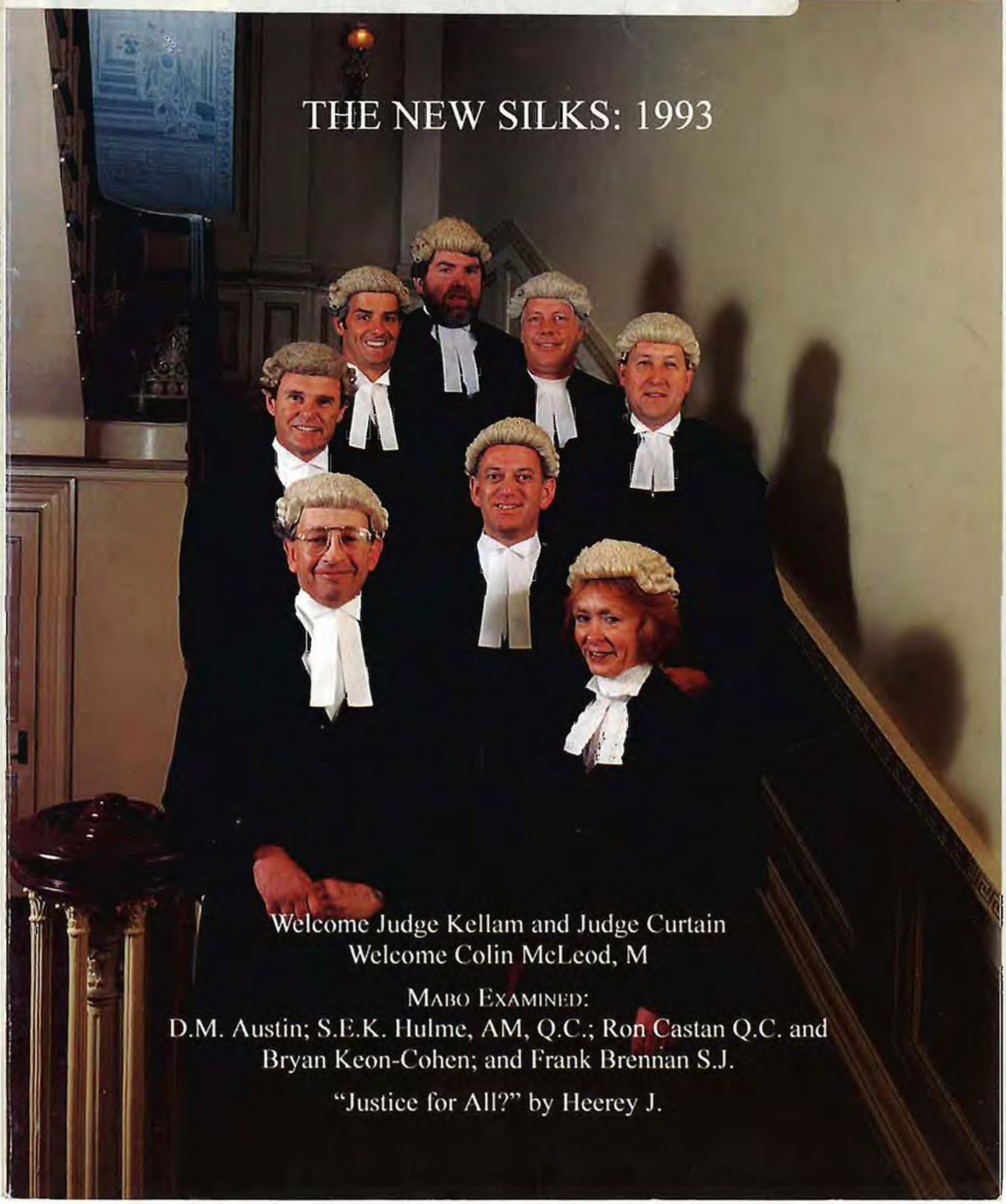
VICTORIAN BAR NEWS
SUMMER 1993



THE NEW SILKS: 1993

Welcome Judge Kellam and Judge Curtain
Welcome Colin McLeod, M

MABO EXAMINED:
D.M. Austin; S.E.K. Hulme, AM, Q.C.; Ron Castan Q.C. and Bryan Keon-Cohen; and Frank Brennan S.J.

"Justice for All?" by Heerey J.

VICTORIAN BAR NEWS

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SUMMER 1993

CONTENTS

Cover:
The new Silks for 1993, photographed by David Johns on the stairway of the Supreme Court Annexe. Full details on page 68 and following.

Welcome Judge Kellam

Welcome Judge Curtain

Welcome Colin McLeod Magistrate

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EDITORS' BACKSHEET

DO THE MEDIA DISTORT?

IN THIS ISSUE OF *BAR NEWS* WE PRINT THE paper which Justice Peter Heerey gave at the closing session of the Australian Legal Convention in Hobart. That paper contains a factual and illuminating analysis of the educational background of the members of the Federal Court and of the High Court.

Unfortunately, the conclusions which follow from His Honour's work do not coincide with those which some members of the media have been putting forward as "sacred truth".

One consequence has been an article by Richard Ackland in the *Financial Review* of 11 November 1993 entitled "Just Where Do Judges Come From?" That article implies that the conclusions in the Heerey paper should be ignored either:

(a) because of their source; or

(b) because of their unacceptable content.

Mr. Ackland does not say that the conclusions are wrong. We can only conclude that either he has not checked any of the facts or those that he has checked bear out the Heerey thesis. Nonetheless he is prepared to say:

"What is needed is a lot more than Justice Heerey's research from the latest edition of Who's Who and what school judges went to".

We ask "why?"

Mr. Ackland's article might be seen by some as bearing out the accuracy of the view which he attributes to "the self-appointed defenders of the judges (mostly from the Bar)" and which he rejects, namely that "in the time honoured tradition, the media has grossly distorted, misreported, taken out of context and crudely had its way with these worthy holders of public office".

The article contains a considerable amount of assertion and second-hand generalisation. Perhaps if Richard Ackland (or his editors) were serious he might do his own research and either verify or contradict the conclusions which he finds so unacceptable. However, he seems to prefer to rely on sweeping generalisations culled from the conclusions of others.

GENDER = SEX?

One part of the Ackland article also illustrates the general lack of feeling for the nuances of our language displayed by so many modern journalists.

Mr. Ackland refers to "recent remarks and court room pronouncements touching on gender issues" and to "gender awareness courses . . . for judges".

We have commented previously on the ignorance which has given rise to the term "chairperson". But we have not referred to "gender bias", "gender awareness" or "gender issues" — terms which must be a product of ignorance or of a desire to argue from a confused (and confusing) premise.

When the journalists and the politicians use the word gender, they usually mean "sex" or "sexual". They are not talking of the way in which a Latin noun is declined, nor are they asking whether the article "*le*" or "*la*" should appear in front of "*plume de ma tante*".

The *Oxford Dictionary* gives four meanings for gender:

"(i) kind, sort, class; also genus as opposed to species;

(ii) each of the three (or in some languages two) grammatical 'kinds', corresponding more or less to distinctions of sex (and absence of sex) in the objects denoted, into which substantives are discriminated according to the nature of the modification they require in words syntactically associated with them; the property of belonging to or of having the form appropriate to concord with, a specified one of these kinds. Also, the distinction of words into 'genders' as a principle of grammatical classification;

(iii) by some philologists applied, in extended sense, to the 'kinds' into which substantives are discriminated by the syntactical laws of certain languages, the grammar of which takes no account of sex;

(iv) (now jocular) sex".

Mr. Ackland joins with most of his media colleagues in his equation of gender to sex. This gives a new twist to the application of biologically related adjectives to inanimate objects.

If one did not know better one would be delighted that members of the press were taking such an interest in matters of syntax. But we fear that such a conclusion would be wildly astray.

We should explain, in case our remarks are misconstrued by some members of the media, that syntax is not a tax on turnover imposed on the proprietors of brothels; it refers "to a regular or orderly collection of statements, propositions, doctrines etc.; a systematically arranged treatise"; and,

CCH UPDATE

STANLEY LEAVER
LLM
CCH Australia Limited

Here's a problem that doesn't arise every day.

Farmer in Queensland sells his property. The current Real Estate Institute of Queensland contract including the standard conditions is used.

After settlement, vendor realises he's left some bales of hay on the property.

Purchaser puts padlocks on the paddocks and refuses vendor entry.

Now it probably doesn't come as a surprise to hear that the standard REIQ contract is silent on the topic. Hay, bales of, left behind after completion.

However, the contract does have a clause about the removal of fixtures, fittings and chattels ... which obliges the vendor to remove any property not sold prior to the purchaser taking possession. It also provides that chattels remaining after completion are deemed to be abandoned — at least between the parties to the contract — and may be appropriated by the purchaser.

The judge who heard this dispute — it got to court because these bales of hay were worth $20,000 — added that the bales had been appropriated by the purchasers as they'd manifested an obvious intention to exercise control over the hay by padlocking the property.

That case *Jigrose Pty Ltd v Drummond & Anor*[1] held in general terms that there's no difficulty at law with the notion of abandonment divesting ownership. It further held that, by virtue of clause 28.3 of the REIQ standard conditions, a vendor who leaves chattels on the land sold under the contract[2] will afterwards be precluded from asserting a right either to ownership or to possession.

■ ■ ■

And as E.B. White said, "A good farmer is nothing more nor less than a handyman with a sense of humus".

■ ■ ■

Perhaps John Sleigh's new book ***Making Team Learning Fun*** isn't the type of publication you'd expect legal practitioners to be fighting to get hold of; nevertheless there does seem to be a place for it in your average law library ... and the best way of introducing it is to quote the true story John tells in his preface. It goes:

> A western equipment manufacturer had won a lucrative contract to supply new, high technology equipment to the Middle East. As part of the deal, home country technicians were to be trained in the operation and maintenance of the equipment. When the time came to check that the technicians were qualified, an examination was scheduled.
>
> To the horror of the trainer, the technicians were cheating. Instead of each answering the question to the best of their ability, they were discussing the question and arriving at a best answer, which each then wrote out. The trainer was emphatic: "I am sorry, but I cannot accept these answers. I need to know that each of you understands how the equipment works."
>
> "Why?" queried the most confident of the technicians. "When we return to our country, if there is a problem with a machine we will all discuss how best to fix it, and proceed according to what we decide is the best answer. Surely that is the right way."

John's comment is that:

> There is an inconsistency with the way that most workplace training is conducted and the way in which it is expected to be applied. Most work is done as part of a team. Most training is individual.

And he concludes his preface with the point which is the key to his whole approach:

> If we can make learning fun, making working fun will not be far behind. Teams are the first step towards both.

■ ■ ■

Stuart Fowler tells the story of the family law solicitor who received a telephone call at home from an agitated woman with a snarling male voice heard in the background.

"If a husband leaves his wife," she asked, "doesn't she get the house and furniture?"

The solicitor replied that he didn't give legal advice over the phone and she should ring his office and make an appointment.

The woman heard him out, then replied loudly, "Oh you say she also gets the car, the boat and the savings account. Thank you very much!" and she hung up triumphantly.

■ ■ ■

Stuart, apart from being president elect of the Law Council, one of the co-chairmen of the recent World Congress on Family Law and Children's Rights, chairman of the Family Law and Family Rights section of Lawasia, and a prominent family law practitioner (partner, Gadens Ridgeway), also has the relatively rare honour, as far as CCH is concerned, of being one of the two named authors of our ***Australian Family Law & Practice*** service.

It's not been part of the CCH tradition to include the names of our authors on the spines of our loose-leaf binders ... for the fairly simple and obvious reason that the nature of a loose-leaf, constantly updated service means that in due course the original writings of the authors will disappear and be replaced, certainly over the years, by the more current pages of a new generation of contributors.

Over the years we have made a few exceptions to that rule — Malcolm Broun QC and Stuart Fowler being two.

■ ■ ■

Some little time ago there was a par on this page about a couple of interesting cases (*Caltex v State Pollution Commission* and *Re Compass Airlines*) on the topic of the privilege against self-incrimination.

From that small acorn of an idea ... well, barrister Dr Brad Caffrey's paper on that same topic that he presented to the recent Lawasia Conference in Sri Lanka mightn't qualify as a mighty oak but it's pleasing to hear from Brad that our par actually prompted his paper.

■ ■ ■

And finally it might be appropriate to end with the actor John Barrymore's observation:

"You never realise how short a month is until you pay alimony."

■ ■ ■

1. Reported in our ***Queensland Conveyancing Law and Practice***, reference (1993) Q ConvR ¶54-453
2. Subject to questions such as relief from forfeiture.

in its grammatical meaning, it refers to "the arrangement of words (in their appropriate forms) by which their connection and relation in a sentence are shown".

THE ELITIST FANTASY

One wonders why some journalists (certainly not all) are so obsessed with the desire to establish that judges, and lawyers generally, are the product of "elitist" backgrounds. It does seem to be an obsession rather than a mere harmless hobby horse. Why do they need their elitist fantasy? What is the background of those who make this assertion?

It would be interesting to ascertain how many of those journalists who refer to the privileged background of our judiciary are people who wanted to be lawyers, who applied for entry into law school and were not selected, or who flunked (or opted) out of law school.

Certainly, at least one of the editors whose working class origins are impeccable is (and, we are sure, those judges of working class background are) fed up with the implied bleat that "I could have been a judge if I had been born into the right family".

Perhaps we are misconstruing what we read in the press. Perhaps all journalists are more concerned with the truth than with "the good story". If so, we would be happy to provide some "Working Class Success Stories in the Law" for appropriate publication.

The editors

CHAIRMAN'S CUPBOARD

THE BAR CONFERENCE ON 24 OCTOBER 1993 was a great success and a range of views was aired on the various topics under discussion. Whilst there appeared a high degree of uniformity about a number of matters, including the abolition of an ethical offence arising out of failure to work to fee scales, issues such as clerking elicited, as they always do, sharp differences.

The Bar Council has under consideration the Draft Report of the Trade Practices Commission in the Legal Profession.

In broad terms the Report urges deregulation of the profession wherever it perceives a regulation or compulsion. It needs to merely spot a compulsion to lead it to recommending the abolition of a rule because it *invariably* assumes, as does the theory underpinning the Report, that net public detriment must flow because any compulsory rules must limit competition, i.e. be anti-competitive. Thus, it is not enough to show that the effect of a rule is neutral vis-a-vis the public, we have cast upon us the burden of showing demonstrable public benefit arising from the rules. Free association under rules which would seem unexceptional to a civil libertarian is anathema to an economist trained in free market theory. Even more to the point, regulation designed to protect the public gets little, if any, recognition.

A simple but eloquent example is the Commission's draft recommendation that many areas of legal work should be opened to appropriately trained non-lawyers. Why an alternative system of training of non-lawyers would be a sensible use of taxpayers' money when Commonwealth university funding arrangements over the last two decades have produced a surfeit of young trained lawyers is beyond any rational understanding. Further, the highly expensive impact on court time and the rights of litigants is not given appropriate weight.

Why an alternative system of training of non-lawyers would be a sensible use of taxpayers' money when Commonwealth university funding arrangements over the last two decades have produced a surfeit of young trained lawyers is beyond any rational understanding.

The Report is not confined to questions of competition.

The Report proposes that a unified legal profession should be supervised and regulated by the Trade Practices Commission itself, receiving support and assistance from the Commonwealth Attorney-General's Department. Whilst the Bar Council has no difficulty in accepting the imperatives of competition insofar as they serve the public interest, it is a good deal more difficult to see why the Trade Practices Commission should have the wider supervisory role it has proposed for itself. The *Trade Practices Act* balances two things: the protection of free competition on the one hand, and the public interest on the other. The Trade Practices Commission's draft report does not sufficiently recognise the public interest served by many of the ways our profession is organised, and thus runs the risk of proposing reforms from a lop-sided perspective. To take one example, I would rather see Commonwealth funds used for civil legal aid, than to see them used to set up a bureaucracy in Canberra to supervise and regulate the profession and to fund the training of non-legally qualified persons *and* no doubt to then fund the supervision and regulation of the non-legally qualified practitioners as well as the qualified ones — and on and on the funding needs will go. *Cui bono?*

Susan Crennan

ATTORNEY-GENERAL'S COLUMN

TWO BILLS OF MAJOR IMPORTANCE TO women, and others who may at some time be subject to discrimination, have been introduced into the Parliament during the current sittings. Both significantly improve the existing legislative structures.

CLASSIFICATION OF FILMS AND PUBLICATIONS (AMENDMENT) BILL

In its *Law and Justice* policy, the Coalition states its commitment to ensuring that publications which are unsuitable for children are not sold or displayed to them. Particular mention is also made in Policies *for Women* about complaints received from parents about young children purchasing publications which depict women in degrading poses. I have received hundreds of letters from concerned parents on this topic.

The Bill deals directly with this concern as well as making a number of other amendments to the *Classification of Films and Publications Act* 1990 that will make the classification system more effective and efficient. First, to address the problem of accessibility of unsuitable material for children, the Bill widens the definition of "objectionable publication" to include not only material that is "offensive to a reasonable adult" but also that lacks merit and depicts certain matters in a manner that a reasonable adult would generally regard as unsuitable for children.

Secondly, the Bill addresses the issue of the display for sale of certain publications in a manner which causes offence. The Bill introduces a new offence that restricts the display of certain defined publications or advertisements that are not suitable for public display. The provisions do not limit the sale of such publications to adults.

Consistent with the agreement reached between the Prime Minister and the Premiers in 1992, and with amendments being made by all Governments, the Bill also introduces a new 'MA' film and video classification.

The new category has been created in response to community concern about the broad scope of the current 'M' classification which is a recommendation that the film is suitable for mature audiences over the age of 15. Concern was also expressed about children's access to material at the higher end of the 'M' classification. The new 'MA' films cannot be sold or hired to a person under the age of 15 years nor exhibited to a person under 15 unless accompanied by a parent or guardian.

The Bill implements another national agreement by permitting cinemas to promote a limited number of popular films, without waiting, as is currently required, for classifications of the films they advertise. It is quite common for the promotional material to be ready quite some time before the film itself arrives in this country. The industry estimates this will enhance takings by millions of dollars.

The amendments provide certain safeguards and limitations.

Finally, the Bill restates the controls over restricted areas and sex shops by setting restrictions on premises and providing for a warning sign outside the premises.

EQUAL OPPORTUNITY ACT (AMENDMENT) BILL

The primary purpose of this Bill is to address the unacceptable delays and inefficiencies in the system established under the *Equal Opportunity Act* and provide for greater accountability within the agency framework.

The Government's decision to address the urgent problem of delays coincides with the tabling of the Interim Report on the Act by the Scrutiny of Acts and Regulations Committee, a number of whose recommendations are included in this Bill.

THE COMMISSION

The new Equal Opportunity Commission will be comprised of five people appointed by the Governor in Council. The representative nature of the new body will allow for the appointment of individuals with special knowledge of anti-discrimination issues.

It is proposed that the existing functions of the Commissioner be undertaken by the Commission, including: implementing programmes for the education of the public with respect to the elimination of discrimination; identifying provisions in legislation that may discriminate; undertaking research in relation to the Act; and overseeing conciliation.

The position of Commissioner for Equal Opportunity will be abolished. As well as the new Commission, there will also be a Chief Conciliator of the Commission who will be appointed by the Governor in Council and who will be a member of the Commission.

The Commission will give policy and general direction to the Chief Conciliator with regard to achieving the objectives of the Commission. The Chief Conciliator will be responsible for the day-to-day management of the operations of the Commission as directed and will be accountable to the Commission.

The Bill also introduces a complaints procedure so that a party to a conciliation, either during or after the completion of conciliation, may make a written complaint to the Commission about any aspect of the conduct of the conciliator. The Commission may investigate the complaint and, if it sees fit, issue a directive to the conciliator, although the outcome of the conciliation will still stand if the complaint is received after the completion of the conciliation.

ADDRESSING DELAYS

The Bill recognises a specific, but small, number of cases which warrant a "fast tracking" procedure because they involve more than mere monetary compensation. This class of cases, which may or may not involve the Government as a party, can be classified as cases where the complaint relates to a policy decision of the respondent, the implementation of which is alleged to be discriminatory.

Currently, there are no time limitations included in the Act. The Bill provides that a complainant must be informed within sixty days of lodging a complaint whether the Commission intends to entertain it or not. Similarly there is no limit on the time that may be taken to conciliate a matter before it is referred to the Board. A 30-day period for conciliation will apply to the expedited cases defined above.

Two Bills of major importance to women, and others who may at some time be subject to discrimination, have been introduced into the Parliament during the current sittings.

The Bill also allows the respondent, in a case of this class, to apply to have the matter determined immediately by the Board without going through the conciliation process at all.

The second stage of delay addressed by the Bill is that which occurs when conciliation has not been successful and a case must proceed to the Board for determination. Currently, the backlog of cases before the Board means that a delay of many months may be experienced before a hearing. Again, a 30-day period within which the hearing must begin will apply to expedited cases.

THE BOARD

At present, the Act insists that the President sit on all Board hearings. This is a major cause of delays. Amendments to be made to address this include: flexibility in the composition of the Board for hearing matters and the introduction of Deputy Presidents. To ensure the current high standard is maintained, the Bill includes a requirement that the President and any Deputy Presidents be solicitors or barristers of seven years standing.

OTHER AMENDMENTS

The Bill also allows me, as the Minister administering the Act, to refer a matter directly to the Board in cases of implementation of Government policy requiring urgent resolution.

Criteria will be included in the Act that must be taken into account by the Board in deciding whether or not to grant interim relief. A case which involves the granting of such relief will also have its path through conciliation expedited.

The Bill amends the Act to allow a party to apply, once a matter has been referred to the Board, to have it struck out on the grounds that it is frivolous, vexatious, misconceived or lacking in substance. The costs provision is also to be strengthened to ensure that an award of costs will be made in favour of the successful party where appropriate.

The Scrutiny of Acts and Regulations Committee identified criticism of the mixing of the investigative and conciliation roles within the Act. In future, officers of the Commission will not be involved in more than one of the separate legal, investgative and conciliation roles of the Commission.

Another measure designed to improve the system's efficiency is the conferring of a power on the Commission to decline to entertain a complaint which may, more appropriately, be dealt with in another court or tribunal, e.g., a case of unfair dismissal being heard by the Industrial Relations Commission. The Bill addresses the problems identified by the Court in the *Nestle's case*. It was held in that case that if the original "complaint" could be shown to be defective in any way, the defect could not be remedied and the Board would be unable to hear the matter. The Bill addresses this by providing that the Commission has a duty to assist a complainant in formulating his or her complaint and by allowing technical defects in the complaint to be remedied by the Board.

The measures proposed in the Bill will improve access to justice by a reduction in procedural delays which is of benefit to all parties. This is the first step in improving the system and further important, but less urgent matters, will be dealt with in a Bill following the release of the Scrutiny of Acts and Regulations Committee's final report.

Jan Wade M.L.A
Attorney General

COMMON LAW BAR ASSOCIATION REPORT

SINCE LAST REPORTING THE ANNUAL General Meeting has been conducted; the existing Office-Bearers and Committee were re-elected, save for Keenan Q.C. who stood aside for Bowman.

On 14 September Shannon Q.C. and the Chairman attended a meeting of the Attorney-General's Bills Committee which was presided over by the Attorney. The submission prepared by the C.L.B.A. Committee, and endorsed by the Bar Council, was addressed. I am pleased to report that the *Juries (Amendment) Act* 1993 will not provide for the abolition of civil juries.

Two important Sub-Committees have been formed, one to deal with the problems associated with the Industries Commission Inquiry into Workers' Compensation in Australia; and the other to address problems associated with listing of cases in the Supreme and County Courts.

A submission of the C.LB.A., endorsed by the Executive of the Bar Council, was forwarded to the Industries Commission before the public hearings commenced in Melbourne on 13 October. Although this submission touched on matters concerning workers' compensation, it was primarily designed to meet the proposed recommendation that in cases of work place injury common law rights be abolished. The Bar Associations and the Law Societies around the country have furnished submissions supporting the retention of common law rights.

At present statistics relating to case disposal, waiting times etc. in the County Court (for both Melbourne and Circuit Sittings) are being collected in an effort to deal with the problems associated with the obtaining of a hearing in particular types of actions, and delays generally. As at 30 September 1993 there were 2,691 civil cases awaiting trial in the County Court, compared with 2,504 at the same time last year. This number comprises approximately 1,200 juries, a slightly less number of causes and approximately 300 WorkCover cases. From setting down until trial there is a waiting time of 12.5 months for both juries and causes. WorkCover transfers are being listed 3.5 weeks after transfer and WorkCover writs are being listed 3.5 months from the date of setting down. The delay in listing for hearing and the rate of disposal of cases obviously have been affected by section 135B compromise procedures, WorkCover transfers and the relegation of actions from the Supreme Court.

To date there are no official figures for the Supreme Court. There is general concern that the Supreme Court is utilising the *Case Transfer Act* to limit its trial work. Attempts are being made to ascertain exactly what criteria are being utilised in case transference. The Sub-Committee is anxious to obtain from members of the Bar details of specific instances where actions have been transferred to the County Court notwithstanding the provision of written submissions against or objections to such transfer. Details in writing should be forwarded to the Secretary as soon as possible. Through the Courts Monitoring Committee attempts are being made to determine exactly what number and type of actions are presently awaiting hearing in the Supreme Court.

On a lighter note I record that the Association held an excellent dinner at the Victoria Club on 22 October. In spite of the pressures imposed upon him by the Spring Carnival, Crockett J. honoured us with his presence as guest speaker and we were regaled with a most amusing and informative portrayal of the characters of those who occupied the Supreme Court Bench at the time when His Honour came to the Bar. To him we are most indebted and thanks are also due to Wodak and Forrest who once again organised this function.

Finally, it is with great personal satisfaction that I note the appointment of a member of the C.L.B.A, Committee to the County Court. For many years Murray Kellam has been a tireless worker for the Bar in general, and the Common Law Bar in particular. Congratulations Murray and thank you for your efforts in the past; may you have a long and happy sojourn on the Bench. We also extend our congratulations and best wishes to Elizabeth Curtain upon her elevation to the County Court.

David A. Kendall

PROPOSED FEDERAL LABOUR COURT

Statement by the President of the Law Council of Australia, John Mansfield Q.C.

THE FEDERAL GOVERNMENT IS MAKING A serious mistake rushing into the establishment of a labour court without proper consultation with the legal profession and without proper consideration of all the problems such a decision might involve.

The proposal to establish an Industrial Relations Court has real significance for the administration of justice, but seems to have been buried in private talks between the Minister for Industrial Relations and various parties interested in new industrial laws. There appears to have been no consideration of the legal and constitutional issues involved. It must be presumed that the proposed court would take from the Federal Court all or most of its existing industrial jurisdiction, but it is not clear how the Court would be constituted.

There are at least two major areas of concern, First, the setting up of a new specialist court in the context of the resolution of a political impasse between powerful forces in society gives rise to the apprehension, to say the least, that the court will not be perceived as intended to administer impartial justice independently and fearlessly according to the rule of law.

The Law Council is not aware of any problems or shortcomings in the way in which our industrial laws are administered by the Federal Court, which is, after all, the superior trial court in the federal jurisdiction. That the Government should consider it necessary in these circumstances to establish a new specialist court makes one wonder whether a different kind of justice is there to be dispensed according to special rules.

Mr Mansfield said that the second problem is that, where a new specialist court is established by a particular Government for a particular social purpose, a subsequent Government with a different agenda might remove the court's jurisdiction or even abolish it.

The proposed establishment of a labour court is worryingly reminiscent of the Victorian Accident Compensation Tribunal, where the dismissal of judges whose special jurisdiction did not fit the programme of the new Government of the day led to a national and international outcry. In such a case, it is all too easy for the new Government to say "We would never do this to a real court," as was the case in Victoria.

For all those reasons, extreme caution and full consultation are necessary before any new court, especially a specialist court, is established.

