday, 27 July 1993, when the profession gathered to welcome Her Honour Judge Balmford to the County Court. The occasion was marked by the presence of the Attorney-General, the Hon. Jan Wade M.L.A., who received congratulations on her choice of appointment. Unfortunately young William Balmford, aged twenty-two months, was not present with his parents in the jury box to watch the historic occasion of his grandmother's welcome to the Bench of which his great-grandfather, Sir John Norris, was also a member prior to his eleva-

tion to the Supreme Court. The crowd included friends of Her Honour from school. university and the law, friends of her father, and also many who did not know Her Honour but came to show their recognition and admiration of her achievement in becoming the only woman judge currently sitting on a Victorian court.

Her Honour was born on 15 September 1933 and attended Melbourne Church of England Girls' Grammar School. In her matriculation year she won a scholarship to Janet Clarke Hall. During her law course she obtained excellent results and finally crowned her academic career by winning the Supreme Court Prize, as her father had done before her, that being the only father/daughter combination to win that honour.

After completing her articles with Messrs. Whiting & Byrne, Her Honour remained with that firm but also was appointed Independent Lecturer in Conveyancing at the University of Melbourne from 1958 until 1963. She quickly became well-known, lecturing in conveyancing at 8.45 a.m., and always wearing a hat for those lectures. Her Honour was the first female lecturer appointed in the Law School at the University of Melbourne. In 1958, her first year in the Law School, she taught her brothers Fagan, Hart, Hanlon, Meagher and Ross JJ. In subsequent years she taught other members of the Court. Her Honour also became a popular tutor at Janet Clarke Hall from the years 1957 to 1961 and among her distinguished students there was Professor Cheryl Saunders of the Law School, University of Melbourne, and until recently the President of the Administrative Review Council.

Her Honour continued to practise as a solicitor with Whiting & Byrne and became a partner of that firm in 1960. In April 1963 she married another partner, Peter Balmford. In 1964 she retired from the partnership after the birth of their son, Christopher, who is now a solicitor with Phillips, Fox & Masel, but she remained as a consultant with the firm for some years.

Her Honour has never walked away from an academic or professional challenge. In 1969 she started a Master of Business Administration at University of Melbourne. She found it demanding but rewarding. Its successful completion, it is believed, makes her the only Victorian judge with an M.B.A. Her Honour then became the first Executive Director of the Leo Cussen Institute for Continuing Legal Education. At that time the only similar bodies in the world were in Nigeria, Canada and Australia. Institutes for Continuing Legal Education started in Sydney and Hobart at about the same time as the Leo Cussen Institute started here. The legal profession in Victoria and in Australia did not quite know what to expect of such an institute. Under Her Honour's direction, close ties were developed with the similar bodies in New South Wales and Tasmania, a high-quality course was created, and an able and dedicated body of instructors was gathered. The Leo Cussen Institute quickly became respected and was accepted as a valuable addition to articles of clerkship. At first people doing articles attended Leo Cussen for a three-week supplementary course. Now the larger Leo Cussen course has became a recognised alternative to articles.

In 1977, after six years, Her Honour resigned from her position at the Leo Cussen Institute and devoted herself to writing the first of her well-known books on birds, *Learning About Australian Birds*. In 1978 she became Assistant Solicitor to the University of Melbourne. In 1979 she was also appointed to fill a temporary vacancy on the Equal Opportunity Board for the well-known case of *Wardley* v. *Ansett Transport Industries*.

Her Honour's appointment to the Equal Opportunity Board reflects an interest in women's issues in which she was following in her mother's footsteps. Dame Ada Norris was the representative of Australia on the United Nations Commission on the Status of Women from 1961 to 1963. Her Honour became the President of the Women Lawyers' Association, which at that stage was known as the Legal Women's Association of Victoria, for the years 1965 and 1966, and followed that by becoming a member of the Victorian Premier's Committee on the Status of Women which recommended the passing of legislation along the lines of the Act which became the *Equal Opportunity Act* 1977 (Vic.). Thus Her Honour's appointment to the Equal Opportunity Board enabled her to see the working in practice of the legislation recommended by the committee of which she had been a member.

During the years 1979–1982 Her Honour was also appointed as an arbitrator under the *Local Government Act* 1958 (Vic.), sitting as and when required, while continuing with her responsibilities as Assistant Solicitor to the University.

In 1975 the Commonwealth passed the *Administrative Appeals Tribunal Act*. The first appointment to the Tribunal was that of the Hon. Mr. Justice Brennan, as he then was, as President in 1976. The next full-time appointments were based in Canberra. When it became apparent that full-time positions were required outside Canberra, Her Honour showed interest in this new area of the law and, with Ian Thompson, now Deputy President Thompson, was appointed a full-time Senior Member of the Administrative Appeals Tribunal from 1 February 1983. She quickly obtained the confidence and respect of those appearing before the Tribunal both as parties and as advocates. Her intelligence, legal skills, efficiency and lively enthusiasm for her work have enabled her to make a very significant contribution to administrative law in Australia.

These qualities will ensure Her Honour an equally successful career on the County Court. Her friendship as a colleague has been valued wherever she has worked. It will no doubt also be appreciated by her 46 new brothers on the Court. That extension to her family will constitute a challenge to Her Honour as she has not had a brother before. Of course the different work of the Court will also constitute a challenge, but Her Honour, as has been pointed out, has never feared or failed to rise successfully to a challenge. She has sought out employment in areas of the law requiring original thought and the treading of new pathways. There is no doubt that her performance on the County Court will add variety and distinction to her career, as well as to the Bench on which she now sits. The Bar welcomes her and wishes her a happy and successful time as a member of the judiciary of this State.

MR. PETER WHITE M.

W. PETER WHITE WAS APPOINTED A MAGistrate on 10 August 1993.

His Worship was educated at Haileybury College and at the University of Melbourne. He was admitted to practice on 2 April 1964 and signed the Bar Roll 1969, reading in the Chambers of the late Woods Lloyd Q.C. He established a general common law practice and was particularly sought after by solicitors who appreciated his patient manner in dealing with clients and his thorough case preparation. Since 1984 he has occupied Chambers in Seabrook Chambers where his counsel and company have been greatly appreciated.

His Worship has a passionate interest in the cin-

Peter White M.

ema, and he possesses a large collection of film classics. He has been heard to describe his home as a collection of rooms built around a cinema. Another of his extra-curricular activities has involved him in a long-term study of four-legged animals moving at speed in an anti-clockwise direction.

His Worship was a keen billiards player in earlier days before family life exerted its inexorable grip upon his spare time. Nonetheless, from this sport His Worship derived an approach to life which he is sure to employ on the Bench, namely a professed intention "never to show any emotion until all the balls have stopped moving". The last witness will always have an attentive audience in His Worship's court.

His friends and colleagues within the Bar and the legal profession as a whole will attest to many admirable qualities which will equip him well for his position as one of the public faces of the law. Although an unassuming man by nature, His Worship possesses large measures of common sense, integrity, compassion and a well-developed sense of morality and fairness. He couples an inquiring legal mind with a willingness to listen and a ready sense of humour. Although not suffering fools gladly, His Worship will no doubt allow ample opportunity for the development of any reasonable proposition.

Renowned as one who regards the ballpoint pen as an advanced piece of office equipment and the dictaphone as the ultimate in modern technology, His Worship will enjoy coming to grips with the computer equipment which now adorns his Bench. However, his obvious enthusiasm for his new position will doubtless enable him to meet this new challenge.

The Bar wishes His Worship a long and happy career as a magistrate of the State of Victoria. It can be confidently asserted that his is a particularly sound appointment.

THE LANGUAGE OF THE LAW

Readers of *Victorian Bar News* will be pleased to discover that the Language of the Law is one of the languages of Australia. In a paper delivered last year to the Australian Academy of Humanities, Dr. Colin Howard of the Victorian Bar analysed the "language" of our particular sub-culture of the new multicultural Australia.

That paper is reproduced below with the kind permission of the Australian Academy of Humanities.

IF I MAY SAY SO, IT BETOKENS A welcome widening in the connotations of the word "language" that a symposium entitled "The Languages of Australia" should include the concept of the language of the law. The explanation is no doubt to be found in the sub-title, "Language Issues for Contemporary Australian Society". I expect there is room for a prolonged series of doctoral theses on the question whether the law is properly called a language. A professional lifetime spent in the law however leaves me in no doubt at all that legal terminology is properly called a language issue.

Broadly speaking there are two points of view. Lawyers think that legal language is splendid. Everyone else thinks that it is terrible. My intermittent contacts with legal systems other than our own lead me to believe that the phenomenon is universal. It is also contemporary, whatever century one happens to have in mind.

It is for example the legal language issue that accounts to a large extent for that perennial presence, the law reformer. There are so many law reform commissions around nowadays that it has emerged as a distinct branch of the profession. The only qualifications required are a law degree, good, bad or indifferent, and a confidence in your own rectitude that is not easily surpassed.

Consider for instance the very words in which law reform commissions describe their occupation. They are highly tendentious. They assimilate mere change to improvement. Although the word "reform" was probably introduced into the legal vocabulary as part of the great English social reform movements of the 19th century, its real power has emerged only recently.

There are law reform commissions everywhere. Commissions need commissioners and commis-

sioners need research assistants, accommodation, libraries, librarians, laptops, laps and equal opportunity teapersons. The whole phenomenon has become an institutionalised bureaucracy dedicated to changing the law, or at least the language of the law, which is usually the same thing.

There are law reform commissions everywhere . . . The whole phenomenon has become an institutionalised bureaucracy dedicated to changing the law, or at least the language of the law, which is usually the same thing.

The commissions have to do that because otherwise they have no reason for existence. I concede that having no reason for existence is not generally looked upon as a bureaucratic defect, but the risk is always there. In consequence we find ourselves living in an era in which legal language, far from becoming simpler, will become ever more complicated because, among woes, it will be under constant pressure to change for the sake of changing.

The law reform aspect of the general attitude to legal language really is no joke. Just recently a quite extraordinary suggestion emerged from the Victorian commission. I quote from a letter from a distinguished Queen's Counsel that was published in *The Age* newspaper of 20 October this year:

"My intention is to draw public attention to the proposal put forward by the commission's own consultant . . . that the commission be empowered to review decisions of the courts, in effect anointing the commission as a sort of 'super' Court of Appeal outside the judicial structure.

The proposal is a direct threat to both the community safeguard of judicial independence and the constitutional principle of the separation of powers. The value to the community of a Law Reform Commission that entertains the idea must be seriously questioned."

All I can say to that is, "hear, hear". I was not in the least surprised when one of the first acts of the new Victorian government was to abolish the Law Reform Commission.

It was probably the heart of a law reformer that beat in the breast of the Shakespearian character, contemplating a perfect world, who observed, "first we'll kill all the lawyers". Personally, as you may have gathered, I incline to the view of the 19th century English judge who, upon being asked what he thought about law reform, went puce in the face and expostulated, "Law reform! Law reform? Aren't things bad enough already?" Truly, legal language has much to answer for.

The heart of the difficulty is that the law makes use of only one component of language: written words. Even within that component it tends to restrict itself to a fairly narrow range of contemporary expressions amplified by Latin and Law French tags and English words from former times which have acquired a specific technical meaning. The result is a technical vocabulary which tends to baffle or mislead rather than enlighten the nonlawyer.

The restriction of legal language to written words inevitably means that the law is cut off from the techniques whereby words, which are notoriously imprecise and ambiguous in themselves, can become, in context, superbly exact. One has only to think of the effect of a well-chosen tone of voice, as for example in the expression "charmed, I'm sure," which, suitably articulated, conveys precisely the opposite.

In such a situation one sees immediately two characteristics of legal language. One is that, just as much as, say, Old Norse, Gothic or Sanskrit, it exists only in written form and therefore lacks the resources in self-expression of a spoken language. The second is that, contrary perhaps to popular belief, it is in no way adapted to conveying what it means by articulating the inverse.

It is perhaps a vain attempt to remedy that second shortcoming that has produced the notorious tendency of lawyers to dissolve meaning in a soup of double negatives, as for example in a statute which said something like this:

"A taxpayer who is not a taxpayer within the meaning of subsection (105B) of section 191ZZX but who is not not such a taxpayer by virtue only of not being outside the operation of subsection (31) of this section is not a taxpayer within the meaning of this subsection unless he or she, not being it, is not a taxpayer within the meaning of subsection (105B) of section 191ZZX."

Some of you may think that I am exaggerating. I invite any such sceptic to inspect a copy of the current *Income Tax Assessment Act*. He will be amazed at my restraint. The obscurities of the Norse Poetic Edda or the challenges of an Indo-European relative particle are as nothing to the revealed truth of the modern parliamentary draftsman in full cry.

Some of you may also doubt my assertion that the language of the law is a purely written phenom-

enon. You may point out that any passing insomniac has only to step into the nearest Supreme Court to be cured by the droning of learned counsel employing that very language. Quite so, but that is no different from students dropping off during a snappy rendering of a homily in Gothic. When barrister meets barrister in the corridors he or she is not apt to intone "de minimis non curat lex" or some comparable witticism by way of a cheerful greeting.

My point is that a written language does not become a spoken language merely because it has to be articulated for professional purposes. The same applies to many religious rituals. You may say however that one of the skills of advocacy is that very use of felicitous turns of phrase and tone of voice that characterises spoken languages. Certainly, but the language of advocacy is not the language of the law. It is the language of argument and, with luck, persuasion.

If an argument is successful and finds its way into a judgment, to that extent it becomes part of the language of the law; but in that capacity it instantly loses its original flexible spoken character. Its tone of voice disappears. Indeed, so do the very words unless you know where in the books to find the passage. If it is ever quoted again it is read out from that book and the context and tone of voice may or may not be similar. The author will be the judge, not the original advocate who thought the clever idea up.

So one of the baffling things for the layman is that a use of language that he expects above all to be precise and comprehensible, especially precise, is not. It is quite possible, although certainly not inevitable, that if he seeks advice from several different lawyers he may get several different opinions on the meaning and effect of a section in an Act of Parliament. This is a common criticism of legal language, although few people actually do seek multiple opinions.

The criticism is misconceived. It stems from the misconception that any written formula can ever produce an obvious and unambiguous result when applied to all the situations to which it is relevant. That difficulty exists from the moment that the formula comes into operation. With the passage of time it is compounded by the unceasing modification of meaning in any language or use of language.

There are for example many passages in the Australian Constitution which bore a given reasonable range of legal meaning in 1901 but have a different range now. Because only a century has gone by, the central idea is still there but the incidentals, and what is automatically included in the central idea, have shifted.

One distinguished High Court judge, no longer there, thought of describing this as the denotation remaining the same but the connotation changing, or perhaps it was the other way round, I forget. Whichever, the phenomenon is undoubted and it applies to all legal language, not just the Constitution. It also adds to the difficulties for the layman.

Since this symposium is about issues of language, here we have an issue: how can legal language respond to the sentiment that it ought to be not only more exact but also a lot more comprehensible to the non-lawyer? The contemporary political response to this issue is the plain English movement.

At both the Victorian and the federal level a policy has been adopted of drafting new statutes, and, where staff resources permit, redrafting existing statutes, in plain English instead of legalese. I noticed a recent example of this interaction in a media release dated 28 September this year (1992) by the House of Representatives Committee on Constitutional and Legal Affairs.

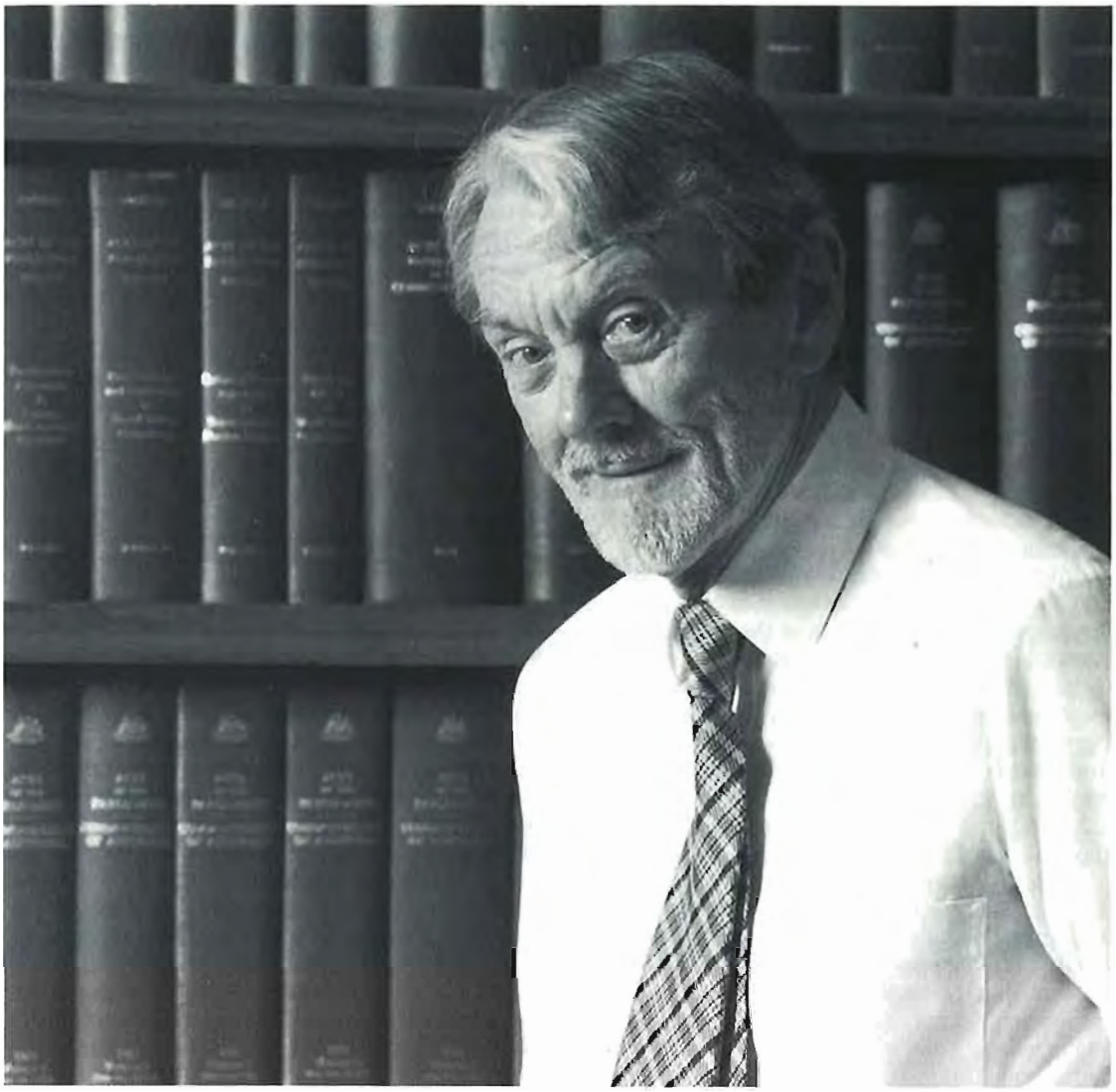
It may not be known to everyone present here today that over the road and up the hill a legislative monstrosity is taking shape under the ironical title of the Corporate Law Reform Bill. Our legislators have occupied themselves with the unceasing reform of corporate law for many years past. As with anthems, flags, republicanism and the *Income Tax Assessment Act*, it has become a national tradition.

In the present case however the annual ritual has taken an unexpected turn. Two prominent business organisations have put a submission to the Committee that the Corporations Law (a fairly huge statute that the reform bill seeks merely to complicate further) cannot be understood by the businessmen that it seeks to regulate. They advance the startling proposition that a company officer of average skill and intelligence, whatever that may mean, should be able to read the legislation and understand what his company can and cannot do.

In support of this splendid cause they recommend, among other things, that as a matter of priority both the *Income Tax Assessment Act* and the Corporations Law be made the subject of a plain English review. They envisage that the review would include the policy objectives of the legislation and the financial impact on business. You observe from this event alone that legal language is big money long before it gets near a court.

I am naturally delighted that my friend the *Income Tax Assessment Act* gets a guernsey as well as the Corporations Law. I am pleased also that the problem of under-employment among lawyers is being taken in hand. Rewriting those two statutes in such form that they can be seen even by the average company officer to mean something will occupy legions of otherwise idle forensic wizards for many years, at the end of which time there will no doubt be endless more reforms of the reform to press ahead with.

Perhaps I should add that the parliamentary



Colin Howard

committee in question has eagerly swallowed the bait and intends to take evidence from, among other worthy persons, a body calling itself the Centre for Plain Legal Language, the existence of which was not previously known to me, and a gentleman called Mr. John Green, a commendably straightforward name, who is apparently an exponent of what is called fuzzy law.

That disclosure no doubt awakens your curiosity about fuzzy law, tempting perhaps the suspicion that fuzzy law is simply law with a superfluous adjective annexed. I have to admit that I cannot for the life of me recall what fuzzy law is, although I do recall once reading an article about it somewhere. I suspect that it may be the most recent name for the school of thought which holds that precision in legal language is an illusion, so we might as well put it all down in simple terms and leave the courts to sort things out.

I readily concede that on the face of it some commendable results have been achieved by the plain English movement. It is indeed now possible to read some Acts and enjoy the sense that you understand what you are reading. Moreover those of the traditional tags which carry a meaning that can just as well be expressed in English are gradually yielding pride of place.

"Inter alia" is now rendered "among other things", "ex parte" "in the absence of the other party", or words to that effect, "mirabile dictu" "wonderful to relate", no doubt, and "nunc pro tunc" "backdated to" whenever. All of this, I am sure, is progress and I have no wish to go into business as a latter-day Jeremiah; but I frankly doubt

that the effort will turn out before long to be anything more than window dressing.

Perhaps the simplest way to illustrate this is to ask what would happen if a similar demand to alter their professional technical terms were addressed to doctors, dentists and astrophysicists. It may be just my bias but I should have thought that the doctors and dentists would face a very difficult task and the astrophysicists an impossible one and that for the most part people would readily understand this.

With law it is evidently different. The illusion persists that it is lawyers who complicate legal language, not anything inherent in the nature of things or in the very phenomenon of language itself. This illusion is an odd one. I am not aware for example that astrophysicists are suspected of unnecessarily complicating mathematics. No doubt some emotional or psychological factors have to be taken into account.

The illusion persists that it is lawyers who complicate legal language, not anything inherent in the nature of things or in the very phenomenon of language itself. This illusion is an odd one.

When people go to a doctor they are quite often frightened and in the case of a dentist terrified. They are not about to argue over their rights or question the competence and goodwill of the practitioner. They want to be rescued from pain or discomfort. Above all they want to escape. A good friend of mine, who is in all other respects a resolute woman, quite often fails even to reach the dentist's premises. Half-way there panic overwhelms her and she drives straight home again with a view to a stiff gin and tonic.

Such unfortunates may have second thoughts later but, assuming that they get there at all, they do not usually arrive on the doorstep of the surgery wanting a quote for the cost of treatment that they can compare with the cash value of putting up with the agony. Neither do they entertain for a moment the idea that they could do a better job themselves. Hence they do not question the technical language used by doctors and dentists. Lawyers are not so lucky.

People resort to a lawyer for three basic reasons. They may want legally-effective documents drafted: a will, a transfer of land, a contract. They may be in trouble and want to be either rescued or at least know what their rights are. Or they may want to gain some private advantage like tax minimisation. Those are the broad categories. They are not mutually exclusive, and within each of them there is infinite room for variation, but that is not my point.

My point is that each of these activities is an exercise in the use of language and is correctly perceived by the client as such. There is of course a thriving industry in myths like Perry Mason and Rumpole, and other such marvels of the imagination, which encourages the belief that oratory is all. In the real legal world not only is oratory not all, it is very little, and what too often passes for oratory is positively counterproductive. One of the many good reasons for not becoming a judge is that by so doing you condemn yourself to being bored out of your mind for the rest of your life.

It is not that sort of thing that I am referring to when I say that when people resort to lawyers they are asking for a particular type of exercise in linguistic dexterity and, although they may not put it in quite those words, they understand that fact perfectly well. That is not what they think is going on at the doctor or the dentist, and probably not what the astrophysicist is knitting his brow about either. Again they are right.

Ironically it is the very accuracy of these popular perceptions which, in my view, leads to the highly inaccurate misconception that lawyers obscure the law in order to keep themselves in business. In other words, that lawyers make a profit out of cornering the market in a job that could be done by anyone with a modicum of common sense.

It was Robert Burns, I believe, who, in one of his poems, in reference to a Scottish advocate wrote something like, "and what his commonsense ran out, he eked out wi' law man". Even worse, in the popular view, lawyers do it by despoiling our common gift and most significant expression of self: our language.

If I am right about that, several consequences follow. One I have mentioned already: the plain English movement. A predecessor of that piece of political opportunism was, and is, the "do it yourself" movement: make your own will, fill in your own house purchase forms and so on. The "do it yourself" attempt to escape from the inevitability of legal language (as a means of expressing the concepts involved) has been around for a long time, but became really popular only relatively recently with the rise of plain English.

It was, and is, associated with the laudable sentiment that the world would be a better place if legal services were not so expensive, and that they would

not be so expensive if lawyers were not allowed to make a mystery of everything by talking in a language of their own.

The initial reaction of most of the legal profession to the spread of self-help was much handwringing and prophecy of disasters that would turn out to be far more expensive in the long run. The initial reaction of the minority was much rubbing of hands and general jubilation at the certain prospect of expensive disasters coming along almost immediately.

They were both right but the minority were obviously the smarter lawyers. Their glee at the prospect of profit in the near future was no doubt unseemly but it manifested a clear understanding of the difficulty of expressing a technical concept in non-technical language. It is precisely this phenomenon that creates the need for a language of the law at all. The widespread failure to appreciate the significance of that proposition leads me to yet another characteristic of legal language.

This is that, inevitably but unfortunately all too often, a word in common use in the language at large is also in common use in legal contexts but with a far more sophisticated, or even different, meaning. An outstanding example is the word "property". "Equity" is another. "Profit", "capital", "discovery", "title", "income", "defence", "reply": the list could go on for ever. The simple but awe-inspiring fact is that there is probably no word in the language that is not capable of becoming a legal term of art.

An example of which I am particularly fond is the English indefinite article, the simple word 'a'. Many years ago there was a notorious statute in English law known as the *Rent Restriction Act*, the title of which is, I trust, sufficiently self-explanatory. Now, if you are going to restrict the amount of rent that can be charged on certain kinds of premises, it is a good idea to say what kind of premises are affected. The *Rent Restriction Act* said, premises, and I quote, "let as a separate dwelling".

Litigation on the meaning of that harmless-sounding expression multiplied exceedingly and at once. A very able barrister, who subsequently became a very fine judge, wrote a book on the Act. He found that he had to include a section on each individual word in "let as a separate dwelling", even the indefinite article, for each word had given rise to bitter dispute between landlord and tenant in the courts.