25 October 1993

OPENING OF THE LEGAL YEAR

Monday, 31 January, 1994

Dear Practitioner,

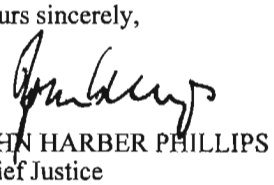
The services for the Opening of the Legal Year are as follows:

- St Paul's Cathedral
  Cnr Swanston & Flinders Streets
  Melbourne, at 9.30 a.m.
- St Patrick's Cathedral
  Albert Street
  East Melbourne, at 9.30 a.m.
  (Red Mass)
- East Melbourne Synagogue
  488 Albert Street
  East Melbourne, at 9.30 a.m.
- St Eustathios Cathedral
  221 Dorcas Street
  South Melbourne, at 9.30 a.m.

I hope that many of you will find time to celebrate this event with your colleagues. Family and friends are also most welcome.

Members of the Judiciary and the Bar are invited to robe for the procession in the various robing rooms in good time for the start of the procession, and all members of the procession are invited to join the procession. Marshals will be present at the services to indicate the order of the procession.

Yours sincerely,



JOHN HARBER PHILLIPS
Chief Justice

WELCOMES

JUDGE KELLAM

MURRAY BRYON KELLAM WAS BORN ON 14 September 1946 and spent his early school years at Firbank Girls' School in Brighton, where his mother worked. He must have showed early promise for, when he was only eight years old, the headmistress suggested it was time that he transferred to a school for boys.

He was educated at Carey Baptist Grammar School, where he matriculated in 1964. He then enrolled at the Royal Military College at Duntroon where he spent a year, and good taste prohibits a public airing of his more notable exploits there.

Thence Kellam commenced a Law Degree at Monash University, from which he graduated in 1972.

During his latter school years and at university, Kellam was a keen rower, he made many firm friendships at Mercantile which have survived his passage into less athletic endeavours.

At his welcome on 12 November 1993, the Chairman of the Bar Council regailed the assembled multitude with stories of Kellam's rowing exploits, most of which centred around *his* centre, and attempts to keep it under control. More recently, he has sought to achieve this by playing Royal Tennis and, last year, in his travels to England and Scotland, found time to play at several courts.

He was articled to John De Ravin of the firm of Aitken, Walker & Strachan and was admitted to practice in April 1973. He was made a partner in 1975, and his rapid progress was a sign of things to come. He completed the Degree of Master of Laws at the University of Melbourne which was conferred in March 1977 and, in that year, he was called to the Bar.

Reading with Jack Strachan was a rewarding experience for him and, no doubt, added a valuable balance to his energy.

He then took Chambers in Four Courts, where he set about making a name for himself as an advocate of considerable ability.

He represented Maurice Glickman, as junior to Cummins Q.C., in a lengthy criminal trial, and whilst his name is often misspelt, the melding with that of his erstwhile client by one correspondence into "Maury Kellman" was *sans pareil.*

He developed a circuit practice, and soon his slightly rotund figure became well-known attending views throughout the Western District, and in the evenings repairing to such salubrious restaurants as Jenny's Stirring Pot in Hamilton and the Grand Hotel, Mildura, where an appropriate measure of food and wine was taken.

Mixing common law with crime, his practice grew rapidly. He moved to Aickin Chambers when it opened, and the group which occupied the 19th Floor there have remained together until his appointment.

He was admitted in all States and Territories available to him, and frequently made flying visits to the Northern Territory and other distant areas. This whetted the taste for travel which in later years saw forays to Switzerland, France, the U.S.A. and Canada and other venues, all in the thirst for continued legal knowledge.

Kellam had three readers, Hennessy, Rowland and Klingender, prior to taking Silk in 1991.

His love of the Bar was shown by the tireless service he gave to the Bar Council on which he served from 1982 until his elevation, with only one break. He resigned as Treasurer and as a Director of Barristers Chambers Limited to take up his appointment, but not without some misgivings about the work still to be done.

The more recent years of his career have seen him involved as senior counsel in several very large personal injury, medical negligence and product liability cases, and his appointment deprived him of a case to be tried in the High Court of Fiji. This disappointment reflected an earlier one, when a personal injuries case involving a paraplegic resident of Oakland, California, was to be heard by the Supreme Court of Victoria in that State, it being thought more cost-effective to fly the judge, his Associate and counsel to the United States than to bring the expert witnesses to Melbourne — that case settled only days before it was due to begin.

The friendships he made at the Bar are enduring

His Honour Judge Kellam

and strong, and many a Chinese meal has been consumed in the restrained company of Middleton Q.C., Curtain and others.

Outside work, Kellam is a devoted family man; his wife Chris has tolerated his workload without complaint. They have two sons, David and Mikey, who are a credit to Chris and Murray. He has a place at Phillip Island, and has often escaped from the rigours of his professional life for a weekend's fishing with one or both of his boys.

Those privileged to be entertained by him at home will appreciate the forensic-like preparation; guests are carefully matched, menus chosen and sampled and, of course, the accompanying wines are, of necessity, tasted prior to the night. His hospitality is as generous as his assistance to other barristers has been.

He has a fine sense of justice, compassion for the underprivileged, an assiduous intellect and a capacity for work which will no doubt serve him well in his new role. The Bar welcomes his appointment, and wishes him well.

JUDGE CURTAIN

MONDAY, 15 NOVEMBER 1993 SAW A VERY large gathering of the profession, friends and family in Court 8 of the County Court to welcome Her Honour Judge Curtain to the County Court of Victoria. If the welcome is indicative of Her Honour's judicial career then we can be assured that a most articulate and independent-minded judge has been appointed who is greatly respected by all. Her Honour gave a speech that will be remembered for being both humorous and interesting. Her Honour recounted with fondness her early days at the Bar and a career as a Crown Prosecutor. There is no doubt that she has always enjoyed the good-humoured rivalry and camaraderie of the Bar. She also addressed the controversial issue of gender bias. Her Honour commented that in her experience the judges of both the County Court and the Supreme Court had never shown such bias. Her Honour believed it to be absolute nonsense that judges are less persuaded by submissions made by female advocates and doubted the capacity of any person who believes that to be true to adequately represent their client's interests and practise competently in the courts.

Her Honour is 39 years of age. Her primary and secondary education were at Mandeville Hall, Loreto Convent, Toorak. Her school career emphasised her future talents in that she was considered

Her Honour Judge Curatin

an outstanding debater. In 1971 she edited the school magazine, was appointed a prefect, and qualified at the end of the year to embark upon a law course.

Her Honour attended *Melbourne University* and graduated as a Bachelor of Laws in March 1976. She was articled to John Chamberlain of the firm Cole & O'Heare and in June 1977 was admitted as a barrister and solicitor of the Supreme Court of Victoria. She practised as an employee solicitor until she signed the Roll of Counsel in October 1978.

Her Honour read with Ms. Lynette Opas Q.C. who later became the first female appointment to the County Court. (Her Honour is only the third female appointment to the Court following Her Honour Judge Balmford.)

At the Bar Her Honour was elected to serve terms upon the Young Barristers' Committee and the Bar Council. She was also a member of the Criminal Bar Association and the Readers' Course Committee. She has extensively tutored in advocacy for both the Leo Cussen Institute and the Victorian Bar Readers' Course. She also served upon this publication's Editorial Committee. She has been a member of the Melbourne Criminal Justice Symposium, the Committee for the Review of the Magistrates' Summary Proceeding Act and various committees concerning child abuse and sexual assault.

Her Honour thoroughly enjoyed life at the Bar particularly in her early years in Four Courts Chambers. The sixth floor of those chambers was known as a very social and friendly place and her camaraderie with David Brown, Heather Carter, Paul Elliott, the late John Bannister, Hurley and Peter Jones and others is still affectionately remembered by her.

Her Honour practised in both civil and criminal law in all jurisdictions and was known for her eloquent and affable style combined with an underlying determination for the party she was representing. It was such attributes that no doubt contributed to the decision to appoint her to the Motor Accidents Tribunal and the Administrative Appeal Tribunal, of which she was a presiding member from 1985 to 1987.

In August 1987 she was appointed a Prosecutor for the Queen in the State of Victoria. She remained in that position until her appointment in November of this year. Her Honour's six years as a Prosecutor gave Her Honour a wide experience in the conduct of criminal trials. Her Honour conducted herself with great competence in a number of long and difficult murder trials. However it was the Court of Criminal Appeal which she regarded as the greatest challenge. It was this court that she came to enjoy the most and it was in this court that she was valued as an articulate and intelligent advocate for the Crown. In Her Honour's welcome she made mention of the fact that it was a court that she had to be carried into and out of as her apprehension was so great. Whilst that may have been true at first there is no doubt that by the end of her career it was a jurisdiction in which she appeared to be totally poised and authoritative.

Her Honour has pursued interests outside the law with great enthusiasm. She has a penchant for acting and has played in many amateur productions. In 1984 she played a number of roles in the Centenary Bar Revue, a production that was acclaimed at the time as being the high point in the centenary year of the Bar. She is still remembered for one of her roles as the barrel girl in Clerk Lotto. Her Honour is proud of the fact that she was the only female member of the Bar in the production.

Her Honour has experienced travel to many different parts of the world and has always arrived home with numerous travel stories for her friends. She is also a regular race-goer and the Spring Carnival at Flemington is a very special time of the year for her.

Her Honour has been encouraged and guided by her family to which she is staunchly devoted. Her father, Daniel Curtain, died at the beginning of the year in which Her Honour was appointed. Her Honour was confident that the day of her welcome would have been her father's proudest day. The Bar is confident that it was also Her Honour's proudest day and a proud day for the County Court of Victoria.

JUDGMENT WRITING

A JUDGMENT SURELY NEED NOT BORE;
The judge can postulate the law,
Adjudicate on points of fact,
And do so with finesse and tact,
But still engage in modest fun,
A quip, a joke, a harmless pun.
It's also nice if judgment draws on
Shakespeare, Pope or Henry Lawson.
And why should critics get all snooty
At metaphors from sport (like footy)?
So I don't think that one should curb
Adventurous use of noun and verb.
And why not play up to the gallery?
At least have fun, if not much salary.

P. H.

MCLEOD, M.

COLIN EUNAN MCLEOD, BORN IN Williamstown some 59 years ago, son of a sea captain plying the Australian coast, educated at Assumption College, Kilmore, later to obtain his matriculation through correspondence as a patrol officer in the Northern Territory and Melville Island, re-emerged recently in the judiciary as a Magistrate.

"Scotty," as he has always been affectionately known over some 30 odd years of practice, including being a Judge of the Accident Compensation Tribunal from 1988 until 1992, where he was known as "Judge Bong," having regard to his instant capacity to form judgements, has confounded the legal profession by his re-orientation into the judicial process as a Magistrate. His eminent good sense, repartee, and practicality will ensure that his tenure as a Magistrate will be of benefit to the administration of justice in this State. We will be all assured that His Worship will have no reserved judgments. His grasp of the essential issues by reason of his past experience as a Judge in the accident compensation field will mean that traffic offenders and the like will not be kept waiting and a full day's work by way of disposal of cases will be expeditiously undertaken. His Worship's earthy appreciation of life, general good humour, capacity to constantly entertain, will undoubtly serve as a worthy replacement to "D'Arcy Dugan". We confidently predict upon his retirement His Worship will join the former Chief Magistrate on the speaking circuit, naturally at a commensurate fee. At his re-swearing-in as a Magistrate before the Chief Justice his wife was heard to say, "Will this be for certain?" Those remarks echo the concern that Scotty McLeod and his former brethren on the Accident Compensation Tribunal have endured since their termination of office. We all welcome His Worship's re-emergence as a judicial figure and feel certain that he will add to the colour of the magisterial bench in this State.

Magistrate McLeod

OBITUARIES

JUDGE HOWDEN

JUDGE JAMES GUTHRIE HOWDEN, AGED 59 years, a member of the County Court Bench since March 1986, eventually lost a six year battle against malignant melanoma when he died peacefully at his home on 10 October 1993 in the company of his loving, supportive wife Elaine and his devoted family of five. Thus ended the career of a Judge known and loved by all in the law as a man with a humble understanding of strengths and weaknesses of human nature.

Educated at Geelong College and later resident at Ormond College whilst undertaking a law course at the University of Melbourne, Jim excelled at most sports but particularly rowing. He rowed at number Four (the "power house section") of the bronze medal-winning Australian Eight at the 1956 Melbourne Olympic Games. He was later to stroke the Australian Four at the World Rowing Championships in 1962 at Lucerne and to become Chairman of the Australian Rowing Council. His association with rowing continued up until his death, being a personal coach to his daughter in her successful career as a sculler. He was to be frequently found at the river on a Sunday morning.

According to Guest Q.C., who rowed behind His Honour on occasions, his physical strength as an oarsman was his greatest virtue. He never "gave up," in rowing, in life and in practice of the law. So it was that he combated the disease that afflicted him, undertaking strict health regimes and treatments of a rigorous kind. Throughout it all, he maintained a cheerful disposition, keeping his relentless battle to himself. As an advocate, in his time, he knew no peer; the monthly civil jury list of the Supreme Court in the early 1980s would frequently feature his name beside each plaintiff. He had a tremendous capacity for work yet was also able to enjoy the conviviality of close friendship, particularly at Bell's Hotel, South Melbourne, where he would occasionally gather to console other barristers who had lost their cases.

A good deal of his year was spent at Point Lonsdale, having grown up in the area. There he maintained a close, caring family life. His Honour was associated with two mass rescues from the Rip area, for one of which he received a bravery award. Notwithstanding his many achievements, His Honour was always unpretentious.

Jim Howden had a ready smile, an easy manner and a great love of life. He will be long remembered for his down-to-earth, no-fuss approach to the practice of law. We salute the passing of a caring husband and father, humane Judge, loyal friend and contributor to life.

Jack Keenan

WILLIAM BERNARD (BARRY) FRIZZELL

WILLIAM BERNARD (BARRY) FRIZZELL was born on 17 February 1928 in the Western district town of Coleraine. His father, born in Central Ireland, was a Captain in the Indian Army and it was there he married a British civil servant's daughter (Aileen Robyns) in 1920. Barry was the third of four children and his family came to Australia as part of the Soldier Settlement Scheme in 1922. The family remained at Wootong Vale near Coleraine until 1938 when they moved to a farm in Drouin, and in 1940 they moved to Sandringham, which Barry referred to in endearing terms by its old name of "Gypsy Village". Barry remained in Sandringham until his death.

Barry's secondary schooling was at Hampton High School and later Melbourne High School where he was a proud Old Boy. He did the five-year articled clerkship course with the firm of Ronald Stewart, Stock & McIntosh. Whilst doing his course, he was offered a five-year singing scholarship to study overseas. He decided to make law his career. However, he retained a keen interest in music, was an accomplished pianist and a regular contributor both as a pianist and vocalist at social

gatherings. He was a prominent choir member at Sacred Heart Church, Sandringham.

During his articles, Barry was instrumental in changing the law. In his day, Latin was a prerequisite to the Law course, but he was unable to pass this subject. He and his fellow student, Frank Bullow, decided to take the matter to the Supreme Court. Their application was successful and Latin was dropped as a prerequisite.

After graduating, he joined the Bar and took Chambers in Equity where his somewhat unique speaking voice was a feature of his advocacy, which saw him soon a successful Junior. He acquired a large circuit practice in Geelong, Colac and Wangaratta, particularly in Criminal Law and Common Law areas. He appeared in a very large number of murder trials, at one stage claiming to have appeared in more than any other Victorian Junior.

Barry took Silk in 1977 and although initially, after gaining Silk, his practice continued to flourish, one of his murder trials led to considerable adverse publicity which was very detrimental to his practice. He found this a very bitter pill to swallow, but he maintained his dignity. With his waning practice, he took a position only last year in Port Augusta with the Aboriginal Legal Rights Movement. However, he returned to Melbourne at Christmas about the time he first noticed what was to become an enormously grotesque brain tumour.

He was diagnosed as suffering from cancer in April and, for the six months between then and his death, he was the admiration of all those who visited him. The manner in which he accepted his circumstances was quite inspirational. His appreciation of nursing and medical care was notable.

It was very gratifying that so very many people visited him both at Peter MacCallum and at Bethlehem Hospitals. His visitors were family, friends from the law and a constant stream of "Gypsy Villagers" (especially from the Sandringham Hotel, and from the Tulip Street Tennis Courts).

At Bethlehem, he quickly acquired the nickname "Rumpole". The smoking room became known as Pommeroy's and was known to open about 10.00 a.m. each day, and close about 9.00 p.m. He there held court.

I was fortunate enough to visit Barry only hours before his unexpected death and was saddened indeed a few hours later to learn that he had died. By some miracle, despite the enormous growth protruding from the tip of his skull, he suffered no pain. His family, one brother and two sisters and many nephews and nieces, all loved Barry dearly, and were greatly comforted by the tribute paid to him by the many friends who packed Sacred Heart Church, Sandringham for his Requiem Mass.

I believe I can speak for a large number of friends when I say that he will be sadly missed by many, but long remembered with affection.

John S. Monahan

MABO: SORTING THE FACT FROM FICTION

D.M. AUSTIN

The following paper was given to the Victorian Branch of the Australian Drilling Association on 19 September 1993.

MABO V. *THE STATE OF QUEENSLAND [No. 2]*[1] (*Mabo*) has given rise not only to considerable debate on a public level but within the broader community. Given that the High Court has held that Australian common law does recognise a form of native title to land, it is appropriate to focus upon what the High Court actually decided.

Damian Austin

BRIEF HISTORY OF THE MURRAY ISLANDS

The Murray Islands are in the Torres Strait and have a total land area of about 9 square kilometres. The largest island is called Mer and the other two islands are Dauar and Waier. The Meriam people are Melanesian, probably coming to the Murray Islands from New Guinea. The evidence as revealed in the findings of Moynihan J. and set out in the judgment of Brennan J. shows that by the end of the 18th Century, the people lived in groups of huts strung along the foreshore. Further, they continue to do so, although the huts are progressively changing to houses. The groups of huts or houses were and remain organised in named villages. Gardening was of profound significance not only in terms of subsistence but integral to the cultural exchanges in community life. Moynihan J. found no notion of public or general community ownership. Rather, the land was regarded as belonging to groups or individuals. Even prior to annexation in 1879, it would appear that the Queensland authorities did exercise some de facto supervision during the 1870s over islands in the Torres Strait even though they did not form part of that Colony's territory. The Murray Islands were annexed to the Colony of Queensland in 1879 pursuant to Letters Patent and an Act of the legislature of Queensland. On 1 August 1879 the Murray Islands formed part of the Colony of Queensland. If there were any doubts about the legality of that annexation, this was erased by Imperial legislation in 1895.[2]

The findings of Moynihan J. reveal that in July 1878 H.M. Chester, the Police Magistrate at Thursday Island, visited the Murray Islands and advised the people to select a chief (Mamoose) and submit to his authority, which would be supported, if properly exercised. After annexation, the Mamoose continued his magisterial role, and effectively, by the end of the 19th Century acted as a Magistrate and Governor, presiding over a myriad of issues affecting the Murray Islands, including disputes over land or land boundaries. The London Missionary Society, having shifted its headquarters to Mer in 1877, was in 1882 granted a lease by the Queensland Government of an area of two acres on the Island of Mer. During that same year, the Queensland Government reserved from sale the Murray Islands for the native inhabitants' benefit. In October 1882, Captain Pennefather reported:

"The natives are very tenacious of their ownership of the land and the island is divided into small properties which have been handed down from father to son from generation to generation, they absolutely refuse to sell their land at any price ..." (page 21 per Brennan J.).

The effect of legislation and executive acts over the years was that the reservation of the Murray Islands remained intact, a fact central to the High Court's view that there was no intention to extinguish, but rather, to protect the Meriam people's native title.

By 1891 the London Missionary Society had removed its headquarters from the Murray Islands, and the position of resident teacher and adviser to the Murray Islands was taken by John Stuart Bruce, commencing October 1892 and concluding in January 1934. The nature of that office had no role in the internal management of affairs on the Murray Islands, as the relevant governing body was the native chief (Mamoose), assisted and advised by councillors, and by a number of native police to uphold law and order. Deane and Gaudron JJ. summarised at page 115 the findings of Moynihan J. as follows:

"It suffices, for the purposes of this judgment, to say that the Meriam people lived in an organised community which recognised individual and family rights of possession, occupation and exploitation of identified areas of land. The entitlement to occupation and use of land differed from what has come to be recognised as the ordinary position in settled British Colonies in that, under the traditional law or custom of the Murray Islanders, there was a consistent focus upon the entitlement of the individual or family as distinct from the community as a whole or some larger section of it."

In 1931 there was a lease purportedly granted over the islands of Dauar and Waier to two non-Islanders for a period of twenty years for the purpose of establishing a sardine factory. Factory buildings and houses were erected. The term of the lease was extended and a new lease was issued containing the same conditions. Afterwards the sardine factory closed, the lease was ultimately forfeited and the islands of Dauar and Waier became part of the reserve.

The effect of legislation and executive acts over the years was that the reservation of the Murray Islands remained intact, a fact central to the High Court's view that there was no intention to extinguish, but rather, to protect the Meriam people's native title. *The Queensland Coast Islands Declaratory Act* 1985 (Q.), which was enacted to specifically counter the plaintiffs' claim, was held to be inconsistent with section 10(1) of the *Racial Discrimination Act* 1975 (C'th.): *Mabo* v. *The State of Queensland* (1988) 166 C.L.R. 186.

BRIEF HISTORY OF MABO LITIGATION

In 1982 the plaintiffs commenced their action in the High Court against the State of Queensland and the Commonwealth, claiming certain land rights in the Murray Islands. The issues of fact raised by the parties' pleadings were remitted to Moynihan J. of the Supreme Court of Queensland for hearing and determination. That hearing commenced 13 October 1986 but did not conclude until 6 September 1989. The interim period should be explained. The hearing before Moynihan J was adjourned on 17 November 1986 to allow the High Court to consider the plaintiffs' demurrer with respect to those paragraphs in the Amended Defence of the State of Queensland where it relied on the *Queensland Coast Islands Declaratory Act* 1985 (Q.) as a defence to the plaintiffs' claims. The effect of that legislation was to extinguish any native title or rights to land in the Murray Islands which might have otherwise survived annexation in 1879. The plaintiffs argued that those particular paragraphs in the Amended Defence did not show a good defence to their claim.

By consent of the parties, the High Court, acting on the assumption that the plaintiffs could establish their specific land rights as claimed, addressed the questions raised by the plaintiffs' demurrer and concluded that the *Queensland Coast Islands Declaratory Act* 1985 (Q.) was inconsistent with the *Racial Discrimination Act* 1975 (C'th.). The High Court handed down that judgment on 8 December 1988: *Mabo* v. *The State of Queensland* (1988) 166 C.L.R. 186. Moynihan J. resumed the fact finding hearing on 2 May 1989 and on 5 June 1989, dismissed the Commonwealth from the action. His Honour's determination was finally delivered on 16 November 1989, the details of which are summarised in the judgment of Brennan J.

On 20 March 1991 Mason C.J. ordered certain

questions to be reserved for consideration of the Full Court pursuant to section 18 *Judiciary Act* 1903 (C'th.). The High Court hearing commenced on 28 May 1991 and concluded on 31 May 1991. During the hearing and towards the conclusion of argument, it was clear that the plaintiffs needed to amend their Statement of Claim. The reasons for this are succinctly set out at page 75 in the judgment of Brennan J. The plaintiffs accordingly, inter alia, sought declarations that the Meriam people are entitled to the Murray Islands as owners, possessors, occupiers or as persons entitled to use and enjoy those islands. Judgment was handed down on 3 June 1992.

While it may be argued that the High Court need not have gone beyond the immediate facts affecting the Meriam people, the majority proceeded on a wider basis.

THE DECISION — A BROAD OVERVIEW

The case was heard by seven members of the High Court. Mason C.J. and McHugh J. wrote a joint judgment. They concurred with the reasons for judgment of Brennan J. Deane and Gaudron JJ. wrote a joint judgment. Toohey and Dawson JJ. effected separate judgments. The carefully-worded joint judgment of Mason C.J. and McHugh J. said that six members of the High Court (Dawson J. dissenting) agreed that the common law of Australia does recognise "a form of native title" which, if it has not been extinguished, "reflects" the entitlement of the indigenous inhabitants "in accordance with their laws or customs, to their traditional lands." Their Honours continued at page 15 in saying that subject to the effect of certain Crown leases, "the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland." Their Honours (again with consent of all members) pointed out the main difference between those six members of the High Court. Their Honours said :

". . . subject to the operation of the *Racial Discrimination Act* 1975 (C'th.), neither of us nor Brennan J. agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ. that, at least in the absence of clear and unambiguous statutory provision to the contrary, the extinguishment of native title by the Crown by inconsistent grant is wrongful and gives right to the claim for compensatory damages. We note that the judgment of Dawson J. supports the conclusion of Brennan J and ourselves on that aspect of that case since his Honour considers that native title, where it exists, is a form of permissive occupancy at the will of the Crown."

The formal order made by the Court accorded with that proposed by Brennan J.

THE LEGAL ARGUMENTS

A perusal of the plaintiffs' outline of argument in the reports is instructive for they were at pains, inter alia, to distinguish Meriam society from that found in the settled Colony of New South Wales. That is understandable, given the Australian case law which dealt with the rights of the Crown upon settlement of the Colony of New South Wales, and to which reference will be made. While it may be argued that the High Court need not have gone beyond the immediate facts affecting the Meriam people, the majority proceeded on a wider basis. Deane and Gaudron JJ. at page 77 said:

"The issues raised by this case directly concern the entitlement, under the law of Queensland, of the Meriam people to their homelands in the Murray Islands. Those issues must, however, be addressed in the wider context of the common law of Australia. Their resolution requires a consideration of some fundamental questions relating to the rights, past and present, of Australian Aborigines in relation to lands on which they traditionally lived or live. The starting point lies in the second half of the 18th Century with the establishment of the Colony of New South Wales."

The irony is that notwithstanding the plaintiffs' careful distinction referred to earlier, they need not have bothered because the High Court jettisoned a line of established authority which had been accepted "as a basis of the real property law of the country for more than one hundred and fifty years" (page 109 per Deane and Gaudron JJ.).

Further, it will be recalled that on 5 June 1989 Moynihan J. dismissed the Commonwealth from the action. The Commonwealth became an intervener but did not participate in the hearing before the Full Court. That Court handed down a judgment which was clearly intended to affect mainland Australia, and yet the Commonwealth, for reasons to date unclear, chose not to participate in the hearing. More revealing is the interview which the Chief Justice Sir Anthony Mason gave to *Australian Lawyer* and noted in the July 1993 issue. His Honour is reported at page 23 as saying :

"Mabo is an interesting example. The Commonwealth was originally a defendant in those proceedings. Later it

ceased to be a defendant and became an intervener. Ultimately it did not participate in the hearing at all, so the Court's decision was given in the absence of argument from the Commonwealth. As developments following the judgment demonstrate, it was a decision on a question which affected the Commonwealth, yet the Commonwealth was prepared to leave the matter to the Court without presenting any argument itself."

In rejecting the Queensland Government's submission, the High Court over-ruled earlier decisions such as *Attorney-General (N.S.W.)* v. *Brown* which said that upon settlement of the Colony of New South Wales, the property of all land therein, without qualification, legally and beneficially vested in the Crown.

His Honour's statement is illuminating not only for what is reported to have been said, but also for what it does not say.

In addition, there is the Prime Minister's Statement dated 2 September 1993 where he inter alia says that "the implications of the High Court's decision will be with Australia forever" and that as "*Australia's* Government," his government is committed to the proposed *Mabo* legislation as foreshadowed in that Statement. I leave aside the separate issue of other groups or interests within the Australian community directly affected by the High Court's judgment -- members of the aboriginal community, mining and pastoral interests, to name but a few, yet in whose absence the hearing was conducted. The merits or otherwise of that state of affairs have been recently canvassed.[3]

However, I am less persuaded by the suggestion that *Mabo* was nothing more than "gigantic obiter dicta".[4] Even assuming for purposes of argument that is so, it does not take one very far. *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465 for instance, was actually decided on an exemption clause but Their Lordships' dicta spawned a number of cases relating to professional negligence and negligent mis-statement generally.

Mabo therefore affects not just the Murray Islands but the Australian mainland.

The Queensland Government submitted that when the Murray Islands were annexed by the Crown, it acquired an absolute beneficial ownership of all land in that territory. Further, no other rights could exist over the Murray Islands unless granted by the Crown. In response, the plaintiffs inter alia, submitted that annexation of the Murray Islands did not extinguish native title and that there was nothing since annexation that extinguished such title.

In rejecting the Queensland Government's submission, the High Court over-ruled earlier decisions such as *Attorney-General (N.S.W.)* v. *Brown*[5] which said that upon settlement of the Colony of New South Wales, the property of all land therein, without qualification, legally and beneficially vested in the Crown. In such circumstances, any native title did not exist upon settlement. The vice in the Queensland Government's submission was that it dovetailed sovereignty with beneficial ownership of land.

The High Court said that acquisition by settlement conferred on the Crown a radical or ultimate title to the newly-acquired territory. The plaintiffs did not contest that proposition. The Court further stated this did not necessarily mean that the Crown simultaneously acquired beneficial ownership to any of the land comprising such territory. If the land were truly terra nullius, in that it was uninhabited and therefore belonging to no-one, the Crown had radical title and beneficial title to the subject land. On the other hand if, at the time of settlement, there were indigenous people in the relevant territory, and if the common law recognised their interests or rights in land, the Crown's radical title would not itself provide the Crown with absolute beneficial title to that affected land (page 48 per Brennan J, with whom Mason C.J. and McHugh J. concurred).

The High Court held that the common law did recognise such indigenous rights or interests and concluded that a mere change in sovereignty did not itself extinguish the native title. Rather, in those circumstances, it survived.

Although the authorities[6] upon which the High Court heavily relied appear to relate to territory acquired by either conquest or cession, the principle followed or adopted by them, namely, that a mere change of sovereignty did not itself disturb private proprietary rights, was interpreted by the High Court as a principle to be applied generally, and not dependent on the mode of acquisition of the relevant territory.

Deane and Gaudron JJ. at page 82 expressed it as a "strong assumption" by the common law, that

interests in land under native law or customs were not swept away by the establishment of a new Colony, but preserved and protected by the domestic law of the Colony after its establishment.

Further, it was not a contradiction in terms to say that radical title and native title could co-exist. The Crown's radical or ultimate title simply enabled the English doctrine of tenure to be applied to the Colonies. Radical title allowed the Crown in the settled colony to acquire land for itself or to grant land to others. However, unless this was done with respect to land that was affected by native title, that native title survived. While there were transient misgivings about the applicability of the English doctrine of tenure to Australia, the High Court accepted that the doctrine, although essentially based on a fiction, was here to stay. Native title did not owe its existence to the doctrine of tenure, as it did not depend on a grant from the Crown.

It is therefore not a question of the common law giving anything to establish such title, its existence comes from a source quite independent — the relevant indigenous people's traditional laws and customs.

In rejecting the Queensland Government's submission, the High Court also focused on other assumptions made by the earlier authorities. This involves a further step back in time. International law recognised that three of the "effective" or "main theoretical" ways in which a Sovereign could acquire territory were conquest, cession and settlement (page 32 per Brennan J. with whom Mason C.J. and McHugh J. concurred; page 77 per Deane and Gaudron JJ.). Originally, where a territory was acquired by way of settlement, this could only occur if the land was truly terra nullius. With the advent of European expansion, the concept of terra nullius was extended to allow acquisition of territory, albeit inhabited, provided the relevant indigenous people were sufficiently backward or barbarous or otherwise not organised in a society that was permanently united for political action (page 32 per Brennan J. with whom Mason C.J. and McHugh J. concurred).

The fact that the Colony of New South Wales was settled as a British Colony in 1788 was, understandably, not questioned by the High Court. That was an act of State. Nor questioned, was the principle that British acquisition of territory by way of settlement meant that the common law of England applied to the relevant Colony and adapted to its conditions. Yet the High Court said it was quite another matter to accept, in view of the present facts, the long-held premise or theory referred to in such cases as *Cooper* v. *Stuart*[7] which underpinned English common law's application to the Australian colonies.

Terra nullius in the extended sense had underpinned the legal basis for applying English common law to the Colony of New South Wales and the other Australian colonies. In the High Court's view, the assumptions made about the indigenous people in the Colony of New South Wales at the time of settlement were not only now shown to be false as a matter of "fact," but discriminatory and unacceptable in our contemporary society (pages 39–42 per Brennan J. with whom Mason C.J. and McHugh J. concurred; pages 108-109 per Deane and Gaudron JJ.).

In the High Court's view, the assumptions made about the indigenous people in the Colony of New South Wales at the time of settlement were not only now shown to be false as a matter of "fact," but discriminatory and unacceptable in our contemporary society.

It should be said that "the facts" upon which the High Court relied seem to be derived from the judgment of Blackburn J. in *Milirrpum* v. *Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141, a case which concerned claims made on behalf of certain native clans with respect to particular areas of Arnhem Land in the Gove Peninsula. There was detailed evidence before that court relating to the social rules and customs of the plaintiffs. At page 267 His Honour said:

"The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men,' it is that shown in the evidence before me."

At page 244, Blackburn J. in substance said that settlement in New South Wales in 1788 was an act of State and accordingly, whether aboriginals living in any part of New South Wales in 1788, had a system of law which was beyond the settlers' comprehension was not for His Honour to determine. Blackburn J. at page 266 speculated about aboriginal community

life in New South Wales in the following way:

". . . having heard the evidence in this case, I am, to say the least, suspicious about the truth of the assertions of the early settlers of New South Wales that the aboriginals had no ordered manner of community life".

The effect of the High Court's judgment was that it rejected the extended concept of terra nullius as a doctrine applicable to Australia's history, and, it is suggested, as an acceptable doctrine anywhere. It did not reject the doctrine of terra nullius as understood in the strict sense. Rather, terra nullius in the strict sense was not relevant to Australia - there were already people living there at the time of settlement in 1788.

Given that the High Court recognised a form of native title, the immediate practical question centres on how far one must go back to establish such title. That is determined by the date of annexation of the relevant territory. For the Murray Islands, that was 1 August 1879, and, at least with respect to the eastern mainland, it would be 1788.

CHARACTER OF NATIVE TITLE

Brennan J., (with whom Mason C.J. and McHugh J. concurred) at page 58, said:

"Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty . . ."

There was no such difficulty confronting the Meriam people.

Terminology varied as between members of the High Court — "native title" (Mason C.J., McHugh and Brennan JJ.), "common law native title" (Deane and Gaudron JJ.), "traditional title" (Toohey J.). Whatever, native title is necessarily a fluid concept as it is referable to the particular laws and customs of the relevant indigenous people. These may be of a kind unknown to the common law. The High Court confirmed that it was important not to be shackled by concepts referable to the common law. To prove its existence, there must be a continuous connection with the land by the relevant indigenous people in accordance with their laws and customs. Deane and Gaudron JJ. at page 86 referred to the "special relationship" that exists between the land and its users. Toohey J. at page 188 said there could be no native title without "presence amounting to occupancy". The degree of presence would be dictated by the demands of the relevant land and the particular society. Occupancy does not necessarily mean possession at common law. A nomadic lifestyle is consistent with occupancy and therefore recognised as a form of native title.

While native title is usually that of a community or group, it may be that of an individual. The ability to alienate native title depends solely on the laws from which such title emanates. It can be voluntarily surrendered to the Crown.

Whether native title should have the character of proprietary rights, personal rights or otherwise, gave rise to divergent views. Toohey J believed it was fruitless to embark upon such an enquiry. Deane and Gaudron JJ classified them as personal rights. Brennan J (with whom Mason CJ and McHugh J concurred) seemed to envisage all classifications, whether proprietary or personal and usufructuary, and whether possessed by a community, group or individual. Dawson J believed native title to be only a permissive occupancy at the will of the Crown. His Honour's view was that upon annexation of the Murray Islands by the Crown in 1879, whatever prior rights may have existed, they were extinguished upon annexation.

Whether native title should have the character of proprietary rights, personal rights or otherwise, gave rise to divergent views.

EXTINGUISHMENT OF NATIVE TITLE

If connection with the land continues, the passage of time and changes that necessarily occur within the relevant society will not destroy native title. The High Court said that once native title is shown to exist, the common law will provide such legal or equitable remedies as appropriate to the rights established as a matter of evidence.

As the joint judgment of Mason C.J. and McHugh J. revealed, there was a 4/3 majority who in substance held that since 1788, and certainly up to but not including the commencement date of the *Racial Discrimination Act* 1975 (C'th.), any extinguishment of native title by the Crown was not wrongful and did not give rise to a claim for compensation.

Brennan J. (Mason C.J. and McHugh J. concurring) and Deane and Gaudron JJ. made it clear that the Crown's right to extinguish native title depended on the validity of the Crown's power to do this. Deane, Gaudron and Toohey JJ. believed that extinguishment of native title without compensation may be invalid under the *Racial Discrimination Act* 1975 (C'th.). Further, Deane and Gaudron JJ. believed section 51(xxxi) of the Constitution was also an important constraint.

For reasons set out at page 74, Brennan J. (Mason C.J. and McHugh J. concurring) did not need to decide the question whether extinguishment of native title without compensation could be invalid under the *Racial Discrimination Act* 1975 (C'th.).

Subject to that Act, it is clear that the High Court accepted that native title is capable of being extinguished by any Crown grant, if it be inconsistent with the continuing right to enjoy native title on or over the affected land. Hence the real task is to precisely identify the relevant native title and the relevant grant and focus on the inconsistency (if any) with the continued exercise of the right to enjoy native title on that land. It may or may not be wholly inconsistent, but to the extent of any inconsistency, the relevant native title is extinguished. A lease in the strict sense providing exclusive possession would extinguish native title. So would freehold title. The lease of two acres in 1882 to the London Missionary Society on Mer extinguished whatever native title was enjoyed to that parcel of land. Brennan J. at pages 68–70 provided many examples where extinguishment of native title would and would not occur. An authority to prospect for minerals would appear not to extinguish native title. See also Appendix 1.

The plaintiffs' argument relating to fiduciary duty owed by the Queensland Government, was not explored by Brennan J. (Mason C.J. and McHugh J. concurring) because it was irrelevant to the facts. Deane and Gaudron JJ. made reference to a remedial constructive trust yet this was mentioned in the context of possible remedies in our legal system to protect native title, but not with any specific reference to the Meriam people. Dawson J. said no fiduciary duty could be imposed, as upon annexation, any native title (which His Honour assumed for purposes of argument) was extinguished. Toohey J alone explored the issue and His Honour's dicta seems to have been adopted in the Wik claims.[8]

Mabo is no authority for the imposition of a fiduciary duty in support of native title claims.

POST-MABO

After expressing in summary form what His Honour believed to be the common law of Australia in relation to land titles, and recited in Appendix 1, Brennan J. (Mason C.J. and McHugh J. concurring) at pages 70–71 said:

"These propositions leave for resolution by the general law the question of the validity of any purported exercise by the Crown of the power to alienate or to appropriate to itself wastelands of the Crown. In Queensland, these powers are at all material times have been exercisable by the Executive Government subject, in the case of the power of alienation, to the statutes of the State in force from time to time. The power of alienation and the power of appropriation vested in the Crown in right of a State are also subject to the valid laws of the Commonwealth, including the *Racial Discrimination Act*. Where a power has purportedly been exercised as a prerogative power, the validity of the exercise depends on the scope of the prerogative and the authority of the purported repository in the particular case."

This question as to the validity of the Crown's power to alienate or appropriate for itself Crown land and its necessary compliance with valid laws of the Commonwealth, including the *Racial Discrimination Act* 1975 (C'th.) will be a constant issue facing a State or Territory.

This question as to the validity of the Crown's power to alienate or appropriate for itself Crown land and its necessary compliance with valid laws of the Commonwealth, including the *Racial Discrimination Act* 1975 (C'th.) will be a constant issue facing a State or Territory. In *Mabo* v. *Queensland* (1988) 166 C.L.R. 186 (*Mabo No. 1*) the High Court held that the *Queensland Coast Islands Declaratory Act* 1985, which purported to extinguish native title without compensation, was inconsistent with section 10(1) of the *Racial Discrimination Act* 1975 (C'th.) within the meaning of section 109 of the Constitution. That latter section provides that where a State law is inconsistent with a Commonwealth law, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid.

The above Queensland legislation was designed to cut the plaintiffs' rights mid-stream, proceedings having already been issued by them in 1982.

Section 9(1) of the *Racial Discrimination Act* 1975 (C'th.) states it is unlawful for a person to do any "act" that involves racial discrimination where the purpose or effect is to nullify or impair the exercise or enjoyment, on an equal footing, of any human right or fundamental freedom. Those rights or freedoms are not exhaustively defined but include those referred to in Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination ("the Convention") which is set out in the Schedule to the above Act.

The legislative responses to *Mabo* will represent a new chapter to this landmark judgment. While *Mabo* continues to reflect the common law of this country, co-operation between governments is the only course to pursue.

In *Mabo No.1* the High Court did not have to interpret section 9 but at page 216 noted that the section proscribes doing any act of the type described therein. Further, Their Honours noted that the section did not prohibit the enactment of a law creating, extinguishing or otherwise affecting legal rights in or over land.

Section 10(1) of the *Racial Discrimination Act* 1975 (C'th.) centres on the enjoyment of a "right" which is not exhaustively defined, and includes those referred to in Article 5 of the Convention. Section 10(1) provides that if any law whether Commonwealth, State or Territory denies persons of a particular race, colour, national or ethnic origin the enjoyment of a right that is enjoyed by persons of another race, colour, national or ethnic origin, then this section shall give them that right. As noted earlier, the High Court in *Mabo No. 1* decided the issue before it pursuant to that section.

It must be said that the *Racial Discrimination Act* 1975 (C'th.) is not free of difficulty with respect to interpreting the above sections. Consider for a moment titles granted by the Crown on and since 31 October 1975. The majority in *Mabo* decided that subject to the *Racial Discrimination Act* 1975, extinguishment of native title by the Crown by way of inconsistent grant was not wrongful and did not give rise to any claim for damages. Imagine the Crown, at some time on or since 31 October 1975 but prior to 1 July 1993,[9] granting a lease in the strict sense to X, thereby providing X a right to exclusive possession of the relevant land. Assume also immediately prior to that grant there was a form of native title affecting the subject land. On those bland facts, it may be fairly argued that the fact of extinguishment of native title was merely an incident of its own nature, as now defined and recognised by the High Court.

The Victorian *Land Titles Validation Act* 1993 attempts to meet the concerns of those who have been granted titles to land during the period beginning 31 October 1975 until the present time, and who, at the same time, may be subject to a native title claim of the type contemplated under *Mabo*. The purpose of the Act is to confirm the validity of all grants of title to land (including petroleum and mining titles) made on 31 October 1975 and ending on a date yet to be proclaimed. The Victorian legislation does not purport to cover future grants, nor does it deal with validity of grants made prior to 31 October 1975.

It is not intended herein to traverse the intricacies of the Victorian legislation. It is clear that the compensation provisions have been included at least with one eye towards the *Racial Discrimination Act* 1975 (C'th.). Whether that Act has been satisfied will be a matter of some debate. Further, there is the recently released Commonwealth proposed legislation on native title. An examination of both pieces of legislation is not within the scope of this paper, and is best explored at another time.

CONCLUSION

The legislative responses to *Mabo* will represent a new chapter to this landmark judgment. While *Mabo* continues to reflect the common law of this country, co-operation between governments is the only course to pursue, notwithstanding that particular interests affected may not be fully satisfied or at all. It is a critical time for our nation.

FOOTNOTES

1. (1992) 175 C.L.R. 1.
2. *Colonial Boundaries Act 1895 (Imp.)*
3. S.E.K. Hulme, A.M., Q.C., *"Aspects of the High Court's Handling of Mabo"* delivered at the Samuel Griffith Society's conference held in Melbourne on the weekend of 31 July–1 August 1993.
4. The Hon. Peter Connolly, C.B.E., Q.C., *"Should the Courts Determine Social Policy?"* delivered at the Samuel Griffith Society's conference held in Melbourne on the weekend of 31 July–1 August 1993.
5. (1847) 1 Legge 312 at pp. 316-319; *Randwick Corporation* v. *Rutledge* (1959) 102 C.L.R. 54, at p. 71 per Windeyer J.;

New South Wales v. *The Commonwealth* (1975) 135 C.L.R. 337, at pp. 438-439 per Stephen J.

6. In *re Southern Rhodesia* [1919] A.C. 211; *Amodu Tijani v. The Secretary, Southern Nigeria* [1921] 2 A.C. 399; *Adeyinka Oyekan* v. *Musendiku Adele* [1957] 1 W.L.R. 876; *Sobhuza II* v. *Miller* [1926] A.C. 518.
7. (1889) 14 App. Cas. 286.
8. *The Wik Peoples* v. *The State of Queensland & Ors.* Federal Court Queensland District Registry, General Division, No. QG104 of 1993.
9. The Commonwealth's proposed legislation on native title contemplates no grant made after 30 June 1993 extinguishing native title (Clause 51) save and except those circumstances under Clause 54 therein.

Hereunder are the nine principles referred to by Brennan J. (Mason CJ and McHugh J concurring), expressing in summary form what His Honour held to be the common law of Australia with respect to land titles.

APPENDIX 1

Hereunder are the nine principles referred to by Brennan J. (Mason CJ and McHugh J concurring), expressing in summary form what His Honour held to be the common law of Australia with respect to land titles:

"1. The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court.

2. On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part.

3. Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.

4. Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (e.g. authorities to prospect for minerals).

5. Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished to parcels of the waste lands of the Crown that have been validly appropriated for use (whether by dedication, setting aside, reservation or other valid means) and used for roads, railways, post offices and other permanent public works which preclude the continuing concurrent enjoyment of native title. Native title continues where the waste lands of the Crown have not been so appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (e.g. land set aside as a national park).

6. Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land. It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains. Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.

7. Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connection with the land or on the death of the last of the members of the group or clan.

8. Native title over any parcel of land can be surrendered to the Crown voluntarily by all those clans or groups who, by the traditional laws and customs of the indigenous people, have a relevant connection with the land but the rights and privileges conferred by native title are otherwise inalienable to persons who are not members of the indigenous people to whom alienation is permitted by the traditional laws and customs.

9. If native title to any parcel of the waste lands of the Crown is extinguished, the Crown becomes the absolute beneficial owner."

ASPECTS OF THE HIGH COURT'S HANDLING OF MABO

S.E.K. Hulme

The paper set out below was delivered by S.E.K. Hulme at a conference of the Samuel Griffith Society, held in Melbourne over the week-end of 31 July–1 August 1993. It is reprinted here with the kind permission of the author.

I WANT TO CONSIDER THIS AFTERNOON not the effect and implications of the decision in *Mabo*,[1] but certain aspects of the handling of the case in the High Court. The more one studies the case the more remarkable these will appear. Also worthy of remark is the way members of the judiciary have handled the matter since.

A. WHY WAS WHAT WAS SAID AND IS PERCEIVED TO HAVE BEEN DECIDED IN RELATION TO THE AUSTRALIAN MAINLAND, SAID AND DECIDED IN THAT CASE?

THE PARADOX

An observer examining *Mabo* would see a position broadly as follows:

Mabo as a piece of litigation concerned a claim by individual persons to specific parcels of land on each of three islands in Torres Strait. When those claims were seen as being doomed to fail it was turned into a claim that native title existed in relation to those islands.

There was before the Court in *Mabo* no claim or issue concerning land on the mainland of Australia. (Without wishing to offend, I use that expression throughout as including Tasmania.)

The Murray Islands are tiny. The largest of them is less than three kilometres long, and their total area is nine square kilometres. (By way of comparison, the parkland constituting the Albert Park reserve in Melbourne is some 2.5 square kilometres.) The islands have at all relevant times been inhabited by a people who seem to be called the Meriam[2] people. The Meriam people are of Melanesian race (as in New Guinea). In 1879, when Queensland annexed the islands, the Meriam people lived in established villages, cultivated the land, had a system of individual and perhaps family ownership of specific parcels of land, and had their own native court administering disputes as to land.

The Australian aborigines are not of Melanesian race, and their culture and customs are very different from those of people of the Melanesian race. At the relevant dates — 1788 and 1825 and 1829 — there were several hundred tribes of them, living nomadic lives on a mainland of some 2,967,895 sq. miles, or some 7,622,183 sq. km. They did not live in established villages, they did not cultivate the land, they did not have a system of individual or family ownership of specified parcels of land, and it follows that they had no court administering such a system.

There was placed before the High Court evidence as to the facts concerning the Meriam people and the Murray Islands.

There was placed before the Court no evidence whatsoever concerning mainland Australia; no evidence whatsoever as to Australian aboriginal culture and ways.

There were before the Court the Meriam Island plaintiffs, and the defendant the State of Queensland, for the Murray Islands are part of Queensland. The original co-defendant the Commonwealth of Australia was represented in *Mabo No. 1* but was dismissed from the action prior to *Mabo No. 2*, on the basis I presume that no issue in the case concerned it.

There were before the Court no Australian aborigines whatsoever, and no person or company holding freehold or leasehold title of any kind, ordinary or pastoral or mining, on mainland Australia; nor any other individual person or company to do with mainland Australia.

With no mainland issue, with no evidence as to the mainland, with no parties concerned with any mainland issue, without argument as to any mainland issue, the High Court proceeded to destroy what Deane and Gaudron JJ. described (175 C.L.R. at p.120) as "a basis of the real property law of this country for more than a hundred and fifty years".

The observer might wonder whether this kind of thing commonly happens in litigation.

THE GENERAL PRACTICE OF THE HIGH COURT AS TO THE DETERMINATION OF CONSTITUTIONAL ISSUES

In former days, including days now gone when international reputation saw the High Court as the finest appellate court in the English-speaking world, the well-established high policy and practice of the High Court was to deal with constitutional issues as sparingly as possible. If a case could be decided on the facts, that is how it was decided. If it

could be decided by determining an issue of general law, or interpreting a statute, that is how it was decided. Only if the case could not otherwise be determined would the Court deal with a constitutional issue. And it would confine that issue to the compass essential to determine the case.

All of this is one element of what is called "judicial restraint". A wise judge will be consciously aware that his basic function is to decide cases, and in doing so to say orally or in writing whatever is necessary to the proper discharge of that function and the development of the law in the manner of the common law. He will be reluctant to say anything that is not necessary. (More than one judge has recently found the unwisdom of expressing some relevant statement about a particular woman as an irrelevant statement about women generally.)

A wise judge will be aware that he will see the ramifications of a problem and the implications of proposed solutions more clearly when an actual problem has arisen and been argued out in front of him, than if he writes an essay on problems not yet before him.

A wise judge interpreting a constitution will be particularly watchful. A judge interpreting a constitution makes decisions in areas involving political disputation, where passions may run high. His decisions can affect the interplay of government and citizen; may decide what governments can and cannot do.

A wise judge will be aware that he will see the ramifications of a problem and the implications of proposed solutions more clearly when an actual problem has arisen and been argued out in front of him, than if he writes an essay on problems not yet before him. He will moreover be consciously aware that his role is to decide actual disputes by the exercise of judicial power; will be aware that he did not attain his position by election, and that he has no mandate from the Australian people to play any other part than that of a judge in the great issues of the day. If he does wish to play some other part he will step down from his court and pursue some other role in public life, as Dr. Evatt did in 1940 and Sir Ninian Stephen did in 1982. While he stays on the Court he will not behave as if he had a constitutional or civic or social agenda to achieve. Like a good bootmaker, a good judge will stick to his last.

It is worth documenting the policy the High Court has traditionally followed. The practice of deciding the constitutional issue only if the Court cannot otherwise dispose of the case has been something more often taken for granted than formally laid down. The young barrister learns it briskly enough the first time he tries to get the Court to do anything else. That it has been the general practice is not to be doubted. Indeed a judge will frequently put the constitutional point aside if he himself can dispose of the case on other grounds, even if his brethren find it necessary to address it. The judgment of Gavan Duffy C.J. in *Huddert Parker Ltd.* v. *The Commonwealth* (1931) 44 C.L.R. 492 provides a typical illustration :

"I need not deal with the constitutional question raised in this case. It is enough for me to say that the Regulations which are attacked are, in my opinion, inconsistent with Part III of the *Transport Workers Act* 1928–1929."

The associated practice of deciding the narrowest practicable constitutional issue, of not engaging in generalisations applying in circumstances wider than those of the case concerned, has been found wise in many courts of ultimate appeal. It was firmly established in the Privy Council.

No lawyer ever had greater experience in the Privy Council, as barrister and judge, than Lord Haldane. With the possible exception of Sir Roundell Palmer (later Lord Selborne), Mr. R.B. Haldane Q.C. had the largest Privy Council prac-

tice any barrister ever had. While Lord Chancellor from 1912 to 1915, and again in 1924, he made a point of presiding personally in every appeal from the Dominions. From 1912 to 1927 he probably sat on more such appeals than any Law Lord of his day. The judgment he prepared for the Privy Council in *John Deere Plow Company Ltd.* v. *Wharton* [1915] A.C. 330 contained his carefully considered statement on the whole matter. The issue in that case arose from a particular feature of the Canadian Constitution. But the statement is more general. Its intrinsic importance, and its relevance to the continuing *Mabo* situation, and its inherent wisdom, justify setting it out at length:

"The structure of ss.91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. *It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided.* Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co.* v. *Parsons* 7 App. Cas. 96 at p. 109 to the effect that in discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to them all, *it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.* The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words 'civil rights' in particular cases. An abstract logical definition of their scope is not only, having regard to the context of ss. 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality. This may not be difficult to determine in actual and concrete cases. But it may well be impossible to give abstract answers to general questions as to the meaning of the words, or to lay down any interpretation based on their literal scope apart from their context."[1915] A.C. at pp.338-339 (my emphasis).

The same approach has traditionally been taken in the High Court. I mentioned above the case of *Huddert Parker Ltd.* v. *The Commonwealth*, where Gavan Duffy C.J. refrained from dealing with the constitutional point because he himself could decide the case on narrower grounds. Other judges disagreed as to the narrow point, and for them, it was necessary to decide the constitutional point. The particular point concerned the "trade and commerce" power which s.51 (i) of the Constitution gives to the Commonwealth, but Sir Owen Dixon stated more generally the principle of deciding no more than was necessary:

"The difficulties which have been experienced in the United States in obtaining a satisfactory criterion by which may be determined the operation and application in such matters of the trade and commerce power, so indefinitely expressed, affords an additional reason for pursuing the course recommended in John Deere Plow Co. v. Wharton by Viscount Haldane L.C., of confining decisions upon questions of constitutional interpretation to concrete questions and avoiding general definitions of expressions occurring in the Constitution. In dealing with the trade and commerce power, it is peculiarly desirable to consider each case which arises without entering more largely upon the interpretation of the Constitution than is necessary for the decision of the particular case." 44 C.L.R. at p. 514 (my emphasis).

I am not aware of the Court having announced any intention of behaving otherwise than in accordance with this established practice.

THE COMMON LAW AND NEW COLONIES

Mabo involved the proposition that certain rights existing under the pre-existing society survived the annexation of the Murray Islands as a colony. That made it necessary to determine the laws applying in the islands after that acquisition.