One consequence was that the word "a" acquired a technical meaning in such contexts as whether a dwelling was "a" dwelling or many dwellings if two thousand people lived in it or, *per contra,* as lawyers are allowed to say, whether it was even "a" dwelling if someone was paying the rent but no-one actually dwelt there. A cautionary tale if ever there was one. You see what I mean about the hazards of law reform.

Another consequence of the utter misconception that legal language is really only everyday language made difficult has been the increasing popularity, at least in political circles, of creating so-called tribunals to replace proper courts run by real judges This phenomenon has had many politically-inspired justifications conferred upon it, none of them, on the face of things, anything to do with language.

Traditional legal language has naturally not been popular in the tribunals. It is after all one of the incidentals that they were supposed to rescue people from. In my view it is far more than an incidental.

Through tribunals justice was going to be quicker and cheaper than in the courts. Warring litigants were going to be allowed to present their own cases in their own way, unhindered by rules of evidence, expensive lawyers, remote judges and so on. There has been a distinct flavour of informality, palm tree justice and, of course, votes about the entire development.

Traditional legal language has naturally not been popular in the tribunals. It is after all one of the incidentals that they were supposed to rescue people from. In my view it is far more than an incidental. Although the justifications advanced by governments have sedulously avoided saying so, the setting up of tribunals all over the place is really only an extension of the "do it yourself" idea. As soon as that fact is perceived, lurking behind all the rhetorical trappings we find that we are once more confronting an issue of legal language.

It is an important issue in any context but perhaps particularly so in this one. The rise of the tribunals has fostered many damaging illusions, one

of them being our now familiar friend the idea that the language of the law can be dispensed with. The language of the law has not been kept out of the tribunals and neither have the lawyers who use it. There is a sound reason for this. It is that people are usually hopeless at presenting their own cases. You will all have heard the aphorism that a lawyer who represents himself has a fool for a client. It is true.

All too often the tribunals have proved to be none too good at deciding anyone's case either. As a result a lot of them have been taken on appeal from the tribunals to the courts. This means that they might just as well have started there in the first place. The attempt to escape from legal language through tribunals has for the most part been an expensive failure for everyone except, inevitably, lawyers who specialise in that class of work.

The great issue of legal language, namely whether it is necessary at all, is in my view susceptible of only one answer, and it is an answer that has been given time and again by both history and current experience. A specialised language of the law is unavoidable in any country with a developed legal system. Any attempt to oversimplify it merely complicates matters, although obviously there is always room for improving on its less necessary absurdities, as in the absolutely iniquitous drafting of large parts of the *Income Tax Assessment Act* that I mentioned earlier.

Legal language as we know it has some peculiar characteristics that are generally overlooked because of its superficially close connection with the ordinary language of everyday. One of them is that it is a purely written language in that it makes no use of such devices open to a spoken language as tone of voice, or nuance. Another is that to a significant extent it appears to be readily accessible to any speaker of the everyday language but in fact is not. Another is that its interaction with the everyday language is subtle and enduring.

One of the reasons why such characteristics are of great importance is that they foster powerful, persistent and costly illusions which seem wholly impervious to the lessons of experience. Personally I see no prospect of that situation ever changing. It seems to be inherent in the phenomenon of language. Is it a problem?

I remember many years ago watching the late Harold Macmillan, as he then, being interviewed during his time as British Prime Minister by two highly-skilled American reporters. One of them asked him if such and such a situation was a problem. He smiled benignly upon them and observed that to describe something as a problem implied that there was a solution. I agree. I therefore answer my own question, no, it is not a problem.

Let me now conclude by relating to you the most remarkable use of legal language ever made in Anglo-Australian law. You will know of the first great stock market bust, the so-called South Sea Bubble, in London in 1720. At that time the modern limited liability company was in an early formative stage and was called a joint stock company.

The government of the day wrongly believed that the existence of joint stock companies had caused the stock market collapse. It therefore passed a statute called the *Bubble Act* to prohibit such companies. The Act however was drafted in terms of such obscurity that no-one from that day to this has ever known whether it actually did prohibit joint stock companies.

A specialised language of the law is unavoidable in any country with a developed legal system. Any attempt to oversimplify it merely complicates matters, although obviously there is always room for improving on its less necessary absurdities.

The general reaction of lawyers and businessmen however was to play it safe and invent alternative mechanisms. The *Bubble Act* therefore was never used. There was not a single prosecution under it. It was repealed about a century later. It was the most successful law ever made. Precisely because no-one ever knew what it meant it delayed the development of the modern registered company by an entire century.

An arid but nevertheless splendid achievement. Note: Since the foregoing lecture was delivered it has come to my notice that the former Victorian Law Reform Commission was working on converting part of the *Income Tax Assessment Act* into plain English. Upon a draft being submitted to the Australian Taxation Office it was criticised on precisely the ground that I identified: that plain English was not an adequate vehicle for expressing the intent of the legislation with precision. The draft was also criticised in detail by a Parliamentary draftsman on the same ground.

Colin Howard

THE LEGAL PROFESSION REFORM BILL 1993 (NEW SOUTH WALES)*

THIS ARTICLE IS INTENDED TO PROVIDE an overview of the Legal Profession Reform Bill 1993 (N.S.W.). Copies of this Bill or, more precisely, copies of what is described as an "Exposure Draft" of the Bill together with an introduction to the Bill, have been widely distributed to the legal profession in New South Wales for comment.

There are three reasons why this Bill is of interest to Victorian practitioners. In the first place, many Victorian practitioners, including members of the Bar, are members of the New South Wales Bar and practise in New South Wales on a regular basis. Secondly, this proposed legislation may at some future time serve as a model for changes in Victoria. Thirdly, the proposed changes serve to focus attention on the question of what is essential to the maintenance of the profession of advocacy as practised by the independent Bar.

The summary which follows should be read with some qualifications. In the first place, the New South Wales Bar starts from a very different position to that which obtains in Victoria. There is, for example, no common admission to practice in New South Wales. The relationship between the Bar and the solicitors' branch is different in a number of respects including the entitlement of a barrister to sue for fees. In a sense, a number of the problems addressed by the Bill were dealt with by the *Legal Profession Practice Act in* Victoria in the 19th century. In the second place, although this can only be said in very general terms, Victoria and New South Wales have very different legal cultures. Legal culture includes a set of predispositions and expectations about the levels of involvement and the proper tasks to be undertaken by different branches of the profession. It includes differing sets of priorities as to what are the essential elements of the practice of the profession. In the third place, the proposed reforms are set out in this article in summary form only. Interested members of the Bar should obtain a copy of the Reform Bill and read it for themselves. Furthermore, the Bill the subject of this article is a draft of a Bill rather than a Bill in final form. There has been a great deal of controversy and discussion in New South Wales about the proposed reforms and no doubt the Bill in its present form has within it the consequences of such debate, including compromises of one sort or another.

The Bill deals with three principal areas:

(a) reforms relating to the structure and regulation of the legal professions (Schedule 1);
(b) reforms relating to complaints and discipline (Schedule 2);
(c) reforms relating to legal fees and other costs (Schedule 3).

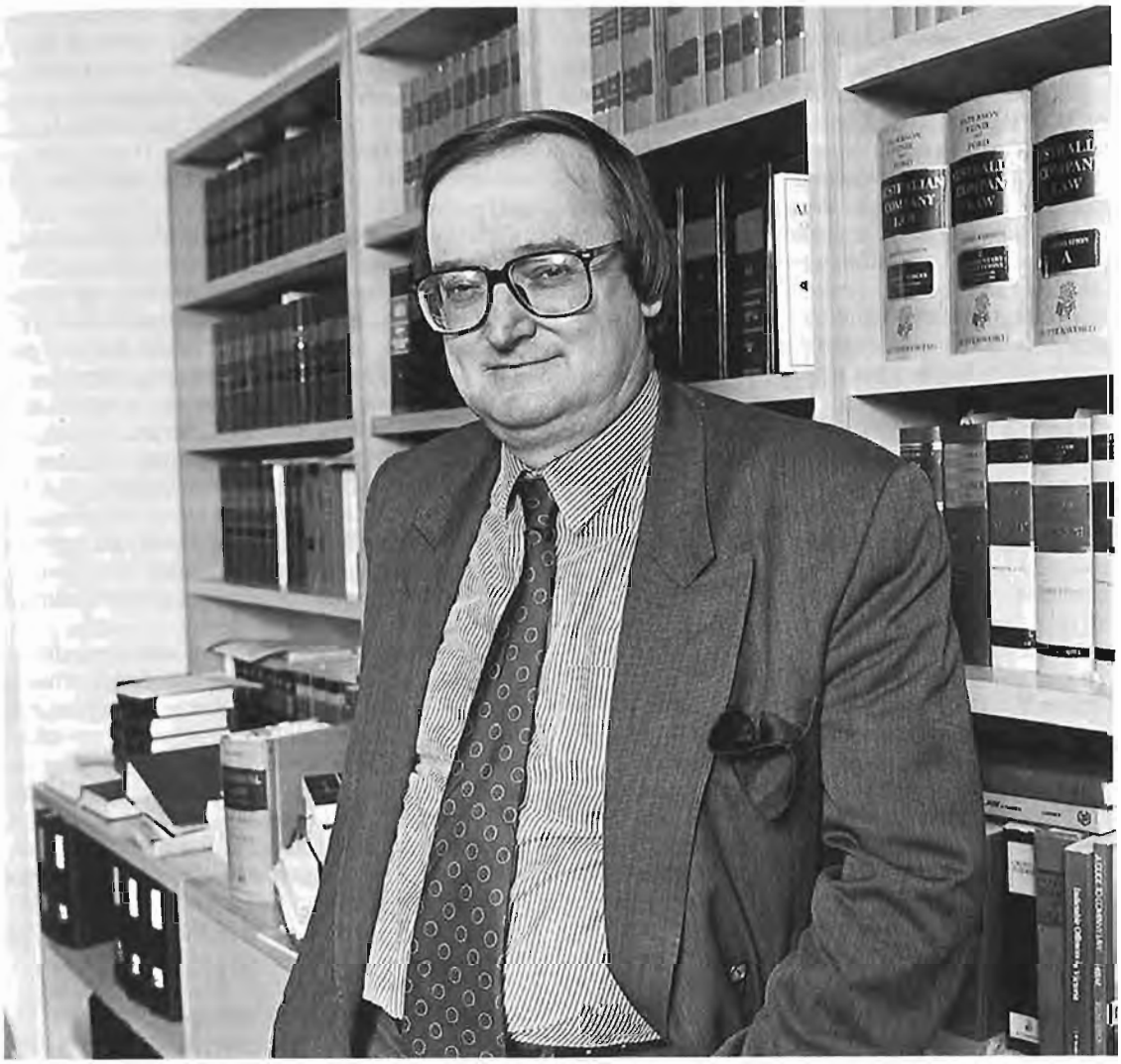
Reforms Relating to the Structure and Regulation of the Legal Profession

Common admission of legal practitioners will be introduced. A combined Legal Practitioners' Admission Board will replace separate Solicitors' and Barristers' Admission Boards. However each practitioner will elect to practise as a barrister or as a solicitor. Thereupon one of the professional bodies i.e. the Bar Council in the case of barristers, will receive an application for the issue of a practising certificate as a barrister or as a solicitor. It is proposed to abolish the Supreme Court's jurisdiction to admit barristers and solicitors. Instead, the Supreme Court "may admit and enrol natural persons as legal practitioners". The legal practitioner will be an officer of the Supreme Court.

The Admission Board will consist of nine members. They will be the Chief Justice of New South Wales, three judges of the Supreme Court nominated by the Chief Justice, the Attorney-General or the Attorney-General's nominee, two barristers nominated by the Bar Council and two solicitors nominated by the Law Society Council. The Admission Board will make regulations regarding and generally administer the process of admission to practice. The Supreme Court will admit and enrol practitioners. The professional councils will issue practising certificates. No person may hold a practising certificate as a solicitor and a practising certificate as a barrister at the same time.

Practice as a barrister is subject to barristers' rules, which are rules made by the Bar Council or made jointly by the Bar Council and the Law Society Council. These rules are subject to overview and disallowance, as will be set out in the para-

* The assistance of John Coombs Q.C. and Bret Walker of the New South Wales Bar is gratefully acknowledged.



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graphs dealing with the regulation of the profession. Barristers are permitted to accept any client, subject to the barristers' rules and the conditions of any relevant practising certificate. It is therefore still open to the Bar Council to have rules which prevent direct access, but such rules will be subject to disallowance, as will be seen.

Barristers may enter into contracts with their clients even though the barrister has already accepted his brief from a solicitor in the matter. This permits a barrister *inter alia* to sue a client directly for fees. Nonetheless the immunity to suit in relation to advocacy is preserved by clause 48C(5). This means that the capacity of a barrister to contract with a lay client is subject to at least one substantial limitation from the client's point of view.

A barrister is permitted to advertise. The limits on advertising are those which already exist in the general law and those which arise from the *Trade Practices Act* 1974, the *Fair Trading Act* 1987 or similar legislation. There is a further prohibition in the Bill on advertising which is false, misleading or deceptive, a prohibition which seems unnecessary having regard to the incorporation by reference of the *Trade Practices Act* and the *Fair Trading Act.* Provision is also made for regulations in relation to advertising.

Barristers may advertise as specialists. They may do so only if they have appropriate expertise or experience or are appropriately accredited under an accreditation scheme conducted by the Bar Council. On the question of appearance both barristers and solicitors may act as advocates. That right of appearance applies to all counts.

A clause which would have permitted solicitor co-advocacy has been scrapped. The question of

solicitor co-advocacy will be dealt with by Bar and Law Society rules, subject to disallowance in the usual way.

Clause 48H declares that "There is no rule or practice that prevents a barrister from attending on another barrister or solicitor or a solicitor from attending on another barrister or solicitor". However sub-clause (2) of the section says "Nothing in this section prevents arrangements being made between individual legal practitioners with regard to attendance on each other". In other words it appears that any rule prohibiting barristers from visiting solicitors' offices in the course of their practice would be struck down by the operation of this section. However, that does not prevent a barrister declining to attend at a solicitor's office.

As to the appointment of Queen's Counsel, clause 481 abolishes the prerogative to appoint Queen's Counsel. Those appointed as Queen's Counsel before the commencement of the section continue as such. The Crown continues to have the power to revoke their appointment. Furthermore, by sub-clause (5), "Executive or judicial officers of the State have no authority to conduct a scheme for the recognition or assignment of seniority or status among legal practitioners". Members of the Victorian Bar may be interested to learn that the definition of "Queen's Counsel" for the purposes of the Bill is "One of Her Majesty's Counsel learned in the laws of the State of New South Wales and extends to King's Counsel where appropriate".

Barristers are not permitted to receive money on behalf of other persons unless there are specific regulations made entitling them to do so.

Rule-making Powers of the Bar Council

The Bar Council may make rules and guidelines. The rule-making power is not confined to heads of power specifically granted by the Bill. The Bar Council may make rules jointly with the Law Society Council.

The rules are binding on all barristers, whether or not they are members of the Bar Association, and, where applicable, on all solicitors, if made jointly. The failure to comply with a rule thus made is not a breach of the Act but is "capable of being professional misconduct or unsatisfactory professional conduct". The rules do not have effect insofar as they are inconsistent with the Act or regulations (Clause 57E).

Provision is made for the continuation of current Bar rules by notice published in the *Government Gazette* by the Bar Council and designated in such notice as barristers' rules. They will then be taken as rules made under the Act. However, such rules will expire on the second anniversary of the commencement of the section unless sooner revoked. In other words, it appears that all old rules will have to be remade under the Act. All rules will be reviewed by the Bar Council within 12 months after the commencement of the section "for the purpose of determining whether [the Bar Council] considers any rule imposes restrictive or anti-competitive practices which are not in the public interest or is not otherwise in the public interest". The results of such review are to be reported to the Attorney-General.

There is to be an Advisory Council constituted by "an independent chairperson, two practising barristers (one appointed from a panel nominated by the Bar Council), three practising solicitors (two appointed from a panel nominated by the Law Society Council) and five community representatives" (Schedule 1). The Advisory Council will from time to time review the barristers' rules and report to the Attorney-General. It may do so on its own motion or when requested to do so by the Attorney-General. One matter on which it is required to report is "whether it considers any rule imposes restrictive or anti-competitive practices which are not in the public interest or is not otherwise in the public interest".

The Attorney-General, after a recommendation of the Advisory Council, and if satisfied that a rule "imposes restrictive or anti-competitive practices which are not in the public interest or it is not otherwise in the public interest," may declare it inoperative (clause 571(1)). This may be done even where the Act specifically permits the making of rules on the particular subject matter of the rule in question. Barristers' rules commence on dates which are not to be earlier than one month after the date of publication in the *Gazette* (clause 57K).

Membership of Bar Association

Clause 57M provides that a barrister is entitled to be a member of the Bar Association and need not pay any fee to obtain that membership additional to the fee paid for the issue of his or her practising certificate.

Reforms Relating to Complaints and Discipline

The objects of Part 10 dealing with complaints and discipline are set out in clause 123 as follows:

"(a) to redress the consumer complaints of users of legal services; and

(b) to ensure compliance by individual legal practitioners with the necessary standards of honesty, competence and diligence; and

(c) to maintain the ethical and practice standards of the legal profession as a whole at a sufficiently high level".

Professional misconduct is defined in clause 127. The definition is in part derived from the common law of professional misconduct. Unsatisfactory professional conduct is also defined in that section as being conduct which "falls short of the standard of competence and diligence that a mem-

ber of the public is entitled to expect of a reasonably competent legal practitioner".

The Act will impose a three-year limitation period on complaints, capable of extension in some circumstances.

The Legal Services Commissioner

The Act will create the office of Legal Services Commissioner. Clause 131 sets out the powers of that Commissioner. So central to the scheme of the Act is this that the draft clause is set out in full.

"131. (1) The Commissioner has, in accordance with this Act, the following functions:

(a) to receive complaints about "professional" misconduct or unsatisfactory professional conduct of legal practitioners;

(b) to assist and advise complainants and potential complainants in making and pursuing complaints;

(c) to assess complaints and to refer them to the appropriate Council for investigation or mediation in appropriate cases;

(d) to initiate a complaint against a legal practitioner;

(e) to investigate or take over the investigation of a complaint if it is in the public interest or the interests of justice;

(It is proposed that these clauses will be amended to the effect that the Council of the Bar Association of the Council of the Law Society will investigate complaints with referral back to the Commissioner in special circumstances.)

(f) to review the decisions of Councils to dismiss complaints or to reprimand legal practitioners in connection with complaints;

(g) to institute proceedings in the Tribunal against legal practitioners following an investigation or review by the Commissioner;

(h) to institute if it is in the public interest or the interests of justice to do so or if the appropriate Council requests the Commissioner to do so;

(i) to promote community education about the regulation and discipline of the legal profession;

(j) to assist in the enhancement of professional ethics and standards, for example, through liaison with legal educators or directly through research, publications or educational seminars;

(k) to conduct regular surveys of, and report on, the views and levels of satisfaction of complainants and respondent legal practitioners with the complaints handling and disciplinary system;

(l) to report on the Commissioner's activities under this Act."

Further clauses set out in more detail the mechanism by which complaints are to be made. However clause 131 sets out comprehensively the very broad powers of the Commissioner which contrast strikingly to the comparatively limited powers of the Lay Observer in the Victorian system. A reading of the Lay Observer's reports in Victoria would show that the Lay Observer would be likely to support the introduction of at least some of the powers of the Legal Services Commissioner in this State.

Provision is made by clauses 143 to 147 for mediation in the settlement of complaints. Detailed provision for the investigation of complaints is made by clauses 148 to 159.

When a complaint against a barrister is being dealt with, the Board will be constituted by two barrister members and one lay member. Proceedings are commenced, in the case of a barrister, by an information laid by the Bar Council.

Legal Services Tribunal

The Legal Services Tribunal will consist of two barristers appointed by the Attorney-General after consultation with the Bar Council, two solicitors similarly appointed and at least two lay members appointed "after consultation with lay members of the Legal Aid Commission, the Law Foundation and such other bodies as the Attorney-General considers appropriate". The Attorney-General may appoint a barrister member or solicitor member as President. When a complaint against a barrister is being dealt with, the Board will be constituted by two barrister members and one lay member. Proceedings are commenced, in the case of a barrister, by an information laid by the Bar Council. The Tribunal is bound by the laws of evidence when inquiring into a question of professional misconduct, but not otherwise.

The parties who may appear at a hearing are set out in clause 166(1). They are the legal practitioner complained of, the Bar Council in the case of a barrister, the Legal Services Commissioner, the Attorney-General, and the complainant, subject to sub-clause (2). Sub-clause (2) provides that a complainant is entitled to appear only on questions of compensation. The Tribunal however may grant more general leave to appear. All parties entitled to appear may appear in person or by a legal practitioner or "with the leave of the Tribunal, by any other person". The hearing will be in public, sub-

ject to orders by the Tribunal that it be held in private.

The powers of the Tribunal to make orders against legal practitioners are comprehensive and are set out in clause 171. They include the power to remove the name of the legal practitioner from the roll of legal practitioners in the case of professional misconduct, to cancel the legal practitioner's certificate, to set out a period in which a practising certificate is not to be issued, and to order fines up to $50,000 in the case of professional misconduct or $5,000 in the case of unsatisfactory professional misconduct. The Tribunal may also reprimand the practitioner, or order that the practitioner undertake and complete a course of further legal education. The Tribunal may also make a compensation order. It also has the power to make ancillary orders. Powers to order compensation are limited to the sum of $10,000 which may include a compulsory waiver of a fee. Compensation may not be ordered where "the complainant has received, or is entitled to receive, compensation under an order of a Court or compensation from the Fidelity Fund". This would seem to have the effect that the complainant could not receive compensation caused by tort or breach of contract. Compensation would therefore be available for example in areas where losses caused by behaviour which would otherwise be the subject of immunity which is preserved by the Act. To that extent the immunity of the advocate is substantially eroded up to the limit of compensation orders, being $10,000.

An appeal lies against orders of the Tribunal to the Supreme Court. That appeal is "by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence received at the original hearing, may be given". The complainant may only appear in relation to loss suffered by the complainant as a result of misconduct.

Fees

Schedule 3 relates to reforms relating to legal fees and other costs. Clause 174 requires a barrister to disclose to a client a set of matters relevant to the final costs to the client. However this disclosure "is not required to be made by a barrister or solicitor who is retained on behalf of the client by another barrister or solicitor. However, the disclosure to the client is to include the costs of the barrister or solicitor so retained." In other words where a barrister is briefed by a solicitor it is the solicitor's responsibility to make the relevant disclosures. Clause 175 governs the matters to be disclosed by a barrister to his instructing solicitor. These include:

"...

(a) the amount of the costs or an estimate of the likely amount of the costs;
(b) if an estimate, the basis of calculating the costs;
(c) the billing arrangements;
(d) if interest is to be charged on unpaid costs, the rate of interest;
(e) any other matter required to be disclosed by the regulations."

If there is any significant increase in an estimate then the barrister must disclose that increase. The disclosure is to be in writing. However a disclosure is not required to be made if it is not reasonably practicable to do so in the particular circumstances of the case. Regulations may be made regarding any additional information which must be disclosed. The failure to comply with these requirements may be professional misconduct or unsatisfactory professional conduct. A costs arrangement comes into existence when a legal practitioner sends a letter confirming the retainer and containing the matters required to be disclosed. The sanction for failure to make a costs arrangement is that a client is not, in these circumstances, required to pay a bill unless it is assessed, and the legal practitioner must pay the cost of the assessment.

Conditional costs agreements are permitted. A conditional costs agreement may provide that the legal practitioner will be paid only in the event of success. It may provide for a premium not to exceed 25% of the costs otherwise payable under the agreement. Regulations may vary that percentage (Clause 187(1)). Provisions of costs agreements which are in contravention of the Act are void.

A barrister or solicitor may charge interest if the costs are unpaid after 30 days if that barrister or solicitor has given a bill of costs in accordance with this division. That may not be done unless the interest has been disclosed. Many Victorian practitioners may find this a welcome addition to fees agreements.

The details of the legal costs committees are not summarised here. There is provision for referral of costs to the proper officer of the Supreme Court for an assessment of the whole or part of the costs. If there is a costs agreement complying with the Act then the costs assessor is to decline to assess the bill. However the costs assessor may determine "whether a term of a particular costs agreement is unjust in the circumstances relating to it at the time it was made". Whether or not this will apply to agreements between solicitors and barristers remains an area of disagreement.

Miscellaneous

Multi-disciplinary practices will be permitted. Whether this will affect the Bar is not yet clear. Maintenance and champerty will be established as crimes or torts, but it is said that disciplinary and "public policy" civil sanctions will remain in the sense that a contract which involves champerty will not be enforceable.

Michael Crennan

A LITTLE JUDICIAL REFORM

Good medicine or a bitter pill. A view from a consumer.

IN HIS 1987 BOOK *JUDGES*, DAVID PANNICK Q.C., a *Times* columnist and a practising silk at the English Bar, uses a line from Kafka as his introduction:

". . . it never occurred to the Advocates that they should suggest or insist on any improvements to the system while — and this was very characteristic — almost every accused man, even quite ordinary people among them, discovered from the earliest stages a passion for suggesting reforms . . ."[1]

AS STATE DIRECTOR OF PUBLIC PROSECUtions I am not only the largest single user of the Bar's services but I am also, at least in one sense, the largest "consumer" of the services provided by the superior courts of this State. On behalf of the State I daily seek the resolution of upwards of 20 separate criminal matters in the Supreme and County Courts. Seeing the courts from this perspective — as "customer" rather than advocate — leads to a different perception of the way courts and judges operate.

At least partly because of my experience as D.P.P., which involves much more public contact than I ever experienced at the Bar, I have come to appreciate and understand some of the criticisms of the justice system and the courts made by the press and the public from time to time. My experience has led me to the firm view that no part of the system can afford to ignore completely currents of public opinion unless it does not mind becoming an endangered species. If courts, judges, prosecutors and other actors in the system ignore public opinion and the press and permit erroneous views and ideas as to their actions, functions, powers, responsibilities and duties to become current and widespread without correcting them or putting another point of view then it should come as no surprise that the average citizen begins to treat the justice system with contempt. Contempt based on ignorance is no less destructive for that.

No one has to convince lawyers that generally judges and the courts they sit in carry out their function in a professional, impartial, honest and legally sound manner. However, I am not so sure the general public always agrees. The system of education appears to do little to disseminate essential information on the justice system and those who know most about it, namely those active within it, do even less. If public confidence in the judiciary and the courts is to be maintained, or even restored to the position we like to think it once held, some important issues need to be addressed.

Lord Devlin, who retired as a Law Lord in 1964 at the youthful age of 59 because his work "had become tedious instead of exhilarating", wrote a book in 1979 entitled *The Judge*. It grew out of a series of lectures he had given on different aspects of the life and function of the English judge.