In *Calvin's case* (1608) 7 Co. Rep. 2a, 77 E.R. 377, 2 St. Tr. 559, the court held that the means by which England might acquire new possessions fell into two categories. The first was descent to the monarch, and the second was conquest, a category seen fairly flexibly. The court held that in both cases the Crown was entitled to rule the new possession without regard to the requirements of English law, and free from interference by Parliament. The case was pretty much a put-up job, instigated by the new King James I (King James VI of Scotland), who had recently acquired the throne of England by descent, and with a court containing judges anxious to meet the royal wishes.[3,4]

While people's vision was confined to Europe — as for hundreds of years the vision of Europeans had been — that approach was realistic enough, especially as conquest was seen as flexible. Europe was settled throughout, and all parts of it fell under one or another system of government, whether na-

tion or principality or duchy or free city or whatever else. No other situation existed. Accordingly it was true enough to say that only if the monarch of one country inherited another, or as a result of conquest, could one country acquire territory of another.

But the world was changing. Three developments in particular were at work. The first was the coming of the Age of Discovery. In 1486 Bartholomew Diaz of Portugal sailed around the Cape of Good Hope into the Indian Ocean. After him Christopher Columbus and Vasco da Gama and the Cabots and Ferdinand Magellan and Francis Drake and Martin Frobisher and Quiros and Abel Tasman led a host of other seamen in opening up lands hitherto unknown. In some places they found villages and towns and established systems of life and government, just as in Europe. But in other places things were very different. In some of them — principally smallish islands — there were no inhabitants at all. Others contained nomadic tribes, who settled nowhere but might pass over any part of large areas of land.

The second development was the increasingly sharp distinction drawn between monarch and country. When in 1714 the Elector of Hanover inherited the throne of England as George I, that was seen to concern the monarch, not the country. No one talked in terms of England having acquired Hanover, or of Hanover having acquired England. George I did not expect to govern England in the manner he governed Hanover, and the English Parliament recognised that it had no power to pass laws for Hanover. Nor had the Prime Minister any role in advising George I as to the conduct of Hanoverian affairs. England and Hanover remained utterly distinct countries, which happened to have the same monarch. Monarch and country were different. In like manner it was beginning to be perceived that overseas possessions acquired under treaties came through the activities of the country, acting through government, and not through the monarch as such.

With all this there was an increasing emphasis on the laws of England and the rights of Englishmen. When King James I declared it treason to say that he was bound by the law, Coke famously replied "Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*": "The king ought not to be under man, but under God and the law." When men felt that James's son threatened those laws and those rights, they chopped off his head. It will not surprise that men willing to do this were beginning to think and to talk in terms of their "right" to enjoy the laws of England, rather than to suffer the royal whim, not only inside England but in England's colonies.

Third, and though discovery long continued and indeed still continues, the Age of Discovery was succeeded by the Age of Foreign Settlement. English settlers settled Roanoke Island off North Carolina in 1585, and though that settlement failed the 1607 settlement at Jamestown in Virginia proved permanent. Settlements followed in Newfoundland and Canada and the West Indies and South Africa and elsewhere throughout the world. Such settlements demonstrated as the case might be the peaceful settlement of totally unoccupied territory, or the somewhat more forceful settlement of land from which nomadic tribes retreated on the settlers' arrival: what were called at first "plantations".

Steadily the notion grew that settlement of land outside England constituted a separate manner of acquisition, with its own rules. The notion went back a long way.

Along with these plantations came questions as to the laws applying in them. Steadily the notion grew that settlement of land outside England constituted a separate manner of acquisition, with its own rules. The notion went back a long way. In *Calvin's case* itself it had been raised by Sir Francis Bacon, counsel for Calvin. The widely-read Bacon had pointed out that in these matters the scholars of other countries were beginning to turn to the Roman Law. The Romans too had built an empire in a world large areas of which were unoccupied or but lightly occupied, and their law had treated acquisition by occupancy of land belonging to no one as a different case from that of acquisition by conquest.

In *Calvin's case* the judges let that ball go through to the keeper. In *Craw* v. *Ramsay* (1670) Vaughan 274, 124 E.R. 1072, the court noted the possibility that colonies acquired by "plantation" of unoccupied territory should be treated differently from those acquired by conquest. In 1693 the House of Lords listened to an argument that English subjects who settled in uninhabited lands had

the common law as their birthright. The argument was unsuccessful on the day, as the football commentators say, but the tide was running that way. In 1720 the Legal Adviser to the Board of Trade expressed his opinion that in "plantations" which had been "settled" in that manner, "the common law of England is the common law of the plantations".

"Let an Englishman go where he will, he carries so much of law and liberty with him, as the nature of things will bear."[5]

In 1720 a Memorandum published by the Privy Council said:

". . . if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England."

That was to be contrasted with the position in case of conquest:

"Where the King of England conquers a country, it is a different consideration: for there the conqueror by saving the lives of the conquered, gains a right and property in such people; in consequence of which he may impose upon them what law he pleases." (1722) 2 Peere Williams, B. & C. 247.

That even in that latter case things were not meant to be totally arbitrary was shown by the rider:

". . . until laws [are] given by the conquering prince, the laws and customs of the conquered country shall hold place."

Clearly it suited the ordinary settler for the colony to be seen as a "settled" colony, for he would thus gain the right to live under not such rules as the Crown chose, but under such of the common law and the statute law of England as were appropriate to the condition of that colony.

In the period from *Calvin's case* in 1608 to the mid-18th century the common law in this area showed steady development. Faced with cases of acquisition by cession under treaty, it first treated cession under treaty as falling within the flexible category of conquest, and then treated cession as a separate new category alongside conquest. It recognised acquisition of "plantations" by "settlement" as another new category. And it dropped acquisition by descent from its normal statement of the rules.

By mid-18th century the common law was usually expressed in terms of three cases of acquisition, namely conquest, cession, and right of occupancy of lands "by finding them desart and uncultivated, and peopling from the mother country": *Blackstone* Commentaries on the Laws of England (1st ed., 1765) vol. I p.104. This last was the acquisition "by settlement".

Three points should be noticed. The first is a general one. It is that the common law was *not* saying that colonies *could* only be acquired in those three ways. Common law could not say that, for common law did *not* govern the acquisition of colonies; did *not* say which colonies had been acquired. Acquisition of colonies, and the binding statement as to which colonies had been acquired, were at all times a matter for the Crown.

"It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction. For such extension the authority of Parliament is not required." *Post Office* v. *Estuary Radio Ltd.* [1968] 2 Q.B. 740 Diplock L.J.at p. 753, a passage cited with approval by Gibbs C.J. in *New South Wales* v. *The Commonwealth* (1975) 135 C.L.R. 337 at p. 388 and (with Aickin and Wilson JJ. concurring) in *Wacando* v. *The Commonwealth* (1981) 148 C.L.R. 1 at p. 11.

Government *told* the courts what places England ruled. Common law governed the *results* of acquisition, and it was for that purpose that common law made its classification of the various modes of acquisition.

Government *told* the courts what places England ruled. Common law governed the *results* of acquisition, and it was for that purpose that common law made its classification of the various modes of acquisition.

The second point is to do with "settled" colonies. It is that the word "desart" had a much wider meaning than it does today. When *Etherege* wrote in *The Man of Mode* (1676), "What e'er you say, I know all beyond High-Park's[6] a desart to you," he had no vision of an uninhabited sandy Sahara Desert beginning somewhere along Kensington High Street. What he was saying was that to Sir Fopling Flutter everything beyond Hyde Park was rude, waste, and uncultivated.

In Act III scene 3 of *The Winter's Tale* Shakespeare has Antigonus say:

> "Our ship hath touch'd upon
> The deserts of Bohemia."

He means no more than the sea-shore. In his *Dictionary of the English Language* (6th ed., 1785) Johnson defined the adjective "desert" as "Wild; waste; solitary, uninhabited; uncultivated;

untilled", and the noun as "A wilderness; solitude; waste country; uninhabited place," and it is clearly enough in that wider sense that those authors — and Blackstone — used the word.

Third, and again in relation to settled colonies. Outside the Antarctic, a few quite small ultra-arid desert areas, and especially in past days numerous small islands, in few parts of the world is or has there been a permanent total absence of all human presence. The great bulk of the land surface, even where there has been no fixed settlement, has been part of an area over which, however rarely or lightly, one nomadic people or another has pursued its life. If being from time to time passed over by nomadic tribes disqualified an area from being settled, plantations would have been few indeed.

But nomadic people have no settlements to protect, and if intruders came they would frequently withdraw to other parts of their nomadic realm, rather than challenging their presence. Their departure would leave behind neither buildings nor cultivation nor other sign of ownership or achievement.

The issue was the acquisition of land by occupancy; by "peopling" the land; by "settlement". Fundamental to that was the cultivation of land, for cultivation ties those who sow to being still there to reap, and it is cultivation above all else which leads to land becoming "settled". The rule developed that the fact that land was known to fall within a possibly enormous area over which there roamed a nomadic people, who did not cultivate the land, did not remain, did not build, in short did not settle the land, was not inconsistent with the acquisition of it by people who did cultivate, did remain, and did build: people who did "settle". This had support in international law. In his *Law of Nations* (1758) Vattel argued that failure to cultivate land meant failure to take lawful possession of the land, so leaving the land available for acquisition by settlement by those who later on did settle and cultivate it.

Need I say that this did not mean that for legal purposes the country was uninhabited, as if one said that for legal purposes brown was green. Terra nullius is not the Latin for "No one lives in this country". It never did mean that a stretch of country had no inhabitants. It meant that the soil was the property of no one, either because there was no one there at all, or more normally because the people who might from time to time pass over it or hunt on it had no concept of individual ownership of it. It was the soil, not the country — there was no "country" yet — which was not "occupied"; was not "settled". Nothing turned on the reason for that, but the usual one was that the nomadic and hunting life of those who were from time to time present had never created a need for such a concept.

As to the results of acquisition, common law maintained the distinction between colonies acquired by conquest or cession on the one hand and those acquired by settlement on the other. Blackstone said of the first two cases:

"But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country." *Commentaries*, Book I, Introduction sect. IV, vol. I p.105.

The case of the "unoccupied" country was different.

"For it is held that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them." *ibid.*, pp.104–105.

There had triumphed the attractive argument which in 1693 Sir Bartholomew Shower had put to the House of Lords without success, in *Dutton* v. *Howell* (1693) Shower P.C. 24 at p.32:

". . . the Common Law must be supposed their Rule, as was their Birthright, and `tis the test, and so to be presumed their Choice; and not only that, but even obligatory, `tis so."

THE FACTS BEFORE THE COURT IN MABO

I said a little as to the facts earlier, but it is convenient to cover the whole ground here. The Murray Islands lie at the eastern end of Torres Strait. They are closer to New Guinea than to Australia, and (with a courteous indication that they are part of Australia) they appear in *The Times Atlas of the World* on the map of New Guinea, not that of Australia. They consist of three immediately adjacent islands. The largest is Murray Island (Mer), which is oval shaped, some 2.8 km. long by 1.6 km wide, and has an area of 4.6 sq. km. A channel 900 m. wide separates it from the other and smaller islands, Dauar and Waier. These two islands together have an area of about 4.5 sq. km. Altogether then the Murray Islands total some 9 square kilometres.

The Murray Islands were annexed in 1879 by the Governor of Queensland, acting under the authority of Imperial Letters Patent and an Act of the Queensland legislature. They became part of Queensland on 1 August 1879, and so they remain.

It was not disputed that the Murray Islands had been occupied by the Meriam people since time immemorial. The Meriam people are not by race Australian aborigines. They are Melanesian people (probably originally from New Guinea), and they have a Melanesian culture. The evidence showed that since time immemorial the Meriam people had lived in permanent groups of huts on the foreshore immediately behind the beach, the different groups of huts being organised in named villages. The evi-

dence was that at the time of annexation gardening "was of the most profound importance". There was some gardening within the villages, but the main garden land was located a little distance inland from the villages. All garden land was identified with a named village and the relevant individual.[7] Moynihan J. reported:

"Gardening was important not only from the point of view of subsistence but to provide produce for consumption or exchange during the various rituals associated with different aspects of community life. Marriage and adoption involved the provision or exchange of considerable quantity of produce. Surplus produce was also required for the rituals associated with the various cults at least to sustain those who engaged in them and in connexion with the various activities associated with death.

It is obvious as a matter of general knowledge that the conditions and life on the small islands were as different from conditions and life on the enormous Australian mainland as they could easily be.

"Prestige depended on gardening prowess both in terms of the production of a sufficient surplus for the social purposes such as those to which I have referred and to be manifest in the show gardens and the cultivation of yams to a huge size. Considerable ritual was associated with gardening and gardening techniques were passed on and preserved by these rituals. Boys in particular worked with their fathers and by observations and imitations reinforced by the rituals and other aspects of the social fabric gardening practices were passed on." 175 C.L.R. at p. 188.

The evidence was that "The natives are very tenacious of their ownership of the land, and the island is divided into small properties which have been handed down from father to son from generation to generation." There was no concept of public or general ownership. All was individual or family group. Shortly prior to the 1879 annexation the Meriam people had, at the suggestion of a visiting Queensland official, appointed a headman, or Mamoose. The institution continued after annexation, and the Mamoose's functions included those of a magistrate. At the time of annexation, in his Island Court he determined disputes as to land, applying a mix of rules containing an element of recognition of individual rights and power plus an element of a search for social harmony.

Deane and Gaudron JJ. summed up the position:

"It suffices, for the purposes of this judgment, to say that the Meriam people lived in an organized community which recognized individual and family rights of possession, occupation and exploitation of identified areas of land.

"It is true . . . that it is impossible to identify any precise system of title, any precise rules of inheritance or any precise methods of alienation. Nonetheless, there was undoubtedly a local native system under which the established familial or individual rights of occupation and use were of a kind which far exceed the minimum requirements necessary to found a presumptive common law native title." 175 C.L.R. at pp.115–116.

Their Honours recognised in terms that the facts were unusual:

"The entitlement to occupation and use differed from what has come to be recognized as the ordinary position in settled British Colonies in that, under the traditional law and custom of the Murray Islanders, there was a consistent focus upon the entitlement of the individual or family as distinct from the community as a whole or some larger section of it." 175 C.L.R. at p.175.

The Contrast with Australia

There was no evidence before the Court as to mainland Australia, for there was no issue concerning the mainland. But it is obvious as a matter of general knowledge that the conditions and life on the small islands were as different from conditions and life on the enormous Australian mainland as they could easily be. In his *Triumph of the Nomads* (1st ed., 1976) Blainey compares the standard of living of the Australian aborigine in say 1800 favourably enough as against that of the great mass of Europeans: see pp.225–228. The people of the Murray Islands probably had a standard of living at least as good. But there was a large contrast between the two. On the mainland the race was different; there were no villages, let alone towns; the life was nomadic, lived over vast distances. In particular, the life did not include gardening or any kind of cultivation.

"New Guinea had gardens and pigs, and several islands in Torres Strait grew vegetables in neat gardens, but the new way of life did not apparently penetrate Australia." *ibid.* at p.230.

Gardening came very close to Australia:

"The invasion of domesticated plants and animals came close to Australia. From the coast of south-east New Guinea it began to cross the stepping stones in Torres Strait. . . . Gardening was not pursued in any part of aboriginal Australia, but curiously it took root on islands in Torres Strait. . . . The islands at the eastern end of the strait had the prolific gardens. The Murray Islands, lying where the shallow waters of Torres Strait met the deep water of the Coral Sea, possessed volcanic soil, ample rains and dense vegetation. Much of the vegetation on the five square miles of the main islands was periodically cleared for the gardens, and the island a century ago supported 800 to 1,000 people. Most of the meals came from the tiny gardens. . . . Gardens were also cultivated on islands which were so close to Australia that they could be clearly seen from the high ground near Cape York. . . ." *ibid.* at pp.236–237.

But the final jump was never made:

"There is a touch of drama about the way in which the world-wide advance of herds and gardens halted within sight of a strip of northern Australian coast. Two different ways of making a living stood side by side: economic systems which were as different as communism and capitalism. Moreover they co-existed in relative harmony for perhaps as long as several thousand years. Why the domestication of plants and animals did not affect Australia is one of the baffling questions in prehistory: and no sure answer may emerge." *ibid.* at p.237.

Nor, one may safely enough assert without enlarging on the matter, was there on the mainland any concept of individual or family ownership of particular parcels of land.

THE CASE MADE FOR THE PLAINTIFFS

Given the state of the law, the critical importance of the issue whether the islands were "settled" prior to their acquisition, and the critical importance to that question of both permanent settlement based on cultivation and a system of law to do with land ownership, it is not surprising that the argument for the plaintiffs stressed the organised ownership and use of land on the Murray Islands. The report of the argument for the plaintiffs says:

"On the judge's findings there was a community in occupation of all the Islands, and within that community there was a society functioning within which individuals were treated as owners of their respective parcels of land. Each had an interest in his parcel. The position is analogous to that where colonization takes place and the Crown annexes territory where there are private owners holding under a pre-existing system." 175 C.L.R. at p.8.

It was argued that the cases to do with the position on the mainland were inapplicable, for in the Murray Islands the soil (not merely the country) was occupied.

"The (mainland) cases proceed on the basis that the land was unoccupied, so that the Crown took an absolute rather than an ultimate title. They are inapplicable to a case such as the present where the evidence is that the Islands were occupied and where a real society flourished. Where land is unoccupied in fact or in fiction, the Crown's ownership is not merely an ultimate or radical title but is absolute or real ownership. The whole of the land is waste land, and waste lands legislation applies. That is not the case with occupied land." 175 C.L.R. at p. 9.

The case made, then, was that on the evidence before the Court the position in the Murray Islands was very different from that assumed by the cases to do with mainland Australia, and that within the established principles of the common law, ownership of the type claimed could be held to exist on the Murray Islands without one word being said as to the position under the quite different facts on the mainland.

THE RESPONSE

One might have expected the judgments to discuss the significance of the facts to do with the Murray Islands, as found by Moynihan J. and as stressed by counsel for the plaintiffs. The claim made for them could have been discussed without mention of the mainland at all. And if somewhat unnecessarily and dangerously the Court were going to say anything as to the legal position on the mainland, one might have expected recognition that such sources as were properly available to the Court (there was no actual evidence before the Court as to the facts on the mainland) showed that on the mainland there was a quite different factual situation. One might have expected discussion of the significance of the differences. Nothing of either sort occurs.

The Judgment of Brennan J.[8]

An explanation is intended to be given in a very curious passage in the judgment of Brennan J., 175 C.L.R. at pp.25-26. It is first said, that the argument for Queensland was cast in terms applying to all colonial territories "settled" by British subjects. Counsel for the Meriam people would have said that the easy answer to that was that the Murray Islands had not been acquired by settlement, and could not have been so acquired, because they were already settled. Brennan J. says nothing as to that, saying instead:

"Assuming that the Murray Islands were acquired as a 'settled' colony (for sovereignty was not acquired by the Crown either by conquest or by cession) the validity of the propositions in the defendant's chain of argument

cannot be determined by reference to circumstances unique to the Murray Islands; they are advanced as general propositions of law applicable to all settled colonies." 175 C.L.R. at p.26.

After that Brennan J. hardly discusses the facts as to the Murray Islands again.

The logic of the first part of that paragraph is less than impressive. Remembering that the evidence showed the existence on the Murray Islands of an organised system of land ownership and cultivation, which was inconsistent with acquisition by settlement, Brennan J. might with equally good — or bad — logic have said:

The common law did not say that there were only three ways to acquire colonies. It could not say that, for as seen earlier it was government, not courts, which said which colonies had been acquired.

"Assuming that the Murray Islands were acquired by cession (for sovereignty was not acquired by settlement or conquest)",

or again

"Assuming that the Murray Islands were acquired by conquest (for sovereignty was not acquired by settlement or cession)".

The position is a plain nonsense. There is of course no basis whatsoever for saying that if the case is not within A or B it must be within C, unless you first posit that every case must fall within one of the three. The common law did not say that there were only three ways to acquire colonies. It could not say that, for as seen earlier it was government, not courts, which said which colonies had been acquired. Common law was concerned with the results of acquisition, and it was for that purpose that it sorted into categories the cases of acquisition which had been brought to its notice.

Faced with a case where government had found a mode of acquisition which did not fall within the perceived boundaries of any of the three categories recognised to date, the common law would not have said it had no answer. It is a principle of the common law that it always has an answer. A good common law judge in form and seeing the ball well would have found easy enough the task of dealing with the matter. He might extend the boundaries of one of the already recognised categories, if that seemed appropriate; or he might recognise a fourth category, with rules established by analogy from the categories already established. That is precisely what the common law had done in this very area in the 17th and 18th centuries, when it first extended the category of "conquest" to include cases of acquisition by cession, then recognised cession as a separate category, and recognised acquisition by settlement as another category.

Any fair analysis would have found the position on the Murray Islands very much closer to both conquest and cession than to settlement. This was the age of blackbirding. The evidence was that the Murray Islands had been raided by blackbirders, its women seized, and its people murdered: see per Brennan J., 175 C.L.R. at p.19. It passes belief that the Meriam people had not become well acquainted with the efficacy of cannon and musket.

In September 1879 Captain Pennefather "mustered the natives" on the beach and told them "that they would be held amenable to British law now the island was annexed" (Brennan J., 175 C.L.R. at p.21). It appears that the natives accepted the annexation and what they understood of its implications. The good common law judge might perfectly sensibly see their conduct as a politic surrender to overwhelming force, treat it as just as much a case of conquest as if they had thrown a few unavailing spears and been cut down by a volley of musketry, and hold the case to fall within the existing boundaries of conquest. Or he might with perfect propriety extend those boundaries to include the case of peaceful surrender to overwhelming force.

Alternatively, and remembering the hard lessons the Meriam people had no doubt learned at the hands of the blackbirders, the judge might analyse the events as resembling a request/consent of the Meriam people, acting directly rather than through a government, for the good and powerful Queen to take control and protect them against the wickedness of the outside world. On that basis he might see the case as one of cession, whether within the existing category or an extension. Or he might recognise a fourth category of peaceful surrender or direct invitation without conquest or treaty, with rules similar to those attaching to those closely related categories.

Any of those several analyses would have been far closer to reality than Brennan J.'s course of

It is one thing to say that land was *available* for acquisition by settlement. It is another thing to treat it as having actually been acquired by settlement. That surely demands *actual* settlement; an *actual* "peopling" of the land.

passing by without mention the quite critical facts of cultivation and land ownership, and proceeding on the basis that it was proper to categorise the acquisition of Murray Island as a case of acquisition by "settlement," just like the mainland.

There is indeed a further point. It is one thing to say that land was *available* for acquisition by settlement. It is another thing to treat it as having actually been acquired by settlement. That surely demands *actual* settlement; an *actual* "peopling" of the land. The simple and undisputed fact is that England did not "people" the Murray Islands. How then *could* it have acquired the Murray Islands by settlement? The point escapes attention by Brennan J. or any other member of the majority.

At p.40 Brennan J. approaches the matter from another direction. At pp.38–40 Brennan J. has noted the words "without settled inhabitants or settled law" in *Cooper* v. *Stuart* (1889) 14 App. Cas. 286 at p.291 (a phrase which is of course true in the sense which the word "settled" bears in this area), and has set against it the finding of Blackburn J. in *Milirrpum* v. *Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141 at p.267 that there was "a stable order of society" and a "government of laws and not of men" (which is in no wise inconsistent with what was said in *Cooper* v. *Stuart*). He concludes:

"The theory that the indigenous inhabitants of a 'settled' colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher 'in the scale of social organization' than the Australian Aborigines whose claims were 'utterly disregarded' by the existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not." 175 C.L.R. at p. 40.

This is heady stuff indeed. I have a number of comments:

(i) It is simply not true that the theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land depended on a discriminatory denigration of the inhabitants, their social organisation and customs. All that is true is that the availability of land for acquisition by settlement depended on the view that those persons who from time to time were or might have been present on the land prior to acquisition were nomadic peoples who did not "settle" the land (and who almost automatically had no concept of individual ownership of land, and therefore claimed and had no proprietary interest in land in the area concerned). To say that is in no way a "discriminatory (or any other kind of) denigration" of them, unless it be automatically a "denigration" of a native race to say that its life style is nomadic, or that its culture did not include the concept of individual ownership of land. Until now I had not thought that it was.

(ii) I do not understand what the word "discriminatory" is doing in Brennan J.'s sentence. What would a non-discriminatory denigration be? Does the word "discriminatory" have any operation in the sentence other than making the "denigration" sound worse?

(iii) If the theory that the indigenous inhabitants had no proprietary interest in the land rested on a view of the indigenous inhabitants and their social organisations and customs which was *not* discriminatory and was not a denigration *but was in fact wrong*, would that invalidate the theory? Is the essential vice of the view taken that it was false, or that it is unfashionable?

(iv) It is not clear what separate effect is to be given to the latter part of the phrase "false in fact *and unacceptable in our society*". Does being "unacceptable in our society" involve a separate judgment from truth? Say that it were held that the statement was *true* in fact. Would it still be "unacceptable in our society"? If so, by what criteria does the High Court decide what truths are and what truths are not acceptable in our society? Who asked it to do that? What is the source of those criteria? Where does the High Court find them? Where may the good citizen find them, so that he can plan his legal arrangements?

(v) It may be that at this point in his reasoning Brennan J. has already decided that the "basis of the theory" is indeed a discriminatory

denigration. If so he has decided that issue in favour of aborigines generally without there being before the Court any evidence whatsoever as to aborigines generally, and without hearing argument from any person affected by that decision.

(vi) If at this point Brennan J. has *not* already decided that point, he now proposes to go on and do so without evidence and without the presence of or argument from any interested party at all.

(vii) Whatever be the position as to all that, it is simply not true that to apply the existing authorities as sought by the plaintiffs would have been to embark on an inquiry "whether the Meriam people are higher 'in the scale of social organization' than the Australian Aborigines whose claims were 'utterly disregarded' by the existing authorities". The inquiry would have been whether the evidence showed that the Meriam people had a social structure and concepts of ownership such as to make an acquisition of the islands of which they were in permanent occupation not capable of being an acquisition by settlement within the applicable common law principles. There would have been no comparison whatever with mainland aborigines or their social organization or whatever else.

(viii) Has any other plaintiff, anywhere, ever been told that a court cannot decide a claim he has properly brought to the court, because to do so would involve deciding whether he was higher in the scale of social organisation than certain other people?

(ix) Say that after considering the mainland position Brennan J. had decided that practical dictates of common sense required the Court to stand by the position existing on the mainland for a hundred and fifty years. Would he have said that the Meriam claim must also fail, because to determine it would be to inquire whether the Meriam people were higher up the scale of social organisation than aborigines on the mainland? Or would he in those circumstances have recognised that justice compelled him to determine the Meriam claim that the Meriam position was different from that on the mainland, notwithstanding any implication as to position in the scale of social organisation? If not, when are we to be told which claims can no longer be considered in Australian courts because to consider them is to involve a comparison as to comparative positions on the scale of social organisation? If Brennan J. would determine the claim in those circumstances, why should the court not determine it immediately, in circumstances where it had not decided what the mainland position would be?

(x) If Brennan J. had felt discomfort as to a contrast between an assumed successful result in relation to the Murray Islands and what might be the position under the different facts on the mainland, could not the position have been met by a statement that the position on the mainland might need consideration, but that must await determination in a case concerned with and properly organised in respect of the mainland?

Rejecting such courses for no stated reason, the course adopted was to proceed to over-rule long-decided cases, in the total absence of argument from interested persons, and a total absence of evidence as to aborigines generally. This was for some reason seen as preferable to deciding the necessary case, as presented, and putting mainland questions aside for consideration, with full evidence and parties and argument, when they arose.

I find it difficult to imagine any earlier High Court proceeding in this way.

The course adopted was to proceed to over-rule long-decided cases, in the total absence of argument from interested persons, and a total absence of evidence as to aborigines generally.

I turn to an earlier associated passage from Brennan J.'s judgment. Here it seems to be said that any differences as to the facts on the mainland would be irrelevant. The passage reads:

"Nor can the circumstances which might be thought to differentiate the Murray Islands from other parts of Australia be invoked as an acceptable ground for distinguishing the entitlement of the Meriam people from the entitlement of other indigenous inhabitants to the use and enjoyment of their traditional lands. As we shall see, such a ground of distinction discriminates on the basis of race or ethnic origin for it denies the capacity of some categories of indigenous inhabitants to have any rights or interests in land." 175 C.L.R. at p.26 (my emphasis).

Personally I find that the scariest passage in the whole of the Mabo judgments.

The passage is not quite as clear as one would wish so important a passage to be. The first sentence says, clearly enough, that circumstances

"which might be thought to differentiate the Murray Islands from other parts of Australia cannot be invoked as an 'acceptable' (here's that word again) ground for distinguishing the entitlement of the Meriam people from the entitlement of other indigenous inhabitants to the use and enjoyment of their traditional lands." Well might the Meriam people inquire "Who invited other indigenous inhabitants to our party?"

The Meriam case claimed nothing, asserted nothing, set out to prove nothing, and argued nothing as to the position on the mainland or as to the rights of other indigenous inhabitants. All it said was "The cases cited by Queensland are not about people like us." Where then did Brennan J. get his starting point? It is hard to believe that when a plaintiff asserts that on the law as it stands the facts he proves about himself entitle him to a particular result, and the defendant raises no allegation as to discrimination, the court is to look around and inquire whether the facts about him are different from those about other people.

If the men's 100 metres race at the Olympic Games is habitually won by someone of negro race, as it in fact is, is the race to be seen as discriminating against whites?

Then the unclear part of the passage follows: "such a ground of distinction discriminates on the basis of race or ethnic origin for it denies the capacity of some categories of indigenous inhabitants to have any rights or interests in land." It is not clear whether the alleged discrimination is founded merely on the assumed fact that there are "some categories of indigenous inhabitants" (if "some categories" constitutes a race) who cannot assert about themselves facts such as the Meriam people assert about themselves, or on that plus the further assumption that the reason why those indigenous inhabitants cannot assert those facts about themselves flows from a lack of capacity to have produced those facts.

Founded on the first assumption only, the proposition would surely be nonsensical. If one tribe chooses to develop in one way and another tribe in another, is each and every distinction founded on facts which are true of one tribe but not the other to fall foul of the *Racial Discrimination Act* 1975? Even where a difference in the facts does indeed flow from a difference in capacity, is it not carrying the idea of "discrimination" to absurd lengths, to say that the difference in the facts must automatically be ignored? If (as is likely) another runner beats me over a hundred yards, is it discriminatory to award him the race, because the reason that he ran faster than me was the difference in our capacities to run fast? If the men's 100 metres race at the Olympic Games is habitually won by someone of negro race, as it in fact is, is the race to be seen as discriminating against whites? Where Brennan J. is getting to in the area of discrimination is a matter of deep concern.

Deane and Gaudron JJ.

Deane and Gaudron JJ. said in partial explanation:

"The issues raised by this case directly concern the entitlement, under the law of Queensland, of the Meriam people to their homelands in the Murray Islands. Those issues must, however, be addressed in their wider context of the common law of Australia. *Their resolution requires a consideration of some fundamental questions relating to the rights, past and present, of Australian Aborigines in relation to lands on which they traditionally lived or live."* 175 C.L.R. at p.77 (my emphasis).

Why that was so Their Honours did not say. I deal below with related matters in Their Honours' judgment.

B. THE ABSENCE OF INTERESTED PARTIES

It is of course not the practice for there to be represented before any court every person likely to be affected when the decision operates as a precedent for other cases. Life is too short for that, and courtrooms too small. The right of representation is limited in the main to those directly interested in the actual proceeding. But the court will be astute to ensure that there are represented before it parties with an interest either way on each of the issues which the court has to decide.

Here the Court set out, in the just-quoted words of Deane and Gaudron JJ., on "a consideration of some fundamental questions relating to the rights, past and present, of Australian Aborigines in relation to lands on which they traditionally lived or live". Not often before, if at all, has the High Court — or, I would think, any other common law court — set out on "a consideration of the rights, past and present" of a group of persons, without there being represented in the court any one of those persons or

any one of many classes of person whose own rights, past and present, were likely to be affected by the decision on the rights concerned.

It is of course true that because they were not parties, no aborigine or property-owner on the mainland is technically bound by what was said and in that sense decided. The reality may be taken to be represented by the words of Deane and Gaudron JJ. The majority meant to decide these issues, and it did so in the absence of the interested persons.

It will be seen that the lack of representation applied to aborigines as well as to others. It might be thought that in the result the aborigines did not need to be represented. But in fact certain aborigines have been very critical of *Mabo*. On 26 January 1993 Mr. Gary Foley said on the Breakfast Show on radio 3CR:

"I mean, Jesus Christ, that is as laughable and as idiotic a proposition as what terra nullius was. So, you know, I have got no faith in the Mabo decision. I think it is a heap of shit.

"In fact the Mabo decision needs to be fought as vigorously as what terra nullius was. I mean, Mabo is the terra nullius of these days. I mean, you know, it is as idiotic a proposition as what terra nullius was.

"I mean, I just find the basic proposition of Mabo insulting. To say to people who you have rounded up, kicked off their land, brutalised, massacred large numbers of them, whacked in concentration camps for a hundred years, done everything you can to destroy their language and culture and custom, steal their children from them, stick them in little white homes and then turn them into domestics and sex slaves and things like that and then you turn around 200 years later and you say, you people can't prove that you have had an ongoing link with your land, so therefore any rights that you had were extinguished 200 years ago. That is a load of garbage."

That criticism might strike one of the majority six as somewhat outspoken, perhaps unfair, perhaps even ungrateful. The fact remains that explicit in each of the majority judgments is a considered denial to many aborigines — 90% of them, I think I have read in the press — of rights and potential benefits held to be available to a minority of aborigines. That denial was made by six members of the High Court of Australia without one word having been said in the court on behalf of the excluded aborigines. Whether there was much or little to say is something one never knows till opportunity is given to say it. There is a doctrine requiring that an interested party be heard. It is called "natural justice".

Although as just stated the issue is not technically closed, the High Court has never (I believe) overturned as needing fundamental rethinking a doctrine it has overturned the legal world in stating just months before. *Mabo* has already caused great uncertainty and harm in the mining and pastoral and financial communities, within Australia and internationally. A restatement of a basic part of the recently stated doctrine would cause deep concern in those communities, and damage to the public's already tarnished perception of the High Court. In all likelihood the aboriginals excluded by this part of the *Mabo* doctrine will remain excluded, though unheard at any effective time. Mr. Foley's criticism illustrates vividly just one aspect of the wisdom of past High Courts in deciding as narrow a constitutional issue as possible, so that before something is decided it has been argued first by interested parties; and the unwisdom of what was done here.

It will be seen that the lack of representation applied to aborigines as well as to others. It might be thought that in the result the aborigines did not need to be represented. But in fact certain aborigines have been very critical of *Mabo*.

C. EVIDENCE AND LANGUAGE

I have been asked by a great historian where the High Court got its "facts" as to the Australian mainland. The particular point he had in mind was the entire absence of recognition that the great slayer of aborigines has been disease, something he had thought accepted by historians of all schools. But the general point is much wider. The inquiry throws into high relief three particular passages in the judgment of Deane and Gaudron JJ. The whole matter is worth attention.

At p.104 Deane and Gaudron JJ. speak of:

"the conflagration of oppression and conflict which was, over the (nineteenth) century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame."

At p.109 the following passage appears:

"The acts and events by which the (dispossession of the Aboriginal peoples of most of their traditional lands) was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices."

Courts get their facts from two main sources. The first is the evidence of one kind and another actually put before the court. The other is via the doctrine of "judicial notice". The court takes judicial notice of facts so notorious that to require evidence would be to waste time and money. The court needs no evidence for the proposition that in mainstream Australian society Christmas is celebrated on 25 December, or that Parliament House is in Spring Street. The court will also take judicial notice of facts which the court does not itself know (though judges with more pride than sense sometimes speak in terms of "reminding" themselves) but which meet the requirement of being capable of "immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy". Morgan: *Some Problems of Proof under the Anglo-American System of Litigation,* p.61. The court will consult works of unimpeachable reference to ascertain such things as the precise meaning of a word, the date of a well-known historical event, or the times of the tides.

The doctrine and its limits were indicated by Dixon J. in *The Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1 at p.196:

"Just as courts may use the general facts of history as ascertained or ascertainable from the accepted writings of serious historians . . . and employ the common knowledge of educated men upon many matters and for verifications refer to standard works of literature and the like . . ., so we may rely upon a knowledge of the general nature and development of the accepted tenets or doctrines of communism as a political philosophy ascertained or verified, not from the polemics of the subject, but from serious studies and inquiries and historical narratives. We may take into account the course of open and notorious international events of a public nature. And with respect to our own country, matters of common knowledge and experience are open to us . . . . But we are not entitled to inform ourselves of and take into our consideration particular features of the Constitution of the Union of Socialist Soviet Republics."

"Two things follow. The first is that one cannot use this head of judicial notice as the basis of findings of fact in areas of controversy. Findings in controversial areas require actual evidence. Judicial notice will justify a judge in looking up a book and taking judicial notice that the Battle of Waterloo took place in 1815. (A better judge would have known it.) The doctrine will not justify him making a finding that the plays we attribute to Shakespeare were written by Bacon. Nor does the position become any different if the judge reads all the sources on a controversial matter and forms his own view on the matter. That is not taking judicial notice, but acting on the judge's personal view on a matter as to which no evidence is before the court."

The second is that when a judge does rely on this aspect of judicial notice, one will expect him to cite the "sources of indisputable accuracy" upon which he has relied. The particular importance of this is that otherwise no foundation for the court's findings will be known to the parties or to the public.

Judgments of other courts are not in themselves evidence, but one can easily imagine findings in such a judgment becoming accepted as a scholarly and authoritative statement of which judicial notice is capable of being taken.

In my view the statements of Deane and Gaudron JJ. fail utterly to meet the requirements for being established by judicial notice. Neither statement seems to me capable of "immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy".

Where cases are instituted in the High Court it has become usual to remit the finding of facts to another court more accustomed to seeing witnesses. That practice was followed in *Mabo*, the High Court remitting to the Supreme Court of Queensland on 27 February 1986 for hearing and determination all issues of fact raised by the pleadings. The task fell to Moynihan J., who delivered his determination on 16 November 1989. All the evidence and findings concerned the Murray Islands. None concerned the Australian mainland. So none of Deane and Gaudron JJ.'s "facts" as to the mainland came from that source.

The validity of the first two passages cited above from the judgment of Deane and Gaudron JJ. must as I see it rest on the doctrine of judicial notice. I know of no other basis upon which a court can introduce, as facts justifying a decision *inter partes*, facts not put before the court by evidence.

In my view the statements of Deane and Gaudron JJ. fail utterly to meet the requirements for being established by judicial notice. Neither statement seems to me capable of "immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy". On the contrary, both are highly controversial and much controverted. They are the very kind of findings which cannot be made on the basis of judicial notice.

In their private capacities it is surely the privilege of Deane and Gaudron JJ. to undertake whatever research they choose on these issues, and to

come to whatever honest views, just or unjust, partial or impartial, might follow. In their private capacities they surely have the right to voice such views as they will, at school Speech Days or anywhere else appropriate for public utterance by judges. But when they function as judges and deliver findings of fact in the High Court, they operate under the constraints of legal doctrine. I cannot avoid the view that they made findings which had no basis in evidence properly before them.

I would add two particular comments on those statements. The p.104 passage speaks of:

"the conflagration of oppression and conflict which was, over the (nineteenth) century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame."

I could well understand it being said, and rightly said — though it would probably be no business of the High Court to say it — that the condition and position and prospects of the aboriginal people in our present society was unacceptable and that the nation ought to try to do something about it: including thinking about the problem before throwing money at it, for I cannot avoid the view that the unthinking expenditure of many billions of dollars in the last generation has made the condition and position and prospects of aborigines steadily worse. But the phrase "national legacy of unutterable shame" seems to suggest that the whole nation is to be unutterably ashamed.

I take the existence of a "national legacy of unutterable shame" to reflect an acknowledgment of moral turpitude in whoever did whatever they did, and an acceptance by all the nation of some kind of personal responsibility for what they did. For myself as merely one citizen, I am sure that some people behaved with moral turpitude, and that some did not. I know that government official after official was instructed to and did endeavour to protect aborigines. To go no further than this city, the reason that Governor Bourke sent Police Magistrate Stewart to visit and report on the forbidden and unlawful settlement here at Bearbrass in 1836, was that there had been reports of violence to aborigines.

I do not know enough to draw up a balance sheet of moral turpitude or otherwise across people largely unknown, black and white, throughout the whole continent, during a century of Australia's history. As for acceptance of personal responsibility, I have enough trouble bearing, and properly bearing, personal responsibility for what I myself have done. I am perfectly willing to bear in addition my responsibility as a citizen to help bring about whatever is proper in this age to repair ills now existing. I have no intention of adding to my troubles by accepting personal responsibility for the acts of others, or of marching through the world trying to repair past ills to people now dead.

Let me say this about that. The mediaeval church held it against all Jews, that Christ had been crucified by Jews a millennium earlier. I had thought that attitude was now regarded as misplaced and unjust; that later Jews did not bear a burden of guilt for what was done far earlier, by others. I read again and again that we must not blame present-day Germans for what Hitler did in the war, nor blame present-day Japanese for what Japan did in the war. That all sounds fair enough. One wonders whether Deane and Gaudron JJ. would say that Germany bears a national legacy of unutterable shame, for the Holocaust. Or Japan, for Pearl Harbour and many subsequent atrocities. If not, it seems somewhat perverse to find a national legacy of unutterable shame for what (they say) was done in Australia earlier still.

I remind you of the second passage:

"The acts and events by which the (dispossession of the Aboriginal peoples of most of their traditional lands) was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices."

Mutatis mutandis, the comments just made apply again. I am willing to do whatever can be done to cure present ills, to give people hope and opportunity for the future. All that I can understand. I do not know how to retreat from a past injustice. If someone was unjustly killed in 1820, he is dead. What does it mean, to retreat from that? "*Talk* cant if you will," said Samuel Johnson, "But clear your *mind* of cant."

The third passage, at p.120, contains what lawyers might call a confession and avoidance. It sets out to explain and justify the first two:

". . . we are conscious that, in those parts of the judgment which deal with the dispossession of Australian Aboriginals, we have used language and expressed conclusions which some may think to be unusually emotive for a judgment in this Court. We have not done that in order to trespass into the area of assessment or attribution of moral guilt. As we have endeavoured to make clear, the reason which has led us to describe, and express conclusions about, the dispossession of Australian Aboriginals is that the full facts of that dispossession are of critical importance to the assessment of the legitimacy of the propositions that the continent was unoccupied for legal purposes and that the unqualified legal and beneficial ownership of all lands of the Continent vested in the Crown. It is their association with the dispossession that, in our view, precludes those two propositions from acquiring the legitimacy which their acceptance as a basis of the real property law of this country for more than a hundred and fifty years would otherwise impart."

I add its concluding part:

". . . in the writing of this judgment, we have been assisted not only by the material placed before us by the parties but by the researches of the many scholars who have written in the areas into which this judgment has necessarily ventured. We acknowledge our indebtedness to their writings and the fact that our own research has been largely directed to sources which they had already identified."

I have several comments.

(i) Unless I have been misled all these years when I thought I was reading judgments of the High Court, I can feel no doubt that the language of Deane and Gaudron JJ. in fact is unusually emotive for a judgment of the High Court. That is a simple matter of comparison, not calling for fine judgment. Many adjectives have over the years passed through my mind as I have read judgments of the High Court, but "emotive" has not often been one of them. I should be surprised if Their Honours disagreed as to the unusual emotion of this one. I think they are intending to say that some may find the language too emotive, whereas they would justify it.

(ii) In fact the judgment does not give us "the full facts of that dispossession" which are said to be "of critical importance to the assessment of the legitimacy of the propositions that the continent was unoccupied for legal purposes and that the unqualified legal and beneficial ownership of all the lands of the continent vested in the Crown." It is far from doing that. Nor does the judgment say where the undisputed evidence as to all those facts is to be found.

(iii) The statement "that the continent was unoccupied for legal purposes" is a gravely distorted version of the doctrine that where the land concerned was not settled (in fixed habitation and settlements), settlement of the land would make the case one of acquisition by settlement.

(iv) Passing that point by, it is not easy to see how the validity of the proposition "that the continent was unoccupied for legal purposes" (a proposition which of its nature had to be true or false in 1788) could be shown to be false (or true) by events taking place over the following hundred years. What, one wonders, was the position in 1789?

(v) If the later shameful legacy referred to by Deane and Gaudron JJ. shows the proposition to have been untrue, would opposite events, namely universal kindness to aborigines at all times, have shown the proposition to have been true? If not, what is showing what?

(vi) It is apparent from the final passage that Deane and Gaudron JJ. have read unnamed sources, and undertaken research in unnamed places. Beyond fair argument the areas in which they did this were areas of controversy. Without recording the facts as they have found them to be, they move to their moral judgments and conclusions based on the unstated facts. That is far indeed beyond what the doctrine of judicial notice justifies.

Deane and Gaudron JJ. stress the importance of all this, by saying that it is the association of the proposition with the subsequent dispossession which justifies their deciding to overturn what has been "a basis of the real property law of this country for more than a hundred and fifty years". If I understand this properly, the passage is an astonishing one. People of 1992, people not alive in the 19th century, people in many cases who migrated to Australia following ill-treatment elsewhere, are to lose a basis of the real property law under which they lived, not even because of some proved and uncontrovertible balance of national shame flowing from evidence before the court, but from a judgment of national shame arrived at otherwise than from such evidence.

It is apparent from the final passage that Deane and Gaudron JJ. have read unnamed sources, and undertaken research in unnamed places. Beyond fair argument the areas in which they did this were areas of controversy.

D. THE CHIEF JUSTICE

Mason C.J. and McHugh J. concurred in the judgment of Brennan J. A Chief Justice is first and foremost a judge, and in ordinary circumstances there is nothing to stop him, any more than anyone else, concurring in a judgment of one of the other judges. But when a great case is involved, one does look to the Chief Justice, first of all for a narration of the procedural history of the case (which would have been very helpful in this case) and the issues and the materials, and second for an ordered and considered analysis and treatment of the matter in words which are his. His views in this latter part of the judgment may not be the ones which prevail. There is no embarrassment if they do not. Sir Owen Dixon made the observation that a judge's influence on his fellows does not depend upon where he sits. But one does hope to find in a judgment of a Chief Justice a firm and steady foundation on which the possibly more personal and idiosyncratic judgments of other judges may stand, and on the basis of which they may make more sense than otherwise.

Especially is all this so in seminal cases where

the law is changing direction. Whatever the High Court thought the implications of *Mabo* might be, whatever it thought the reception of the decision would be, it must have recognised a likelihood of honourable people being concerned at its content. It was a situation in which one might have expected a Chief Justice, like any other leader, to show the way. It is a lasting pity that the judgments which were delivered were not preceded by and seen in the context of a sober statement of the kind one at least hopes for, and on the whole expects, from Chief Justices on such an occasion.

E. JUDICIAL BEHAVIOUR SINCE MABO

Since *Mabo*, Mr. Justice Einfeld of the Federal Court has attached the dignity of his position as a judge of that court to criticisms of people who take views contrary to his.

"Australia is in danger of being engulfed in hatred, racism and division because of mischievous self-seekers spreading false information about Aboriginal land claims."

"Corporate nobodies and people who should know better are deliberately stirring hatred and racism by misrepresentation in the guise of prosperity and a sound economy."

"Australia is reaching another low in intolerance, racism, self-interest and self-indulgence."[9]

A person who talks like this publicly should not do so unless he is happy for others to reply in kind. Will Mr. Justice Einfeld and his court be happy if this happens? Can a mining executive, if he feels just as angry as Mr. Justice Einfeld and is willing to be just as discourteous, talk of "judicial nobodies"? Or will someone start muttering about contempt of court? That really would seem unfair, but one can never be sure that everyone agrees. It seems worth suggesting that people who bring the title of judge to their participation in controversial affairs would do well to abide by ordinary standards of civility and courtesy.

The judge is further reported as follows:

"Mr. Justice Einfeld said . . . Mr. Justice Brennan was one of Australia's most distinguished sons, who had made a greater contribution to the nation's progress and quality of life than any mining executive could emulate."

I imagine that Mr. Justice Brennan is just as embarrassed by this kind of public utterance as most people would be. No doubt it is flattering to find one's contribution to the progress of the nation compared with those of Bowes Kelly, and W.L. Baillieu, and W.S. Robinson, and Essington Lewis, and Sir Ian McLennan. The time for such comparisons is not yet. If it ever does arise, the matter will not be judged by Mr. Justice Einfeld.

The Chief Justice has also broken new ground, in commenting for publication on a recent and controversial decision of the Court, both here and abroad. An interview initially agreed to for the purpose of discussing a different matter was extended to include an interview on *Mabo*. The interview was published in the *Australian Lawyer* for July 1993. A few days before highlights of the interview were published in the press. The account I saw[10] ignored the principal part of the interview, and dealt solely with the *Mabo* appendix to it.

At a conference held at Cambridge University on 12 July 1993, the Chief Justice took the matter abroad. He talked of "the most sustained and abusive (criticism) I can recall in my career as a lawyer". He identified the groups from which this came, namely "interest groups such as the mining and pastoral industries and to a lesser extent politicians". He spoke of "the concerted campaign run by the mining interests supported by the pastoral interest to discredit our decision".

In the days before Mr. Keating became Prime Minister, there was a firmly entrenched tradition that a Prime Minister or other Minister travelling abroad did not make public comment on current happenings at home. I cannot recall any occasion on which one has even thought in terms of a Chief Justice of the High Court of Australia making such criticisms of Australians while in another country, and one cannot but regret that the pressures of *Mabo* led to that taking place on this occasion.

CONCLUSION

It will be obvious that I do not think the High Court served itself well in handling *Mabo* the way it did. I have no doubt that the High Court has wounded itself in recent years, and has done so again in *Mabo*. I first sighted the High Court as a student, in March 1948, when it was hearing the Banking Case: *Bank of N.S.W.* v. *The Commonwealth* (1948) 76 C.L.R. 1. That was a great case, involving a matter of great political and social controversy. Just three years later came the Communist Party case: *Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1. That was a great case, involving a matter of great political and social controversy. When the Court's decisions came, each matter was seen as at an end. The decisions were accepted as if brought down from Mt. Sinai on tablets. The Court carried the high respect and esteem of the great mass of Australians, of all shades and classes. This flowed, I have no doubt, from men's perception, their correct perception, that the judges strove to confine themselves to judging, and to doing so in judicial manner, in judicial language, and with judicial restraint.

The position today seems very different. Even before *Mabo* I was both astonished and fearful for the future, when hearing the terms in which ordinary Australians were talking of a court which so few years earlier carried the esteem of the great

mass of Australians. Indeed I myself spoke here last year of judges seeming to have things they wanted to say, instead of being content to say only what they needed to say. They may not have things they want to say, but like Caesar's wife, High Court judges should be above suspicion. They are losing the war if people think such things true, or suspect that they might be.

Mabo has taken the matter far further. It is not merely the calls for the result in *Mabo* to be reversed by constitutional amendment (as, I presume, by an amendment providing that all title to land on the mainland of Australia shall flow from grant by the established government of the State or territory concerned, and not otherwise). In the Cambridge conference, the Chief Justice said that the campaign by the mining and pastoral interests had the purpose :

"of discrediting the decision and . . . persuading the government to in effect repeal it and, if need be, *even to initiate the constitutional processes that would result in an amendment of the Constitution.*" (my emphasis).

The suggestion seems to be that there would be something vaguely improper about that, or at least unsporting, as if querying the umpire's decision.

Seeking to reach a different result in that way would in fact be neither new nor discourteous. The same Constitution which puts the interpretation of the Constitution with the High Court puts the ultimate power over the content of the Constitution fairly and squarely where it belongs, with the people of Australia. Few people had more respect for the High Court than Sir Robert Menzies, but the great man did not hesitate to seek by constitutional amendment to reverse the result of the Communist Party case.

Deane and Gaudron JJ. have said in terms that the content of the law of property in Australia should be altered forever because of their view, arrived at by their joint research among unspecified material referred to by unspecified writers, of the rights and wrongs of what they call the dispossession of the aborigines in the nineteenth century. It would not surprise if the Australian people, if asked, said that it shouldn't.

But discussion now goes beyond that. One is asked in unexpected places questions as to *why* the High Court has such power. The political agenda has been extended to asking *whether* the High Court should have such power. These are novel questions. They have not arisen because the Court is handling delicate and controversial matters. The Court has always done that. What is perceived to have changed is the manner of the Court's handling of such matters. Whatever the ultimate answers turn out to be, years hence, the handling of the *Mabo case* will not have helped the defenders of the Court.

FOOTNOTES

1. The one piece of litigation gave rise to two hearings in the High Court and two reported decisions of the High Court: *Mabo & Ors* v. *The State of Queensland & Anor* (1988) 166 C.L.R. 186, and *Mabo & Ors* v. *The State of Queensland (No. 2)* (1992) 175 C.L.R. 1. I call the case as a whole simply *Mabo*. Where it is necessary to distinguish I call the two decisions *Mabo No. 1* and *Mabo No. 2*.
2. At the time of *Mabo No. 1* they were the Miriam people; in *Mabo No. 2* they are the Meriam people. The Court does not mention the switch, let alone explain it. Hopefully it is safe to stick with the Court's second version.
3. Smith, *Cases and Materials on the Development of Legal Institutions* (1965), p. 467.
4. Scholars will recognise and other readers should be informed of my heavy debt to Castles, *An Australian Legal History* (Law Book Co., 1982) in this area.
5. Chalmers (ed.), *Opinions of Eminent Lawyers on various points of English Jurisprudence chiefly concerning the Colonies, Fisheries and Commerces of Great Britain*, p.206.
6. High-Park is of course Hyde Park. In 1954 I was told by an English gentlewoman who was a nice observer of these things that in the early years of the century her grandmother habitually pronounced the name as if there were no "d". My informant's brother was a judge, so what she said must be true.
7. The analogy with garden allotments in many crowded English cities is an obvious one.
8. Brennan J.'s judgment was concurred in by Mason C.J. and McHugh J.
9. *The Age*, 5 July 1993.
10. *The Age*, 2 July 1993.

APPENDIX 1 — THE BACKGROUND OF CALVIN'S CASE

The case grew out of the acquisition by James VI of Scotland (b. 1557) of the throne of England, on the death of Queen Elizabeth in 1603. The King's claim to the English throne was a claim by descent; indeed a claim by two descents. His mother was Mary Queen of Scots (b. 1542), daughter of James V of Scotland (b. 1512), son of James IV of Scotland and Margaret Tudor, eldest daughter of King Henry VII of England. His father was Henry Stuart, Lord Darnley, son of the Countess of Lennox, daughter of Margaret Tudor by her second husband, the Earl of Angus. This double lineal descent from an English king was matched by no other possible claimant, and King James ascended the throne of England unopposed.

It might be thought that the accession of James VI of Scotland as James I of England represented an acquisition by Scotland rather than an acquisition by England. Reality was around the other way, and *Calvin's case* discussed acquisitions by England, not acquisitions of England. The unattractive but shrewd Henry VII had foreseen at the time of his daughter's marriage, in 1502, how matters would turn out a hundred years later. To the comment that if the marriage should lead to a Scottish king succeeding to the throne of England then "Scotland will annex England," he replied "No, in such a case England would annex Scotland, for the greater always draws to it the less."

MABO AND THE HIGH COURT: A REPLY TO S.E.K. HULME, Q.C.

RON CASTAN AND BRYAN KEON-COHEN

WE HAVE BEEN ASKED BY THE EDITORS to "respond" to the article by Hulme Q.C. published in this edition. Before launching into the substance, some preliminary points should be made.