In one such lecture Lord Devlin examined a 1976 English proposal for compulsory judicial education in sentencing.[2] The idea of judicial education of any kind was then very new, at least in the U.K. It was probably unheard of here. The proposals being put forward involved a requirement that all new judges should undergo educational courses on various aspects of penology It was suggested that the neophyte judge should be required to undergo at least one month's residential novitiate before being permitted to engage in sentencing. His Lordship was very critical of the idea that any English judge needed any "background" information before he could begin judging. He saw it as the "unacceptable face of socialism" — although quite what political ideology had to do with the proposal is not immediately apparent. He thought that any sensible person would acquire the necessary knowledge at his own expense and in his own way upon being elevated to the Bench. He suggested that as it would be impossible for a judge to absorb everything he needed to know to perform his task properly in such a course it was therefore somehow dangerous for him to be exposed to any learning experience at all.

Lord Devlin considered the judge as being the "*juryman writ large*" and contended that to have trained Judges would deny open justice: everything that influences the court's judgment should be presented by way of evidence or argument in open

Bernard Bongiorno

court. His Lordship's arguments might be more persuasive if one could be sure that judges come to the Bench with minds that are not only broad but also blank. Experience strongly suggests that such is not the case. Those normally appointed to the Bench do not automatically lose all vestige of prejudice nor do they become omniscient either in the law or outside it upon donning a judicial wig. They are not like the boy from Tangmalangaloo upon whom the "*squall of knowledge*" suddenly descended.[3]

Since 1979 the United Kingdom has had a Judicial Studies Board. It began by establishing principles of judicial training in the criminal jurisdiction and subsequently (in 1985) expanded its role to cover the provision of training in the civil and family jurisdictions. English judges who attend courses organised by the Judicial Studies Board have invariably been Deputy Circuit Judges or Recorders prior to their appointment. One cannot be appointed permanently to the Bench there without first having acted as a judge in one capacity or another. Although a Judicial Studies Board was to have been inaugurated in this State, current indications are that it will not materialise for some time, if at all. In the meantime judicial education remains *ad hoc* under the auspices of bodies such as the Australian Institute of Judicial Administration. Indeed it may be cogently argued that an organisation such as the A.I.J.A. is best equipped to understand the requirements of judicial education and to design and provide them.

It has the added attraction that although funded largely by governments it is part of a respected university (Melbourne) and completely independent in its educational and research activities.

Lord Devlin regarded judicial education as being dangerous in that it might impose "an official view" on the judge. I would suggest that the role of a Judicial Studies Board or Judicial College (in the United States and Canada) or the A.I.J.A. is to provide information, not doctrine. If judicial appoint-

ees have the necessary legal knowledge, intelligence and independence of mind to suit them for the career they are about to undertake they must surely be able to identify and reject any attempt to impose "political correctness" upon their judicial decision making. Otherwise judges should stop reading newspapers, watching television or perhaps even going to the football lest they begin to be "educated" in unacceptable ideas by the leader writers, current affairs reporters or vocal supporters of the opposing team.

Of topical concern, of course, is the question of raising judicial awareness of issues of racial and gender equality. None of us who has been around the courts for any length of time will be unaware of unfortunate judicial comments from time to time which draw on stereotypes which are themselves the product of unfounded generalisation and myth. Sometimes the comment is almost disguised: the raised eyebrow can be as effective a comment as words in condemning a plaintiff in a racially-biased stereotypical way. The term "Mediterranean back" was alive and well when I practised in the personal injuries area. It may still be, and its use was not confined to certain insurance company examining specialists.

In August 1991 the Supreme Court of Canada handed down a decision in two related cases: *Seaboyer* v. *R.*; *Gayme* v. *R.*[4] The accused in each case had been committed for trial on a charge of rape and was challenging the validity of his committal on the ground that certain sections of the Canadian Criminal Code were unconstitutional as infringing the Charter of Rights and Freedoms. The challenged sections were so-called "rape shield" laws which prevented the accused leading evidence or cross-examining as to the prior sexual reputation or history of the complainant. They resembled section 37A of our *Evidence Act*. The appellants argued that their right to a fair trial, as guaranteed by the Charter, was infringed by the restriction on their ability to raise the complainant's sexual history as part of their defence.

It is not because of the constitutional challenge (which was successful as to one section and unsuccessful as to the other) that this case is interesting. It is because of a remarkable (and very long) judgment given by L'Heureux-Dubé J. on behalf of herself and Gonthier J. Although they were partially in dissent (they upheld the validity of both sections) the judgment is notable for the way in which it purports to expose what the judges asserted were stereotypical myths about women, about offences of sexual assault upon women and about their perpetrators.

Her Ladyship enumerated some ten stereotypical perceptions of rape victims and rapists which, if held by various people involved in a rape prosecution, may distort the criminal justice system at various stages between the point at which an alleged crime is reported and the point at which the tribunal of fact brings in its decision. She adopted the stereotypes from a 1983 publication in the field of sociology.[5] They included generalisations such as "a woman cannot be raped against her will," "rapists are strangers who leap out of bushes to attack their victims," "women are maternal or they are sexy," "being on welfare or drinking implies consent" etc. She points to examples of these stereotypes which have found their way into law reports, journal articles and the like and provides examples.

It is unfortunate that in the heat of an election campaign some politicians, including the Prime Minister, have spoken of "sending judges back to school" and the like in relation to issues of gender equality. Such suggestions are, of course, demeaning, offensive and constitutionally unsound.

The relevance of L'Heureux-Dubé J.'s judgment to this discussion is not to establish that the stereotypes of which she writes are in fact unjustified generalisations but rather to raise the question of whether, if such stereotypical conceptions exist, if they are held by some judges or if they can be demonstrated to be provable misconceptions of fact (as Her Ladyship asserts in her judgment) then why is not the elimination of such misconceptions from judicial thinking equally as important as would be the elimination of a judicial misconception that the earth was flat or that the square root of 64 was 9? If, on the other hand, L'Heureux-Dubé J.'s assertions are no more than baseless opinion or feminist polemic then judges exposed to a discussion of them will immediately recognise that they are being subjected to propaganda and form their own judgments accordingly. It is entirely arguable that judicial education in the area of sociology is no less important for a criminal court judge than a basic knowledge of the ordinary laws of physics would be for a judge who habitually decides cases involving structural engineering, or a basic knowledge of anatomy is for one who assesses damages for personal injury. The evidence upon which the tenets of sociology generally, or the falseness of the stereotypes referred to specifically, are based is available to be

critically examined. Even if it does not have the scientific exactitude of Boyle's Law it can still be evaluated by an otherwise unbiased and balanced judicial mind.

It is unfortunate that in the heat of an election campaign some politicians, including the Prime Minister. have spoken of "sending judges back to school" and the like in relation to issues of gender equality. Such suggestions are, of course, demeaning, offensive and constitutionally unsound. They provoke entirely understandable opposition from judges and those who read into them yet a further attack on the independence of the judiciary. However I suggest that to place before a judge, who voluntarily attends a judicial education course, evidence which suggests that certain views (which he may or may not hold) about women or blacks or Turks or paraplegics or rapists or lesbians or those suffering from cerebral palsy are factually wrong is no more an attack on his judicial independence than it would be for him to be confronted at a similar course by a challenge to an opinion which he held that the pressure of a given quantity of gas was directly proportional to its volume. Who better than a judge to decide whether the material with which he is being presented is factually correct, arguably polemic or merely propaganda for one or other school of current sociological thought? I would go further and suggest that judges have a duty to inform themselves in this area. To remain wilfully ignorant is arguably tantamount to refusing to accept one of Newton's laws and then deciding a bridge collapse case accordingly.

The connection between judicial education and the sometimes copious flow of letters which I receive from members of the public might not be readily apparent. However, whenever I read in such correspondence a criticism of a judicial statement which seems valid on its face I wonder whether there is a need for organisations like the A.I.J.A. to be more forthright in their offering judicial education more widely in a greater number of areas and to a greater cross section of judges.

Whenever a sentence is imposed in a newsworthy or controversial case I receive varying quantities of mail. Some of it is remarkable for the ignorance of the justice system which it displays. I am sometimes asked to change the law, sack judges, run trials again, charge people in respect of whom no evidence exists, carry out Royal Commission-type investigations and, most commonly, increase sentences which have been imposed. Sometimes the mail is clearly encouraged, even directed, by people who Brennan J. referred to as *". . . personalities who affect to convey the moral conscience of the community and to possess information, insights and expertise in exceptional measure"*[6] broadcasting on radio and television. For example, in the notorious case of Robert Tahché (the "pay back" rapist) I received over 1,200 letters written at the express exhortation of a particular radio journalist. Often, however, it is the anguished cry of a victim, a widow or a parent who, however ignorant of the real situation, is deeply aggrieved by what is perceived to be an injustice.

Every letter I receive is answered in an attempt to disseminate, as widely as possible, accurate information as to the way the criminal justice system works. However, there are occasions when I find answering such letters extremely difficult. The fact of the matter is that occasionally judges do make indefensible comments, conduct their proceedings in ways which are other than entirely appropriate or fail to ensure that what they are doing is fully understood or even understandable by onlookers — particularly victims and their families.

Victims complain that in the sentencing process their feelings are sometimes ignored — even trampled on by remarks made by a sentencing judge. Of course, all the judge might be doing is engaging in a Socratic dialogue with counsel for the prisoner to assist him or her to put the best case possible on his or her client's behalf by asking appropriate questions designed to elicit favourable material. To a victim sitting in court this can sound as if the judge is either dismissing the victim's anguish or seeking to minimise the effect of the crime. He is almost certainly doing neither. Inevitably the sentence imposed in such circumstances will be seen by the victim as being inadequate not because it is, but because of what was said before or at the time it was handed down.

Again, judges sometimes deal with matters so expeditiously that a victim or a police officer or even a member of the public idly observing writes to complain that justice appears to have been so swift that it wasn't done at all. In the New South Wales case of *R.* v. *Martin* the Court of Criminal Appeal criticised a District Court judge who disposed of the sentencing hearing on a charge of defrauding the Commonwealth in less than 5 minutes. It said that his minimalist approach had lead to a miscarriage of justice!!

I have had complaints that the judge sometimes commences a sentencing hearing by announcing the course he proposes to follow, apparently without hearing the case at all. The victim does not know that the judge has read the whole of the depositions and perhaps such other material with which he has been provided. Often the extent of the judge's knowledge is not clear to a bystander (particularly a victim) who has come to court expecting that the matter will be canvassed in some detail. After all, a serious judicial function is being carried out which affects him. For the judge to display impatience or even an apparent prejudgment (which might be quite proper as a matter of law) creates an

impression which may lead to a letter to me. Perhaps one remedy for this particular problem might be for prosecutors to be required *in every case* to fully open the facts in a sentencing hearing following a plea of guilty. The extra time might be well spent.

The vast bulk of the mail I receive consists of complaints about inadequate sentences. Most of it is uninformed and it goes without saying that no consideration of the appellability of a sentence by prosecutors in my office is influenced by any such public outcry. Indeed, such mail is not circulated to prosecutors involved. However, from time to time I cannot help feeling that although a judge has imposed a perfectly proper sentence his sentencing remarks leave a lot to be desired from a public relations point of view. A victim listening could sometimes be forgiven for thinking that the prisoner was about to receive a bouquet rather than the gaol sentence which the victim thought he deserved. Even a stiff sentence in such circumstances will appear inadequate.

The victim is a relative latecomer to the modern criminal justice system as we understand it. I offer the observation, however, that if courts continue, either consciously or unconsciously, to ignore him and to give him less than the deference he deserves having regard to his involvement in the crime being dealt with, the agenda of the debate in this area will shift to an unacceptable degree towards the distortion of the trial and sentencing process. I have seen courts in the U.S.A. which are required to permit a victim separate legal representation during a trial and are required to take his views on an appropriate sentence into account. Such procedures certainly add a new dimension to the criminal justice system, a dimension I do not endorse.

The idea of the courts being more prepared to use hitherto ignored methods of communicating with the public (such as using a press liaison officer or even giving TV interviews) as to what they do, why they do it and how they do it is still repugnant to many judges. They assert that courts hand down judgments which anyone can read, criticise, discuss and disagree with as they wish. But this ignores the fact that much of what courts say and do is unintelligible to the vast majority of the population who form their ideas of the justice system from *L.A. Law* or Derryn Hinch. If my correspondents are any guide we are losing the battle to retain confidence in the justice system. I suggest a little judicial reform, a little more judicial education and a little more effective judicial communication as "pills" which might have some remedial effect. If public confidence in the system is thereby increased might not the treatment be worthwhile, even if some people find the "pills" a little bitter?

NOTES

1. Pannick, D., *Judges*, Oxford O.U.P., 1987, p.v.
2. Devlin, Patrick Arthur, *The Judge*, Oxford, O.U.P., 1989, p.34.
3. John O'Brien, *Around the Boree Log and Other Verses*, Sydney, Angus and Robertson, 1936.
4. [1991] 2 S.C.R. 577.
5. L. Holstrom and A. Burgess, *The Victim of Rape: Institutional Reactions*, New Brunswick, N.J., Transaction Books, 1983.
6. *R.* v. *Glennon* (1992) 173 C.L.R. 592, 611.

Bernard Bongiorno

DISCOVERING THE TREASURE HOUSE OF AUSTRALIAN LAW

The Hon. Justice Michael Kirby A.C., C.M.G.*

At the launching of *the Laws of Australia* on 4 August 1993 the President of the New South Wales Court of Appeal, the Honourable Justice Michael Kirby A.C., C.M.G., spoke of the emerging independence of the Australian legal system. His paper is with his kind permission reproduced below.

* President of the Court of Appeal of New South Wales. Chairman of the Executive Committee of the International Commission of Jurists.

A NEW SERVICE

I AM HONOURED TO PARTICIPATE IN THIS launch of *The Laws of Australia*. By any account it is a bold enterprise of legal publication. Perhaps it is the boldest in our country's history. The Law Book Company, as publisher, and the many editors and authors from all parts of our contintental country, are to be congratulated upon their contributions: some made, some still promised, to this remarkable work.

It is intended that the series will cover, in one publication, all significant areas of Australian law.

Every practising lawyer and judge knows the difficulties which are faced in quickly finding the law, absorbing its principles and requirements and offering advice to the anxious client or a decision to the nervous litigant. Over four hundred Australian lawyers are taking part in this enterprise. They have been chosen with exquisite care to ensure that their contributions will be conceptual. They will take this series beyond the potted versions of decided cases. They will seek to extrapolate the principles from the myriad of instances which always threaten to obscure them. Theirs is the task, on behalf of thousands of fellow lawyers and millions of fellow citizens, to stand back from the topic in hand. To synthesise the emerging rules. And to write with clarity and grace legal prose which will endure in a tune of restless change.

My study of the sample chapters which the publisher has put together suggests that the authors have been chosen well. Needless to say, the conviction that this was so was reinforced by noting that, in a sample chapter on error of law in "Administrative Law" under the heading "A useful definition of jurisdiction," a humble effort of my own was presented to assist the reader.[1] The chapter on "Injunctions," included in the sample, deals in a lively way with that ever expanding remedy. The author notes the development of the Mareva injunction. He calls it "a flexible remedy". He has spared readers the calumny heaped upon this Australian adaptation of an English invention by Justice R. P. Meagher of my Court. Those who are interested will find their way to that topic[2] Every time he is called upon to consider the Mareva injunction, Justice Meagher feigns the reluctant duty of a protesting innocent in the manacles of legal authority. Medusa — like he applies the law. But reluctantly. And with endless protest, in the hope that one day reason might prevail and Lord Eldon with his unaltered Equity will return in full splendour to Australian law.

The most creative step of the new series is in line with the effort towards conceptual presentation of the law. The 200 titles of the *Australian Digest*, and the even greater number of sub-headings found in legal indexes and other works, cut the law into tiny fragments. They present the risk that the great mosaic — and even its principal sections — will not be seen in their correct relationships. Instead, this new work adopts 35 titles only. This mode of organisation will help the user to find, in convenient proximity, all or most of the legal principles which have to be considered to solve the problem at hand.

Our marvellous system of law — inherited from England — has many great strengths. It also has weaknesses. Of the weaknesses of substance, the greatest is the propensity which is at once the reason for its success in governing a quarter of the world's people. It is a highly practical system of law derived, still in large measure, by analogous reasoning from the solutions offered in earlier like cases to provide the solutions for new problems in later times. I see in my own Court the difficulty of getting the noses of the lawyers out of the books where they can read passages written long ago on facts only marginally similar to the case in hand. Seeing the immediate legal problem in its conceptual setting remains the greatest challenge of substance which the Common Law system presents to its practitioners.

It is here, I hope, that *The Laws of Australia* will help. By conceptual analysis of the mass of detail and by standing back from the particular cases to perceive the emerging themes, it is hoped that the series will reveal the tapestry of Australian law in all of its variety: displaying strengths, revealing weaknesses.

If this great object is achieved we may see yet another step towards harmonisation of the two enduring international systems of law: derived from the Common Law of England and the Civil Law of France. Already we see the systems moving together as the Common Law judge (in Australia not least) becomes a more active inquisitor in the conduct and management of the case. I have been known to ask a few questions myself in the Court of Appeal. Even more fundamental is the search by the Common Law for the principled concepts that are the strength of the Civil Law and Code systems. I see *The Laws of Australia* as potentially offering an important contribution to that search: lifting the sights of judges and lawyers in this country so that they will see the legal system in more principled terms. And less as a collection of isolated solutions to particular problems which might, one day, come together as if by oversight in a unified legal concept.

Writing a judgment, pleading a case or advising a client it is essential to have the framework of legal principle clearly in mind. It is my hope that *The Laws of Australia* will facilitate this vital process of lawyering. If that hope is fulfilled, the result will be a nation of lawyers who think, speak and write more simply and clearly and whose minds are free from captivation by the thought that "there is a case on this somewhere". Instead, they will think of the principles to which the cases are but the handmaidens.

THE APRON STRINGS

The other idea of this work which is so attractive is the preference which is being given to Australian authority. I am not one of those who is prepared to adopt an anti-English approach to the law (or anything else) because of the current fashion or dimly-perceived and half-remembered slights. It has become all too modish, on both sides of the earth, to challenge the relationship between Australia and Britain. Our Prime Minister was reported as having

disdained the preferred flag of Australia with the instruction: "Give that thing to one of your Pommy mates". On the other hand, the *Daily Telegraph* in London was recently reported (perhaps not wholly in jest) as suggesting that the English would not want Noeline Donaher as a mother, declaring:

"Two hemispheres separate us . . . and that's not a hemisphere too many".[3]

The *Daily Star* in London went a step further, suggesting that *Sylvania Waters* continues to demonstrate that too much sunshine in Australia can "seriously affect your brain".[4]

Such exchanges of pleasantries are not new between Australians and the English. Justice John Bryson recently gave a witty and highly readable account of the ambivalent relationship between our legal system and that of England. He described the mood of it:

"Australian history as taught in pubs seethes with resentment against Britain. A strange feeling against a country which has left our internal affairs to our own devices since about 1855. There is a feeling that Britain did not do enough for us, poorly focused as to when and how, and why anything should have been done at all. Where the relationship is ambiguous, it is not really possible for its effects to be satisfactory; some part of the expectations may lead to disappointment somewhere. Ambiguity was found everywhere in Australia's relationship with Britain for generations. Obviously apart, but in some ways still together. That age has passed."[5]

Considering our many debts (and in particular to the laws of England) we should never forget our precious legacy of constitutional stability, the rule of law, jury trial, and basic liberties. I would have added judicial independence and tenure to that list. But important derogations,[6] most recently and disgracefully in this State, have put that inherited tradition at risk, at least for the State judiciary in Australia.[7]

In considering what we owe to the Common Law of England, we should also remember that our formal link to that system, through the Privy Council, kept our country tied, in its legal infancy, to what was, undoubtedly, one of the foremost legal centres of the world. At times when our own intellectual resources were strictly limited, the link was a mighty stimulus against parochialism. It was a steady and constant reminder of legal basics enjoyed in common by many societies with unmistakable imperfections but important strengths too.[8]

Nevertheless, the time came when it was appropriate to sever the formal links. The exact moment of Australia's complete legal independence is unclear. It was probably some time in the 1930s or early 1940s. In the way of these things, it was completed by the gradual elimination of Privy Council appeals and finally when the Queen came to Canberra to sign into law, as Queen of Australia, the *Australia Acts* 1986. As Justice Bryson laconically observes:

". . . It was a rather quiet affair, poor stuff for legends of independence achieved in struggle".[9]

Lawyers' minds are not so easily released from the habits of a lifetime. Still in my Court (and occasionally even in Australian judgments) we see the English Court of Appeal described, with the definite article, as "The" Court of Appeal. English authority continues to be quoted before Australian authority. English precedents are still given greater weight by many judges and lawyers than New Zealand or Canadian. The reasons for these enduring legacies are easy to see. They include habit and the possession of report series left over from times when Australian law was indeed bound by the Privy Council to the chariot of English authority.

In considering what we owe to the Common Law of England, we should also remember that our formal link to that system, through the Privy Council, kept our country tied, in its legal infancy, to what was, undoubtedly, one of the foremost legal centres of the world.

The High Court of Australia has now nudged the courts of this country to a new independence.[10] It accepts English, like other foreign legal material, as a priceless legal legacy of our membership of the great family of Common Law countries. But with no higher authority than that of any other country. Getting that message through to Australia's judges and lawyers is taking an awfully long time. Perhaps, as one Lord Chancellor said, it takes 20 years (the peak working life of a lawyer) to rid the system of old heresies. Lawyers, being often creatures of habit and not infrequently conservative, remain for too long the captives of their law school notes and the theories of their post-adolescent teachers.

My principal hope for *The Laws of Australia* is that the series will accelerate the perfectly natural and highly desirable process of judicial and legal independence. It is not enough to be independent by statute and on paper bearing the Queen's name. We must also be independent in our minds. Far

from slamming the door on Britain, this means opening the door of the treasure house of Australian law and peering further into the great systems of the Common Law — in Canada, New Zealand, the United States, Ireland, India and other newer countries of the Commonwealth such as Singapore, Malaysia and (whilst it is still with us) Hong Kong.

In Australia, we have all too often looked to England alone. We have been ignorant of the decisions of other States of our own country. The advent of *The Laws of Australia* and the increasing mastery of information technology should reverse this shameful neglect of the legal material systems of our own nation. Whereas in the past we often looked first to *Halsbury's Laws of England* for the encyclopaedic principles of the law, in future we will look to *The Laws of Australia*. Whereas in the past we were so blinded by the legal minds at work on The Strand and in Whitehall, in future we will have a greater sense of comradeship with lawyers in Australia and in other lands, sometimes with societies having closer similarities to our own.

I fear that, for this process to fully succeed, it will be necessary for a generation of lawyers to pass on. In this sense *The Laws of Australia* come none too soon. They appear at an important moment of legal and constitutional reappraisal. It is less astonishing that this mighty work of publication has been put together now than that it has taken two centuries of Australian law for it to come to pass.

CHANGES IN THE WIND

There are many problems which the publisher and editors will have to grapple with as this work proceeds. Its inter-relationship with the new information technology and the cost and inconvenience of updates is clearly one. The avoidance of duplication between *The Laws of Australia* and the *Australian Digest* is another. Maintaining the evenness of the quality of chapters of the work penned by so many hands is yet another. The maintenance of a high standard of expertise with an appropriate level of written simplicity demands great judgment and the avoidance of any endeavour to duplicate the more detailed works of text writers or the scribblings of law review essayists.

The impact of statute law continues to grow. A New Zealand judge recently lamented that such was its erosion of the Common Law that judicial life threatened to become tedious as the judges were increasingly consigned to the mechanical task of verbal interpretation.[11] Much in demand will be the chapter of *The Laws* which deals with "Statutory Interpretation". With the multitude of statutory enactments and the plethora of local variations, it will always be important for lawyers in Australia to check carefully and keep up to date with the doings of their many Parliaments — rapacious as they are of forests of newsprint.

Perhaps the greatest challenge for *The Laws* will be to keep up to date with the changes of fundamental legal principle. In the past two years, since this series was launched, we have seen in Australia a dazzling galaxy of decisions of the High Court which have removed from Australian law things long taken to be settled or found in that law things long taken to be absent — all by judicial decision. I refer, only by way of example, to the following:

- the effective reformulation of the principle of freedom of interstate trade and commerce in *Cole* v. *Whitfield*;[12]
- the reformulation of privity of contract in *Trident General Insurance Co. Ltd.* v. *McNiece Bros Ltd.*;[13]
- the abolition of the presumption of consent by a wife to sexual intercourse (rape) within marriage in *The Queen* v. *L*;[14]
- the explosion of the doctrine of the Common Law that Australia was *terra nullius* when first occupied by European settlers and the declaration of continuing rights to native title in *Mabo* v. *Queensland*;[15]
- the declaration that the rule precluding the recovery of money paid under a mistake of law should no longer be held to form part of the law of Australia in *David Securities Pty Ltd* v. *Commonwealth Bank of Australia*;[16]
- the discovery of implied constitutional freedoms to discuss public and political affairs and to criticise federal institutions necessarily imported into the structure and language of the Australian Constitution, as stated in the *Australian Capital Television case*[17] and reinforced in the *Nationwide News case*;[18]
- the rejection of the Bolam principle for the liability of medical practitioners in *Rogers* v. *Whitaker*;[19] and
- the holding that an accused person, denied legal representation in a criminal trial, may, in some circumstances, suffer such a miscarriage of justice as to require the stay be granted or a conviction to be quashed. See *Dietrich* v. *Queen*.[20]

These decisions have been laced with peppery judicial dissents. Some have produced unusually sharp public commentary. One decision, requiring judicial warnings of the dangers of convicting accused persons on the unrecorded and uncorroborated verbal statements of police,[21] was even expressed to be prospective in its operation. This is something that may lead to occasional injustice[22] and is certainly a novel judicial development with large portents for the future.

Perhaps these changes merely reflect the failure of earlier generations of judges in Australia to look afresh at judge-made law inherited from England and to consider, from an Australian perspective, the

suitability of English legal doctrine for importation into our rather different community. Hitherto there was resistance to such variation.[23] But in the new mood of independence of the legal mind much more is expected of Australian jurists.

The Laws of Australia will therefore have to keep on its toes to remain up to date with the changing fabric of our law. Ours is not the law of the Medes and Persians, set in stone. Our laws are constantly changing, including in fundamentals. This too emphasises the need to replace hard-copy encyclopaedias with loose-leaf editions and electronic updates. Only in this way will lawyers of the future be sure that the advice they are giving is safely accurate.

At a time when it is specially fashionable to curse Australia's lawyers and describe the judges as "pissants" (as one Federal politician did recently) it is as well to put the criticisms — sometimes warranted, often not — in perspective.

RE-DEDICATING TO LEGAL RENEWAL

Within the last fortnight I have visited Malawi and Cambodia. In Malawi, I took part with the judges of that country in the process of reconciliation which, it is hoped, will convert it peacefully from a One-Party State, with a life President, to a true democracy — the balance held by a courageous and independent judiciary. In Cambodia, I was engaged in a course of training of the judiciary. Most of my pupils were teachers. Pol Pot and his regime exterminated the judges and lawyers and destroyed the rule of law.