Why us? As most readers of this journal may know, we, along with Barbara Hocking, formerly of this Bar, and Greg McIntyre, now of the Perth Bar, appeared for the plaintiffs during the case's ten year duration, 1982–1992. The procedural (and private) history of the case deserves to be written.[1] Many noteworthy events occurred over the decade. Thus, for example, most of our learned opponents gained well-deserved elevation. More pertinently, this continuity of the plaintiffs' legal representation obviously makes it appropriate that we comment on aspects of Hulme Q.C.'s criticisms, since we are familiar, beyond the published versions, with the detailed procedural facts — what was argued,. what "evidence" was and was not presented, and so on.

In another sense, we are a bad choice for this article, since like embattled directors of a financially embarrassed company we instinctively spring to the defence — if that be needed — of the many submissions put by us which found favour with the majority Judges of the High Court.[2] Manifestly, we are not writing as apologists for the Court, nor to explain or excuse error. High Court judges, in the fullness of time, are perfectly capable of explaining themselves.[3] We are not "apologists" for the High Court — if such persons were ever necessary.

However, we should of course declare our interests.[4]

Nevertheless, in what follows we attempt, in the best traditions of the second-oldest profession, to avoid subjectivity, to address matters of substance dispassionately, and to focus on essentials — not as winners or losers, but with Hulme Q.C., as counsel concerned for the proper administration of justice.

Hulme Q.C.'s interests should also be declared. He is a long-standing director of Comalco Pty. Ltd. which is a defendant in the Wik claim now proceeding in Queensland. He is also, we understand, a close personal friend of Geoffrey Blainey. His article contains much material which is of interest, unobjectionable, and a valuable contribution to a serious public and professional debate. Much of it we criticise. All of it, however, we are happy to assume, like that which follows, springs from a deep concern for justice and its administration. That said, however, we leave common ground, and launch into sharp conflict.

Underlying philosophies: The above leads to a second point. Reading Hulme Q.C., especially his complaints about constitutional "judicial activism" (pp. 29–31) by the High Court and reflecting on our own experience in this case over the decade, it appears to us that our criticisms of Hulme Q.C. which follow spring from different attitudes to the role of the High Court as a final Australian Court of Appeal. That we may sharply differ with Hulme Q.C. on such issues is of no more (probably less) significance than if we support different AFL clubs. But these philosophical differences do, perhaps, go far to explain much of our reply which follows.

We perceive a fundamental difference of view as to the proper role of the High Court. Hulme Q.C. laments the passing of what he sees as the preferred non-activist, strictly legalistic court of earlier times. He further appears to consider that the removal of appeals to the Privy Council and the strong emergence of the High Court as the final independent arbiter, and propounder, of an Australian common law, and as interpreter of the Constitution, is highly undesirable. We, in stark contrast, warmly welcome these developments. Hulme Q.C. states (pp. 45–46):

"I have no doubt that the High Court has wounded itself in recent years, and has done so again in *Mabo*. . . . The judges [of the *Banking case* (1948) 76 C.L.R. 1 and the *Communist Party case* (1951) 83 C.L.R. 1] strove to confine themselves to judging, and to doing so in judicial manner, in judicial language, and with judicial restraint. The position today seems very different. I . . . spoke last year of judges seeming to have things they wanted to say, instead of being content to say only what they needed to say. . . . *Mabo* has taken the matter far further. . . . One is [now] asked in unexpected places[5] . . . *why* the High Court has such power. The political agenda has been extended to asking *whether* the High

Court should have such power. These are novel questions. They have not arisen because the Court is handling delicate and controversial matters. . . . What is perceived to have changed is the manner of the Court's handling of such matters. . . . The handling of the *Mabo* case [has] not helped the defenders of the Court."

This attitude may be compared to that of Kirby P., "outspoken" law reformer and President of the N.S.W. Court of Appeal, recorded in the last issue of this journal.[6] His Honour, launching the Law Book Company's *Laws of Australia,* welcomed that major publishing initiative as accelerating "judicial and legal independence". He acknowledged a great debt to the Common Law of England, and that our prior "formal link to that system, through the Privy Council . . . at times when our intellectual resources were strictly limited . . . was a mighty stimulus against parochialism". Nevertheless, the time came when it was appropriate to sever the formal links.[7] Kirby P. welcomed the High Court "nudging [Australian] courts to a new independence" and noted that:

"Getting the message through to Australia's judges and lawyers is taking an awfully long time. 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."[8]

Where Hulme Q.C. laments this change in the Court's role and functioning, Kirby P. speaks of "a dazzling gallery of decisions of the High Court" which have reformed the law by judicial decision. He cites nine recent well-known cases reported between 1988-1992, concerning interstate trade, privity of contract, rape in marriage, *Mabo*, mistake of law, free speech in the Constitution, and others.[9] He comments:

"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 (*Trigwell's case* (1979) 162 C.L.R. 617). But in the new mood of independence of the legal mind, much more is expected of Australian jurists."

Reading Hulme Q.C., it is clear that he rejects this new mood. We accept it and encourage it. It is as simple as that.

But perhaps we should cite the High Court itself. In *Cook* v. *Cook* (1986) 162 C.L.R. 376 the Court considered the applicability to a State Supreme Court of previous statements of Latham C.J. and Dixon J. as against the English Court of Appeal. Matheson J., of the S.A. Supreme Court, stated that he had felt obliged to prefer English precedent. The High Court said at p.390:

"Whatever may have been the justifications for such statements in times when the Judicial Committee of the Privy Council was the ultimate court of appeal or one of the ultimate courts of appeal in this country, those statements should no longer be seen as binding upon Australian courts. The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of the United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts. Subject, perhaps, to the special position of the decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning."

The general developments in judicial activism had a very significant impact upon the *Mabo* litigation.[10] Ten years is a long time, even (these days) in Chancery!

We, with respect, agree, and apply this passage particularly to the Privy Council and House of Lords' decisions which were not followed by the majority in *Mabo.*

It is also worth pointing out that Hulme QC makes much of the desirability of the High Court's professed role, e.g. in the 1930s/1940s, to avoid deciding constitutional points except where essential to do so, and to decide then only on the narrowest possible grounds. Of course *Mabo No.2* was not a "constitutional" case in terms of interpretation of the Constitution. In any event, as we shall demonstrate, the Court did decide precisely the points and only the points, that were necessary for its decision, and argued before it.

The above is not merely academic. The general developments in judicial activism had a very significant impact upon the *Mabo* litigation.[10] Ten years is a long time, even (these days) in Chancery! The composition of the High Court changed significantly between the Gibbs Court of 1982, and that of today. The impact of new attitudes, such as those of Murphy J., particularly as to matters of philosophy and functioning mentioned above, became more powerful as the decade progressed.

The Mabo team

Various doctrinal developments[11] over the decade in Canada[12] and Australia[13] led to significant amendments to the Statement of Claim in 1989 to include an allegation of fiduciary duty or trust relationships between governments and traditional owners.[14]

These developments significantly affected prospects of success. For example, at various stages, the case faced crisis, likely failure, or instant termination due to a variety of factors.[15] One such major crisis concerned a direct legislative attack by the Queensland Parliament: see the decision in *Mabo No.1*.[16] The *then* Court decided by a 4/3 majority that the Queensland legislation specifically designed to kill the case was inoperative, by reason of s.10 of the *Racial Discrimination Act* 1975 (C'th.). In that decision, Wilson and Dawson JJ. dissented on various points. Wilson J. left the Court in 1989, and was replaced by McHugh J. Dawson J. alone dissented in *Mabo No.2*.

One may observe that perhaps Hulme Q.C. should direct his criticism at the process by which High Court judges are appointed, and the rapidly changing social and legal culture in which they work. (As an aside for those who believe that every development which they consider adverse much be the result of some political conspiracy, we also point out that of the six judges constituting the *Mabo* majority, three were appointed by a Labor Prime Minister, and three by Liberal/National Prime Ministers.)

Factual errors: We may now proceed to the substance. First, we regret to say that Hulme Q.C.'s article, especially the first section, "The Paradox", contains many factual errors, some serious, some merely technical. Some of these are caused, no doubt, by errors in the C.L.R. report itself.[17] To avoid boring readers with tedious detail, and to save space, a "Table of Factual Errors" is attached. As will be shown below, these are of considerable significance.

A SERIOUS ERROR OF FACT: ABORIGINAL SOCIETY

However, one central error by Hulme Q.C. in this section of his paper must be noted. At p.34 he states, after discussing "terra nullius" and "desart":

"But nomadic people have no settlements to protect, and if intruders came they would frequently withdraw to other parts of their nomadic realm, rather than challenging their presence. Their departure would leave behind neither buildings nor cultivation nor other sign of ownership or achievement."

As a description of Aboriginal society and land use, this is appallingly wrong. Further, its ignorance as to traditional Aboriginal use of and relationship to land is profound. We are happy to provide Hulme Q.C. with a library of scholarly works,[18] and indicate to him living human beings — "nomadic" Aboriginals personally known to us or our instructors — who would again and again refute every word of this passage. Professor Blainey also gives the lie to the gross misconceptions of Hulme Q.C.'s position. He states:

"In Tasmania in the 1820s they gained ascendancy in many valleys and waged guerilla warfare . . . lived off the land, travelled lightly and swiftly, and attacked suddenly. . . . The uniformed British soldiers could do little . . . Private expeditions of revenge and attack were launched . . . The guerilla war went on . . . In the Spring of 1830 the government acted decisively. It planned the largest military operation to be seen in Australia in the 19th century . . ."[19]

What more can we say? This factual misunderstanding, however, is critical to Hulme Q.C.'s further arguments, mentioned below, as to why the *Mabo* principles should not have embraced the mainland.

THE DISTINGUISHERS DISTINGUISH AGAIN

Hulme Q.C. commences his analysis of our argument by saying that the state of the law focused on the critically important issue of whether the islands were "settled" prior to their acquisition, and the critical importance to that question of both permanent settlement based on cultivation and a system of law to do with land ownership.

This is utterly wrong-headed. The state of the law did *not* focus on whether the islands were "settled" prior to their acquisition. It focused on whether they were "occupied". This is clear even from the Privy Council case most strongly against the plaintiffs: *Cooper* v. *Stuart*.[20] In 1889 in that case, the Privy Council, in one of those classic throw-away lines which is supposed to have set Australian law in concrete for all time, described the whole of Australia as "practically *unoccupied*" in 1788![21]

Having mis-stated the central issue, Hulme Q.C.

then proceeds to mis-state the plaintiffs' arguments. The relevant portion of the plaintiffs' written submissions is as follows: (submissions pp.459–460):

"1. For purposes of English law applicable to territory as yet unacquired, the islands were a territory in which land was owned, occupied, utilised and regulated in accordance with local custom, tradition and practices operating within the Island community.

It is seriously wrong to berate the High Court for accepting the plaintiffs' fully argued primary point, by pointing to the matters argued by the plaintiffs in the alternative, and then ask why the Court did not confine itself to those alternative arguments.

2. Prior to annexation, and for many generations beforehand, the Islanders participated in a connected intelligible pattern of customary relationships to land in which individual members were treated by each other as having various rights and interests in their respective areas of land on their own behalf, and on behalf of their families. Within their community the whole of the islands were regarded as theirs, and each part of it was regarded as owned by one or more of them.

3. The Privy Council in *In Re Southern Rhodesia* [1919] A.C. 211 drew attention to those societies which were 'so low in the scale of social organisation' that their conceptions of rights and duties could not be reconciled with 'civilised society'. It contrasted those 'whose legal conceptions, though differently developed, are hardly less precise than our own'.

This distinction should be wholly rejected. Ethnocentric formulations of the criteria for the existence of a social, political or legal system, or for the existence of interests in land which parallel those known to English law, should also be wholly rejected.

4. However if any such distinction may be drawn, then the operative rights and interests in land of the Islanders fall on the 'higher' side of the distinction, and parallel those known to English law.

5. The High Court in *Daera Guba* (1974) 130 CLR 365 held that the correct law to now apply in respect of early land transactions in a territory which later becomes a British colony, is the local custom and usage applicable to such land at the time of such transactions."

Hulme Q.C. has picked up the plaintiffs' *alternative* contention (para.4 above), and treated it as the primary contention. The plaintiffs argued for the *rejection* of the very distinction which Hulme Q.C. says we were seeking to make. Naturally we also argued, in the alternative, that if the Court did not accept our primary contention that this distinction between different types of indigenous societies should be rejected as a matter of law, then our clients fell on the so-called "higher" side of the scale. In the course of this alternative, we drew attention to the nature of Murray Island village and gardening life.

It is seriously wrong to berate the High Court for accepting the plaintiffs' fully argued primary point, by pointing to the matters argued by the plaintiffs in the alternative, and then ask why the Court did not confine itself to those alternative arguments. Having accepted the primary argument (that no distinction can be drawn) our alternative argument based on such a distinction, was necessarily rejected.

Most tellingly against Hulme Q.C., the dissenting judgment of Justice Dawson deals with the matter in exactly the same way! He rejects the notion of native title for the whole of Australia, because that is what was in issue before him.

Hulme Q.C.'s distinction between those who possess "the soil," and not merely "the country," is and always was wrong-headed. His fixation on it directs the thrust of much of his article, and misleads him into intemperate criticism of the Court itself.

INDIVIDUAL OR COMMUNITY TITLE

We turn to another attack. At p.29 Hulme Q.C. states confidently:

"*Mabo* as a piece of litigation concerned a claim by individual persons to specific parcels of land on each of three islands in Torres Strait. When those claims were seen as doomed to fail it was turned into a claim that native title existed in relation to those islands."

This is manifest error. The claim, from day one, was a representative action by five named lead-plaintiffs, who claimed title to specified portions of land and seas "on their own behalf, and on behalf of the members of their respective family groups". The further Amended Statement of Claim alleged that "the plaintiffs are Murray Islanders and are members of *the Miriam people*: para.2. Paragraph 3 alleges continuous occupation of the islands "since time immemorial" of "*the Miriam people,*" and particulars of such occupation of those people are exhaustively given, e.g. "occupied, used and enjoyed, and benefited from the said islands". Paragraph 4 speaks of the customs and traditions of "*the Miriam people*". Paragraph 5 and following then allege that the plaintiffs have rights in specified areas of land "according to the customs and practices" of *the*

Miriam people.

Thus, two levels of allegation were set up from day 1: first the individual claims of the family groups represented by the plaintiffs; second, the rights of *the Miriam people* as a community. Thus paragraph 6 speaks of the Crown "recognising *the Miriam people* as . . . the owners . . . of the islands"; recognised "the rule of *the Miriam people* over the said Islands". Paragraph 12 alleges Queen Victoria "extended her sovereignty . . . subject to the rights of *the Miriam people* . . . and the rights of the plaintiffs' predecessors". Paragraph 13 alleges that "the said rights of *the Miriam people* and in particular of the plaintiffs . . . have been recognised by . . . Queen Victoria". Paragraph 14 alleges that the "traditional native title . . . of *the Miriam people* and in particular of the plaintiffs and their predecessors continued" since "the extension of sovereignty" in 1879. Paragraphs 31A-D, introduced as amendments, allege a trust and fiduciary duty between the Crown and "(i) *the Miriam people*; and (ii) the plaintiffs and their predecessors in title".

These pleadings, in the normal way, defined the issues at trial and before the High Court. To our knowledge, these claims, as things stood immediately prior to the amendment mentioned by Hulme Q.C., were certainly not "doomed to failure". On the contrary, at the relevant time — on our feet before the Full High Court — as best we could ascertain, things were looking rather hopeful. But such assessments on your feet are impressionistic, and, as every counsel knows, such impressions resulting from judicial behaviour can be horribly wrong. Perhaps Hulme Q.C. knows something we don't?

As to the amendment mentioned by Hulme Q.C., as the pleadings then stood (see above) the prayer for relief contained a technical defect. Whilst "the plaintiffs" and "the Miriam people" sought declaratory relief regarding breach of trust[22] only "the plaintiffs" sought declaratory and injunctive relief regarding their enjoyment of native title.[23] As is recorded by the judges,[24] following discussion, the prayer for relief was amended during the last day of argument. All of this occurred in open court, without objection, and with every opportunity for the judges, or counsel for Queensland, to say whatever they wished. Nobody was greatly concerned, because this technical amendment made no difference in substance — and especially given the way in which wide-ranging argument of nationally-applicable legal principle had proceeded during the previous three days. Thus, the final amended prayer for relief introduced the extra claim for a declaration that, as already pleaded, *the Miriam people,* as a community, enjoyed native title to the entire three islands. The declaratory relief already mentioned for the family groups represented by the plaintiffs was still also sought. In the event, the Court focused on the community title, leaving the identification of individual title to be subsequently worked out by the community itself, in accordance with tradition and custom. This is now taking place on Murray Island.

Had Hulme Q.C. sought to check these matters, the pleadings are set out in Moynihan's published *Determination of Facts, Volume 3*, Annexure A. He also could have checked with his close colleagues at the Victorian Bar, who were there!

It is simply wrong to suggest that the Court was somehow upsetting existing precedent or practice, by expressing its views on these issues. There was no existing precedent on *these* questions, in Australia.

HULME Q.C.'S ERRORS OF LAW

Hulme Q.C. raises other criticisms. Many of these, in our view, do not warrant response, or are of no great significance. For example, in an extensive and interesting discussion under the heading "The Common Law and New Colonies," Hulme QC reviews the history of Empire, and relevant authorities concerning the mode of acquisition of new colonies; the meaning of "desart," "occupation," "peopling" and "settlement" of new lands; the meaning of terra nullius and so on. We disagree with much of this analysis. But the more relevant response is whether Hulme Q.C. or we be of one view or another, the law on these and other issues had never before been considered by the High Court. It is simply wrong to suggest that the Court was somehow upsetting existing precedent or practice, by expressing its views on these issues. There was no existing precedent on *these* questions, in Australia, save for the stupendous untruth contained in the Privy Council's reference to Australia as "practically unoccupied": see *Cooper* v. *Stuart.* In 1971 in the *Gove case* Blackburn J. had been embarrassed by the manifest untruth of this statement, but felt bound by it as a ruling on law, rather than a finding of fact.[25]

On these questions the law in Australia was fully argued, and decided authoritatively for the first time, in the *Mabo case*. As with most questions of law, there is room for differences of opinion — hence the dissent of Dawson J. The fact that the majority took the views it did (after full argument) does not warrant any suggestion that the court has somehow acted improperly, or outrageously, or politically, or has somehow exceeded its function.

Counsel on location

The Facts before the Court: History and Native Title: Hulme Q.C. (at pp.34–40, 46) criticises Deane and Gaudron JJ. for making unjustifiable findings about (or re-writing) Australian history concerning the treatment of Aboriginals since 1788; and for relying on "unspecified research among unspecified material referred to by unspecified writers". He also criticises the Court for making rulings of law generally applicable to the mainland, and its nomadic Aboriginal communities, when the only evidence, and factual findings before it, as to native title issues concerned, as he sees it, the very different Melanesian people of Murray Island and their traditional interests in individually-owned blocks of land.

In reply we say that Hulme Q.C. raises a storm in a tea-cup. He misses the wood for the trees. As to native title, the factual situation between Murray Island and, e.g. central Australian Aboriginal communities, is of course, quite different. But as earlier mentioned, the *issues* upon which all parties argued the case (without objection by Queensland) and the facts upon which all the judges wrote (including Dawson J. in dissent) were at a level of common fundamental facts concerning indigenous peoples everywhere. This had to be so, for the legal principles under debate are applicable whether the people are gardeners or "nomads", and can only be meaningfully debated at that level.

As to history, it is noticeable that Hulme Q.C. has not told us what precise historical fact is actually in error. However, in order sensibly to discuss these criticisms of the factual bases underlying findings of history and native title, and whether improper private reliance was made on private historical research, it is appropriate to indicate what material was actually before the Full High Court.

The Pleadings and Annexures: Pleadings are evidence[26] of nothing — but this was an unusual case: please read on! The much-amended statement of claim was filed in May 1982. Thereafter, several volumes of particulars and further particulars, including many annexed and cross-referenced historical documents subsequently admitted into evidence, were filed. The "pleadings" thus exceeded 1,000 pages and incorporated, by way of particulars, a range of historical, anthropological, and Queensland Department administrative materials.

The Remitter, Demurrer and Trial: On 26 February 1986,[27] Gibbs C.J. ordered that all issues of fact raised by the pleadings be remitted for hearing and determination to the Supreme Court of Queensland.[28] A trial began on 13 October 1986 and adjourned part-heard on 17 November 1986 for a variety of reasons, basically because the time set aside proved hopelessly inadequate. But further, in April 1985, the Queensland Government had passed legislation designed specifically to extinguish retrospectively all of the plaintiffs' claimed traditional rights.[29] The trial was thus adjourned in order to test that question by way of a demurrer to Queensland's amended defence (which now pleaded the 1985 *Declaratory Act* as a complete bar). If the *Queensland Act* was constitutionally good then all parties (including the judge) were spared the cost and agony[30] of a lengthy trial, and "*Mabo*" was finished. The demurrer was argued in March 1988, judgment in *Mabo No.1* was delivered in December 1988, the *Queensland Act* was struck down, and the case continued: i.e., the trial reconvened in May 1989.

The Trial Evidence: The trial re-commenced (Eddie Mabo still in chief) in Brisbane on 2 May 1989. The plaintiffs called 24 islanders and three other witnesses, including an anthropologist, Dr. Jeremy Beckett. Queensland called nine Islander witnesses and five non-Islanders, including an historian. The Commonwealth called no evidence. It was struck out as a party by order of Moynihan J. on 5 June 1989 after the plaintiffs abandoned certain claims to offshore seas and reefs, being the only Commonwealth "areas" in question. That is why *Mabo* says nothing about seas or their resources.[31]

A large volume of documentary evidence was also presented by the plaintiffs to Moynihan J in a trial lasting 67 sitting days, spread over the three years 1986-1989.[32] 313 exhibits were tendered, including much historical material going essentially

to the Torres Straits.[33] This historical material was found in one of the abovementioned annexures to the pleadings, being a volume of historical materials: Vol.4: Exhib.4. This volume does not exhaust the historical material properly before the High Court (see submissions described below) but it does reveal the essential documentary historical *evidence* presented at trial.

Queensland contested the entire case on virtually every point, and at every stage. It was represented by various senior counsel, including its Solicitor-General, Davies QC, now appointed a judge of the Queensland Court of Appeal.

THE MATERIALS BEFORE THE HIGH COURT

Following a lengthy trial, 227 pages of detailed findings of fact plus annexures were handed down by Moynihan J on 16 November 1990.[34] This document was delivered to the High Court together with all the trial material — including the historical and anthropological exhibits, transcript of evidence, pleadings, and counsel's voluminous written submissions. These included a pleading document: the plaintiffs' "Statement of Facts," containing 116 paragraphs of alleged facts. This was a convenient summary of the statement of claim, much utilised during the trial, when the plaintiffs set out to prove each and every paragraph. Paragraph 1(b) alleged:

"In 1770 James Cook sailed through the Strait and landed on Possession Island in Endeavour Strait where he took possession of eastern Australia for His Majesty King George III. This Territory did not include the islands of the Torres Strait."

Queensland "did not admit" this allegation. Moynihan J., at *Determination,* Vol.2, p.3, accepted this as fact — along with others dealing particularly with the Torres Straits. Hulme Q.C. claims (p.35) "there was no evidence before the Court as to mainland Australia for there was no issue concerning the mainland" and "all the evidence and findings concerned the Murray Islands. None concerned the Australian mainland" (p.42). Hulme Q.C. again is wrong — on both points.

But that was not the end of material before the High Court. The parties, following orders of Mason C.J., then delivered "comprehensive written submissions" to the High Court, ahead of its final hearing in May 1991. These are all on record at the High Court Registry. The plaintiffs' submissions occupied nine spirex-bound volumes, being submissions (1113pp) and annexures (650pp). The submissions and annexures included references to case law, journals, books and academic writings in the normal way. Hundreds of references were also given to material not handed up, but which was available in the very same building — the High Court library. The plaintiffs' written submissions[35] dealt with fundamental issues in a way applicable to all British colonies. These submissions were complemented by many extracts from cases, articles, treatises and the like, all provided in these volumes of submissions.

As may already be obvious, Queensland contested the entire case on virtually every point, and at every stage. It was represented by various senior counsel, including its Solicitor-General, Davies QC, now appointed a judge of the Queensland Court of Appeal. Queensland did not "run dead" in the case when the Nationals were in power, nor under Premier Goss. Queensland's written submissions to Moynihan J. and the High Court were also extensive and detailed, including numerous references to material supporting their contrary views.

Argument in May 1991 extended over four full hearing days. The detailed written arguments already before the court were analysed at length, and counsel were questioned in depth by the seven judges on all issues, including lengthy analysis of the "mainland cases".[36]

As can be seen, the argument before the court necessarily involved reference to many historical treatises and decided cases. The historical and legal arguments contained in those materials derived from Australia, England, Canada, the U.S.A., New Zealand, India and Africa. Some of the critical cases dated back to 1608[37] whilst treatises handed up included classical texts such as *Kent's Commentaries* (1896) and Blackstone *Commentaries on the Laws of England* (1830). The court's judgments also cite Vattel, *The Law of Nations* (1797) and Holdsworth, *A History of English Law* (1944). Hulme Q.C. suggests that given such submissions, the court erred in searching out and having regard to sources such as these, as against material physically handed up. That criticism makes no sense.

It should be noted that none of these submissions, or materials, were wildly esoteric or dramatically novel to common law courts. The principles contended for by the plaintiffs had already been accepted by the superior courts in the USA in 1823;[38] New Zealand in 1847;[39] Canada in 1972 and 1984;[40] and the International Court of Justice in

1975.[41] These cases and the facts behind them were fully debated. The High Court, indeed, had touched upon many relevant issues in the past,[42] but had never before directly and fully addressed the central issue: does Australian law recognise native title? Oral argument went forward on that basis — as it must in the High Court. There was thus extensive examination of legal principles propounded in, *and the factual circumstances of*, prior "mainland cases". There was no objection from anyone, counsel or judges, that issues or authorities could be discussed only insofar as they were relevant to Murray Island, as against being generally applicable to all of the Commonwealth. Indeed, such an objection would have been ridiculous: no other process of argument was possible.

In the *Gove case* in 1971[43] Blackburn J., in the Northern Territory Supreme Court, rejected the proposition that traditional native title existed in the common law. The plaintiffs in *Mabo* argued that this conclusion was wrong. A detailed analysis was made of the whole historical, legal and anthropological content of the 1971 judgment and of many of its sources. The judgment in *Gove* contains a lengthy discussion of the history of Australian law and policy towards Aboriginals, from 1788 onwards. An enormous volume of mainland historical material is set out in that 1971 judgment. Scores of other cases dealing with Australia, and many other British colonies, were also presented to the court in *Mabo*. Hulme Q.C. notes (pp.54-55) that "judgments of other courts are not in themselves evidence, but one can easily imagine findings in such a judgment becoming accepted as a scholarly and authoritative statement of which judicial notice is capable of being taken". We wholeheartedly agree. The detailed history of mainland Australia set out in the *Gove case* is unassailable. Does Hulme QC suggest either that it is in error, or that the High Court cannot draw on it?

JUDICIAL NOTICE

Hulme Q.C. complains that Deane and Gaudron JJ. took judicial notice of historical matters to an unjustified extent (p.42), and the particular historical issues were "highly controversial and much controverted" (p.42).

Clearly much original legal and historical research was undertaken by the judges (including Dawson J., who dissented). This is evidenced by the numerous historical references sprinkled through the *Mabo* judgments, being additional to materials directly handed up by or referred to by counsel. Hulme Q.C. does not appear to criticise this process as such.

But let us examine the judgments themselves. The joint judgment of Deane and Gaudron JJ. contains 144 footnotes. The historical references are to numerous original sources such as Captain Cook's *Journal* and the 19th-century comments on it, the official Historical Records of Australia Series and Historical Records of New South Wales Series, the Colonial Office Records, and the like. They include two references to a secondary source, Professor Henry Reynolds *The Law of the Land.*

Interestingly, Dawson J., who dissented on the law, clearly agreed with the rest of the court in evaluating history. He also included Professor Henry Reynolds' "The Law of the Land" among his references.