By the great lake which once we called Nyassa, and stumbling over the ruins of Angkor, I had moments to reflect upon wonderful blessings of our judicial and legal system in Australia. At a time when it is specially fashionable to curse Australia's lawyers and describe the judges as "pissants" (as one Federal politician did recently) it is as well to put the criticisms — sometimes warranted, often not — in perspective. And to remember our many legal blessings. And to rededicate ourselves to legal renewal in our unique country with its happy combination of unbroken legality and multi-cultural challenge for the future.

As we contemplate the next century and the geographical place of Australia in its region and the world, the advantages we enjoy certainly include a dutiful and honest judiciary and a highly-trained and disciplined legal profession. *The Laws of Australia* will, it is hoped, bring the basic principles of our system of law — inherited and locally made — to the fingertips of the judges and lawyers. But also to the aid of other experts and ordinary citizens who need to know in clear terms what the law is.

The fiction that everyone is deemed to know the law may have been abandoned. But we can certainly do much more to bring the law's principles to ready notice. By this venture, the publisher and authors have made an important contribution to the rule of law itself. They will also have contributed to the process of reform and community awareness about the law. These are most worthy objectives. I am therefore particularly glad to be associated with the launch. May this venture contribute to our greater knowledge, throughout the continent, of the treasury of Australian law. May it reinforce our nation's commitment to a government of laws, not of power.

NOTES

1. See Ch. 2.4 *Judicial Review of Judicial Review of Administrative Action [90]* referring to *Reischauer v. Knoblanche* (1987) 10 N.S.W.L.R. 40 (CA).
2. See e.g. *Paterson* v. *BTR Engineering (Aust.) Pty. Ltd. & Ors* (1989) 18 N.S.W.I.L.R. 319 (CA), 326. See also now *Reid* v. *Howard & Ors*, Court of Appeal (N.S.W.) unreported, 29 July 1993 per Meagher L.A.
3. As quoted H. O'Neill, "Bush Queen Noeline" in *Sydney Morning Herald, The Guide*, 28 July 1993.
4. *Ibid.*
5. J. Bryson, "Australian Law and English Sources" (1993) 10 *Aust Bar Rev.* 93 at 107f.
6. See e.g. *Attorney-General (N.S.W.)* v. *Quin* (1990) 170 C.L.R. 1; Cf. *Macrea* v. *Attorney-General (N.S.W.)* (1987) 9 N.S.W.L.R. 268.
7. See M.D. Kirby, "A disgraceful blow to judical independence". in (1993) 5 J.O.B. 41 Cf. M.D. Kirby, "the Removal of Justice Staples and the Silent Forces of Industrial Relations" [1989] J.I.R. 334.
8. See F.C. Hutley, "The legal traditions of Australia as contrasted with those of the United States" (1981) 55 A.L.J. 63, 69.
9. See J. Bryson, *op. cit.*, n.5, 107.
10. See *Cook* v. *Cook* (1986) 162 C.L.R. 376, 390.
11. See Mr. Justice Williams, "Enlivening the law" [1992] N.Z.L.J. 288.
12. (1988) 165 C.L.R. 360.
13. (1988) 165 C.L.R. 107.
14. (1992) 66 A.L.J.R. 36 (HC).
15. (1992) 175 C.L.R. 1; A.L.J.R. 408 (HC).
16. (1992) 66 A.L.J.R. 768 (HC).
17. (1992) 66 A.L.J.R. 695 (HC).
18. (1992) 66 A.L.J.R. 658 (HC).
19. (1992) 67 A.L.J.R. 44 (HC).
20. (1992) 67 A.L.JR. 1 (HC).
21. *McKinney* v. *The Queen* (1991) 171 C.L.R .468.
22. See e.g. *G. Savvas* v. *The Queen* (1991) 55 A. Crim. R. 241 (N.S.W.CCA).
23. See *State Government Insurance Commission* v. *Trigwell* (1979) C.L.R. 617, 633.

INTERVIEW WITH ROBERT DEAN M.L.A.

THE EDITORS INTERVIEW DR. ROBERT Dean, M.L.A. for Berwick, who was 12 months ago in full time practice at the Bar.

GN: You've made the comment that as a politician you operate more by the seat of the pants than you did as a barrister.

RD: It's a bit like doing an injunction without even a general endorsement and in fact not even having a chance to speak to the client. Perhaps while you're crossing William Street you'd speak to the client. Lots of us — and I was one — think of politicians as doing a job anyone could do. You just step off the train and become a politician and you do it perfectly because it is all common sense.

That view is wrong. There is a lot to learn, not only about the way the House works and the way the party works and how to operate within that system, but also to put your message across in the community without doing a whole lot of damage. When you talk to someone it's not within the environment of a court where you know all the rules and that he or she is not going to repeat what you say. You have to be so careful when you're talking to people lest you fall victim to being hoist by your own petard.

GN: And what about the reaction to the law? You have moved from a situation where you were applying or manipulating it to one where you play a role in creating it. Does that make your perception of the law a bit different?

RD: It's a lot harder because there are two separate dimensions. I do, as a lawyer, play a role up here to quite a large extent once the legislation has been drafted. As a member of the Attorney-General's committee I, along with other lawyers, check the legislation. You see that it's properly drafted and achieves its objects, doesn't have retrospectivity. That's a part I really enjoy. It's like coming home to familiar and secure surroundings.

GN: That's not very different from drafting pleadings or interpreting statutes.

RD: That's right. It's statutory interpretation and that's a useful role that I can play. But it's a cop-out if you want to be in politics. To get a grip of the policy you've got to be where it is being discussed and the legislation is being put together and that's the big difference. It's a satisfying thing to be simply a professional. It means you do not have to decide whether something is right or wrong, whether or not it achieves its policy objective. That's somebody else's problem. It was good to be a professional, and I enjoyed it thoroughly. I remember a Minister chairing a meeting who said, "I'm a chairman, pure and simple". The meeting broke up with laughter. The professional takes the brief, works on it and presents the case as an advocate hopefully with dignity, intelligence, finding satisfaction in doing it. But I've taken a step outside that calm dignified existence. It can get quite squally out here.

GN: Does this mean you are now in the world of the value judgment?

It's a bit like doing an injunction without even a general endorsement and in fact not even having a chance to speak to the client. Perhaps while you're crossing William Street you'd speak to the client.

RD: Absolutely that.

GN: Whose value judgment? Yours or the party's or both?

RD: That's really the hard bit. You do have to make one compromise, and if you are a person of integrity it should be the only compromise you make. You understand and accept the fact that you could not have got into a position to affect legislation and do the other things you can now do unless you had joined the party and the party had supported you. Because you stood as a Liberal candidate you were voted in. If Robert Dean stood as Robert Dean, individual, he would not win any election. If any individual got 2 or 3% he would be doing extremely well. The compromise is this that you can do everything in your power, you can ring up Ministers, you can go and see them, you can

bring deputations, you can stand in the party room, you can frustrate things, you can form groups to try and change things, but once the party has voted that's it. At that point the game is over as far as your contribution and efforts are concerned. In fact being a lawyer helps in this way. Objectivity from my former profession helps me take that on board. You in fact revert to being a lawyer, and at that stage you objectively support a view — the one adopted by the party. If I couldn't do that I would feel obliged to resign immediately. I would have to as I'm there only because I was preselected by the Liberal Party. I've got to remember that. I'm not there in my own right. I would have to resign and in fact stand again as an individual on that point.

Once you've passed that point you can become a lawyer. It's actually quite comfortable, because you can say you've got a view to put on behalf of the party you represent and proceed to put that view. Of course, it's not black and white. If after the party has voted you are still in disagreement with the view in question (and I must admit I haven't had a situation where there has been a life-and-death disagreement) you do not have to actually stand in a Parliament and advocate it. If someone asks you, you reply so that you support the Liberal Party policy, which is a truthful response. We are all entitled to do that. No one holds that against you. You will not be put down in our party room. Cabinet has already had its argument in a different place. But others, very senior and even some junior members, will get up and present their points of view.

GN: We were discussing earlier the question of the differences between our legislature and the U.S. legislature, where the Senator for Arkansas really represents Arkansas.

RD: Yes, the party system gives representative yet much stronger government.

GN: Where do the interests of a particular group within the community come in? Let's assume that there are factories to be built and decisions to be made as to where they are built. Presumably any lobbying would be in the party rooms.

RD: I have two key functions and duties. One is to the electorate and that is my principal but not my only duty. I also have a duty to the Liberal Party. The first is my duty under the Constitution to represent my electorate to the best of my ability — to seek out what they desire in their area. And that may mean that, if a group of people come to me on something that I actually personally disagree with (again it's almost being back to the lawyer) I nevertheless present their particular view in whatever form I can to get it. I can do a lot more good for them than if their member is in the opposition because I can get to the channels of government and talk to government. If there is ever a chance to change something, if there is ever a chance for the government, which has large numbers, to change its view because of what my electorate says, I am in the best position to do it. I certainly wouldn't change things by getting up in Parliament and putting that particular view against the government policy. I certainly can either change things, or at least give a particular view the very best chance it would ever have of being listened to, by going in to the party room, the engine of government, or the Minister and running with it as hard as I can.

If someone comes to me and says I want you to put this point, the first thing is I write a letter to the appropriate Minister. To put it down on paper and get it into the system. I then follow it up with the Minister and if necessary raise it in the party room.

If the matter brought to me is such that my reaction is "Look; you haven't got a hope in hell. Not a chance," this may increase rather than diminish pressure from a group within the electorate. The Joseph Banks School in Doveton was a case in point. It was closed because of an aging population and a long-term decline in enrolments. It was going backwards and so it was better to close it and send the students to other schools, sell off the property, and use that money to purchase new schools in the growth area.

In fact I've just opened three primary schools in the growth area so that was a good deal. Nevertheless, beforehand the locals came to me, they were my constituents and they argued long and hard. In the event I went to a public meeting called to keep Joseph Banks in operation. It was my first step into the political arena, and I was a babe in arms. The meeting was held in the Joseph Banks Hall in Doveton, which is a Labor portion of my electorate. When I arrived there were near on 1,500 people packed into that hall. The police had arrived, thank God. The opposition members were there stirring up the crowd. It was a near riot. The chairman who was running the meeting was in fact closely associated with the Labor Party and he basically said to the crowd "Let him have it". Things were thrown at me. I couldn't be heard. The cameras were focusing in on me as I tried to make myself heard. People would come and take a microphone to stand in front of me and shout abuse. I decided that I would stay until the end. It was a matter of sticking it out. The police then formed a circle around me and people who were asking questions did so over police shoulders. I answered all their questions.

PE: Was it on a stage?

RD: No, it wasn't a stage; it was on floor level, which added to the difficulty. That was an extraordinary introduction. This school had been there for a long time. Mum went there and grandpa went there and it was a school they loved and they had all the reasons why we had made the wrong decision. The emotion was enormous. That was really a toughening-up process. It would be very easy for

Robert Dean, M.L.A.

me to say "well, that's the end of my re-election. I'll just pack up my bags and go home." But I learned that having been through that, it's now 11 months down the track and the emotion has died down. There are certain people in the community who were instrumental in running the protest that I was able to talk with privately. We came to agreements about saving the hall and the library. That was an important political experience for me. You can make a decision where the public heat goes up enormously but then it will come down, things will quieten down and people's memories fade.

PE: Would you go and appear at another meeting like that again?

RD: I think I would have to appear. They're my constituents even though they might want to hang me. You have to turn up for the hanging. I had the same thing with the kindergarten show. That was a bad demonstration. I got there thinking it was just an exchange of information between the Department and the kindergarten committee.

When I arrived there were TV trucks everywhere. Those big aerials in the air. That's the first thing I saw as I rounded the bend, and I thought "oh no! It's a set-up." I walked in and I realised that the media had been invited by the demonstrators. The fellow who was running the show, the chairman, was a public servant and understandably had no idea of how to control such a political gathering. Certainly he did not control it. I realised that; and in fact I made an error. I should have stood up and taken over the meeting myself, but I didn't think of

that at the time. I just sat at the front and in no time everything was focused in on me. Well, I stood up and said that you really can't ask a public servant those questions because he is a public servant and it's not his job to answer them. They are the sort of questions you direct at me. That was a form of suicide.

The cameramen saw me. They started charging with all their cameras towards me to get the shot of me walking away. Soon the demonstrators and cameras were all around me again. That was an amazing situation. Oh for the dignity of the Bar!

The cameras came in at the start. They were allowed to do some background shots and they were then told to leave. They weren't leaving. They had cameras on their shoulders. They were in there and they loved every minute of it, and I said, "Listen, guys, this is not a camera circus, time to go". The fellow from the ABC turned on me with his camera, turned the lights on and starting filming me. He jeered "So it's a camera circus is it — a camera circus, hey," and he wanted me to respond. Now that was pure intimidation. If I'd responded angrily you would have seen that on TV the next day and thought "that's Robert out of control". So I actually had to shut up. Then he swung off and he looked at me. He caught my eye and the message was flashed "I've got the power and you haven't; just remember that". That was the look in his eye. So they were meant to go out but they didn't; they kept at the door, and then the thing exploded and the demonstrators did a mass walkout and one demonstrator came up to me and started yelling at me. The cameras came again with their lights. What could I do? Scream back at him? Nothing. I just had to stand there; and then when I left I realised they were waiting for me out the front and decided it was far more diplomatic to leave by the door closest to my electorate office, which happened to be not the front door where they were waiting, and walked towards my office. That was another big mistake. The cameramen saw me. They started charging with all their cameras towards me to get the shot of me walking away. I turned and stood there and said "Do you want me?" The cameramen stopped, not knowing what to do. Soon the demonstrators and cameras were all around me again. That was an amazing situation. Oh for the dignity of the Bar!

PE: Who asked the questions?

RD: Not the camera people. Just the mums and the demonstrators. They said how do you justify this, and why do you do that, and I was there answering all these barbed questions and the cameras were there with their big woolly microphones stuck right in front of my face. It was rather intimidating. I realised that they could not always provide a balanced coverage if there was something more interesting. I mean, if I'd made a complete idiot of myself that would have been more important to them than putting it in a balanced way. Because it's news if a politician loses his cool.

GN: What are the main frustrations of the Bar as you'd see them and what are the main frustrations of being a politician?

RD: Thinking back about the frustrations at the Bar I'd consider it, nevertheless, an idyllic life. What you worry about at the Bar is making sure you've done enough work; you worry about whether or not you make a submission in the best way it could be made. One of my frustrations was not sufficient time to prepare and that was always a big worry to me in the end; and I'm talking about having a day only instead of a week. In politics you have no time at all. Less time, higher stakes.

GN: But what's the equivalent of answering interrogatories?

RD: The equivalent is sitting in your electorate office with hundreds of letters to deal with; and the many people who come to your headquarters with their problems. It's difficult to respond in a fresh and creative way to questions by the 20th teacher or the 30th mother who has come to me about expenditure reduction and whatever.

PE: Do you find that you are able to solve people's problems on a more personal level or is that something you can't do?

RD: There are three levels of assessment. The first one is one you can often solve immediately; and as often as not your legal training comes in because the one thing you seem to be able to train yourself to do as a lawyer is to think through a bundle of disorganised facts and bring lots of common sense to bear. And those problems are easily fixed. A woman who came in yesterday was in tears because her son and others who had been paying rent hadn't paid and had left; Telecom was going to cut off the phone, and she needed it for her business. All I had to do was dictate a letter immediately to Telecom to say, "Look; this lady's genuine; she will be able to pay in time; please let me know before you cut the phone off". Now that means that she can hand that letter over to Telecom, and I think there's a pretty good chance they will give her time. So there's a

fair bit of common sense involved.

The next one is the long involved problem. You write the letter to the Minister and you don't think there's too much chance of it being solved. There's probably about a 30% chance of success. You write the letter. His department doesn't reply so you write him another letter seeking the reply. Then the department replies and it's not the right reply; so then you ask again and the department says no; so you say "well, I'll come and see the Minister"; and that goes on for a long time. That's to do with people with compensation claims and allegations of fraud, or with marital problems and that sort of thing.

GN: What about the case of effecting executive action? It's really a question of going to the Minister and saying "stay your hand" etc.

RD: Yes, that happens quite a lot and there's a reasonable degree of success with that. There really is. But you've got to allow the Minister latitude. You won't be able to help your constituents much if you get a reputation amongst the Ministers as being an idiot who asks the impossible. Sometimes you write the letter knowing in your heart there's no future in it. If you are honest you'll say to them: "Look, I'll give it a go but don't get your hopes up". That covers everything from gun lobbies to four-wheel-drive vehicles. It's just extraordinary the variety of problems that surface.

The third and last category are people, although you can't solve their problems, you play a pastoral role; and just by coming to you and talking to you about it they go out feeling better; even though you've told them there's nothing that can be done. They thank you. You say "I'm sorry . . ." but they are in there for an hour and it's not wasted.

PE: How much of your time does this sort of electoral office work take?

RD: Well, I'm in a busy electorate because it's young and growing rapidly. There are forty families a week moving into the City of Berwick. Just imagine all these removalist trucks coming in. All these new houses. We are now at 80,000; and by the turn of the century we will have reached 120,000; so we increase another 40,000 in the next seven years. That's where it's all happening — Endeavour Hills, Narre Warren and Hallam. I've got lots and lots of young families with lots and lots of young family problems: mortgages they can't pay; losing jobs at a time when if you're older you can cope, but if you're young and have kids and debts it's hard. Education problems loom large. They've all got school-kids. We've got 25 kindergartens, so there's a lot of action down my way; and I would say that the electoral office paperwork probably takes at least a day a week. The rest is interview meetings, openings, closings etc. It's at all sorts of hours.

GN: You were going to say something about gender bias.

RD: Yes, I think the point is that it is changing now. It is happening now. The point was made that the majority of entrants to Law School now are female. For five to ten years they have been working their way through the system, into the partnerships of city firms. There is a much larger proportion of females coming to the Bar. Do you know what the proportion is? I'm not sure what it is but it's quite significant compared to what it used to be.

GN: Our list has actually taken more females over the last five years than males.

You won't be able to help your constituents much if you get a reputation amongst the Ministers as being an idiot who asks the impossible.

RD: So what I'm saying is that it is happening and that is the way it should be allowed to happen; and in fact, if you just make the decisions on merit from here on in then I believe you will find that we will have women appearing on the Supreme Court bench; and the same on the County Court; and I don't think that anyone should be herded into making decisions which aren't based on choosing the best legal mind; because people who are chosen are making decisions and affecting more than gender; they're making decisions about people's livelihoods, how the law applies to people's lives; and consequently they must be the best people. If you can see that the gender issue is sorting itself out, anyway it's better to let it happen. If it comes down to two people of equal merit, one male and one female, I'm not against the female being chosen on the basis that that would not in any way be lowering the legal reputation of the court. In fact, to have the female on the court gives it a broader aspect; but I am absolutely and totally against looking for a woman to be put onto the bench because of public perceptions or the media, or the way the media have used the issue, or the way the women's groups have used the issue. If we buckle to that sort of pressure then we're really not doing our job. As for "re-educating" judges, I'd rather leave re-education camps to modern-day Stalinists or South Ameri-

can dictatorships. The Coalition has not buckled to pressure since we started. We've done the right thing and I don't see why we need to buckle under pressure on this issue and I don't think we will. There's another point that need airing.

Looking at the Bar from this end of town rather than always looking from down there towards here is an interesting perspective, and I do believe that the Bar has to keep a clear understanding of the way in which issues are raised and dealt with. I think the differences that exist result from the media playing a much larger role, particularly through television. I also think that the direct path into the channels of power has definitely gone.

In former days, as I understand it, there was a large proportion of members of the government who were lawyers and who had an understanding of the law. That has now been reduced to a small handful of lawyers, five or six at the most, and some have not specialised as either barrister or solicitor. As a consequence there isn't a great deal of understanding.

At the same time the media have whipped up an impression about lawyers being the hell-hounds who take your money and are not interested in social change. Because the media have such power they play a game on this issue. In the Parliament lawyers receive quite a lot of flak, particularly on our side. In a way lawyers are criticised right there in the party room, that is while you're sitting there. If you look at the other professions, they are consciously promoting within themselves a group whose task it is to communicate with local members, back-benchers, Cabinet members. They continually talk and discuss the issues and don't fall for the trap that I did when I was at the Bar and I think we all do. We say, "I'm too busy. I'm a barrister. I'm too busy. I've just got to get on with my practice. I'll look after it later." It is a perfectly natural attitude to adopt. The trouble is that the world has changed, and you actually have to stop and realise there is this thing called public relations and we've got to participate as a group; and we've got to be involved in it even if it means lobbying or whatever.

GN: Even if it's undignified?

RD: We don't have to do it in an undignified way but even doing it was regarded as dignified because basically it was always assumed that "well, we'll make a phone call"; and that's not good enough.

GN: Does it do you any good if you are intellectual?

RD: There isn't much time to be intellectual. You don't want to end up with a reputation as Mr. Intellectual. Politicians employ intellectuals. Politicians have a wider and more difficult role. You actually have to entertain. It's not like making submissions to a judge. He's stuck there as are your solicitor and clients. The judge has to stay there and listen to you. He's even got to smile now and then. But where everyone can get up and walk out from the chamber normally excepting the speaker, and even he can walk out and a member fills his place for a while, you can feel pretty lonely.

GN: Is it more like giving lectures and you want the students to turn up?

> If you just make the decisions on merit from here on in then I believe you will find that we will have women appearing on the Supreme Court bench; and the same on the County Court; and I don't think that anyone should be herded into making decisions which aren't based on choosing the best legal mind.

RD: Absolutely. Yes. And also they are not that interested in the technicalities because the technicalities are not why they are there. This is policy. The technical stuff is for the bureaucrats. You employ lots of bureaucrats to be technical and they do that very well — some would say to perfection. That's not why you're here. I have found, however, that on the more complex legal Bills I have been able to explain to the Assembly the way in which the legal system works, which has opened their eyes to a lot of things. For example, the Commercial Arbitration Amendment Bill provides an instance where I was able to explain how that system can really work only if people approach it in the right way; and the members came up to me saying that they had no idea that that was the difference between courts and arbitration and asking what sections you could use to short-circuit litigation. On that score I believe that there is going to be a trade-off as time goes by, which will be this. There will be an alternative to the detailed interlocutory procedures and that alternative will entail taking the procedures out and putting in the discretion of a judge. We already see a form of it in the Commercial List, but that's still pretty technical, but I'm still technical. What I'm saying is that you may well get a system further down the line where people can effectively opt for a lower form of justice in that the interlocutory pro-

cedures have been reduced, but you agree to accept the outcome. I think small business might be interested. The "Judge" would have a much larger role to play. Such a system cannot be a hybrid of our high-quality system. That will always remain as the backbone of our society. To fuse the two would be disastrous. That is why arbitrations are not cutting costs. There are other reforms.

Imagine a Supreme Court totally computerised so that when the solicitor sends you up his brief you draft the proceeding and it goes directly from your computer. He looks at it, you discuss it and make changes on either computer, and then he lodges it in the Prothonotary's Office through his computer to that in the Prothonotary's Office. It automatically lodges his stamp duty fee and he gets a bill at the end of each month for stamp duty. Then the judge too has his computer on the bench. He may have a file in front of him. The very same thing can be just brought up in front of him. I believe there would be huge savings.

GN: What do you say to the idea that the litigant pay for the judge's transcript? You know what's happened, don't you, as a result of the 4% cut on the Supreme Court budget? You can't be set down for trial until one of the solicitors has undertaken to meet the cost of the transcript for the judge.

RD: Well, look, everybody has suffered. The difficulty with respect to judicial administration is that I knew but not many people up here know or appreciate that they were already way behind the eight ball before any of these cuts started. That's the difficulty; and it's very very hard to get that message across given the constrictions that judges are under. But all other departments have taken a 10% reduction. So in this case it appears that the judges' plight has been given some recognition.

There are all sorts of other things that can be done. Lots of things can be done to make trials faster and to rationalise the tribunal system and lower costs. Now what I'm saying is that it's very important that if the Bar and the legal profession see these sorts of things that can be done that they actually take an initiative and work on it and put the proposals up rather than be at the tail end because they're too busy at the start. If they see that's it's a good thing to do and if they add a little of public relations to let the public know what actually goes on and how these things work, they would receive better press.

THIS SPORTING LIFE

THIS SPRING ISSUE OF *VICTORIAN BAR NEWS* heralds that time when a young man's fancy is caught by the vivid contrast of crisp white flannels against the rich green lawn of the village oval and the pleasurable thwack of willow against leather.

The thrust of this article is the relationship, perhaps *prima facie* preposterous, between sporting prowess and appointment to high judicial office. There does exist such a linkage. It is widely known that in Great Britain the appointing of judges is solely within the province of the Lord Chancellor. What is not so well known is that the Lord Chancellor also is responsible for the appointment of clergy in the Anglican Church. The spouse of a Lord Chancellor once asked to see the list of candidates for such appointments and was surprised to find their credentials carefully noted against each name: "good left-hand bowler" or "right-hand bat".[1]

At this early stage in the development of my thesis it is respectfully submitted that those contributors to *Bar News* who have cast snide remarks on the ability of fellow members of the Bar on the cricket ground would be well advised to curtail such commentary lest they find themselves appearing before their target, newly appointed to the Bench. It is no coincidence that "bench" is used widely in both sporting and legal parlance.

Our American brothers-in-law apparently pulled up stumps when they jettisoned the British tea into Boston Harbour. Cricket does not play a large part in contemporary American life. What did they keep? That question shall be answered shortly. But it is noteworthy that his status as an All-American gridiron player played a large part in the appointment of Byron White to the U.S. Supreme Court by President John Kennedy in 1962. This would seem to augur well for those ex-VFL (now AFL) ruckmen, particularly those with a possible genetic disposition to judicial office.

One disappointing aspect of Byron White's recently announced resignation and President Clinton's nomination of Judge Ruth Bader Ginsburg to fill the vacancy was the failure of the representatives of the Murdoch and Black press empires. At the time Judge Ginsburg's nomination was announced, her daughter, Professor Jane Ginsburg of Columbia University, was in Australia as a visiting lecturer in copyright law and the Australian journos swarmed around her en masse. However, they frittered away their opportunity. Instead of asking Professor Ginsburg what handicap her mum played off or her preferred position in the batting order and whether her mum was a clay or grass court player, these representatives of the fourth estate wasted time, effort and column inches on such trivial issues as her mother's record as an advocate and as a judge.[2] Obviously, these highly-paid pros from Spencer and Flinders Streets have something to learn from us underpaid hacks at *Bar News*.

The thrust of this article is the relationship, perhaps *prima facie* preposterous, between sporting prowess and appointment to high judicial office. There does exist such a linkage.

What was it that our American cousins retained after 1776? The answer is, of course, the English common law tradition and — dare I say it — tennis.

Notwithstanding that the "highest court in the land" is a basketball court on the top floor of the U.S. Supreme Court building in Washington, D.C.;[3] the U.S. Supreme Court justices are nuts about tennis. In fact, it is conjectured that the northern summer recess of the U.S. Supreme Court is scheduled to permit the justices to stay glued to the TV coverage of the All England championships or, indeed, to travel and attend personally at Wimbledon. Indeed, who of our sharp-eyed readers identified the spectator behind and just to the left of Barbara Streisand at this year's Wimbledon?