Next, one may ask: what precise findings of historical facts are said to be wrong?

As to historical *fact* (compared with interpretation) Hulme Q.C. in his address has identified (at p.41) only the concern of "a great historian" (presumably his colleague Professor Blainey) "that there was an entire absence of recognition that the great slayer of Aborigines has been disease". This is an odd criticism. None of the judgments said anything about the death rate of Aborigines, or its causes, one way or the other.

As to the *assessments* contained in the abovementioned passages, the most telling critique that may be levelled at Hulme Q.C. (and others) is that he has not responded to what the judges actually said. The two particular matters of history that are identified by Hulme Q.C. (at p 41), are passages from the judgments of Deane and Gaudron JJ.:

"... the conflagration of oppression and conflict which was, over the (nineteenth) century to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame." (175 C.L.R. at 104).

and

"The acts and events by which the (dispossession of the Aboriginal peoples of most of their traditional lands) was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices." (at p.109).

The conclusion that "oppression and conflict spread across the continent" is hardly a matter of historical controversy. The assessment of the judges that such oppression and conflict "dispossessed, degraded and devastated the Aboriginal peoples" is also apparently not disputed by Hulme Q.C. or other critics such as Professor Blainey. In *Our Side of the Country* Blainey writes:

"If warfare was not the destroyer, what was? (William Thomas, guardian of the Aboriginals) gave a wide-ranging answer that encompassed alcohol, prostitution, and an inability to fend for themselves. 'Their dissipated habits have, I may say, been their executioners'. But their dissipation was largely the result of illness, bewilderment, the breakdown of the old tightly knit society, and *their alienation from the beloved tribal land which*

had sustained them for thousands of years.

"... Here were a people of whom it could almost be said: they died of grief."

(Emphasis added.)

It is certainly unusual to read in a High Court judgment that "the acts and events by which dispossession was carried into practical effect constitute the darkest aspect of the history of this nation". But again, Hulme Q.C. does not tell us whether it is seriously suggested that this statement is inaccurate. Inevitably we are tempted to ask: if this is not correct, as a matter of history, in what respect is it wrong? Is there some *darker* aspect? More importantly, does it matter if Hulme Q.C. or Blainey consider that there is some other, even "darker" aspect of our history?

Perhaps Hulme Q.C. is upset not so much with the judges' history and sources, but with the fact that they have dared to acknowledge so publicly these undisputed and incontrovertible facts in such forthright language.

Arguments about the concept of native title applying in the Torres Straits took as their starting point, the applicable law of the colony of Queensland, to which the islands were annexed in 1879.

FACTS AND NATIVE TITLE

Was the High Court entitled to apply findings of principle to the mainland, in a case dealing with an island in the Torres Straits? As mentioned, Hulme Q.C. claims that "the *Meriam case* claimed nothing, asserted nothing, set out to prove nothing, and argued nothing, as to the position on the mainland or as to the rights of other indigenous inhabitants" (pp.39–40). This is entirely misconceived: indeed, as to the ultimate legal principles in issue, nothing could be further from the truth.

The materials which were presented allowed, and the legal issues under debate demanded, a wide ranging discussion of the process and legal impact of British colonisation. The Torres Straits and Australia formed only a small part of this process. The debate was one concerning the legal principles of the common law operating at a high level — not just State (Queensland) nor national (Australian) but indeed international common law (the British Empire).

Arguments about the concept of native title applying in the Torres Straits took as their starting point, the applicable law of the colony of Queensland, to which the islands were annexed in 1879. The colony of Queensland was part of the colony of New South Wales until 1859. The critical question that arose was whether, upon acquisition of sovereignty by the Crown, any pre-existing interests of indigenous peoples in land were instantaneously extinguished. This question does not depend on whether the indigenous people are of one kind or another. The argument put to the High Court was that, wherever indigenous people exist, their interests are not extinguished by the acquisition of sovereignty. Thus the particular facts of Murray Island's traditional society throw up fundamental legal issues of wide and general application. That is how the matter was openly and publicly argued and that is the proper level of response. The fact that the "horticultural" and "residential" Murray Islanders led a different lifestyle to, e.g., nomadic central desert Aboriginals is a distinction with no meaning in law.

Both Aboriginals and Torres Strait Islanders are indigenous citizens of this country; both groups occupied their land before whites arrived; both enjoyed their own system of customary laws including relationships to land since well before colonisation; both were subjected to the British legal regime upon colonisation.

The suggested "critical" distinction between nomadic Aboriginals and residential Murray Islanders descended from Melanesia and who have individual customary titles was thus squarely faced and debated, including the question whether "nomads" can, in the common law, "occupy" land in the relevant sense. The International Court of Justice decided in 1975 that they can.[44] The High Court majority followed this precedent.

An argument put in the forefront in *Mabo* was that the notion that different legal treatment should be accorded by the legal system to different indigenous societies, depending upon where they were perceived to stand on the "scale of civilisation," was indefensible in approach, inconsequential in fact, wrong in law, and should be rejected by the court. It was strongly argued that the court should not enter into any inquiry as to where the Murray Islanders stood on the so-called "scale of civilisation".[45] The principles of native title apply whether

the indigenous people concerned are horticultural, nomadic, or otherwise.[46] Counsel for Queensland read and heard this argument, and argued forcefully against it. However the argument was clearly and firmly accepted by the majority judges.

An alternative argument was also put — that if the court accepted there could be a judgment about the "scale of civilisation," then undoubtedly the Miriam people are at the "upper end" of the scale.

To suggest that the court had no basis of fact to apply Murray Island legal principles to the mainland is to ignore the legal issues that were actually raised for decision, fully argued, and then decided in the case.

THE ATTACK ON BRENNAN J

Hulme Q.C. devotes pp. 36–39 to a colourful and swingeing attack on Brennan J.'s judgment. This starts with a false premise concerning "settled colonies". According to Hulme Q.C. a colony can only fall into this category if there is no cultivation by indigenous people. Since there was cultivation on Murray Island, it was *not* a settled colony. And since there was no cultivation on the mainland, it *was* a settled colony. Thus Brennan J. got it all wrong in dealing with them both on the same basis. Not only wrong, but, for Hulme Q.C. ". . . a plain nonsense" or not what "any fair analysis would have found" or "difficult to imagine any earlier High Court proceeding in this way" or what Hulme Q.C. finds ". . . the scariest passage . . ." or, again, ". . . the proposition would surely be nonsensical".

The whole of Hulme Q.C.'s diatribe against Brennan J is founded on his idiosyncratic logic concerning how colonies were acquired by the Imperial powers. Once again, he has totally ignored what was before the court, and lambasted a High Court judge for not dealing with the arguments that Hulme Q.C. thinks should have been put. His starting point of criticism of Brennan J. bears no relation to anything put to the Court by Davies Q.C., Solicitor General for Queensland. Davies Q.C. was in turn responding to arguments that were put by the plaintiffs' counsel, by reference to the law, not by reference to Hulme Q.C.'s personal vagaries, which bear no relation to the law.

Nor is anything even vaguely resembling the Hulme Q.C. "analysis" summarised above, which frames his attack on Brennan J., to be found in the dissenting judgment of Dawson J. These judges disagree on the result, but both analyse and respond to the same issues. Hulme QC dares to say that the point that England did not "people" the Murray Islands "escapes attention by Brennan J. or any other member of the majority". What has "escaped attention" by Hulme Q.C. is that the court was provided with detailed references and analysis of numerous *settled colonies* where there was a substantial indigenous population (including cultivation of land) and where little or no "settlement" took place, e.g., Ocean Island (*Tito* v. *Waddell No.2* (1977) 2 WLR 496, 519), British Papua, New Zealand (South Island), Colony of Gold Coast etc.

Hulme Q.C.'s entire construct of the "settled colony doctrine" is misconceived. It misleads him into a ten-point, three-page revelation of his constricted view of the concept of "discrimination". The reality is that, as Hulme Q.C. himself reveals at point (i) on p.43, it *is* discriminatory denigration to assert that because people do not grow crops, or do have a communal relationship rather than an individual relationship to land, they are to be treated as having no rights to that land at the time of acquisition. Hulme Q.C. says that up until now he "had not thought that it was". This reflects the thinking process of Hulme Q.C., but no deficiency in the judgment of Brennan J. Hulme Q.C. professes not to know how the word "discriminatory" operates in the phrase "discriminatory denigration". A non-discriminatory denigration of Hulme Q.C. is contained in this response to him. A discriminatory denigration would be to classify him in some way as inferior to some other class or group, and attribute the logical deficiencies which his writings reveal as characteristic of the group to which he belongs. We do not seek to undertake such a discriminatory critique or denigration of his argument.We do seek to criticise it in a non-discriminatory way.

Hulme Q.C. indulges in sophistry also — "Is the denial of interests just discriminatory denigration or is it also wrong?" he asks. The answer of course is that it is all three. Moreover his suggestion that Brennan J. rejected the notion of terra nullius because that view is "unfashionable" is an unnecessary attack upon Brennan that is unworthy of counsel of the standing of Hulme, Q.C.

Hulme Q.C. is also quite agitated by Brennan J.'s reference to concepts that are: ". . . unacceptable in our society". Yet he knows full well what

Brennan J relies on, for the Brennan judgment has taken as its starting point the passage in *Re Southern Rhodesia* where the Privy Council suggested that there *is* a "scale of civilisation". Surely it is not suggested that such a scale should still exist and *is* acceptable in our society!

Hulme Q.C.'s way of coping with a concept that the Privy Council laid down in 1919, and which the High Court was expressly invited to, and did, reject, is to mis-state the concept, and to misstate the question which arises from it. Brennan J.'s judgment rejects the Privy Council's test of a "scale of social organisation" and points out that if used to draw a legal distinction between "gardening" and "nomadic" indigenous societies, it necessarily involves the application of criteria which discriminate against one group and denigrate them by characterising them less favourably in terms of their relationship to land, according to how remote its concepts are to those of traditional English law. Hulme Q.C. cannot see this.

Reference to Policy: Hulme Q.C. (pp. 38–39) asks "by what criteria does the High Court decide what truths are and what truths are not acceptable in our society . . . what is the source of those criteria?" This raises the commonly-heard criticism that the judges exceeded their role in considering "community values" when deciding contentious questions of law. If this is the criticism made, it refuses to accept the realities of the decision-making process. For over 500 years, judges operating in the British common law system have, when appropriate, taken into account matters of "policy" when deciding cases. *Donoghue* v. *Stevenson* illustrates the point in a simple way.

In truth we are here debating merely: when does this factor become appropriate? The authorities show that resort to the "unruly horse" of "policy" or reference to "community values" (essentially the same things) occur when judges are faced with a choice of available legal principle, or when applying an ancient principle now out of step with the needs of a contemporary society. Thus the High Court has recently decided that a husband could be guilty of rape in marriage (contrary to long-standing British precedent).[47] The court stated that the prior rule was unacceptable in Australia today.[48]

Many Privy Council and High Court decisions, since 1901, including those of Sir Owen Dixon's Court, have decided important legal issues with appropriate regard to issues which are political, social or economic or what are now called: "community expectations".[49] In criminal cases, judges do this constantly when sentencing. The difference today is that the judges often state this element of judicial reasoning more openly, and for all to understand. But that does not mean that in doing so, they depart from normal practice, or exceed their proper judicial role.[50]

GUILT, SHAME AND HISTORY

Hulme Q.C. apparently does not:

". . . know enough to draw up a balance sheet of moral turpitude or otherwise across people largely unknown, black and white, throughout the whole continent, during a century of Australia's history."

Dawson J., who dissented, apparently does know enough. He felt quite comfortable in finding, in relation to the dispossession of the Aborigines (175 C.L.R. at 145):

"There may not be a great deal to be proud of in this history of events . . ."

Having blithely professed ignorance, Hulme Q.C. proceeds to raise the drawbridge of responsibility. He gives interesting examples at p.43. He conflates the Christ-killer accusation against current-day Jews with the Jew-killer accusation against present-day Germans, and then tells us that he generously believes that present-day Jews should not be held guilty for killing Jesus. Nor should present-day Germans be held guilty for killing Jews.

This is sad stuff indeed. The Christ-killer accusation has been used for over 2000 years as the justification for the wholesale slaughter of Jews, as well as their expulsion from England in 1185, Spain in 1492 and unbelievable cruelties in the course of the Crusades. It is not the Jews who need to be relieved of guilt for "killing Christ". It is the Christian Church which bears the "legacy of unutterable shame" for what has been done in its name.

Germany certainly does bear "a national legacy of unutterable shame" for its conduct during the war, notwithstanding the absence of personal guilt of individual young Germans of today. Germans are surely entitled to be proud of Beethoven and Schiller. And Australians are surely entitled to a "national legacy of enduring pride" for the feats of the Anzacs, and for the achievements of Sir MacFarlane Burnet. And if we are entitled to a sense of national pride in the achievements of our great heroes, are we not equally obliged to acknowledge shame at the fact that, as Geoffrey Blainey has written, the Aborigines ". . . became lost tribes in their own land"?

It is not "somewhat perverse" to acknowledge that such a result is not morally neutral. It carries with it not personal guilt but national shame, and national and individual responsibility to face up to those realities, and not to shut them away. The courts are not dispensing some dry formulas to be found in an archaic dusty drawer. They are the fountains of justice according to law, to which the Australian community comes to drink. The morally neutered stand advocated by Hulme QC expresses itself as an obscenity when it suggest that Germans

in the Germany of today carry no legacy of national shame.

Why the Concentrated Attack?: Finally, we ask: why in recent times, have some respected community leaders engaged in what appears to us to be a sustained attack upon not just the *Mabo* decision, but also personally upon the judges of the High Court? Why the inability amongst some sections of the community to accept that Australian law is now the same as other common law countries; to accept that indigenous people in Australia have been held to enjoy property rights in specific and restricted circumstances to precise areas of land, which rights are equivalent to (or less than) those of other Australians?

Why in recent times, have some respected community leaders engaged in what appears to us to be a sustained attack upon . . . the judges of the High Court?

What is so terrifying, or offensive, about this legal principle founded, ultimately, upon simple justice? Is it a fear of historical truth? A reluctance to accept equality before the law? A sense of grief amongst some commentators that the bulwark of their conservative values — the High Court — has apparently abandoned their cause? A culture of "disremembering" the unsavoury facts of our history in the interests of groups facing some claims should those facts be known?[51] We can only guess.

It is interesting that Hulme Q.C.'s analysis of the High Court's decision was given as an address to the Samuel Griffith Society, then circulated widely in pamphlet form, together with an emotional and somewhat offensive address also given to that society by Connolly Q.C., formerly of the Queensland Supreme Court. The pamphlet was published by the Association of Mineral Exploration Companies, and apparently sent to members of the various Bars, and to a large number of solicitors and people in industry. Regrettably, the Hulme Q.C. address was not submitted to the *Australian Law Journal*, a university law review, or some other appropriate academic journal of legal commentary.

Perhaps it was not written as a mere critique of a High Court judgment. The criticisms do not seem designed to show merely that Dawson J.'s views were more correct in law. (This is best illustrated by Hulme Q.C.'s extraordinary attack on the Chief Justice for supposedly failing in his duty, by concurring with Brennan J. rather than writing his own judgment.)

The Hulme Q.C. piece linked as it is with the extreme language of the Connolly piece, appears to be a shot fired in a campaign to de-legitimise the *Mabo* decision, and the High Court judges. Were this the case (and we hope and assume it is not so) then, regrettably, disappointment and frustration with the *Mabo* result may have overtaken dispassionate analysis in this instance.

REFERENCES

1. See generally N. Sharp "Contrasting Cultural Perspectives in the Murray Island Land Case" (1990) 8 *Law in Context* 1.
2. But not always with the trial judge, Moynihan J. See below.
3. One such "opportunity" is anticipated with interest. On 17 August 1992, Mason C.J., who is personally criticised by Hulme Q.C., heard a strike-out application in Sydney in the Wiradjuri "Mabo-style" claim to large portions of central New South Wales: see *Coe* v. *Commonwealth and N.S.W.* No. S.65 of 1993. Judgment is pending.
4. Castan Q.C. (after reading with Hulme Q.C. in 1966!) has been advising and appearing for indigenous claimants to land since 1970. He was one of the founders of the Victorian Aboriginal Legal Service in 1972. He has participated in numerous negotiations between Aboriginal land owners and resource companies for mining and petroleum development agreements. He is currently a trustee of the Koorie Heritage Trust, and indirectly holds interests in shares in public companies, which include major resource companies.

   Keon-Cohen has taught and published on "land rights" and other Aboriginal issues since 1974 (see especially P. Hanks and B. Keon-Cohen (eds.). *Aborigines and the Law*, Allan and Unwin 1984; and *Legal Service Bulletin* (1974–1978 issues) when Keon-Cohen was foundation editor); from 1978-1981 was a Senior Law Reform Officer, Australian Law Reform Commission, working, inter alia, on the reference concerning the recognition of Aboriginal Customary Law, under Commissioners Michael Kirby and Bruce Debelle, (now Kirby P. and Debelle J.); has been advising and appearing for Aboriginal and Islander land claimants since 1982; was in 1984 appointed by Premier Burke as counsel assisting the W.A. Aboriginal Land Inquiry conducted by Paul Seaman Q.C. (now Seaman J.); was retained as advisor to the National Aboriginal Conference in the early 1980s in its work on the Aboriginal Treaty or Makarrata; has been a member of the Australian Institute of Aboriginal and Torres Strait Islander Studies; was advisor to the N.L.C. during the Ranger Uranium negotiations of 1974–75; and holds a few shares in some resource companies.
5. It is fascinating (perhaps not irrelevant) to speculate: which places?
6. M. D. Kirby, "Discovering the Treasure House of Australian Law", *Victorian Bar News* (Spring 1993, No.86), pp.39-45.
7. See *Australia Act* 1986 (C'th.).
8. Kirby, *supra*, p.41.
9. See all these cases cited at Kirby P, *supra*, fnts.12-20.
10. Such considerations, at a different time, and with a very different court, may have explained why the *Gove case* was not appealed in 1972.

11. E.g., as to very relevant developments in the law relating to racial discrimination, see *Gerhardy* v. *Brown* (1985) 159 CLR 70.
12. See *Guerin* v. *R* (1984) D.L.R. (4th) 321.
13. *Hospital Products Ltd* v. *CIS Surgical Corporation* (1984) 156 C.L.R. 41; and dicta by Deane J. in *Mabo (No.1)* v. *Queensland* (1988) 166 C.L.R. 186 at 228.
14. As to which, see *Mabo*, 175 C.L.R. especially per Toohey J. at 199-205.
15. E.g., legal aid, death of plaintiffs, strike-out applications, some plaintiffs discontinuing half-way through the trial, availability of critical witnesses, sheer physical exhaustion, admissibility of evidence, etc.
16. See *Mabo* v. *Queensland* (1988) 166 C.L.R. 186.
17. E.g., at 175 C.L.R. 6, Moynihan J. is said to have delivered judgment two months after completion of a six month trial. He did not. He delivered his "Determination of Facts" in Brisbane 14 months later, on 16 November 1990. Keon-Cohen appeared to take judgment. Merralls QC has been advised of this CLR error. We look forward to its correction. Moynihan J's "Determination" has been criticised by some commentators as having the appearance of a "rushed job," and as not adequately reflecting the voluminous evidence and substantial submissions presented to His Honour by all parties.
18. See for example, Professor W.E. Stanner's *Boyer Lectures for 1968* (ABC Books).
19. On the matter of withdrawing, rather than challenging the presence of intruders, see Professor Henry Reynolds' seminal works; Professor C.D. Rowley's *The Destruction of Aboriginal Society* (1970); and Professor Blainey's *Our Side of the Country* (1984).
20. (1889) 14 App. Cas. 286.
21. The case dealt not with native title, or anything to do with Aborigines. It was a dispute as to the application in Australia of the Rule against Perpetuities.
22. See Further Amended Statement of Claim, Prayer for Relief, paras. BX-BZ. All relevant pleadings (without particulars and Annexures) were published at Moynihan J. *Determination of Facts*, Vol.3, Annexure A, pp.1-63.
23. See Prayer, paras.A, B, H, I, J.
24. See Dawson J at 175 CLR, 174; Brennan J. at 75.
25. See *Milirrpum* v. *Nabalco* (1971) 17 F.L.R. 141, at 200-201.
26. See for evidential discussion B.A. Keon-Cohen: "Some Problems of Proof, The Admissibility of Traditional Evidence" in M .A. Stephenson (ed.) *Mabo: A Judicial Revolution* (Qd. U. Press 1993) pp.185-205.
27. Four years were spent in dealing with a strike-out application, pleading, and especially attempting (unsuccessfully) to agree at least some of the facts, with Queensland.
28 See (1986) 64 A.L.R. 1.
29 See the Queensland *Coast Islands Declaratory Act* 1985, introduced by the Deputy Premier on 2 April 1985.
30. The trial indeed involved "agony". For example, Eddie Mabo gave evidence in chief over ten days recorded in 536 pages of transciples. His evidence attracted 289 objections from Queensland, mainly due to alleged hearsay. See for discussion B.A. Keon-Cohen, *supra.*
31. The plaintiffs continued with claims to fishtraps and waters immediately offshore, but Moynihan J. finally rejected these.
32. The demurrer intervened, as mentioned above.
33. One was 42 volumes of xeroxed Queensland department administration files, standing about as high as Keon-Cohen, and far more than he could carry!
34. See *"Determination of Facts,"* 16/11/1990, unreported.
35 Vol.3, ch.3, pp.459-78, "Pre-annexation Rights and Interests in Land", Vol.4, ch.4, pp.604-656, "The Effect of Annexation upon Rights and Interests in Land", and Vol.5, ch.5, pp.787-843, "The Nature of Rights and Interests in Land".
36. E.g.: *AG* v. *Brown* (1847) 1 Legge 312; *Williams* v. *AGNSW* (1913) 16 C.L.R. 404; *NSW* v. *Commonwealth* (1926) 38 CLR 74; *Randwick Corp* v. *Ruttledge* (1959) 102 C.L.R. 54. And see pp.630-633 of plaintiffs' submissions.
37. *Case of Tanistry* (1608) Davis 28; 80 E.R. 516; *Calvin's case* (1608) 7 Co.Rep.1a 77 E.R. 377.
38. *Johnson* v. *McIntosh* (1823) 8 Wheat 543; 21 U.S. 240.
39. *R* v. *Symonds* (1847) N.Z.P.C.C. 387.
40. *Guerin* v. *R* (1984) 13 D.L.R. (4th) 321; *Calder* v. *AG (British Colombia)* (1973) 34 D.L.R. (3d) 145.
41. *Advisory Opinion on Western Sahara* (1975) 1 C.J.R. 12.
42. E.g., *Daera Guba* (1973) 30 C.L.R. 353, 396-7; *Coe* v. *Commonwealth* (1979) 24 A.L.R. 118; Wacando (1981) 148 CLR 1; *Seas and Submerged Lands Act* (1975) 135 C.L.R. 337; *Mabo No.1* (1988) 166 C.L.R. 186.
43. (1971) 17 F.L.R. 141.
44. See *Western Sahara case* [1975] 1.C.J.R.12.
45. See *Re Southern Rhodesia* [1919] A.C. 211.
46. See (1992) 175 C.L.R. 1,7.
47. See *Queen* v. *L* (1992) 66 A.L.J.R. 768.
48. *I bid* at . . .
49. See *Bank of NSW* v. *The Commonwealth* (the *Banking case* HC) (1948) 76 C.L.R. 1, 382 per Dixon J:
"To place among the essential attributes the requirement that there be goods for sale or delivery or a man upon a journey, is to . . . yield to *habits of thought inherited from a more primitive organisation of society.*"
See also *The Commonwealth* v. *Bank of N.S.W.* (*the Banking case*) (1949) 79 C.L.R. 497, 639:
"The problem to be solved (sec 92 Constitution) will often be not so much legal as political, social or economic."
50. See the address by Mason C.J.: Annual Oration for 1993 of the Australian Institute of Judicial Administration.
51. See Professor W.E. Stanner's *Boyer Lectures for 1968* (ABC Books).

SCHEDULE 1

SOME ERRORS OF FACT BY HULME QC

Some Alleged Facts	*Some Comments*
1. Individual claim doomed to failure (p.29).	Wrong: see text.
2. No claim or issue re mainland (p.29).	Wrong: see text.
3. "Perhaps family ownership of specific parcels of land" (p.29).	Wrong: Moynihan J. accepted, on the evidence, a form of family ownership by plaintiff, D. Passi.
4. "Had their own native court".	Misleading: the "court" was established by Europeans initially informally, thereafter by statute. It still exists.
5. Aboriginals "did not live in established villages (p.29).	Wrong: some did. See e.g. beehive rock houses at Lake Condah, Victoria.
6. Aboriginals "did not cultivate" (pp.29,35).	Wrong: see e.g. fire harvesting, practised extensively throughout Australia.
7. Aboriginals had "no system of individual or family ownership of specified parcels" (pp.29,36).	Wrong/misleading: depends what is meant by "ownership" Individuals or family groups certainly have primary responsibility for, or sole rights to, "speak for," or control, country, including specific (sacred) sites. See findings of N.T. Land Commissioner; numerous anthropological works.
8. No evidence as to Aboriginal culture and ways (p.29).	Wrong: see text, especially re "native title," "judicial notice," etc.
9. Commonwealth dismissed because no issue represented concerned it (p.29).	Wrong: see s.109 and *Racial Discrimination Act* issues in pleadings.
10. No party present holding leasehold title (p.29).	Misleading: see "sardine factory" lease granted over Dawar Island in 1931, the reversionary interests which (per Brennan J.) flowed back to the Crown upon its forfeiture in 1938: see Brennan J., 175 CLR 71-73. Issues raised apply equally, in any event, to "mainland".
11. No evidence as to mainland (pp.29,35).	Wrong: see text.
12. No party concerned with mainland issue (p.29).	Wrong: Queensland was vitally concerned with its mainland.
13. No argument as to any mainland issue (pp.29,40) or argument "excluded" Aborigines (p.41).	Wrong: see text; see pleadings. Argument also concerned the RDA and Queensland legislation concerning Deeds of Grant in Trust on Aboriginal reserves.
14. "Nomadic people have no settlements to protect," etc, etc. (p.34).	Wrong: see text.
15. "No concept of public or general ownership. All was individual or family group" (p.35).	Wrong: see text: the Miriam people certainly believed (and believe) they as a group "owned" their island and surrounding seas and reefs as against the rest of the world.
16. Mamoose functions re "individual rights" (p.35).	Wrong: the Mamoose, inter alia, looked to community, tribal, family and individual factors.
17. Conditions on Island very different to mainland conditions (pp.35,36)	Wrong: how is this said? Has Hulme visited, eg, Stradbroke, Bathurst Islands recently, in 1788 or 1879? Are these "mainland"? In any event, many coastal and riverine communities on the mainland experienced similar conditions.
18. Argued that mainland cases inapplicable (p.36).	Wrong: see text.
19. Mainland involves "quite different factual situation".	Wrong: see text.
20. 90% Aboriginals will be denied any benefit from *Mabo*: judgments of majority explicitly deny them (pp.41).	Wrong as to percentages. Nobody knows how many will benefit. Wrong interpretation of judgments.
21. "National legacy of unutterable shame" as a personal obligation for today's generation (p.43).	Wrong: not meant (in our view) in the sense of personal criminal guilt; rather, a basis for national responsibility and action.
22. "Full facts of dispossession not provided" by Deane and Gaudron JJ. (p.44).	Ingenuous. Is dispossession denied? See Blainey's *Our Side of the Country* and *A Land Half Won*.
23. Dispossession is an area of controversy.	Wrong: is dispossession disputed by Hulme or by anyone? See Blainey's books, above.
24. "Full facts of dispossession" not given, nor references to where they may be found (p.44).	Inconsequential. Is the fact of dispossession disputed? See above.