It was widely known at the time that Justice Hugo Black (who served on the Court from 1937–1971) played a keen and vigorous game of tennis almost right up to the end of his life at the age of 85 years.

Consider the one-time US Solicitor-General and (unsuccessful) nominee to the Supreme Court (in 1987), Robert Bork. As a faculty member of the Yale Law School it was widely known that Bork had ambitions to be appointed to the Supreme Court. Christmas 1974 saw the Yale law students produce a skit roasting judicial conservatives and Bork's tennis-playing was used to mock his ambition. The parody was to the effect that Bork so wanted to play tennis he would run down his mother, trample little old ladies, get up at 5.00 a.m., all just to play tennis because "Bob Bork would do anything to get on the court".[4]

Justice John Paul Stevens plays tennis — most weekends, even during term, will see him at his weekender Fort Lauderdale condominium where he works on opinions and plays with other 70-plus-year-olds, most of whom have no idea that their court opponent is a sitting Supreme Court justice.[5]

Justice Sandra Day O'Connor apparently plays tennis (and golf) with the unremitting devotion with which she approaches all aspects of her life.[6]

When Associate Justice Rehnquist was elevated to Chief Justice (replacing the retiring Chief Justice Warren Burger), Antonin Scalia, one-time Professor at the Chicago Law School, was nominated to fill the Rehnquist vacancy. In 1986 when he was subjected to Senate scrutiny to approve President Reagan's nomination of him, Scalia displayed the confident superiority of one who has scaled the legal heights. During the Senate Judicial Committee hearings he lit up his pipe and puffed away serenely. When Senator Howard Metzenbaum (Democrat, Ohio) began his questioning by noting that Scalia had recently beaten him on the tennis court, the nominee jauntily responded that "it was a case of my integrity overcoming my judgment, Senator".[7]

Once sworn in, Scalia didn't let up his relentless competitiveness. Having quit jogging and gained weight around his waist, he did not look like a tennis player. Nonetheless he was ferocious. Law clerks who took him on came away surprised. One clerk who fancied himself a first-rate tennis player had set up a singles match with the Justice. He returned from the court to the Court stunned: "I can't believe I got beat by a 55-year-old fat Italian," he told his fellow law clerks.[8]

Last, there is the present Chief Justice. Every Thursday morning William Rehnquist and his three law clerks play on the courts in Potomac Park (including winter, and remember, Washington D.C. snows in winter). All the justices are entitled to engage four law clerks, but Rehnquist C.J. picks only three every year - just enough to make up a doubles match. The clerks joke amongst themselves that to be hired by Rehnquist the desirable (but not necessary) qualifications are a first-rate academic record from a first rate law school and a conservative political outlook. The only essential quality is to be a competitive tennis player.

While the Press Officer of the U.S. Supreme Court admits to the existence of a basketball court ("the highest court in the land") in the gymnasium above the hearing chamber in the building, it is emphasized that games are forbidden while the Court is in session because the distracting Noise of the dribbling can be heard in the court-room directly below.[10] This writer suspects that the truth lies in the justices, particularly Rehnquist C.J. and White J., not being able to countenance the thought of the clerks playing while they are stuck in court listening to scintillating legal argument.

The clerks joke amongst themselves that to be hired by Rehnquist the desirable (but not necessary) qualifications are a first-rate academic record from a first rate law school and a conservative political outlook. The only essential quality is to be a competitive tennis player.

Given the foregoing I maintain that I have established a solid relationship between appointment to high judicial office and sporting prowess (and in the case of the U.S. Supreme Court, prowess at tennis). I readily concede that my conclusion is not widely accepted and note that the *Harvard Law Review's* motoring editor, Christopher de Franga, has formulated a rival theory ("Auto-selection") linking a judicial nominee with their choice of motor vehicle. Without pre-empting de Franga's argument it can be stated briefly that the driving of a Volkswagen is essential to ensure successful appointment as a Supreme Court justice. Almost alone among academic legal writers, de Franga postulates that the failure of Robert Bork to secure Senate confirmation of his appointment had very little to do with the perception that Bork was a rigid conservative ideologue out of touch with the mainstream of contemporary American values.[12] Instead, de Franga attributes the failed nomination entirely to Bork's reluctance to trade down his BMW[13] to a VW. While there exists a certain attractiveness about the Auto-selection theory it suf-

fered a setback just prior to its scheduled publication in early 1992 when it was hurriedly retracted to permit much-needed modification which de Franga is still working on: Justice Clarence Thomas, sworn in on 1 November 1991, drives a Corvette.[14]

NOTES

1. Campbell, *F. E. Smith: First Earl of Birkenhead* (1983) 473.
2. The Melbourne *Age* and the *Australian*, 16 June 1993.
3. *The Oxford Companion to the Supreme Court of the United States* (ed. Hall, 1992) 356.
4. Bronner, *Battle for Justice: how the Bork nomination shook America* (1989) 83.
5. Savage, *Turning Right: the Making of the Rehnquist Supreme Court* (1992) 319.
6. *Id.*, 226.
7. *Id.*, 22.
8. *Id.*, 306-307.
9. *Id.*, 306.
10. *The Oxford Companion to the Supreme Court of the United States, loc cit,* note 3 above.
11. Savage, *op. cit.* 209 (Rehnquist) and 353 (Souter).
12. Bronner, *op. cit. passim*; Savege, *op. cit. passim*; Gitenstein, *Matters of Principle: an insider's account of America's rejection of Robert Bork's nomination to the Supreme* Court (1992), *passim*; Phelps and Winternitz, *Capital Games: Clarence Thomas, Anita Hill, and the story of a Supreme Court nomination* (1992) *passim*; Abraham, *Justices and Presidents: a political history of appointments to the Supreme Court* (3rd ed., 1992) chapters 11 and 12.
13. Gitenstein, *op. cit.*, 76.
14. Phelps and Winternitz, *op. cit*

E.W. Grace

A NEW IMAGE FOR THE BAR

IN A TIME OF RELATIVE GLOOM AT THE Victorian Bar, we should, perhaps, forget about the technicalities of the law or the training of the intellect. According to the *Daily Telegraph*, 27 May 1993, "interpersonal skills" with emphasis on the physical — and even "bare flesh!" — are what our British cousins are advocating. The *Daily Telegraph* article states as follows:

"Future generations of Law Lords and judges will have met rigorous criteria. A fresh manual issued to trainee barristers asks bar school pupils to indulge in massage, sing nursery rhymes and 'attempt "doggy" exercises.

Horace Rumpole would not recognise the modern barrister's training. Would-be advocates are being handed a £21.95 booklet called *Advocacy, Negotiation & Conference Skills.* The idea: to improve lawyers' voice projection and "interpersonal skills".

The manual's tone is matey. It urges: "Just let yourself go." Under a chapter headed Relaxation is the advice: "One of the easiest ways of achieving positive relaxation is through massage . . . remove any clothing which is nonstretch . . . bare flesh is even better." Another ruse: "Imagine yourself lying on a beach . . . it is quite late in the day and you are quite close to the water's edge, so that you can hear the waves lapping gently on the smooth sand." Freud might have been proud of this stuff but it appears, in fact, under the names of various senior barristers from Gray's Inn, Middle Temple and elsewhere.

Candidates are offered "resonance exercises". For instance: "Stand up and hum a song you know." Recommended tunes include *Blue Moon* and *Summertime.* Alternatively, "take one of your speeches and sing it . . . try different styles: grand opera; Gilbert and Sullivan . . . imagine yourself slowly winning the jury over". The book's "projection" tips are even stranger — "another exercise is imagining yourself to be a dog! Place the body in an all-fours position . . . your diaphragm should be allowed to relax".

Lord Hailsham, for one, does not recognise such teaching methods from his day. "I detect a mood of eccentricity," he says. "It is important for barristers to get on, but I can tell you I never went in for this sort of thing. But if it's going to make you well thought of to get down on all fours and grunt, I suppose it might be a good idea."

SIR EDWARD COKE'S "LETTER FROM AMERICA"

Garbage in — garbage out

A BANK'S "ROGUE COMPUTER" WAS HELD in civil contempt and fined 50 megabytes of hard drive memory and 10 megabytes of random access memory in the U.S. Bankruptcy Court for the Southern District of Florida recently.

This milestone in jurisprudence marking one of the few victories of the common man over microchip tyranny took place on 10 December 1992.

John and Margaret Vivian, having obtained their discharge in bankruptcy, received a letter of demand from NationsBank regarding a debt that had been discharged. According to testimony by a bank executive before the Bankruptcy Court, the bank's computer generated the notice in error. The bank apologised to the Vivians and chastised their computer, directing it not to send any further letters. However, another similar letter was sent to the Vivians although it disclosed no balance owing or due payment date. At that time both the court and the bank emphasised to the Vivians that this latest letter was not an intentional violation, but the rampaging of a "rogue computer".

However, upon receipt of a third letter, the Vivians wrote a letter of complaint to the bankruptcy judge, who treated it as a motion to declare the computer in contempt. The judge said that, like the Vivians, he was "mad as you know what" and was "not going to take it anymore". He held the computer to be in civil contempt and levied the 60 megabyte "fine".

In Re Vivian, 61 *U.S. Law Week* 2450 (2 February 1993)

SMOKIN' IN THE POKEY

Recently the Federal District Court in Houston, Texas has ruled that a ban on cigarettes for pretrial remand prisoners imposed by the prison authority does not violate the Eighth Amendment prohibition against "cruel and unusual punishment". The Court ruled that the purpose of the Eighth Amendment was to protect individuals from conditions of confinement threatening their health but does not shelter such individuals from the discomfort and inconvenience that results from imprisonment and likened the deprivation of an incarcerated smoker of his right to smoke as no worse than depriving a prison inmate of his former eating, exercise, sex, drinking and sleeping patterns enjoyed prior to imprisonment.

Washington v. *Tinsley*, 16 December 1992, 61 *U.S. Law Week* 2451 (2 February 1993)

[It is not clear what relief the prisoner Washington was seeking from the court. My Australian correspondents have described to me a common phenomenon there which is wholly unknown to us in the U.S. — the gathering of groups of smokers outside the foyers of public buildings. Perhaps Washington sought the governor's leave to "duck outside" the wall for a "quick puff and drag"].

At the time that Washington's assertion of his right to smoke in prison was being dismissed, the U.S. Supreme Court was preparing for oral argument in a similar case, albeit that the right claimed was that of a non-smoker to be protected from passive smoking.

William McKinney, a Nevada State prison inmate and non-smoker, was assigned a six-foot by eight-foot cell to be shared with another inmate who smoked five packs of cigarettes a day (characterised by McKinney's counsel as a cigarette every ten minutes for every waking hour of the day).

In a 7–2 judgment handed down just prior to the close of the 1992–93 term the Supreme Court held that the prison authorities' "deliberate indifference" to the serious medical needs of a prisoner can amount to a violation of the Eighth Amendment prohibition against "cruel and unusual punishment," notwithstanding that the injury complained of is that of future medical problems arising from passive smoking.

The dissenting justices (Thomas and Scalia J.J.) held that the respondent inmate McKinney's feared future injury was an indirect consequence of his prison sentence and that this was wholly attributable to the prison administration. In their view, the Eighth Amendment protection prohibiting cruel and unusual punishment was directed at the sentencing court, which in this case had merely imposed a period of imprisonment — it had not dictated that the sentence be sharing a cell with a heavy smoker. That the prison authorities had allocated a cell to be shared with such a smoker was outside the ambit of the Eighth Amendment.

Helling v. *McKinney*, 61 *U.S. Law Week* 4648 (18 June 1993)

[Perhaps fortunately for the respondent inmate McKinney, only a week prior to the oral argument

before the Supreme Court (on 13 January 1993) and after all written briefs had been submitted to the Court, the US Environment Protection Agency published its report on passive smoking and the Justices' questioning during oral argument and the Court's judgment referred to the EPA report.

The court held that routine body searches of female inmates by male prison officers which are more intrusive than mere "pat-downs" amount to unnecessary and wanton infliction of pain.

A further afterthought has been brought to my attention by one of my Australian correspondents. Apparently your Divorce Court in Adelaide has recently upheld an interlocutory application by the custodial father of the children of a marriage that the non-custodial mother be restrained from smoking in the company of the children of the marriage when exercising access — this in fact was a hypothetical question posed by the bench of the US Supreme Court during oral argument but not canvassed in their judgment.

"Deliberate indifference" by the prison authorities figured in another Eighth Amendment challenge recently — this time before the Ninth Circuit Court of Appeals. The court held that routine body searches of female inmates by male prison officers which are more intrusive than mere "pat-downs" amount to unnecessary and wanton infliction of pain (particularly with regard to female inmates who had previously been victims of sexual abuse).

Jordan v. *Gardner* (CA 9, 25 February 1993)

61 *U.S. Law Week* 2612 (13 April 1993)

FRYE'S OBITUARY

After 70 years the U.S. Supreme Court has ruled on the admissibility of expert testimony and, in doing so, has purported to bury the seminal case of Frye v. *U.S.*, 293 F 1013 (1923), which stood for the proposition that expert opinion, based upon scientific technique, is inadmissible unless that scientific technique is "generally acceptable" as reliable in the relevant scientific community.

The case before the Supreme Court concerned the summary judgment given against the plaintiffs in favour of the defendant manufacturer of Bendectin, an anti-nausea drug prescribed to relieve morning sickness suffered by expectant mothers. Thus, the issue here was causation — the duty owed to the mothers and the *en ventre sa mere* infants was not in dispute given the manufacturer's proposed users of their product. Here the plaintiffs were infants complaining of deformities arising from their mothers' use of Bendectin during pregnancy.

My Australian readers will no doubt recall that it was the claims of Dr. William McBride that Bendectin was a teratogen ("'the new thalidomide") that contributed to his downfall [Peter Huber's *Galileo's Revenge: Junk Science in the Courtroom* (1991) provides a detailed history of the Bendectin litigation in the U.S. and Dr. McBride's participation in that litigation].

The Supreme Court held that the adoption of Rule 702 of the Federal Rules of Evidence displaced the *Frye* standard and requires a more liberal standard of admissibility to be applied to proposed expert testimony.

Rule 702 states that:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, or training or education, may testify thereto in the form of an opinion or otherwise".

The *Frye* criterion of "general acceptance" remains as a relevant, though not necessarily dispositive, consideration in assessing the reliability of expert testimony.

However, the opinion of the court, written by Associate Justice Blackmun, requires the trial judge to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable, and thus, it is submitted, *Frye* lives on.

The Supreme Court opinion suggests that the reliability of such testimony can be gauged by reference to whether a scientific theory or technique can be (and in fact has been) tested and whether such theory or technique has been subjected to peer review and publication. However, it is not essential to admissibility that peer review and publication have occurred — publication does not necessarily correlate with reliability. Submission of such theory or technique to the scrutiny of the scientific community is desirable because it is a component of "good science".

The *Frye* criterion of "general acceptance" remains as a relevant, though not necessarily dispositive, consideration in assessing the reliability of expert testimony.

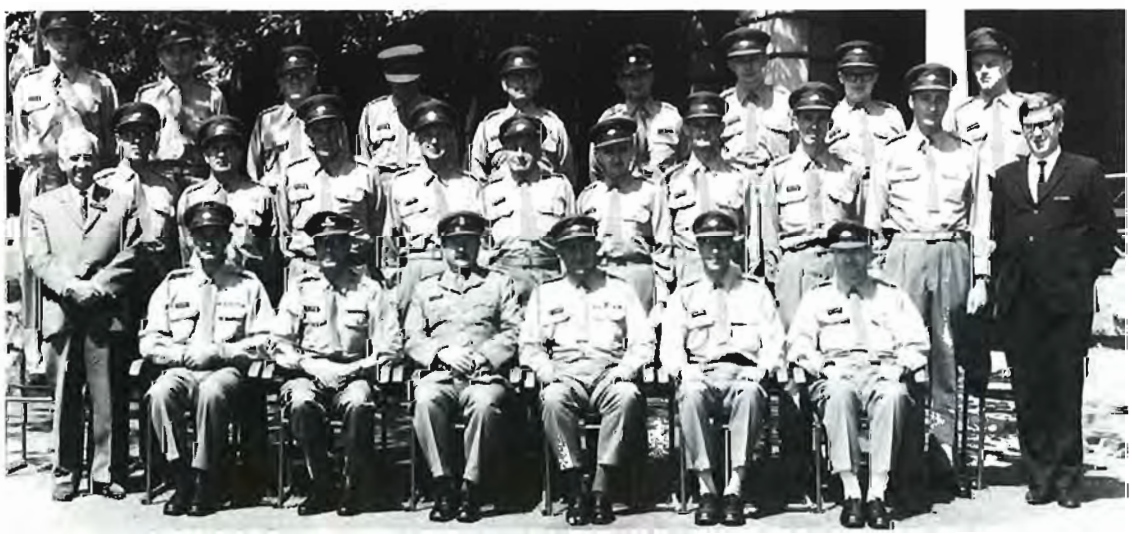
The Court was unsympathetic to the petitioners' argument that exclusion of the evidence they wished to adduce would tend to stifle scientific inquiry — the Court noted that scientific inquiry is wholly independent of evidentiary admissibility in litigation where such scientific inquiry is unrelated to evidence which is unpublished, not subject to the normal peer review process and is generated solely for use in litigation. The Court distinguished between scientific truth as sought by the scientific community to advance mankind's knowledge and legal truth with the limited purpose of advancing a litigant's case in a dispute between the parties to a lawsuit.

Daubert v. *Merrell Dow Pharmaceuticals Inc.*, 61 *U.S. Law Week* 4805 (29 June 1993)

Regards
Ted

AS YOU WERE, GENTLEMEN

OUR PHOTO AT PAGE 80 OF THE WINTER issue of *Bar News* did not generate a great number of entries. The winner was Bill Morgan-Payler who was able to name correctly one Bronzed Anzac of 1966. The photo is reprinted below together with the names of the conferees.



(Back Row - L to R)

Capt R.K. Walls
Capt P.J.A. Martin
Capt W.A. Reid
Capt R.D. Bristol
Capt D. Graham
Maj R.P. Lincoln
Capt M.J. Kearney
Capt N.H.M. Forsyth
Capt D.B. Blackburn

(Centre Row - L to R)

Maj T.M. Butler
Capt W.B. Treyvaud
Capt G.P. Mackenzie
Capt R.C. Steele
Capt J.F. Garvey
Maj M.R. Ham
Capt P.L. Waller
Capt P.R. McGrath
Capt I.C.F. Spry
Capt L.S. Liberman
Mr D.H. McLennan

(Front Row - L to R)

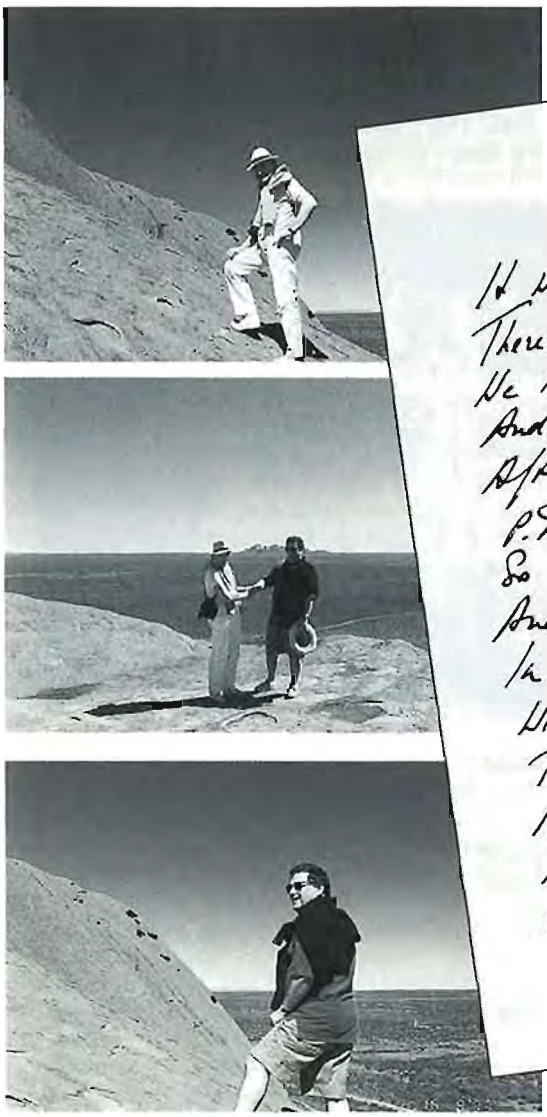
Maj R.F. Mohr
Maj W.E. Webb
Col M.J. Ewing
Lt Col S.K. Pearson
Maj P.J. Moore
Maj G.L.Walker

SNOW JUSTICE ON THE ROCK

THOSE READERS WHO ARE HABITUEES OF Victoria's snowfields will appreciate the problems which faced the Honourable Mr. Justice Hampel this year.

Acting apparently on some gross misinformation, or suffering from an aberration brought on by a combination of obsession and frustration, His Honour, it seems, sought to go skiing at Ayers Rock. Phillip Dunn went with him, to play St. Bernard should Hampel J. be caught in a blizzard.

His Honour (at least) obviously realised his error on arrival at the rock. He sought to cover up by writing a letter to *Bar News* which suggests that he knew all along that Ayers Rock would not have snow — in August. The letter reads as though it were written between pants at the end of the climb.



JUDGES' CHAMBERS
SUPREME COURT
MELBOURNE. 3000

It was August
There was no snow!
We had lots of energy
And some time
After reading advocacy in Darwin
P.D. looked at it
So we took the chance
And he made it, to the top
In under average time
With a little coaching
The result was not so bad
Nothing a hot bath
And a couple of bottles of red
Could not cure.
Some called it male bonding.

THE HILMER REPORT — AN UNBIASED VIEW?

THE HILMER "REPORT ON NATIONAL COMpetition Policy" dated 25 August 1993 runs to some 385 pages. It contains, in addition to a number of "motherhood" statements, a balanced approach to competition policy. The Report says:

"Competition policy is not about the pursuit of competition per se. Rather, it seeks to facilitate effective competition to promote efficiency and economic growth while accommodating situations where competition does not achieve efficiency or conflicts with other social objectives. These accommodations are reflected in the content and breadth of application of pro-competitive policies, as well as the sanction of anti-competitive arrangements on public benefit grounds."

The Report acknowledges that in certain situations competition does not achieve efficiency. It accepts that the merits of efficiency deriving from competition may conflict with other "social objectives", that competition *per se* is not always a "good thing".

Amongst the more significant aspects of the Report is a recommendation that governmental monopolies be opened up to competition and that in certain circumstances the facilities previously used by the government monopoly should be made available to its new competitors. "Essential facilities" should be made available on fair and reasonable terms. "Effective competition in electricity generation and rail services, for example, will require firms to have access to the electricity transmission grid and rail tracks."

There is a major treatment of monopoly pricing and of anti-competitive agreements (both horizontal and vertical), which deals with price fixing agreements and boycotts. The Committee is clearly of the view that the prohibition on primary and secondary boycotts which at present fall within the ambit of the *Trade Practices Act* should be expanded, not contracted. The Committee (at p.42) says:

"On the basis of submissions received by the inquiry, the Committee has not been persuaded of the need to amend the current provisions dealing with boycotts".

The ink could hardly have been dry on the Committee's Report when it was announced that the Federal Government will introduce legislation to provide that trade unions which engage in primary or secondary boycotts will no longer be liable to penalties under the *Trade Practices Act.*

The Report devotes less than five pages to a discussion of the "professions". The legal profession receives express mention in some five short paragraphs, only one of which (running to five lines) is concerned solely and specifically with the legal profession. Submissions from law-related bodies are mentioned in five footnotes and there is a reference in one footnote to the *Legal Profession Practice Act* 1958.

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The Report does canvass in those five pages the constitutional problem relating to Commonwealth supervision of the professions and the need to police, in the interests of competition policy, restrictions on professional practice whether imposed by legislation, by rules of professional associations which are given the force of law, or by rules of professional associations which operate without specific approval of Commonwealth, State or Territory law.

All in all, the Report contains a lot of meat for analysis by any economist or lawyer or (in the light of the Federal Government's recent decision to

amend s.45D of the *Trade Practices Act*) an industrial relations expert.

Dealing with the constitutional limitation on Commonwealth power, the Committee says:

"Similarly, the constitutional limitation effectively discriminates between professions operating in States and Territories and between those firms that operate within a single State and those which operate nationally, as is increasingly the case with lawyers, accountants and engineering businesses. The overall result is patchy and difficult to justify on public policy grounds."

Implicit in that statement is the proposition that a lawyer who is a member of a national firm is subject to the provisions of the *Trade Practices Act* and that a lawyer who is a member of a purely Victorian firm or a member of the Bar is not . . .

Implicit in that statement is the proposition that a lawyer who is a member of a national firm is subject to the provisions of the *Trade Practices Act* and that a lawyer who is a member of a purely Victorian firm or a member of the Bar is not subject to the restrictions imposed by that Act. The unspoken assumptions provide considerable scope for a major article by a lawyer-journalist on the ambit of s.51(l) and the nature of legal practice.

So far as we know, only one lawyer-journalist has commented on the Hilmer Report. In the *Financial Review* of 2 September 1993, Greg Barns (described at the bottom of his column as a "Melbourne lawyer") has managed to interpret the Report in a way which would justify the average reader in thinking that the Hilmer Report was concerned primarily, if not solely, with the restrictive practices, real or imaginary, justified or otherwise, in which Mr. Barns says we lawyers indulge.

Mr. Barns' article is set out below in full.

LAWYERS AND THE THREAT TO HILMER

WHILE Queensland solicitors may heave a sigh of relief at Fred Hilmer's competition proposals, other lawyers around the nation are in for a radical readjustment in the way they deliver services to consumers if the Hilmer dream becomes reality.

Mind you, the reality may be difficult to achieve. Hilmer proposes lifting the constitutional curtain behind which the legal profession has hidden from Trade Practices Commission scrutiny. The profession is protected because of the lack of constitutional power to control unincorporated entities.

Hilmer's view is that the Commonwealth could act unilaterally to catch lawyers by extending the reach of the Act or seek the co-operation of the States with a model akin to the Corporations Law.

But the latter option seems fraught with difficulty. Victoria's Attorney-General, Jan Wade, told the Victorian Bar earlier this year that there is a "very good legal profession in Melbourne" and she is not prepared to "hand over the regulation of that to Canberra". And she's not alone in that view.

The Hilmer recommendations on professional regulations differentiate between laws imposed by governments and the professions' self-imposed regulations.

It's an important distinction. Hilmer says that even if a law regulating the profession is anti-competitive it will not offend his proposed market conduct rules. Thus the statutory monopoly which Queensland solicitors enjoy over that State's $180 million conveyancing market would not be threatened.

But regulations imposed by the profession itself will be placed under the scrutiny of the proposed Competition Commission and any rules that "had the purpose or effect of substantially lessening competition would be prohibited unless authorised by the commission on the showing of a net public benefit".

There's little doubt that the restrictive practices of the independent Bar associations will fall under this regime. The well publicised restrictions on direct access to the public, and office location, price-fixing, and the refusal to appear in cases with solicitors are prime candidates for the chop under the Hilmer rules.

A Hilmer regime is likely to result in a major benefit for consumers with the emergence of interdisciplinary partnerships where legal and financial skills are offered under the one roof by accountants and lawyers.

Whether the threat of Hilmer will force the nation's lawyers to jettison the remaining obstacles to a rigorously competitive market will be put to the test in Hobart next month. There the Victorian Law Institute will meet with other solicitors' unions from around the country to discuss its recently adopted competition policy.

This policy proposes that a net public benefit test be applied to professional conduct rules and that "State Acts and rules regulating the legal profession should be . . . subject to revocation on competition policy grounds in appropriate cases". If the Victorian policy receives a favourable hearing then the facelift will have begun.

MORE TRICKS FOR NEW PLAYERS

THE EDITORS WISH TO EMPHASISE THAT they accept absolutely no responsibility for, and do not warrant the efficacy of, any of the stratagems described herein.

On a less sombre note, the editors are pleased to announce a new competition with the winner to be rewarded with a bottle of Essoign plonk.

Readers will note the first extract below is from Paul O'Neill's *Life* magazine article on the legendary U.S. criminal lawyer, Edward Bennett Williams, whose clients have included Alger Hiss, Leona Helmsley and Michael Milken. The editors are of the view that O'Neill's prose is of the "fly-blown" rather than high-flown variety and consequently, inspired by the English Lit Department of an American university which has an annual Bulwer-Lytton Fiction Award for the worst opening sentence of a novel, propose to make a similar award for such prose arising in a legal context — perhaps the award could be dubbed a "Drakey".

Negotiations have not yet been completed but the editors are seeking to enlist Mr. Justice Byrne (*qv* 82 *Bar News* 7, Spring 1992) to judge the award. So let's hear your examples of convoluted, tortured and regrettable imagery. Would-be entrants should not be dissuaded from submitting suitable examples for judging because of their reluctance to subject the physically disabled (gnawed elbows) Byrne J. to the onerous task of judging the entries. We hope to announce shortly that Mrs. Justice Byrne will turn the pages for His Honour.

LAWYERS' ETHICS: DEFENDING THE CRIMINAL CLIENT

A criminal lawyer, like a trapeze performer, is seldom more than one slip from an awful fall, and because he must swing rascals away from the clutches of the law to get top billing, he is eternally pinned in the hot arc-light of controversy. If he drops his client in mid-air, he is damned for clumsiness. If he slides the sinner down a guy-wire near the exits, he is absolutely certain to be booed by those in the audience who feel the miscreant will get home ahead of them and steal the silverware. If he grows reckless in his zeal to win, he may learn, too late, that no splints yet invented will heal a lawyer's broken reputation.

O'Neil, *Life* magazine (22 June 1959)

ADAPTING WELL-KNOWN QUOTATIONS

As Fortas hammered away at the prosecutor's arguments, the lawyers on the defence side took heart. One scribbled an epigram on a piece of paper and passed it to a friend: "If God be Fortas, who can be against us?"

Shogan, *A Question of Judgment — the Fortas case and the struggle for the Supreme Court* (1972) 123.

The judgments of Associate Justice Frank Murphy (U.S. Supreme Court, 1940–48) were described as embodying "justice tempered with Murphy".

Schwartz, *Superchief* (1983) 268.

Negotiations have not yet been completed but the editors are seeking to enlist Mr. Justice Byrne (*qv* 82 *Bar News* 7, Spring 1992) to judge the award.

LEARN FROM YOUR CLIENTS

Wednesday, 19 November 1947

Garner Anthony, an old student of mine and former Attorney-General of Hawaii, dropped in to say hello. He is a very successful lawyer in Honolulu and I greeted him with, "Anthony, I hope you are not making too much money". And he said, "Don't worry, Sir". I said, "You know, too much money isn't any good". He answered with vehemence, "I can assure you it isn't. In observing some of my clients, I find ample proof of that."

From the Diaries of Felix Frankfurter (ed. Lash 1975) 328

JUDICIAL INDEPENDENCE

The responsibilities of the Chief Justice were, of course, considerable. Decision making and opinion writing were a substantial part of his work, of course. He had certain procedural duties and prerogatives: he arranged the Court agenda, presided over the Court at open argument and closed conference, and assigned the writing of opinions when he was in the majority. But he was one vote in nine, one among equals, a fact nicely illustrated many years earlier by Justice James C. McReynolds' answer to Chief Justice Hughes when Hughes one day despatched a messenger for his colleague — it was late, Court was about to open, and the brethren were waiting impatiently in the robing room behind the bench for the absent member. Reported the messenger to Hughes: "Justice McReynolds says to tell you that he doesn't work for you".

Justice W.H. Rehnquist (as he then was), "The Supreme Court: Past and Present", 59 *ABA Journal* 361 at 362 (1973)

SOLICITUDE TOWARDS YOUR OPPONENT'S CLIENT

In one trial in which Mr. Wildman's client was charged with negligence by a middle-aged businessman whose wife died in an auto wreck, he had his attractive blonde secretary come into the courtroom at the end of the trial and sit next to the widower. Following Mr. Wildman's instructions, she asked the man an innocent question, smiled, patted his hand and quickly left. "Just one look at the cold expressions on the lady jurors' faces was enough to tell me that we were home free", Mr. Wildman recalls with a smile. "When the jury came back with a [verdict against him] the plaintiff's lawyer never knew what hit him. You see, the entire interchange took place while he was facing the jury in the midst of his closing argument."

O'Connell, *The Lawsuit Lottery: only the lawyers win* (1979) 32-33.

GUIDE AND ASSIST YOUR INSTRUCTING SOLICITOR

To a solicitor who sent Tim Healy endless further observations about a case, he wrote, "Ammunition is what I want, not stores".

Comyn, *Irish at Law* (1981) 193.

LEGAL PROFESSIONAL PRIVILEGE

Joey Adams cracked jokes about Roy's loose tongue: "The wonderful thing about Roy is loyalty. As you know, what goes on between the lawyer and his client is privileged information. When you tell something to Roy Cohn, you're guaranteed of absolute confidentiality. Nobody will know about it, nobody but 'Page Six' of the *Post*, nobody but Liz Smith at the *News*".

Von Hoffman, *Citizen Cohn* (1988) 404.

ENDEAR YOURSELF TO THE BENCH

A political decision. Who are those three old farts in the Court of Appeals, who give us a fifteen minute argument and obviously, despite what they say, did not read the record?

Disappointed plaintiff's Attorney Barry Nace after the Court of Appeals overturned a $1.16 million jury verdict in favour of his client. Huber, *Galileo's Revenge: junk science in the courtroom* (1991) 123.

CUTTING THE GORDIAN KNOT

In one session, a judge explained how he resented the Catch-22 created when a social services department refused to return to their mother the children of a woman who had completed a residential alcohol treatment program because, in the interim, she had lost her subsidized housing. At the same time, the housing bureaucracy denied her eligibility until she had her children back. The judge said he ordered the state to pay for a motel to house the woman and her children until the state bureaucracies could work out something more permanent. Another judge interrupted, "You can't do that". "Well, I did it", said the first judge.

Minow, "Law, Language and Family Violence", 43 *Vanderbilt L. Rev.* 1665 at 1689, footnote 134 (1990).

FAMILY LAW

After the quasi-ex-husband had departed, the petitioner spoke to me. I expressed some surprise at seeing them together.

"Oh — we've been staying here during the case", she told me.

"Not as husband and wife?" I exclaimed in horror.

"Oh — no, not exactly. We did have separate rooms, though we managed to make love every night. I never could resist the begger".

I don't know what the judge would have thought of litigation by day and copulation by night.

Parris, *Under my Wig* (1961) 177.

USER PAYS

"The statement that genius is the capacity for taking infinite pains might have originated in speaking of the justice", said [Justice Brandeis's third law clerk Dean] Acheson about Brandeis's approach to opinion writing. A Brandeis decision went through many drafts; he scrawled out the opinion with pen, sent it to the printer to be set in type, and then revised the galleys. He would do that four, five, sometimes twenty times, a revision often being a complete rewrite.

Because Brandeis put his decisions through so many revisions, using the Supreme Court printer as a typewriter, he offered to pay the costs of his revisions. "It would not, in the least, embarrass me to

pay", he told Chief Justice Taft. But Taft would not allow it: "I think we would make a great mistake if we allowed the fear of expense to interfere with the necessary procedure in making our opinions what we wish them to be . . . It is a legitimate and necessary expenditure in the discharge of our duty."

Baker, *Brandeis and Frankfurter: a dual biography* (1984) 192–193

STATUTORY INTERPRETATION

In 1981 the telephone number of a woman named Rita was enacted into law because it had been scribbled in the margin of the only copy of an amendment being voted on, and the following day it was duly transcribed into the printed copy of the bill.

Tribe, *God Save this Honourable Court* (1985) 131

ENCOURAGING SCHOLARSHIP

The cleverest thing said about [Sir Samuel] Griffith's version [of Dante] was said by Sir Julian Salomons. When Mr. W.M. Hughes became Attorney-General of the Commonwealth, the Bar rather sneered at the idea of a "junior" with not much practice becoming the official leader of the Bar in Australia. But Salomons took wider views, and made a point of "calling on" the new Attorney-General. The two men found plenty to talk about without law, and a cordial liking led to Hughes being invited to Salomons's house. He was shown pictures and curios and books of interest, and presently Salomons took up Griffith's translation of the *Inferno*.

"Look at this book, Mr. Hughes! Notice the inscription! 'From the author'. I was very careful to get that put in. You see I'm an old man now and I don't know what may become of my belongings. I shouldn't like anybody who might pick up this book with my name on it to think I had stolen it! *Still less, that I bought it!*"

Piddington, *Worshipful Masters* (1929) 240

ADVANCEMENT

(i) The Labour Government was perhaps moved as much by fear of being accused of finding "jobs for the boys" as by lofty principles. It is a fear from which the Tory Party has always been free, no doubt because of its supreme confidence that its members are divinely ordained to occupy all the important posts in the State.

Parris, *Under my Wig* (1961) 117.

(ii) "Become a Tory", Lord Hewart is reputed to have advised a younger colleague at the Bar. The Tories have all the loaves and most of the fishes."

Id., 118

LEGAL SCHOLARSHIP

"Roy [Cohn] would have been a great lawyer", an older colleague in the US Attorney's office said in an affectionate remembrance, "if he'd ever cracked a law book."

Von Hoffman, *Citizen Cohn* (1988) 75

CLARITY IN COMMUNICATIONS

A crusty and humourless man, [Harold] Ickes was a self-described curmudgeon who delighted in fighting critics. "Although I . . . have never met you, I feel that I know you very well as a cowardly, skulking cur", he once wrote a publisher whose newspaper had printed an unflattering editorial. "I can see you in my mind's eye eating your own vomit with relish but enjoying even more the savour of the excrement in the pigsty in which you root for choice morsels."

Kalman, *Abe Fortas: a biography* (1990) 65–66

DON'T ACCEPT GIFTS FROM CLIENTS

One of Birkett's best lay clients was an old man with a white beard and deceptively courtly manner, named Tommy Evans, a professional pickpocket, whose acquittal Birkett secured on three occasions. Happening to meet Tommy on a railway station, where he was catching a train, Birkett admonished the pickpocket to mend his ways, as he could not rely on [Birkett] to get him off a fourth time. While they were talking, Birkett, whose mind was on the departing train, felt for his watch and discovered to his annoyance that he had forgotten to bring it with him.

"What's the matter?" asked Tommy Evans. "Haven't you got a watch?"

"No, confound it — I must have left it at home".

"Wait a moment, guv", said Tommy with his usual innocent-looking air. "I'll get you one!"

Fortunately the whistle blew at this moment, and Birkett was glad to bolt for his train.

Hyde, *Norman Birkett — the life of Lord Birkett of Ulverston* (1964) 72–73

ROUNDABOUTS AND SWINGS

As one old country lawyer used to rationalize when he was criticized for winning too often, "When I was young, I lost a lot of cases I should have won. Now that I'm older, I win a lot of cases I should lose. Justice gets averaged out."

Spence, *With Justice for None* (1989) 125

CLINCHING THE CASE WITH YOUR CLOSING ARGUMENT

It is prevailing wisdom in California courts that murder cases without bodies are won or lost in closing arguments. One story, perhaps apocryphal, has a defence lawyer winning his case with the following ruse. As he finished his closing remarks, he dramatically withdrew his pocket watch and announced to the jury, "Ladies and Gentlemen, I have some outstanding news. We have found the

supposed victim of this murder alive and well, and, in exactly one minute, he will walk through that door into this courtroom."

A hushed silence falls over the courtroom, as everyone waits for the momentous entry. At the end of the minute the lawyer turned towards the courtroom door and shouted the victim's name. Nothing happened.

The lawyer then said, "The mere fact that you were watching the door, expecting the victim to walk into this courtroom, suggests that you have a reasonable doubt whether a murder was committed!" Pleased with the impact of the stunt, he then sits down to await the acquittal.

Horton, *The Billionaire Boys Club* (1989) 308

Not bad, eh! But do be wary of the other version clearly demonstrating the danger in such a ruse. It is included as a cautionary note.

CLINCHING THE CASE FOR YOUR OPPONENT WITH YOUR CLOSING

Again, pleased with the impact of the stunt, the lawyer sits down to await an acquittal.

The jury is instructed, files out and returns ten minutes later with a guilty verdict. Following the proceedings, the astounded lawyer chases after the jury foreman to find out what went wrong. "How could you convict?" he asks. "You were all watching the door!" The foreman explains, "Most of us were watching the door. But one of us was watching the defendant, and he wasn't watching the door."

Jones, Sevilla and Uelman, *Disorderly Conduct* (1987) 129

FAMILY LAW

(i) The plural of spouse is spice.
(ii) One man's mate is another man's passion.

PAYMENT INTO COURT

A long time ago it is said that an irrepressible Irish barrister, appearing for a plaintiff, told the jury how much money the defendant had paid into Court.

When he had recovered his breath the appalled judge, shaking with fury, said that never in his life had he heard such monstrous behaviour at the Bar. "I have been at pains to look the matter up in the books", came the answer in a satisfied brogue, "and I find, my Lord, there is no law against my telling the jury this. It is merely" — an expressive gesture waved away the triviality — "merely a gross breach of professional etiquette."

Lincoln, *No Moaning of the Bar* (1957) 24–25.

And, perhaps, therein lie the origins of Order 26, rule 5 and Order 63, rule 23.

CONFINING PRECEDENT

Justice Stewart asked whether he was right in his impression that Fortas was not arguing for the old proposition that the Fourteenth Amendment had incorporated the Sixth Amendment as such. Fortas agreed — he was not. But the answer that pleases one justice may arouse another, and this one aroused the member of the Court who had been arguing for a generation that the Fourteenth Amendment incorporated the entire original Bill of Rights — Justice Black. He asked in a puzzled way why Fortas was laying aside that argument.

"Mr. Justice Black", Fortas replied, "I like that argument that you have made so eloquently. But I cannot as an advocate make that argument because this Court has rejected it so many times. I hope you never cease making it."

Justice Black joined in the general laughter.

Lewis, *Gideon's Trumpet* (1964) 174

SHARING DOMESTIC CHORES

I let Earl go with me to a delicatessen just once. We never could afford it again."

Nina Warren, on shopping with husband Chief Justice Earl Warren

RESPECT YOUR OPPONENT

Once when opening an argument before the Full Court, Sir Julian Salomons said, "This really is a very short point, Your Honours. My learned friend has brought his whole library into court, but that, Your Honours, is only because he is apprehending some harshness on the part of his landlord."

Blacket, *May it Please Your Honour* (1927) 34

SET A GOOD EXAMPLE TO IMPRESSIONABLE YOUTH

In 1928 he turned up for the Oxford v. Cambridge match very obviously the worse for drink, wearing the loudest check suit, and accompanied by his faithful cairn terrier, Jane, for whom an exception had to be made to the rule that dogs were not admitted; he was propped up just enough to deliver his usual sparkling speech, as witty as ever, but then, before the eyes of the delighted undergraduates — still holding a drink in one hand, a cigar in the other and Jane tucked under one arm — slid gently under the table.

Campbell, *F.E. Smith, First Earl of Birkenhead* (1983) 705

PICKING THE BRAINS OF YOUR COLLEAGUES

It is told of a popular solicitor that he called upon another brother of the profession, and asked his opinion upon a certain point of law. The lawyer to whom the question was addressed drew himself up and said, "I generally get paid for what I know!" The questioner took half-a-crown from his waist-

coat pocket, handed it to the other, and coolly remarked, "Tell me all you know, and give me the change!"

Willock, *Legal Facetiae* (1887) 12

REFUSE TO BE INTIMIDATED BY HIGHER AUTHORITY

A British Columbia judge had acquitted a man in a bestiality case involving a dog. He was informed by a court official that the BC Court of Appeal had just reversed his decision. "It doesn't surprise me", the judge said. "They know more about fucking dogs than I do."

McDonald, *Court Jesters* (1985) 50

WISHFUL THINKING

They met at the Manhattan Opera House on 26 October, 1924, to debate "Is Capital Punishment a Wise Policy?" The tickets sold for $1.65 to $4.40.

Judge Talley opened, "In the heart of every man is written the law: 'Thou shalt not kill!'"

Darrow fended off the opening statement with humour. "I think every man's heart desires killing. Personally, I never killed anybody that I know of. But I've had a great deal of satisfaction now and then reading obituary notices."

Weinberg and Weinberg, *Clarence Darrow: sentimental rebel* (1980) 315

THE PUREST OF INTENTIONS

When High Court judges are appointed, they are at first invariably courteous and patient. At that stage they recollect the indignities they have all suffered at the hands of judges during their career at the bar, and are determined not to inflict them on others. They may be in the mood of Mr. Justice Russell (the present one) when he took his seat on the Bench for the first time. "I have made a number of resolutions", he said, "but I will not reveal any of them, because I don't wish to encourage wagering amongst members of the Bar as to how many will be broken and how soon. I will do my best."

Parris, *Under my Wig* (1961) 189–190

ADVISE YOUR WITNESS TO FOLLOW HIS HONOUR'S PEN

In 1945 [James Christie] was appointed a temporary Judge of the Supreme Court (an office he held for two years). Wishing to follow the methods of his master Salmond in the taking of notes of cases he was to hear, he asked the Court staff to find Salmond's first notebook. As he described it later, he opened the book with a feeling of reverence. "And there", said Christie, "I found the name of Salmond's first case, the date, and nothing else but a pen-and-ink drawing of a butterfly."

Portrait of a Profession: the centennial book of the NZ Law Society (ed. R. Cooke, 1969) 186

Brien Briefless

UNIVERSITY OF MELBOURNE INTRODUCES AN SJD

LEGAL EDUCATION AND THE BAR

FOR MANY YEARS AN SJD FROM HARVARD — or even Yale — was the prize that the budding academic treasured. Some of those budding academics, now fairly full-blown perhaps, now practise as full time members of the Bar.

The exclusivity of their relatively small club is now threatened by a new venture of the University of Melbourne Law School. It will soon be possible for every barrister to carry an SJD — admittedly of the homegrown variety but no less real for that — in his knapsack.

Professor Cheryl Saunders and Simon Whelan, in the short comments set out below, tell us why participation in the SJD programme is a "good thing".

WHY DON'T BARRISTERS UNDERTAKE GRADUATE STUDY?

At a recent meeting of a graduate studies committee of the University of Melbourne Law School I was asked why it was that the LL.M. coursework and the graduate diploma programmes attracted so few barristers. Why, I was asked, did solicitors and accountants participate in large numbers but not barristers? I responded with the rather obvious joke that barristers knew everything already. The response of those present was to agree with me, adding the proviso that barristers "thought" they knew everything already.

My experience at that meeting prompted me to think about what I have gained from participation in the LL.M. coursework programme, both as a participant and as an instructor. I can only speak of my personal experience, but I found the coursework programme to be of enormous value. Graduate study exposes the practitioner to academic discipline in approaching legal problems and at the same time gives the practitioner the opportunity to have an overview of an area which is very rarely obtained when working on particular cases. Barristers who wish to move into new fields would be assisted greatly by undertaking graduate study in the proposed new field, and the University of Melbourne offers the opportunity to study in most fields.

If this sounds like an advertisement, it is, but only in one sense. Enrolments are very full, at least in the area in which I am involved, which is corporations and securities. There is no need to advertise to any substantial degree in order to obtain satisfactory numbers. My only motive in seeking to proselytise barristers is my belief that barristers participate in low numbers because they are unaware of the potential benefits.

In addition to myself, there are two other barristers who are presently instructing in the graduate diploma in Corporations Law and Securities Law (which is also part of the LL.M. programme); they are Ms Julie Dodds and Mr. Joseph Santamaria. Although I haven't discussed it with them, I am sure that either of them would be most happy to discuss the programme with any interested counsel at great length. If pressed I may also find a few minutes to do so (provided I am given plenty of notice and don't have anything better to do).

Simon Whelan

The advantages of the SJD lie in the foundation of knowledge which the coursework can provide for the original research required for the thesis. The coursework component must be completed before the thesis is begun and provides the key to admission to candidature for the degree.

A NEW DOCTORATE FOR LAWYERS

A specialist doctorate in law, the SJD, will be offered by the University of Melbourne Law School in its Graduate Programme in 1994.

The SJD, or Doctor of Juridical Science, is a professional doctorate which combines coursework with original research, culminating in a doctoral dissertation of approximately 60,000 words. The SJD has been familiar for a long time in leading North American law schools, but has only recently been introduced in Australia. The Melbourne degree is the first of its kind in Victoria. Melbourne will continue to offer the Ph.D., which is a general university doctorate. But many lawyers with an interest in advanced legal research are likely to prefer the SJD instead.

The advantages of the SJD lie in the foundation of knowledge which the coursework can provide for the original research required for the thesis. The coursework component must be completed before the thesis is begun and provides the key to admission to candidature for the degree. Applicants for the SJD will be expected to obtain a 2-A average in all four coursework subjects. Candidates may transfer from a graduate diploma or master's programme to the SJD, even when they had no firm intention of undertaking an SJD when their graduate studies began. But ideally, coursework subjects should be chosen with the broad subject matter of the thesis in mind, to ensure that maximum advantage is taken of the potential for one to build on the other.

The opportunities for specialisation already available in the Graduate Programme put the Law School in a good position to offer the SJD. Over the past three years, the Faculty has progressively introduced a series of graduate diplomas in response to increasing demand from the legal profession for specialisation. Whilst some graduate students enjoy the luxury of tackling a range of different subjects at an advanced level, others prefer to take subjects in the same area which contribute to a specialist body of knowledge. The Faculty now has ten such diplomas in the Graduate Programme.

- Advanced Family Law;
- Asian Law;
- Corporations and Securities Law;
- Dispute Resolution and Judicial Administration;
- Finance Law;
- Government Law;
- Intellectual Property Law;
- Labour Relations Law;
- Media Communications and Information Technology Law;
- Natural Resources Law.

There is some cross-fertilisation between the diplomas: for example, some Finance Law subjects are available in the Asian Law Diploma and some Government Law subjects are available in Dispute Resolution and Judicial Administration. Candidates for the Masters by coursework or SJD may use the subjects for a particular diploma as the core of their coursework studies or may choose subjects from different diplomas to construct a specialist grouping relevant for them.

There has always been a concern that post-graduate research students in law are unduly isolated in their studies. Nor have traditional post-graduate research degrees always offered the systematic training in legal or social sciences research methodology or in alternative philosophical or cultural approaches to law which might now be considered desirable. The University of Melbourne Law School has sought to meet this in the past by regular meetings of post-graduate research

students, devoted to particular methodological or theoretical issues. These meetings will continue in 1994, under the congenial auspices of Dr Robin Sharwood.

The Faculty hopes that this new degree, tailored as it is to the needs and circumstances of the legal profession, will offer incentives to undertake legal research which have not existed before.

In addition, however, all candidates for the SJD will be required to participate in a seminar programme on advanced legal theory and research over the first year of their preparation. The focus of the seminars will be on a selection of monographs and articles that exemplify different approaches to legal theories and research. Where possible, visiting scholars, authors of the works studied and academics from other disciplines will be invited to participate in, or lead, seminars. A further component of the course will be the presentation of work in progress by members of the Faculty. Graduate students will be expected to make presentations of their own work at an annual weekend seminar, in each year of their candidature.

Graduate research in law is a valuable resource for the examination, development and improvement of the Australian legal system and the understanding of the legal system of others. So far, using traditional approaches, it has been but lightly tapped. The Faculty hopes that this new degree, tailored as it is to the needs and circumstances of the legal profession, will offer incentives to undertake legal research which have not existed before. An introduction to the Programme will be given at its launch on Tuesday, 5 October at 6.00 p.m. Anyone with potential interest is most welcome to attend. Enquiries should be directed to the Programme Manager, Ms Kay Nankervis, on 344 4476.

Cheryl Saunders

THE JUDGES' RECEPTION

JUDGES' RECEPTIONS ARE NOT POLITICALLY correct occasions. The Judges' reception held in the Essoign Club in August was not a politically correct occasion. By definition it could not be. Any event where barristers entertain judges cannot conform to the present thought guide lines of our free and democratic society. We all know what barristers and judges are like. The press has told us!

Here they were plotting in that most elitist of places the Essoign Club. I mean there were actually white Anglo-Saxons present! Some had even gone to SCHOOL! Most were men. Most of the judges were over 50! Shock! horror!

Crockett J.,Northrop J., Judge Rendit and Brian Bourke

Sarah Lindsay, Jeremy Twigg and Aileen Ryan

Judge Barnett, Mara Catalano, Simon Lopez and Ian Bowditch

Judge Smith, Dawson J., Hase J. and Judge Fagan

There were some female barristers present, but they had all been brainwashed by this medieval guild and therefore don't count. None were wearing polka dot tights. Power dressing prevailed.

The thought police have taped the proceedings. All will be exposed in the *Financial Review*. The tape will be played at whatever Senate Standing Committee Inquiry is presently going on in Canberra. There were undoubted breaches of trade practices. They will appear in footnotes to the next

Betty King, Carolyn Douglas, Judge Jones and Judge Murdoch

T.P.C. report on those terrible, terrible things — professions!

Somebody undoubtedly expressed a sexist view. Most present were not gender-free. Lots broke the thought laws and discussed Mabo. A majority was not multicultural. Some even had the audacity to say that a Republic would not be a good thing. One barrister announced that he was a conservative! Naturally all judges and fellow barristers quickly backed away from him. Drugs were consumed in the form of alcohol and tobacco. The tax department is investigating the fringe benefits of judges being asked along for free. The Liquor Control Commission is conducting an inquiry into the club's licence, to see if the guest book was properly filled in and to establish who were really bona fide travellers for the purpose of the Act. The rape laws were discussed in an objective non-warm, caring and sharing manner.

Somebody, when asked if he/she or it wanted a drink, said no, and got intoxicated. Rumour has it that even intellectuals were present. All were elitist because they had a law degree.

Can these illegal gatherings continue? How long can society tolerate judges and barristers? Can they be allowed to socialise? The pictures on these pages are of those soon to be interned in thought reprogramming camps. Wait till next year to see the results! We are not paranoid! Not everyone is against us! *Vive les judges' receptions . . . Vive le Bar!*

Retrained Revisionist

LAUNCH OF *THE LAWS OF AUSTRALIA*

IT CAME IN AN UNPREPOSSESSING ENVELope. It looked just like another missive from the Law Book Company. Either the usual request for an "overdue payment" or a blurb urging the purchase of an interesting book on Trade Practices in Communist China. The envelope was opened with diffidence. But lo and behold it was an invitation to attend the Law Book Company's launch of *The Laws of Australia*. It was an invitation to a black-tie dinner at the Hyatt on Collins in Melbourne. A very quick acceptance followed.

The Laws of Australia has been a long time in the coming. The launch certainly made the wait worthwhile. It was an extremely stylish evening and a great credit to the staff of the Law Book Company.

The grand ballroom was filled with some two hundred people comprising members of the judiciary, the Attorney-General of Victoria, barristers, solicitors and academics. The legal community mixed with the staff of the Law Book Company who had put so much work in ensuring that *The Laws of Australia* had at last come to fruit. Sir Zelman Cowan and the Honourable Mr. Justice Michael Kirby delivered speeches on behalf of the profession and Mr. Bill Mackarell, managing director of the Law Book Company, replied. A tribute was paid to John Riordan, who was the founding architect of the whole project. Mr. Justice Kirby said in his opening remarks:

"*The Laws of Australia.* By any account, it is a bold enterprise of legal publication. Perhaps the boldest in our country's history."

His Honour's excellent speech is reported in full elsewhere in this issue.

There can be no doubt that this is a very important publication. It will become an essential resource for the lawyers of Australia. Undoubtedly future generations will be greatly indebted to the Law Book Company for giving birth to this reputable work.

Also, the food and wine were excellent.

Paul Elliott

Justice Michael Kirby

Sir Zelman Cowan

Sir Zelman Cowan; John Beale, Director of the Law Book Company; Attorney-General Jan Wade; Bill Mackarell, Managing Director of the Law Book Company; Gerry Halpin, Publisher of the Law Book Company; Justice Michael Kirby; and Brent Dowsett, Group Managing Director of Thompson Australia

Sir Zelman Cowan, Bill Mackarell (the Law Book Co.) and Justice Michael Kirby

Justice Michael Kirby addresses the launch

LAW INSTITUTE ABOLISHED

THE ATTORNEY HAS BEEN DESCRIBED AS a "good friend to the Bar". We should not, however, allow ourselves to be lulled into a false sense of security. According to the *Melbourne Weekly*, 10 August 1993:

"In less than one year Jan Wade, Victoria's first female State Attorney-General, has shaken up the judicial system with tougher sentencing laws for serious crimes, abolishing the Law Institute and cutting a range of legal services . . ." So subtly has she brought about the abolition of the Law Institute that few solicitors have yet realised what has happened. What the Attorney can do to the Law Institute (with the co-operation of the *Melbourne Weekly*) could easily be done to the Bar with the co-operation of (say) the *Financial Review*.

MOUTHPIECE

IT IS LUNCHTIME. THE LOCATION IS A cheap, very cheap, eating place within a moderately comfortable walk of the corner of William and Little Bourke Street. A gossip of barristers are lingering over coffee:

Kevin: Well how is it going? Good?
Kerryn: It's OK.
Kelvin: I'm keeping out of mischief. Are you?
Kevin: More or less. Can't complain.
Kerryn: No use complaining. If you do it is an open invitation to everyone else to regale you with their problems.
Kevin: And if you don't nobody believes that you're not struggling.
Kerryn: I am doing OK.
Kelvin: What's that mean?
Kerryn: I am doing as well as can be expected given the current circumstances.
Kevin: Me too.
Kelvin: So! You're really struggling!
Kerryn: I wouldn't say that!
Kevin: Neither would I!
Kelvin: Let's face it. Neither of you have been in Court for a long time.
Kevin: That's not true! I had two matters at Melbourne last week!
Kerryn: And I was in the County Court.
Kelvin: You were both doing Chambers matters.
Kerryn: And when were you last in Court!?
Kevin: Yeah!
Kelvin: I've had plenty of work.
Kerryn: What sort of work? Where?
Kevin: Tell the truth.
Kelvin: Mind your own business!
Kerryn: I thought so. So you have been struggling. Like everyone else.
Kevin: Yeah. No better than anyone else.
Kelvin: I've been doing alright thank you very much. I've had heaps of paperwork to keep me going whenever I have had the odd day out of Court.
Kevin: What! You'd be lucky to get a Magistrates' Court Particulars of Demand once a month.
Kerryn: And it shouldn't take you four days to do it.
Kelvin: Well I am doing alright I tell you.
Kerryn: Like everyone else.
Kevin: No one cares to admit that they are struggling. No one.
Kerryn: I am not too proud to say that I have seen better days.
Kevin: Me neither.
Kelvin: I still say I am doing alright.
Kerryn: Well the Supreme Court isn't.
Kevin: Can't say that I get there very often.
Kelvin: I've been there.
Kerryn: Yeah. For your celebrated winding up before the Senior Master.
Kevin: You dined out on that for weeks.
Kerryn: And you sweated on it for weeks beforehand.
Kevin: And it turned out to be an adjournment application in the end.
Kelvin: It wasn't my fault that my instructors forgot to advertise the application.
Kerryn: Well as I was saying, even the Supreme Court is finding times tough.
Kevin: What do you mean?
Kerryn: You saw the circular about the transcript?
Kevin: No!
Kerryn: You know, the one advising that no civil matter will be set down unless the solicitors promise to pay for the judge's transcript.
Kevin: Can't say I do.
Kelvin: We're all aware of it. So what!
Kerryn: I reckon it's a great idea. If you want an adjournment — such as for a last-minute brief where you haven't had time to read it — you don't need to dream up some plausible excuse. All you have to do is refuse to pay for the transcript.
Kelvin: I don't think it is that simple. What if the other side promises to pay for it?
Kevin: Oh yeah! That would be a bit of a problem.
Kerryn: You never know. That other side mightn't want to pay for it or might not know about the new rule.
Kelvin: I still do not see the problem.
Kevin: Can't say it will affect my practice greatly.
Kerryn: Well the Supreme Court had to do it because the Government has put the squeeze on them.
Kelvin: I still can't see the problem. It is just another case of the user pays.
Kerryn: I don't have any problems with the "user pay" principle but . . .
Kevin: Me neither.
Kerryn: This is a matter of having a down payment before use.

Kelvin: I still can't see the problem.
Kerryn: What happens if the idea catches on?
Kevin: What idea?
Kelvin: The user pays in advance idea?
Kerryn: For instance we might have to pre hire the Court-room.
Kelvin: Or have to promise to pay for the clerk's stationery.
Kevin: Or pay for the magistrate's computer time when he enters up the orders . . .
Kelvin: Or a toll to the Supreme Court Prothonotary when we take a short cut through the building on a wet day en route to Melbourne Magistrates' Court . . .
Kerryn: Worse still, the Government may have the County Court scaffolding put on the Heritage Register . . .
Kevin: So-o-o . . .
Kerryn: And pay for it with a poll tax on all CBD office occupiers . . .
Kelvin: They might make us pay for having clients and witnesses paged at Court . . .
Kerryn: Worse still — we might have to lodge a security deposit to ensure our matters are called over the PA system when they come on for hearing . . .
Kelvin: Or to ensure we are called when there are telephone calls or even when our matter is to be heard . . .
Kerryn: It could spread. The Police might seek rental of conference facilities — such as they are — in the lockups . . .
Kelvin: Or the Courts might want a security deposit to pay for Court facilities if our client indicates a plea of not guilty at the mention day . . .
Kerryn: Or a fee to allow us to appear at the trial . . .
Kevin: But the client would be responsible for the fees . . .
Kerryn: Can you see legal aid paying these fees . .
Kelvin: They might get on the bandwagon too . . .
Kerryn: You mean seek an up front fee before they consider whether they will aid a person . . .
Kelvin: Or guaranteed mileage from the Courts before they leave their office for a stint of duty soliciting . . .
Kevin: Or from the occupants of the lock up . . .
Kerryn: But it could really take on . . .
Kelvin: I thought it had.
Kerryn: The possibilities have not yet been seriously considered.
Kevin: You mean like a tax on love making or breathing?
Kelvin: This is serious.
Kevin: That would be serious!
Kerryn: What if the emergency services took the idea on board?
Kelvin: They have already: I mean you get charged for ambulance trips, the fire brigade charges for for alarms, the Police have been known to charge people for making false reports, what more could they do?
Kerryn: Just imagine. You have an emergency, you ring the emergency number and you get this recording: "All our operators are presently busy. You have been placed in a queue. One of our operators will be with you shortly. Whilst you are waiting consider whether it really is an emergency. And remember before the operator is able to take your call the operator will require your credit card details. You will be charged a minimum 15 minutes for the initial consultation."
Kelvin: It will be like calling out a plumber, electrician, TV mechanic or the like.
Kevin: I'll have to be going now.
Kerryn: Me too.
Kelvin: Gotta rush off to Court do we?
Kerryn: Not exactly . . .
Kevin: My clerk expects . . .
Kelvin: We have better fix up the bill — I didn't have any of the bread . . .
Kevin: And I only had water.

LUNCH — FITZSIMMONS

THE NAME FITZSIMMONS CONJURES UP A vision of good times, of times past, of the 1980s. These were the days when we didn't know how good it was. Fitzsimmons was always packed with barristers. Heather Carter and Bev Hooper would be seen there once or twice a week along with many other members of the Family Law Bar. It was a regular haunt of the Bar and the Bench. The 1980s were the days when members of various Chambers could afford a very good Christmas bash. I remember a particularly good black-tie function at Fitzsimmons for the 6th floor Chambers in Four Courts. The whole restaurant was hired and a riotous evening ensued. Alas the recession has struck. Christmas parties now consist of a warm beer, a little boy, and a square of Cheddar cheese.

So the editors decided to blast into the past and have lunch at the new-look Fitzsimmons. Sasha and Freda went earlier this year after successfully running the restaurant for many years. Fellow barrister Maurice Alexander, with the kind permission of the Bar Council, has been allowed to continue his practice alongside owning Fitzsimmons. Maurie is well-known at the Bar for giving the last speech at the Bar Dinner as Mr. Junior Junior (a tradition that perhaps should be re-established). He is well-known in the restaurant trade as being the former other half of Stephanie's. His face would be well-known to those who patronised that restaurant over the years.

Fitzsimmons Restaurant

He has acquired the services of Mary Miller, a very experienced young lady who has previously worked at Mietta's, Q.C.'s and Delaceys. Fitzsimmons is now very much a 1990s restaurant. This is reflected by the development of the bistro. Many will not realise from its facade that there is a courtyard and airy bistro attached to the formal restaurant. In these recessionary times Maurie has introduced a bistro menu whereby everything is under $10.00. The bistro menu is the same as that of the formal restaurant. However for those in a hurry or not wishing to spend or eat too much, the portions are somewhat smaller but essentially the same. This is a perfect place for a quickish lunch or a place to take solicitors or clients.

The formal restaurant looks very much the same as it has been over the years. It is still a very tasteful and charming restaurant with proper tablecloths and an atmosphere to match.

Despite rumours to the contrary, those who write lunch columns for the *Victorian Bar News* do not get a free lunch. Therefore the editors decided to lunch in the bistro. Especially since it was the junior editor's turn to pay for lunch.

There are five entrees, six main courses, four desserts and cheese on the menu.

Feeling in restrained recessionary mode we shared a Swiss Winzerteller plate which was a Winter salad with a multitude of meaty morsels such as barbequed quail, air-dried beef and pork and prune terrine. It was excellent. The quails were moist and properly barbequed. The terrine was extremely interesting and all in all it was an excellent starter. There was enough for two. Other starters included a hearty vegetable soup with pungent parmesan shavings and white beer crouton, butterfly wing prawns, pumpkin gnocchi with walnut pesto, herbs and roasted egg plant and star anise and dill cured Atlantic salmon with wild rice blinis on a confetti of vegetables bound in Pernod-flavoured yoghurt. (Phew!)

Being unthinking and unimaginative we both had the same main course. It was the South Australian whiting fillets with tiny capers pan-sealed with tarragon mustard oil and raspberry vinegar dressing. To some this might sound extremely Nouvelle and tizzy. I have always treated raspberry vinegar with suspicion. However the fish was excellent. It had been properly pan-seared, the sauce supported the fish rather than over-powered it. The price was $9.50. Those of the large Bar would find the serving too small. However we both felt that the serving was sufficient. We ordered sauteed potatoes and a green salad which were extra in the bistro. In the main restaurant the whiting fillets were $20.00 but this price included the potatoes and a green salad. Other main courses included a smoked veal rump, pan-sealed and oven roasted with pancetta, corn-fed chicken fricassee with wild mushrooms, char-grilled Atlantic salmon with Thai flavours and coconut rice, barbequed lamb fillets with a Moroccan rissotto and prime eye fillet steak barbequed with green peppercorns, rosemary, red wine and green shallot sauce. All looked extremely interesting.

We were informed that desserts were a speciality. These included a drunken fruit soup with a dollop of cinnamon ice cream; this evidently is intended to be a pick-me-up for the depressed members of the WorkCover and personal injuries Bar. There was also a French almond and orange cake, a vanilla bean sponge and a lime tart with King Island cream. It was a good plate of cheese and fresh fruit.

There used to be criticism of the old

Fitzsimmons that the food was rather too Nouvelle, servings too small and prices too high. This criticism cannot be levelled at the new establishment. The flavours in the bistro were sharp and the cooking was crisp. If you wanted the big lunch it is still available. Main courses ranging from $18.50 to $20.00 are not all that expensive when compared with certain other bistros which charge $29.00 for a T-bone steak without vegies.

The wine list is reasonably priced. Wines are available by the glass. If you want to splash out there are the big wines there at big prices.

All in all Maurice Alexander deserves to succeed at Fitzsimmons. Those who now walk past Fitzsimmons for newer establishments should give it another go. The bistro fits in to our recessionary society. The restaurant will bring nostalgia to those who go back to the 1980s when things were good and yet we still complained. As a notable barrister once said, "There is no better cure for the depression and paranoia caused by the rigors of the Bar than lunch, lunch and more lunch".

Fitzsimmons,
556 Lonsdale Street, Melbourne
Phone: 670 3521
Proprietor: Maurice Alexander
Chef: Mary Miller
Licensed — lunch Monday to Friday from noon.

Paul Elliott

VERBATIM

Supreme Court of Victoria

Coram: Hayne J.
Esso Australia Ltd. v. *Australian Petroleum Agents' Distributors' Association*
7 September 1993
J. Santamaria for the Plaintiff
Burnside Q.C. and Hardingham for the Defendant

Santamaria: "In paragraph 24 we say what trustees must do when they give due and proper consideration is make enquiries which are practical and reasonable. It is not a judicial discretion. It is a discretion which has to be exercised sensibly . . . "

Supreme Court of Victoria

22 June 1993
Coram: Byrne J.
P.R. Hayes Q.C. and H. Foxcroft for the Plaintiff
Phipps Q.C. and M. Clark for the First Defendant
Buchanan Q.C. and Bick for the Second Defendant

Bick: Is that the first such request you have had for a contact number or a contact address for Mr. Thew from Baker & McKenzie — sorry, Mr. Wong, from Baker & McKenzie?
Witness: Are we talking about Mr. Wong?
Bick: Sorry, Mr. Thew. The names are all the same.
His Honour: They do not sound at all the same, Mr. Bick, Mr. Bock — the names are very different, Mr. Bick.

Supreme Court of Victoria

Geelong Building Society (In Liquidation) v. *Encel*
Coram: Hayne J.
11 August 1993

Murdoch Q.C. and T. North for the Plaintiffs
Burnside Q.C. and Waller for the Defendants
Your Honour, we have referred to the case of *Thomas Fuller Construction* v. *Continental Insurance*, a Canadian case, and we hand up a copy of that.
His Honour: Thank you.
Mr. Burnside: The particular passage we rely on is found at page 355, the first complete paragraph on that page.
His Honour: I assume the courts of Ontario would accord to my unreserved judgments the same respect that you would wish me to accord to this, Mr. Burnside. Is that the position?
Mr. Burnside: Your Honour, I think the reason that Mr. Waller wanted me to refer to this case was because the principal of one of the parties was a Mr. Burnside and he thought it might be the only time I would ever get my name in a report anywhere.
His Honour: At least in this branch of the reports, Mr. Burnside.

Supreme Court of Victoria

28 September 1993
Coram: Smith J.
Alucraft Pty. Ltd. v. *Grocon Ltd.*
Levin for the Plaintiff

Levin: Would your memory have been better in June of 1989 about the events of 1988 than it is now?
Witness: I don't know, I am not sure my memory is ever going to be the same after this. Would my memory have been better in June of 1989 than in November 1988 is the question? The answer is, I don't know whether it was good, or better, or what. I don't know.
His Honour: I think — it's not an unusual question actually to ask a witness. Do you think your memory of events, your memory in June 1989 of events in 1988 would be better than your memory in 1993 . . .?
Witness: I see.
His Honour: . . . of events in 1988?
Witness: I see what you mean. When you explain things, Your Honour it's a lot easier to understand.
Levin: That is why His Honour is a judge and I am a barrister.

Magistrates' Court at Frankston

Coram: Mr. R. Crisp M.
19 July 1993

Magistrate reading aloud passages of a personality profile from a psychologist's report handed up on a plea relating to multiple thefts of motor vehicles:
". . . Self-confident and resilient . . . expedient . . . insensitive to people's approval or disapproval, doesn't care, no fears, given to simple action . . . a personality type found in only one per cent of population . . . He lives in an introspective reality focusing on possibilities and using thinking rather than feeling to make decisions . . . No idea is too far fetched to be entertained . . .
Why Mr. — ! This is a perfect description of a barrister!"

Magistrates' Court at Prahran

Coram: Mr. B. Barrow M.
The Police v. *Beljajev & Ors*

Counsel cross-examining: Are you prepared to swear that you never had shares sent to Susie's place — shares that you bought under the name Jack Hills?
Witness: I can't recall it.
Counsel: You are not prepared to swear that you did not.
Witness: I can't recall it. Excuse me, judge, if he talks about these — can I first have legal advice?
His Worship: If there are any matters that you want to query Mr. Hills or you wish to have legal advice about, say so before the commencement of the question . . .
Witness: OK.

County Court of Victoria

R. v. *A. Stone*
Coram: Judge McNab
Prosecutor: R. Barry
Defence: J. Saunders

The prosecution concerned the conduct of the proprietor of a Special Accommodation House, the majority of whose residents were suffering from, *inter alia*, the effects of long-term alcohol abuse and/or psychiatric illness.
The wife of the proprietor was in the box.
Barry: These places have rules relating to the patients?
Witness: I don't know what you mean.
Saunders: There are many rules. Could my learned friend be more specific?
His Honour: (To witness): What he's asking, can he [meaning Barry] get in there?
Witness: No, I don't think he could. — Pause — Yes, he could stay there. I have just re-assessed him.
Barry: I don't think I will persist with it.

As Others See Us

Recently Vincent J., Kent Q.C., Ray and McIntosh, *inter alia*, were being entertained at the Port Moresby home of John Kil (PNG trainee at the March 1992 Readers' Court). Kent Q.C., Ray and McIntosh were together in a large group, while Vincent J. was speaking to a lady friend of John Kil. Looking across to Kent Q.C., Ray and McIntosh, she asked Vincent J. which of the trio was the member of the Victorian Supreme Court. Vincent J. explained that the trio were all members of the Victorian Bar and that he was the Supreme Court judge of whom she spoke. Embarrassed, she explained her mistake by saying that it was her impression that all Australian judges were plump and unfit.

PASSING OFF — OR FRENCH FOR EVERYONE

IN FEBRUARY THIS YEAR A LETTER EMAnated from a solicitor's office in Melbourne directed to the Company Secretary, Ingoldby Wines Pty. Ltd. of McLaren Flat, South Australia. The letter complained of the use of the word "French" in the description of one of the company's wines, the label of which bore the words "French

Colombard". It indicated that if the practice did not cease, proceedings for passing off and/or misleading and deceptive conduct would issue.

In reply to that letter Ingoldby Wines wrote the following:

"Dear Mesdames,

Re: Misuse of the Word "French

You would probably have good cause to question some practices here in Australia involving misuse of the "F" word, e.g. there is very little of your great nation's input into Australian Made French fries, French mustard or French dressing.

Indeed, all our French windows are made here and a good deal of French polishing is done locally.

For that matter, I doubt whether any of our French poodles have had the opportunity to defecate in a Parisian street.

Sexually, of course, French kissing will have to stop and this country's current boudoir haute couture — the French letter — will in future simply be referred to as "The Letter".

Perhaps your illustrious law firm's efforts in this direction could be immortalised by us referring to the franger as "The letter of the Law".

Again, perhaps franger is etymologically too close to franc and therefore illegal.

Unfortunately your French client seems to have missed the point. French Colombard is a traditional *grape variety* just the same as Shiraz, Chardonnay, Pinot Noir, Marsanne and Cabernet Sauvignon, to name a few.

Indeed, Marsanne is known universally as a Rhone variety, just as French Colombard is now an acknowledged variety grown more in California than elsewhere. Don't take our word for this, but Hugh Johnson in his *World Encyclopedia of Wine* agrees (at p.228).

Interestingly, whilst the variety French Colombard is referred to by Johnson, there is no mention of Colombard whatsoever.

One thing you are right about is that we do sometimes call it "Colombard", just like we say "Pinot" and "Cabernet" to achieve some economy of expression.

Our only real concern is that your client's paranoia may have some foundation in part, i.e. if we thought that people could mistakenly think there was some French connection (perhaps you can change the name of the book and the film — neither were produced in France) we would be mortified.

We have never made Champagne, White Burgundy, Burgundy or Chablis.

The wines of McLaren Flat are immeasurably superior to those of contemporary France, having regard to our consistency of quality and price.

Further, any association with the selfishness, preciousness and hypocrisy of the modern French is to be avoided at all costs.

How any nation so characteristically associated with self-interest, senseless slaughter, murder, mayhem and the wholesale destruction of the environment could have the temerity to ask that its adjectival form be removed from a bottle of the finest Australian White is beyond us.

See you in court.

Kerry Clappis"

A FAIRY TALE (CONTINUED)

NOW GATHER AROUND ME MY DEARS whilst I tell you more of the VicBees. Actually there isn't very much to tell you. Little has changed for the VicBees. Times are still tough. If anything, there are fewer and fewer, and smaller and smaller, patches of flowers for them to harvest their pollen from. Even then the flowers are generally quite bedraggled and appear to have been harvested from already. So each day few and fewer VicBees go out to these barest of pickings and even fewer return. Those that do return appear almost empty-handed. Those that stay behind continue to gather in disconsolate and bitter groups complaining about the luck of those with fields to forage in and the inequity and unfairness meted on those deprived of their rightful share. Some claim that if things do not look up they will get out. They never do. Once a VicBee always a VicBee! Let us face it — a VicBee generally isn't skilled, trained or sufficiently experienced to be anything but a VicBee!

However, some VicBees have found themselves well fitted to become PaperBees. As PaperBees they have found it impossible to resist the urge to sting the wing that once fed them so adequately. With a zeal known only to the converted they constantly carpingly criticise everything to do with VicBees yet say nothing to their readers to suggest that once they too were happy being a VicBee. It is interesting to note that whilst being VicBees they did nothing to change the things they now find so objectionable. One is left to wonder how much bet-

ter life would have been for them, and the community they have so emphatically departed, if they had remained to change things from within rather than to seek to tear down from without.

I shouldn't ignore those VicBees who have returned to the halls of academia to become full-time TeacherBees. Of course, most of them have never really stopped being TeacherBees but, rather, attempted to keep a wing in both camps by being simultaneously a TeacherBee and a VicBee. There are a few others who have attempted to gather their pollen in vastly different ways. Perhaps more about them some other time.

You will probably have noticed that Spring is nearly here. It is a time of rising sap and accelerated heartbeats — even for VicBees. It also is a time for heightened optimism. Come to think of it, each of the last half-dozen or so seasons has been a time of heightened optimism. There is absolutely no reason to doubt that once again the optimism of the brave little VicBees will be dashed.

Still VicBees would not be VicBees if they did not try to change things. Once again a meeting has been arranged to ask all those questions that anyone ever wanted to ask about the situation of hives past, present and future. In the past, such meetings have tended to fade away because of lack of interest. Older and wiser VicBees are of the view that even if this latest meeting goes ahead and lots of questions are asked there will be very few answers and that few, if any, of those answers will satisfy the askers of the questions. The askers will then huff and puff and make a lot of noise. The VicBees who have not answered the questions will promise to investigate the concerns of those who asked the questions. Time will pass and the concerns will not be addressed — at least in the minds of those who profess to be concerned. There will probably be another meeting called and more questions asked and not satisfactorily answered.

But there will be other changes afoot in keeping with the onset of Spring. Once again the VicBees will seek to change those that lead them. Once again an election will be held. Once again lots and lots and lots of VicBees will put up their feelers in an endeavour to garner support from their fellows. Of course there will be some changes. There always are some changes. However, rest assured my dears, the changes will be minimal. But then again, VicBees, despite their talk to the contrary, do not tolerate change particularly well. Deep down they do not want change. Insofar as they want change they want to revert to the "good old days" when the sun shone brightly each day, there were broadacres filled with flowers redolent with pollen and so few VicBees that most of them had to visit at least two different fields each day. In fact, if one can believe the tales of the oldest of the VicBees there were times when VicBees had to visit three or four fields a day! Better still those were the days when other bees admired and looked up to VicBees. Even PaperBees were known to occasionally show a degree of respect to VicBees and to recognise the effort and skill required of a VicBee to enable him (in the good old days there were few, if any, lady VicBees) to do his job properly.

Still, not quite everything is doom and gloom for the VicBees of today. There are many guessing games organised for them such as "pick the next JudgeBee", "where will the next cuts take place in VicBee areas" and "musical lifts". You haven't heard of musical lifts? It is the latest sport organised to divert VicBees from the more mundane aspects of their existence. It only takes place in their pink Hive. The idea is that the VicBee presses a button to summon an elevator to lift them upwards in the hive (I know they have wings but they don't like to use them in their hives whether to go up or to go down). An elevator arrives — always at the end furtherest from the button pressed by the VicBee. The VicBees hastens to the elevator (the older the VicBee the faster they hasten for they have played this game before) which closes its door just as the VicBee arrives. The VicBee then calls upon its Deity who instantly causes another elevator to arrive, this time near the button that was originally pressed. The VicBee hastens back and . . . yes you are right . . . the door closes in its face. Better still the first elevator then opens its doors, just long enough to have the VicBee turn back and flee towards it. On a good day this can go on for quite some time and can even involve quite a gaggle of VicBees at any one time. Such are the diversions created for VicBees.

Of course, in the good old days that I told you about before, groups of VicBees did not have to play such games because they were able to go out and have long lunches with fermented honey and other things and spend their time regaling each other with better and better tales of how good they were, how many fields they harvested each week, how large those fields were and how chock-a-block with flowers were those fields. Of course, no VicBee believed any other VicBee, but they all had a good time pretending it was true. Nowadays VicBees prefer to stay and play the liftgame and have only short conversations wherein they attempt to depress each other with tales of doom and gloom, with each take being darker and more foreboding than its predecessor.

And talking of things dark, night has now come and it is time that you must all be in bed. Try not to think too hard of the poor little VicBees or it will bring nightmares upon you. Think instead of the EntrepreneurBees who have flown across to fields far away and who appear to have bottomless pits of pollen from which to sup.

(To be continued)

FOOTBALL

RAMPANT BAR VICTORIOUS AND UNDEFEATED

THE BAR FOOTBALL TEAM HAS FOR years now been acknowledged as a tenacious hard-working team burdened with excessive age.

The March and September drafts (intakes) have failed repeatedly to produce the young enthusiastic player the team so desperately needed.

However, at last in the March 1993 draft, the Bar was able to produce not one but eight players of ability, all of young years.

The recruitment of Matt Connock, Phil Corbett, James Gates, Simon Lopez, James Patterson, Damian Sheales and Chris Townsend was comparable to the Bears' signing of Nathan Buckley.

On Sunday, 8 August 1993, the Bar team gathered in the changing rooms of the MHSOB football club. After the traditional and emotional "presentation of jumpers" ceremony, traditional coaching methods were dispensed with and assistant coach John Carmody addressed the players.

Assistant Coach Carmody, in a highly-motivational address, pointed out that the eyes of the legal world were on the Bar Football team. At home office in Chicago, across the United States and throughout the world, the firm of Baker & McKenzie was awaiting the results of this game against the Victorian Bar. Never had the Bar faced a greater challenge.

The teams entered the arena with umpires Chris Wallis and Mark Gibson in charge. One wondered, could they maintain the high standard of previous years? The Bar knew that this game was going to be hard. Baker & McKenzie had defeated Mallesons whom the Bar had never beaten. Not only had they beaten them, but reports had filtered through of a very physical clash and of players being flown down from Sydney.

The first quarter was sensational for the Bar with Chris Townsend showing dash and courage, kicking 3 goals in a record-breaking performance. Mark Gamble snuck in for 1 goal and at the break, it was the Bar 4–5 (20) to Baker & McKenzie 1–0 (6).

Not to be outdone, Baker & McKenzie fought to reduce the margin at half-time with Peter Lithgow scoring the Bar's solitary goal in the second term.

Bar 5–6 (36) to Baker & McKenzie 4–6 (30).

The third term was a tight hard-fought affair with Simon Lopez and James Elliott scoring a goal each. The score at three-quarter time showed that the Bar had edged away, but as we knew, Baker & McKenzie did not obtain multinational status by giving it away with a quarter to go.

At three-quarter time, it was the Bar 7–8 (50) to Baker & McKenzie 5–7 (37).

The stage was set for an exciting last quarter. As

Savas Miriklis at full stretch in the game against Baker & McKenzie ably supported by Sean Grant and Chris O'Neill

Savas Miriklis in a classic pose immediately before kicking. Sean Grant and Chris O'Neill supporting

Lex Lasry Q.C. in contention with three Baker & McKenzie players. Steve Pica is on the right helping out the opposition

it progressed, the Bar policy of youth began to pay off.

In an excellent last quarter, Peter Lithgow kicked 3 goals, matching Chris Townsend's first quarter. Damian Sheales topped off a great day for him by marking and making no mistake. The Bar ran out comfortable winners.

Game 1

BAR: 11–10 (76)

BAKER & McKENZIE: 6–10 (46)

GOALS: Bar — Lithgow 4; Townsend 3; Gamble, Lopez, Elliott, Sheales 1.

BEST: Steve Grahame, Mark Gamble, Matt Connack, Joe Tsalanidis, James Elliott, Peter Lithgow, Chris Townsend, Savas Miriklis, Damian Sheales.

INJURIES: Chris O'Neill.

REPORTS: Nil.

UMPIRES: Mark Gibson and Chris Wallis.

CROWD: A charming group of female barristers.

HIGHLIGHTS: Chris Townsend bagged 3 goals in the first quarter to set up the Bar's victory and Andrew Donald's stab pass.

COACH'S COMMENTS: Damien Maguire — "After one win in three years, it was very satisfying to have another win".

The stage was therefore set for the big one, the Bar v. Mallesons. In 1990, Phil Opas Q.C. laid down the challenge and in 1990, 1991 and 1992,

THE VICTORIAN BAR TEAM V. BAKER & McKENZIE

Back row: *Mark Gibson, Chris Wallis, Damien Maguire, Ron Clark, Steve Grahame, Peter Lithgow, Paul Scanlon, James Elliott, Damian Sheales, Steve Pica, Lex Lasry Q.C., Savas Miriklis, John Carmody, Dennis Smith, Sean Grant, Matt Connock.*

Middle row: *Simon Lopez, Andrew Laird, Mark Gamble (Captain), Patrick Southey, Chris Townsend, Phillip Corbett, James Patterson.*

Front row: *Joseph Tsalanidis, Temi Artemi, Chris O'Neill, James Gates, Rob Williams, Andrew Donald.*

Awaiting the coach's instructions are Chris Townsend, Mark Gamble, Sean Grant, Peter Lithgow and Joseph Tsalanidis

the Bar had been defeated. Could this be our year?

Sunday, 15 August 1993 dawned with heavy rain continuing from the night before. It did not stop until shortly before the big game commenced at 2 p.m.

The Bar team had been unsettled by the late withdrawal of two of the March draft choices, but John Carmody put on the boots despite his assertion in 1991 that that game was his last. Rob Williams and Frank Parry took up the vacancies with Lex Lasry Q.C. and Ron Clark starting off on the bench.

The stage was set and in the heavy conditions the Bar entered the playing arena of MHS determined to avenge the past defeats.

In the first quarter, kicking to the Alexandra Avenue end against the breeze, the Bar started brilliantly, in fact, setting up the victory which ultimately came. Goals from Corbett, Lopez, Lithgow and Parry saw the Bar well in front at the end of the first term.

Quarter time: Bar 4–1 (25) Mallesons 1–2 (8)

The second quarter was a disaster, the Bar kicking with a favourable breeze but being unable to take advantage and managing only 1 goal, from Frank Parry. However, Mallesons were restricted to 1 goal, leaving the Bar with a comfortable margin at half-time.

Half-time: Bar 5–5 (35) Mallesons 2–4 (16)

The third quarter developed into a tight affair, Mallesons being able to remain in the game with a couple of running players who were continually

THE VICTORIAN BAR TEAM V. MALLESONS

Back row: *Mark Gibson, Joseph Tsalanidis, James Elliott, Patrick Southey, Sean Grant, James Gates, Peter Lithgow, Damian Sheales, Damien Maguire.*
Middle row: *Ron Clark, John Carmody, Andrew Donald, Chris Townsend, Phillip Corbett, Steve Grahame, Savas Miriklis, Dennis Smith.*
Front row: *Simon Lopez, Lex Lasry Q.C., Mark Gamble (Captain), Andrew Laird, Frank Parry, Rob Williams.*

Lex Lasry Q.C. about to beset Mallesons players. In the background Joseph Tsalanidis, Rob Williams and Andrew Laird

John Carmody using left foot whilst being hotly pursued by Mallesons players

able to create something for them. Peter Lithgow continued his outstanding form, kicking 2 goals for the quarter. However, the quarter was an even one with both teams scoring 2 goals.

Three-quarter time: Bar 7–5 (47) Mallesons 4–7 (31)

With a 16-point margin and with the better end, the Bar faced the prospect of an historic win. But there was still a lot of work to be done. So it proved. Mallesons, desperate to retain their undefeated record, threw themselves into the fray and outscored the Bar in the last quarter. The Bar hung on, scoring 1–3 for the quarter to Mallesons' 2–2.

In the final result, the Bar was victorious by a margin of 9 points.

The final scores: Bar 8–8 (56) Mallesons 6–9 (45)

Scenes of jubilation greeted the victory, an historic well-earned win after years of unsuccessful endeavour.

So the season ended with the Bar victorious and undefeated. Congratulations to all the players, the umpires, Mark and Chris, who did perform to the usual high standard, making the game a fair and enjoyable contest. Dennis Smith, our Chairman of Selectors, provided the refreshments and welcome support. Chris O'Neill and Simon Lopez deserve special mention in that they suffered injury beyond the call of duty. Thankfully, they have both made rapid and successful recoveries. Finally, commiserations to our opponents.

Game 2

BAR: 8—8 (56)

MALLESONS: 6—9 (45)

GOALS: Bar — Lithgow 4; Parry 2; Lopez, Corbett 1.

BEST: Andrew Laird, Phil Corbett, Savas Miriklis, James Elliott, Peter Lithgow, Frank Parry, John Carmody, Damian Sheales, Chris Townsend.

CHANGES: Steve Pica, Matt Connock, Paul Scanlon, James Patterson, Chris O'Neill. (Out injured or unavailable).

INJURIES: Simon Lopez.

REPORTS: Nil.

CROWD: Down, due to adverse weather conditions.

UMPIRES: Mark Gibson and Chris Wallis.

HIGHLIGHTS: The Bar's victory.

LOWLIGHTS: The Bar's inability to score goals with the wind.

COACH'S COMMENTS: Damien Maguire — "This victory was the highlight of my coaching career".

LAWYER'S BOOKSHELF

The Modern Contract of Guarantee (2nd ed.)

J. Phillips and J. O'Donovan
The Law Book Company Limited, 1992
pp. v–lxxxix, 3–750

This book is divided into four parts. The first part provides useful definitions as to what is a contract of guarantee and discusses the scope of suretyship. The distinction between a guarantee and primary obligation is also referred to together with the distinction between a guarantee and an indemnity, a warranty and insurance.

The first part also sets out the general principles relating to the formation of a contract of guarantee, including privity of contract, the capacity of the parties, consideration and uncertainty. The formal requirements and statutory provisions relating to guarantees and in particular their execution are also discussed.

The final chapter of the first part enumerates factors which effect the validity of the guarantee, including the duty of disclosure, misrepresentation, mistake, illegality and unconscionability, which are obviously fertile areas of litigation.

Part two relates to the guarantor's liability under a contract of guarantee, the problems of construction affecting the scope of the guarantor's liability and various terms which are commonly used in a guarantee. Three chapters relate to the discharge from liability of a guarantor as a result of a number of particular events occurring.

Part three deals with the rights of the creditor and the rights of the guarantor before and after payment.

Part four deals with suretyship and negotiable instruments, the effect of various consumer credit legislation in relation to guarantees, performance bonds, private international law and stamp duty.

The appendix provides a check list of matters relating to the drafting of guarantees and indemnities, which are usefully cross-referenced to the relevant pages in the book.

This book covers most areas relating to guarantees and is the most exhaustive text currently available. It is therefore recommended as the first reference point for any research.

Leslie M. Schwarz

Annotated Mergers and Acquisitions Law of Australia (3rd ed.)

Darryl D. McDonough
The Law Book Company Limited, 1993
Price: $70.00 (Soft cover)
pp. v–xlii, 1–435

This is the third edition of a book first published in 1987 under the title *Annotated Take-overs Code*. Following the introduction of the *Corporations Law*, the author had to substantially revise his work, up to the point of renaming it.

In its present form, *Annotated Mergers and Acquisitions Law of Australia* comprises chapter 6 of the Corporations Law and its corresponding regulations, relevant definition and interpretation sections not found in chapter 6, and various parts of chapters 3, 7 and 9, all with detailed annotations, but also includes reference to practice notes, media releases and policy statements, and cross-reference to other legislation.

The latest inclusions to this text are the *Foreign Acquisitions and Take-Overs Act* 1975 and its Regulations in their entirety, as well as draft Parts A, B, C and D statements. Unfortunately, the *Foreign Acquisitions and Take-Overs Act* 1975 has not been annotated, so it would appear the author included it in the text more for convenience than for instruction.

Like the Law Book Company's other annotated text, Miller's *Trade Practices Act*, McDonough's work is carefully set out and easy to use. There is also an introductory chapter explaining how to read the text and how to locate the relevant section, as well as advice on whether to proceed by way of a Part A or a Part C statement. The advice is clear and simplified so as to cater for people without law degrees, but practitioners should have no complaints about the absence of complexity.

Anna Megalogenis

Costs and Taxation in Family Law

G. Pesce
The Law Book Company Limited, 1988
pp. vii–xxi, 1–201

The costs of a proceeding have a great impact on all parties. This hard-cover book deals with costs in the Family Court; however, a number of the principles discussed are applicable to all courts.

The introductory chapter deals with the types of costs which can be awarded and the basis of awarding those costs, together with the mechanisms for disputing a bill of costs and taxations of bills.

The next chapter deals with section 117 of the *Family Law Act* 1975 and discusses the relevant factors which a court takes into account in deciding whether or not to award costs to a particular party.

The following chapter deals with Order 38 of the Family Law Rules, which deals with the allowances which will be made on a taxation of costs. The annotations to each rule are extremely useful in identifying the relevant principles.

The schedules referred to in Order 38 are also included and explained.

The final substantive chapter deals with the *Federal Proceedings (Costs) Act* 1981 which relates to costs in respect of an appeal and provides useful information which can be used to assess the cost consequences of an appeal.

The appendices in the back of the book consist of Order 38 of the Family Law Rules and the *Federal Proceedings (Costs) Act* 1981 (unannotated).

The book is clearly written and has a useful index at the back of the book which enables specific points on costs to be located quickly.

Leslie M. Schwarz

Administrative Law: Cases and Materials

Roger Douglas and Melinda Jones
Federation Press, 1993
pp. vi–xxxvii, 1–690
Bibliography
Index 686–690
Cloth

In the preface to this new work, the authors state that the reason for the compilation of a new book of cases and materials in administrative law lies in the dramatic changes that have occurred in this area of the law in the recent past. The authors observe that "The two existing casebooks have suffered somewhat from the ravages of time". This collection of cases and materials attempts to remedy that. The book is not limited in its use to students of law. It is a coherent collection following the format style of casebooks, that is to say, major concepts grouped into separate chapters with short commentaries followed by extracts from journals or judgments.

This allows me to get one major gripe off my chest. Being a casebook, the substantial volume of the book is of reproduced extracts. Unfortunately, the extracts are reproduced in very small type, which for me has the effect of making dense articles difficult and difficult judgments dense. That aside, the work is a valuable contribution. It is up to date, dealing not only with issues such as the Ombudsman and Freedom of Information, but also with the new directions in dealing with corruption (chapter 5). It traverses the traditional heads of challenge available under the broad umbrella of administrative law, together with perspectives on matters more practical (e.g. advice on negotiating with civil servants). The collection of cases is well-linked and, in these republican times, bias Australian.

The index is far from comprehensive (five pages) but the layout of the book, with clear topic headings throughout, is helpful. It is a useful addition to the library of anyone with an interest or practice in this area.

G. B. Wicks

Business Law (5th ed.)

Peter Gillies
The Federation Press, 1993
pp. iii–1, 1–861

Peter Gillies' *Business Law*, first published in 1988, is into its fifth edition. Current to October 1992, it now includes 1992 amendments to the *Bankruptcy Act*, *Trade Practices Act* and *Industrial Relations Act*.

This is a basic text, more appropriate for students and business people than for lawyers seeking a detailed analysis of business law in Australia. This is not to say *Business Law* is not useful for lawyers. What makes it appealing is that it has what so many legal texts lack — conciseness and comprehensibility. The numerous topics covered (there are 43 chapters dealing with many areas of the law which affect business) make this work an appropriate starting point when researching an unfamiliar area of the law.

The areas covered include torts (chapter 5), criminal law (chapter 6), contracts (chapters 7–24), quasi-contracts (chapter 25), agency (chapter 26), partnership (chapter 27), property (chapter 28), intellectual property (chapter 29), trusts (chapter 30), succession (chapter 31), bailment (chapter 32), consumer protection (chapter 33), credit law (chapter 34), insurance law (chapter 35), bills of exchange (chapter 36), banking law (chapter 37),

bankruptcy (chapter 38), restrictive trade practices (chapter 39), industrial law (chapters 40 and 41) and company law (chapter 42). I highly recommend *Business Law* as a "first base" reference text for both students and practitioners.

Anna Megalogenis

Evidence and Procedure in a Federation

Archie Zariski (ed.)
The Law Book Company Limited, 1993
pp. v–xxv, 3–231

In May 1992 the Australian Institute of Judicial Administration and the federal Litigation Section of the Law Council of Australia conducted a two-day conference in Melbourne on evidence and procedure in a federation. For those who were not present at the conference, Archie Zariski's compilation is a welcome chance to read the papers that were given and some of the comments that were made by eminent members of the legal community. Indeed, a simple glance at the list of contributors to *Evidence and Procedure in a Federation* should suffice to convince anyone of the merits of this book. Justices Ashley, Hayne, Marks and Smith of the Victorian Supreme Court, as well as judges from the Federal Court, the Family Court, the New South Wales Court of Appeal and the Supreme Courts of Western Australia, Queensland and the A.C.T., are just some of the people who have contributed to this work by way of papers and/or comments.

The book is divided into four sections headed Litigation in a Federation, Evidence — Business Records, Discovery and Subpoenas and Coercive Discovery and Interrogation. Among the articles are Sue Crennan's "Reach of Process and Subpoenas", Justice Marks' "Voluminous, Limited and Multiple Action Discovery" and Justice Beaumont's "Survey Evidence".

Justice Hayne examines the admissibility of business records and Steven Charles looks at the Trade Practices Commission's powers of discovery. The desirability or otherwise of uniform evidence legislation is one of the underlying themes of this book, and J.J. Doyle has written a specific article on this.

At the conclusion of each of the four sections, a series of interesting and useful views and comments are presented on aspects of litigation. Some of the themes raised in the articles are challenged, expanded on or simply endorsed by the book's contributors.

This is a wonderful compilation. The sheer diversity of the topics discussed under the general theme of evidence and procedure in a federation should make Archie Zariski's book appealing to many readers.

Anna Megalogenis

Health Law: Commentary and Materials

Peter MacFarlane
The Federation Press, 1993
pp. v–xv, 1–240

Australian HIV/AIDS Legal Guide (2nd ed.)

J. Godwin, J. Hamblin, D. Patterson and D. Buchanan
The Federation Press, 1993
pp. v–lvi, 1–567

These two releases from the Federation Press are premier works on aspects of health law in Australia.

Peter MacFarlane's *Health Law: Commentary and Materials* is Australia's first casebook on health law. Practitioners, at least those who specialise in the area, might not derive great benefit from this text, but students and lecturers certainly will. The authors' style is clear and precise, commentary is plentiful and to the point, and only cases and legislation of real importance and relevance are extracted. This casebook is sure to have a bright future in universities around the country.

The *HIV/AIDS Legal Guide* is the only specialist legal work in Australia on AIDS and the HIV-virus. When it was first published in 1991, the authors promised to dramatically expand the text in coming years. We did not have to wait long for this to happen. This second edition is nearly 300 pages longer than the first and contains 18 new chapters. While the first edition suffered somewhat by devoting too much space to criminal liability of HIV-infected persons at the expense of their legal rights, the new edition has comprehensively remedied this deficiency. There are now chapters on censorship and media standards, therapeutic goods, insurance and superannuation, compensation, and employment. The authors have also included discussions of Australia's immigration laws (for example, the effect of positive HIV tests on applications for temporary or permanent residency or for refugee status) and the family law implications of HIV-infected parents.

The *HIV/AIDS Legal Guide* is a wonderful work. Its examination of Commonwealth and State legislation and of case law is clear and detailed and, unlike so many specialist legal texts, is remarkably easy to read. Each jurisdiction is dealt with separately, and each piece of legislation is headlined. If a jurisdiction is lacking in law, this is stated imme-

diately as there is no need to search through chapters for the non-existent. Finally, the authors have added a glossary of legal terms, an extensive bibliography and a contact list of AIDS organisations, anti-discrimination and equal opportunity offices, and medical complaints bodies, making the *HIV/AIDS Legal Guide* a valuable reference for practitioners dealing with HIV-infected persons or with legal issues involving AIDS.

Anna Megalogenis

The Law of Securities (5th ed.)

Edward I. Sykes and Sally Walker
The Law Book Co. Limited, 1993
pp. vii–cxxii, 1–1070
Price: Hard cover: $160.00, Soft cover: $110. 00

This huge work on Australia's securities law has its origins in a thesis prepared by Professor Sykes nearly 40 years ago. In 1962 it was published as a textbook, and since then has grown in size and status with every new edition.

The latest version, published after a gap of seven years, sees the addition of a co-author (Sally Walker) and a new chapter on the inter-relationship of laws concerning chattel securities, bills of sale, hire purchase and credit. As expected, there are also general updates of all previous chapters to incorporate new or amended legislation plus the latest case law.

As with prior editions, the fifth edition of *The Law Of Securities* is divided into four parts. The first part is introductory only. It consists of two chapters on the general nature of security interests, questions of priority, and external and internal validity. The second part, titled Securities over Land, comprises nine chapters. Legal and equitable mortgages, as well as non-mortgage securities over freehold old title land, are discussed in chapters 3, 4 and 5. The next two chapters concern statutory mortgages, equitable mortgages and non-mortgage securities over Torrens title freehold land. Securities over leasehold interests and interests under conditional sales of land are examined in chapters 9 and 10.

The next part is devoted to securities over personal property. The first two topics deal with securities over choses in action and corporeal chattel. Hire purchases and mortgages of specific types of chattel (for example, livestock, wool, crops and vessels) are also discussed.

The final part is titled Common Considerations and General Conclusion. Its five chapters examine the effect of bankruptcy on secured creditors (chapter 18), limitations of action issues (chapter 19), company securities (chapter 20), credit control (chapter 21) and conflicts of laws (chapter 22).

On the whole, *The Law of Securities* is thorough in text and clear in explanation. There are, however, two aspects of this work which could do with some expansion. First, the basic principles, although always well-stated, are often stated without accompanying judicial authority Secondly the book's index is too limited and somewhat idiosyncratic for such a large and detailed work. These problems aside, *The Law of Securities* remains the essential text for practitioners and students researching Australia's securities laws.

Anna Ziaras

Commercial Leases (2nd ed.)

W.D. Duncan
Law Book Company Limited, 1993
pp vii–xliii, 1–277
Price: Hard cover $55.00

W.D. Duncan's *Commercial Leases* is a concise and useful text on the law of retail tenancies in Australia. First published in 1989, this book has been updated and expanded to include the leading cases of the 1990s and further commentary by the author. Two chapters in particular have been substantially revised — chapter 5, which deals with rent, and chapter 13, which concerns default by the parties to a lease.

Commercial Leases comprises 17 chapters. The first chapter looks at the negotiation stage of leases. The role of real estate agents, the extent of their authority to make representations and the duties of solicitors to explain the terms of a lease are discussed.

Chapters 2 and 3 examine the construction of a lease and its subject matter.

Chapters 4 to 8 look at the terms contained in leases, and in particular those concerning covenants, rent review, outgoings, repair and quiet enjoyment.

Chapter 9 is a detailed chapter on assignments. It includes discussions about the right to assign, qualified and part assignments, assignments without consent, the mechanics of gaining consent and the remedies available for the failure to obtain the lessor's consent to an assignment.

The next two chapters concern user and issues of insurance. Options, including options to purchase and options to renew, are examined in chapter 12.

Chapters 13, 14 and 15 look at, respectively, default, the determination of leases other than by forfeiture and the recovery of the leased property upon forfeiture. Issues of guarantees are discussed in chapter 16.

The final chapter deals with miscellaneous matters. Among the topics discussed are unregistered leases for terms exceeding three years, a mortgagee's consent to lease and powers of attorney in the context of retail tenancies.

Detailed though it is, *Commercial Leases* has

one major drawback for Victorian practitioners: the author has chosen to focus on Queensland case law and Queensland legislation; in particular, that State's equivalent to Victoria's *Retail Tenancies Act* 1986, *Property Law Act* 1958 and *Transfer of Land Act* 1958. The text is not overflowing with Victorian decisions, and of those that are cited, most predate the *Retail Tenancies Act* 1986. Despite this drawback, the principles stated in this book are sound and for the main part applicable in Victoria. Furthermore, with a little help from the Comparative Table of Statutes at the start of the text, the Victorian practitioner will be able to use W.D. Duncan's book with some confidence as a general text on retail tenancies in Australia.

Anna Ziaras

Annotations to the Social Security Act 1991

Peter Sutherland with Peter Johnson
The Federation Press and Welfare Rights & Legal Centre, 1992
pp. vi–xxx, 1–681
Index 682–690
Cloth

This work is the successor in title to the *Annotated Social Security Act*, which comprehensively dealt with the *Social Security Act* 1947. Rumour has it that, in the mid-80s, it had been decided at a meeting of members of the AAT (Commonwealth) that a summary of the law in each of the AAT's major jurisdictions would be prepared by members. Shortly thereafter, the members delegated to the task of preparing the summary of social security law began the daunting task of drawing together the AAT, Federal Court and High Court decisions on the *Social Security Act*. At about the same time, much to the relief of the delegated members, the Welfare Rights Centre published the first edition of the annotated Act. The rumour is that, upon perusing a draft of the first edition, the President of the AAT, recognising a hard act to beat, directed that there was no longer a need for a summary of the social security law to be prepared by those members. Whether the rumour is true or not does not detract from the value of the various editions. One thing is certain: any practitioner whose work touches directly or indirectly on social security law should have a copy of this work.

Probably second only to the *Income Tax Act*, the *Social Security Act* is regularly and unsystematically amended. More often than not, convoluted provisions have been amended to include vague qualifications and exceptions, uncertain provisos and limitations, or clear and downright draconian measures to exclude potential beneficiaries from the operation of the Act.

In 1991, the Commonwealth Government recast the *Social Security Act* both in form and content. Anyone who could find their way around the old Act was suddenly lost. For instance, the compensation recoveries provisions, which appeared at section 152 *et seq*, are now dispersed between section 17 and section 1163 *et seq*! Thanks to the current edition, it is now possible to find one's way around the *Social Security Act* again.

Tribunals and courts have examined the *Social Security Act* in fine detail and, on other occasions, painted it in broad brush. This work continues the tradition of commentary and extract of judgments on each section of the Act. Naturally, the work provides a starting point, because the law continues to evolve. A practitioner would be advised, after having studied the relevant sections of this work, to refer to the bulletins in Professor Pearce's *Administrative Law Decisions*.

G. B. Wicks