MABO: "INHERENTLY CONSERVATIVE"

FRANK BRENNAN S.J.

IN A COLUMN ENTITLED "POINT OF VIEW" in the issue of *News Weekly* published on 25 September this year the following statement appears:

"Since the case related to the Meriam people and not to Australian Aborigines, why not bring down a judgment limited in its effects to the case actually before the Court? Why bring down a decision relating to a mainland inhabited by nomadic peoples of totally different race and culture? Why widen the entire subject matter to cover the totally different situation on the Australian mainland?"

In a comment published in the 23 October issue of *News Weekly* Fr. Frank Brennan of this Bar replied to that comment and to the comments made by S.E.K. Hulme to the Samuel Griffith Society and which are also published in this issue of *Bar News*.

With kind the permission of Fr. Brennan his comments in *New Weekly* are reprinted below].

In his "Point of View" (September 25), Mr Santamaria studies "Mabo: the mysteries of the legal process". He quotes from Mr S.E.K. Hulme Q.C.s paper to the Samuel Griffith Society, entitled "Aspects of the High Court's Handling of Mabo" which has been given widespread coverage by the Association of Mining and Exploration Companies Ltd.

Basically Mr Hulme contends that the High Court went well beyond the evidence and made a decision without the benefit of hearing from the affected parties. Either charge, if correct, would impugn the judicial propriety of the nation's highest court.

Mr Santamaria, focussing on the lead judgment of Mr Justice Brennan (with whom Chief Justice Mason and Justice McHugh agreed), says:

"There may well be a valid reply to Mr Hulme's arguments concerning both representation and evidence. If public confidence in the High Court is to be retained, it would seem necessary to propose it."

Though at least one captain of industry is given to ungracious remarks about my being a son of Justice Brennan, I, being a lawyer and priest with a long time involvement in land rights issues, am prepared to offer such a reply from my study of the judgment and the academic critiques, which have now emerged from the Universities of Queensland, Sydney and New South Wales, to name only those to which I have contributed.

Readers should be aware that the *Sydney Law Review,* one of the more reputable academic legal journals in the country, dedicated an entire issue to the Mabo decision. In their preface, the Editorial Board wrote:

"Our aim was to provide the broadest forum for lawyers, scholars and activists. We sought a wide range of opinions and expertise. If we were less than fully successful in producing a volume that covers the spectrum of opposing views on Mabo it is not for want of trying. A number of commentators who have made themselves known to the general public as vocal critics of Mabo declined, on various grounds, our invitation to contribute."

I welcome access to the pages of *News Weekly* to commence the necessary public discussion about the rigour of the judicial method in the Mabo decision which I regard as a conservative decision.

PRINCIPLES OF LAW

Justice Brennan's judgment commences with eight pages of facts about the Murray Islands, the people and their relationship with land as determined by Justice Moynihan in the Supreme Court of Queensland.

The declaration made by the court was strictly confined to the Meriam people and their lands. In considering the facts, the court had to set down some general principles of law which when applied to the facts yielded the declaration in the proceedings.

Justice Brennan said the State of Queensland's submission about the legal effect of acquisition of the Torres Strait Islands was "founded on propositions that were stated in cases arising from the acquisition of other colonial territory by the Imperial Crown".

The propositions on which the defendants sought to rely had been "expressed to apply universally to all colonial territories 'settled' by British subjects".

Despite the assertions of Mr. Hulme, there was no submission by either party that the territory was

On the beach at Murray Island

conquered or ceded. As I understand, it was common ground that the territory was "settled" in the sense that where a threefold classification had been used in the past, any colony which was not conquered (with war, and peace to follow) or ceded (by way of a treaty) was viewed as settled for the purposes of determining the application of the common law.

The defendant not only advanced "general propositions of law applicable to all settled colonies". In the oral argument, the Solicitor General for Queensland, Mr. Geoff Davies Q.C. (as he then was), put a far more universal proposition as his first submission on the legal issues. He argued that "upon annexation of the Murray Islands, Queensland acquired absolute ownership and legal possession" of all land.

Responding to Justice Toohey, he said, "sovereignty includes absolute ownership". He claimed this was the case "whatever method of occupation is employed". A reclassification of any part of Australia as a conquered or ceded territory (as suggested by Mr. Hulme) had no place in Queensland's submissions, would have required the court to determine issues not before it, and would have provided no answer to the primary submission put by the defendant.

Queensland's submission was so absolute and universal that Justice Gaudron asked, "Does it follow from what you have said, Mr Solicitor, that at any time from the time of annexation the native population could have lawfully been driven into the sea?" He replied, "It does, your Honour.' He continued, "And it means also, that they are [there] at the pleasure of the Crown".

The State of Queensland submitted that the earlier legal authorities supported such a universal proposition whatever the mode of annexation and whatever the sum of civilisation of native peoples. That was the "first legal issue" put by the defendant for determination. The court had to give an answer to this universal proposition.

Defending the islander claim, the State of Queensland relied upon precedents including an 1847 decision of the Supreme Court of New South Wales and High Court decisions from 1959 and 1975 each of which assumed that the Australian colonies were ,"settled" colonies. It is a very novel suggestion by Mr. Hulme that any part of an Australian colony be classified as ceded or conquered. However his argument will have some appeal for Aboriginal separatist groups dissatisfied with continued court declarations that Australian colonies were settled despite evidence of conflict in different areas.

Justice Brennan said if the court were to continue to follow the earlier precedents, the effect would be that "the interests of indigenous inhabitants in colonial land were extinguished so soon as British subjects settled in a colony, though the indigenous inhabitants had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquests."

There was no evidence of a formal cession nor of a war. In fact, the behaviour of the islanders at the time of annexation was irrelevant to the legal submissions of both parties. The contested issue was the legal effect of the assertion of sovereignty. Mr. Hulme, being neither judge nor counsel in the case, has felt free to develop a jurisprudential theory aside from the evidence saying:

"The good common law judge might perfectly sensibly see their [the Islanders'] conduct as a politic surrender to overwhelming force, treat it as just as much a case of conquest as if they had thrown a few unavailing spears and been cut down by a volley of musketry, and hold the case to fall within the existing boundaries of conquest".

No party asked the court to classify the Islanders' behaviour at any time. This rewrite of history and fairy-tale rendition of the common law could more readily be applied to the settlement, or should I call it the conquest, at Sydney Cove. I am sure it will be a great boost to Mr. Paul Coe and Mr. Michael Mansell for them to know that they have a respectable ally for the conquest scenario in "one of the leaders of the Victorian Bar".

The majority of the High Court, not having been invited by either party to the proceedings to reclassify the Australian colonies as conquered or ceded and having no evidence to warrant such reclassification, properly restated that the colonies were settled in the technical sense of the threefold classification. As Justices Deane and Gaudron rightly said:

"The annexation of territory by 'settlement' came, however, to be recognised as applying to newly 'discovered' territory which was inhabited by native people who were not subject to the jurisdiction of another European State. The 'discovery', of such territory was accepted as entitling a State to establish sovereignty over it by settle-

ment, notwithstanding that the territory was not unoccupied and that the process of 'settlement' involved negotiations with and/or hostilities against the native inhabitants."

Mr. Hulme has suggested that "a good common law judge in form and seeing the ball well would have found easy enough the task of dealing with the matter". The judge could, without submission from the parties and without evidence, rewrite the classification of Australian territory as conquered or ceded.

With a boundless invitation to judicial creativity, he even suggested that a court be invited to recognise "a fourth category, with rules established by analogy from the categories already established". Mr. Hulme is suggesting that it would have been far better for the court to invent a new classification of colonies rather than to articulate any consistent principle which, when later applied to the mainland in an appropriate sense, may have resulted in Aborigines being recognised as having any common law rights. This policy approach to judicial method is far more political than any adopted by the High Court Mr. Hulme is really suggesting that it would have been better for the High Court, by judicial and other means, to find some way of upholding Queensland's submission that the assertion of British sovereignty extinguished native interests in land, whatever the facts and whatever the inconsistency of legal principle and its application.

The court properly maintained the "settlement" classification in the absence of argument or evidence to the contrary and limited itself to the question of whether or not the settlement of new territory necessarily implied the extinguishment of any native interest in the land. Having considered the authorities, Justice Brennan said:

"In my opinion, the common law of Australia rejects the notion that, when the Crown acquired sovereignty over territory which is now part of Australia it thereby acquired the absolute beneficial ownership of the land therein and accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change of sovereignty. Those antecedent rights and interests thus constitute a burden on the radical title of the Crown.

"It must be acknowledged that, to state the common law in this way involves the overruling of cases which have held to the contrary. To maintain the authority of those cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterising the indigenous inhabitants of the Australian colonies as people so low on the scale of social organisation to be acknowledged as possessing rights and interests in land."

Brennan's judicial method was to set down principles which were, in his opinion, consistent and just, for determining the rights and interests of native peoples living on land which was part of a territory "settled" by the British. Those principles would be applied to the facts and circumstances of each native people. The State of Queensland had relied on cases which set down the general principle that if people were judged to be low in the scale of social organisation, they were deemed to have no rights. Justice Brennan and the others of the majority set down a general principle that people, regardless of their place on the scale of social organisation calibrated by European colonisers, would retain their rights and interests though their land was "settled" by a new sovereign until the new sovereign validly dealt with those rights and interests.

At no stage did Justice Brennan claim that it would be "racist" and "irrelevant" to "attempt to show the Meriam people and their landholding system were radically different both from the Aboriginal mainlanders and their land holding system".

In rejecting the theory of universal and absolute Crown ownership of all settled territory and in espousing the theory of radical title vesting in the Crown upon the assertion of sovereignty (subject to the burden of native title), he said:

"Nor can the circumstances which might be thought to differentiate the Murray Islands from other parts of Australia be invoked as an acceptable ground for distinguishing the entitlement of the Meridam people from the entitlement of other indigenous inhabitants to the use and enjoyment of their traditional lands. As we shall see, such a ground of distinction discriminates on the basis of race or ethnic origin for it denies the capacity of some categories of indigenous inhabitants to have any rights or interests in land."

There are differences between the rights, interests and relationships Aborigines have with land and those which Islanders enjoy. The present High

Court, having heard countless land rights cases from the Northern Territory, would be all too well aware of the difference.

To highlight those differences would not be irrelevant or racist when it came to an application to the historical facts of the general principle that native title survives acquisition until extinguishment by the sovereign. It would however be discriminatory to rule that some native title rights would be recognised under that test and others would not. Justice Brennan simply asserted that the same principle was to be applied to all native groups — i.e. continued recognition of native title rights (whether they be Aboriginal or Islander, individual or communal) until extinguishment by valid act of the sovereign.

He and the other judges then applied the principle to the case at hand. They never claimed to determine its applicability to any other land or any other group. Justice Brennan made the observation:

"And there may be other areas of Australia where native title has not been extinguished and where Aboriginal people maintaining their identity and the customs are entitled to enjoy their native title".

He also opined that the tide of history would have washed away many native title areas.

To argue that "the High Court over-ruled long decided cases in the total absence of argument from interested persons, and a total absence of evidence as to Aborigines generally" is false. The court determined a dispute between two parties, one of which was the State of Queensland. The Commonwealth had been an intervener but chose to withdraw. To decide the case, the court had to determine the issue of whether in Australian common law, native title survived the Crown's acquisition of sovereignty. That had never been an issue for central determination by the High Court previously. That was the primary question put to the court by both parties. The court set down principles which it admitted could have some application to the mainland.

Mr Hulme's objection is similar to saying that the High Court should not set down a principle of contract law in a dispute between two parties unless every other party to every other contract in Australia has a chance to be heard. The court having set down the principles, applied them to the facts at hand, thereby performing its judicial task, conceding that the principles may have application in other cases. The other applications, and if need be, the refinement of the principles await other cases.

No doubt eminent silks and others with the Samuel Griffith Society will continue to give their adverse views of the judgment. Given Mr Hulme's eminence and the authority he enjoys in some circles, Aborigines will now give serious consideration to trying to reopen the conquest question. If this line of argument were to succeed, it would open up more uncertainty than the modest Mabo decision, unless he was suggesting that the good common law judge would cut and weave in enunciating principle and creating categories so as always to ensure that the law visited the most limited rights possible upon Aborigines. He would have to agree that conquest rather than settlement would strengthen the Aboriginal case for prior and continuing sovereignty.

In my opinion, the High Court's decision is inherently conservative and consistent. Native title survives the assertion of sovereignty. It can be extinguished at any time by valid act of the sovereign, even without payment of compensation. The only protection for any surviving native title at this time is the *Racial Discrimination Act* passed by the Commonwealth Parliament. If the Parliament were to repeal that Act, State governments would once again be free to extinguish native title without compensation. If it comes to that I can foresee Aboriginal groups taking off for Geneva with Mr. Hulme's preposterous claims that Australia is just as readily classifiable as a set of conquered colonies now wanting a cessation of hostilities and a U.N. supervised peace process!

The High Court's decision has already been quoted with approval in the Court of Appeal in New Zealand and with approval and at length by both the majority and minority in a recent case in the Court of Appeal in British Columbia. There is sure to be ongoing debate and division about the political and economic consequences of the decision. Mr. Hulme's elaborate device for avoiding the "evils" of Mabo carries the prospect of even more uncertainty, is not faithful to the essence of the judicial method, and shows no regard for the rigour and scholarship of the decision.

After travelling the Torres Strait with Dr. Hewson a few months ago, Mr Iain McLachlan said, "It is perfectly obvious to me that those people have owned that land forever as history has been recorded. But it is different to say that all over Australia we should have a feast for lawyers." There is now a need for a system of registration of native title holdings and a claims system which is cost-efficient. The mysteries of the legal process are not to be overcome by judges responding to political and economic arguments denying the application of judicial method in the determination of rights of litigating parties.

Courts must develop consistent principles and apply those principles to the evidence, without fear or favour, even if the principles developed on the islands might have some application on the mainland. Politicians then have to make political and economic decisions affecting the islands and the mainland.

"JUSTICE FOR ALL?"

A Summation given to the Closing Session of the 28th Australian Legal Convention, 30 September 1993, by the Hon. Mr Justice Heerey, Federal Court of Australia

WITHOUT LAW SCHOOLS THERE WOULD be no lawyers — a state of affairs which all here would regard as unthinkable, although others may not.

It is therefore a happy coincidence that the 28th Australian Legal Convention is being held in Hobart in the Centenary year of the Law School of the University of Tasmania, the fourth oldest law school in the country. One of the founding fathers of the Law School, Andrew Inglis Clark, then Tasmanian Attorney-General and later a judge of the Supreme Court, played a similar leading role on a larger stage in the drafting of our Federal Constitution. This was not, as a recent commentator has asserted, a routine British Colonial legislative document. It was not just a case of taking the British *North America Act*, crossing out "Ontario and inserting "Victoria". As we approach the centenary of Federation, the contribution of Andrew Inglis Clark will become better known to modern Australians.

An excellent history of the Law School by Professor Richard Davis of the History Department gives an account of an exciting 100 years, and some notable achievements of its graduates, including a professor who fought at the City Hall under the name "KO Wells".

The Conference theme "Justice for All?" finishes with a question mark. It has been treated on all sides as a genuine inquiry and not a rhetorical question. Assuming the question to be in the present tense, various answers might emerge, ranging from "No" to "It depends what you mean by 'Justice'" to "Well, probably not, but we're working on it". An unqualified "Yes" would, I think, not be heard.

Not all papers of course touched the Conference theme. Professor Ricketson on the Protection of Industrial Designs, Mr. Justice Cole on the Concept of Reasonableness in Construction Contracts and Mr. W.M. Jansen on the Valuation of Interests in Professional Partnerships dealt with important topics but, as the learned authors would be the first to admit, ones not at the front line of the struggle for human rights and the redress of historical wrongs.

Others however did, on examination, bear a connection with the noble aspiration of justice for all that might not have been apparent at first blush. For example, Mr. Justice Hampel's paper and workshop session on advocacy skills dealt with a topic which has a direct and measurable effect not only on the quality of justice, but also its availability. Competent advocacy makes for shorter trials and hence availability of limited legal aid funds to more who need them. Moreover, advocacy is a skilled craft. It would be a cruel twist if those whom many of the papers at this Conference identify as being especially disadvantaged managed to obtain entry to the justice system only to lose their cases because of incompetent advocacy or other defective professional services.

Many of the papers however were squarely within the Conference theme. The Conference was as fortunate in the eminence and quality of the speakers as it was in the range of experience on which they were able to draw.

As the theme "Justice for All?" developed in these papers there could be detected a counterpoint, usually subtle and muted, but at times quite compelling. It can be expressed in the famous editorial aphorism, sadly so often ignored in the trade from which it sprang, "Comment is free, but fact is sacred".

We do have a justice system, imperfect though it may be. It is a complex beast involving not only tangible things like laws printed in books and court-rooms in which cases are heard, but practices, beliefs, values, prejudices and traditions. Many of these intangibles have a great potential for misunderstanding because they are at the same time invisible to outsiders but so obvious to insiders that they go without saying.

My message is not another serve of that saying which has regrettably passed from useful homespun philosophy into overdone cliche viz. "If it ain't broke, don't fix it". The justice system needs a lot of fixing. But everyone involved in the fixing process, including critics who argue for change, will be much more effective if they work from a basis of fact.

For example, Justice Michael Kirby's paper questions a proposition that is now often treated as received wisdom of universal and literal application. The proposition in question is that only the very rich and the very poor (who are legally aided) can invoke the courts. His Honour cites Chief Justice Gleeson's observation:

"So far as I am aware no-one has ever undertaken a systematic attempt to construct a financial profile of litigants for the purpose of testing whether it really is the case that only very rich or very poor people in fact litigate. My own impression is that it is not the case. The explanation may lie in the fact that, in personal injuries litigation, the plaintiffs' lawyers operate on what is, de facto, a contingency fee basis."

The reference was of course to fees calculated on the ordinary fee for service basis, but which are in reality often only payable if the case is won or settled. Yet there is a strong push to introduce into Australia U.S. style contingency fees (that is to say percentage of verdict) even though they greatly increase the cost of litigation for successful plaintiffs and amount to an indirect subsidy by those plaintiffs of unsuccessful claims, as well as creating great potential for abuse. Thus misunderstanding as to how the Australian justice system really works can lead to "reform" which creates its own new and different problems.

Justice Kirby's paper "Changes in the Delivery of Legal Services in Australia", is replete with up-to-date information. In attempting to describe His Honour's knowledge of the Australian legal system, one is struck with the sheer inadequacy of the word "encyclopaedic". Nevertheless, even excellent Homer nods, as His Honour does in implicitly attributing to the whole of Australia the N.S.W. practice of involving the elected government of the day in the appointment of Queen's Counsel (at least up until last year when the N.S.W. Government announced the discontinuance of such appointments). This has never been the case in Victoria and I suspect not in other States, although it is hard to be sure. The local legal culture in Australia differs in many respects from State to State. This very diversity adds another layer of complexity and underlines the need for accurate factual information.

How fortunate then, one might say, that there is such a plethora of inquiries into the Australian legal system by Parliamentary committees, commissions, government departments and the like. Surely such bodies will at the very least create a vast storehouse of knowledge to inform accurately the decision-making process.

Alas, the reality is somewhat different. In his paper on Legal Aid in Australia Mr. Sydney Tilmouth Q.C. of the South Australian Bar notes that the Senate Standing Committee on Legal and Constitutional Affairs published a discussion paper in April 1992 on legal aid which said that:

". . . the cost of legal aid through the private sector is largely outside the direct control of the funder because the scale of fees by which private practitioners' remuneration is determined are [sic] not set in consultation with the legal aid commissions."

With commendable restraint, Mr Tilmouth notes that this "is simply not true".

More recently the Commonwealth Attorney-General released a discussion paper prepared by his Department and entitled "Judicial Appointment — Procedure and Criteria". One's confidence in its reliability is somewhat dented by a remarkable historical discovery concerning judicial appointments in the United Kingdom. The paper asserts:

". . . the tradition of appointing highly qualified lawyers to the bench rather than making blatantly politically motivated appointments was only started in the United Kingdom by English Prime Minister Attlee in 1946 and its continuance relies on the precarious base of convention". (par.4.3.5)

If the Scruttons, the Wrights and the Atkins who sat on the English Bench prior to 1946 were all time serving party hacks, they must have had pretty good ghost writers.

Of more direct importance, the paper commences its theme of the unrepresentativeness and non-reflectiveness of the Australian judiciary by stating — as a matter of fact and not just recording of argument — that judges on Federal and State Courts are "unrepresentative", because they are "overwhelmingly," amongst other things, "products of the non-government education system".

The message is clear. Current methods of judicial appointment are to be reviewed on the assumption that they have produced a judiciary (and presumably the Federal Bench in particular, since that is the only one for which the Commonwealth Attorney-General is responsible) which, amongst other things, comes from a privileged and elitist educational background.

What are the facts?

In considering educational background in Australia as an indicia of wealth and privilege, most people would accept three broad categories:
(i) APS/GPS - Scotch, Xavier, Melbourne Grammar, Shore, Riverview, etc.;
(ii) government schools;
(iii) other independent schools, which happen to be

mainly Catholic — Christian Brothers, Marist Brothers etc., and which would not ordinarily be regarded as particularly privileged.

Commencing with the High Court, which is not only the most important court in the land but the one where there is the greatest scope for societal value judgments, the figures are:

APS/GPS – 2 (28%)
Government – 2 (28%)
Catholic etc. – 3 (43%)

The figures for the Federal Court are:

APS/GPS – 38%
Government – 41%
Catholic etc. – 21%

So in both courts a substantial majority (71% on the High Court and 62% on the Federal Court) came from non-privileged educational backgrounds.

In an area where there is so much subjective theorising and misinformation, educational background is one of the few objective criteria that the public can look to in assessing the worth of current criticism of the Australian judiciary.

Please do not misunderstand me. The system by which judges are appointed is self-evidently a question of high public importance. There probably are changes that should be made to the present system. But two things need to be said about the present debate. First, it ought to proceed on a basis of fact and not on an assumption that, to borrow Mr. Peter Ryan's phrase, in so grand a plan, officious insistence on facts would be mere pedantry.

Secondly, while a Bench that in its composition is representative or reflective of society may in itself be a worthy aim, there is a danger that undue emphasis on such criteria may create an expectation that decisions of courts should always reflect the thinking of the community, or a majority of it; in other words, that decisions of courts should be popular, in the opinion poll sense.

From time to time however decisions of courts will be deeply unpopular, or at least will be so regarded by those who have power to direct the course of public debate. If recent experience is any guide, opposition to the result of the case or the reasons given may take the form of personal vilification of the judge and misrepresentation, whether from ignorance or design, of the true nature of the decision itself.

There is irony here. The current debate on judicial appointment is led by politicians and the media. Success in those fields is to a large extent dependent on an ability to discern what the public wants at any given time. Being able to sniff the breeze of public opinion and trim sails accordingly is a vital skill in those areas, but not, I suggest, something to be looked for in appointment to the Bench.

Sir Iain Glidewell has told us that criticism of individual judges has become a popular sport in the U.K. That has certainly been the case in Australia. Perhaps this is a sport which can be contested at international level. A Fleet Street team could surely redeem much of Britain's damaged sporting pride.

Here one must endorse Justice Kirby's comment that:

". . . the judges are all too often laid bare to ignorant attacks by Premiers and Attorneys-General who should know better. It is because they are not defended as once they were that judges must find better ways of communicating to the public. By doing so, I believe they may help to win back the confidence of the community despite the media and political barrage."

A good starting point was the recent public statement by Chief Justice Phillips of the Supreme Court of Victoria, departing from a practice of over a century, which rebutted a particularly ill-informed editorial in *The Age*. But I agree with Sir Iain Glidewell that judges have to be philosophical. At the end of the day, the bottom line, as I look through the window of opportunity over the level playing field, is that I would sooner be a judge than a journalist.

Lest this occasion sound too much like an inaugural meeting of the Amalgamated Judges' Union, I return again to some of the papers because they demonstrate the primacy of accurate information. Sir Ivor Richardson introduced us to the major and complex developments following the introduction in New Zealand of the *Bill of Rights Act*. It would seem from one of the citations in Sir Ivor's paper that such is the weight of litigation on the Bill of Rights in that country that there is a new series of law reports, the New Zealand Bill of Rights Reports. One asks — if justice comes, can CCH be far behind?

Professor Tilmouth reviewed in scholarly detail the present status of class actions. Mr. Peter Gordon showed us how traditional institutions like trial by jury can meet new challenges like HIV blood infection claims.

Particular mention needs to be made of Mr. John Marshall's paper "A New Zealand Perspective of the Mabo Decision". As we embark on the Mabo era, the experience of New Zealand with Maori land claims and the Treaty of Waitangi is likely to be of major assistance. FT Marshall's paper, which also touches on the North American experience, was lucid, practical and full of information.

Overall, one is left with a distinctly positive impression. There are huge problems to be tackled. The real advances are likely to come from serious work where legal skills and experience are applied to specific areas. In doing so, lawyers will continue to gain personal satisfaction. I conclude on the cheerful note of Mr. Nicholas Cowdery Q.C. of the Sydney Bar — that by doing good for our communities, we may do some good for ourselves.

THE NEW SILKS — 1993

Full Name:	**Michael Rothschild Shatin**	Full Name:	**William Francis Lally**
Date of Admission:	1967	Date of Admission:	1969
Date of Signing Bar Roll:	1967	Date of Signing Bar Roll:	1970
Readers:	C.J. Ryan, J.R. Dixon and D. Doane	Readers:	J. Garner, R. Bair, M.J. Sweeney, S.G.R. Wilmoth, N.A. James, M. Clarke, L.E. Kennett, K.G. Howden
Areas of Practice:	Commercial, Banking, Insurance, Professional Negligence, Defamation, Local Government	Areas of Practice:	General Commercial
Reason for Applying:	New challenges in my Profession	Reason for Applying:	Mark of achievement
Reaction on Appointment:	Excitement and happiness	Reaction on Appointment:	Humble

Full Name:	**Philip James Kennon**
Date of Admission:	1 March 1972
Date of Signing Bar Roll:	22 March 1973
Readers:	John Healy, Kerrie Symons, Robert Cameron, Dellan Hyde, Heather King, Robert Mugarenang
Areas of Practice:	Commercial/Equity
Reason for Applying:	"Still just a junior dad"? finally became unbearable
Reaction on Appointment:	Happy and honoured

Full Name:	**Maureen Rosalind Hickey**
Date of Admission:	3 November 1975
Date of Signing Bar Roll:	26 February 1976
Readers:	Michael Cosgrave, Mordy Bromberg, Alan Hands, Irene Lawson and Kirsty McIntyre (The first three of whom divided their reading period between two masters)
Areas of Practice:	Industrial and Administrative Law
Reason for Applying:	Many including professional development, need for challenge, and for increased recognition of women at the Bar
Reaction on Appointment:	Initially tongue-tied — to the relief of those around me. Thereafter revival of the sense of community with one's colleagues because of their pleasure on the appointment

Full Name:	**David Edmund Curtain**
Date of Admission:	2 September 1974
Date of Signing Bar Roll:	27 May 1976
Readers:	Marilyn Smallwood, Philip Ginnane, Ken Oliver, Helen Mason, Jessica Klingender, Jeremy Twigg
Areas of Practice:	Medical Negligence, Personal Injury, Insurance Litigation, Professional Negligence
Reason for Applying:	N/A
Reaction on Appointment:	Honoured

Full Name:	**Ernest Noel Magee**
Date of Admission:	1 April 1976
Date of Signing Bar Roll:	24 June 1976
Readers:	Frazzetto, Whitford, Flower, Davey, Sparks, P. Clarke, T. Young, E. Lagos
Areas of Practice:	Commercial
Reason for Applying:	I wanted to be a silk — I had the practice to support it
Reaction on Appointment:	Delighted

Full Name:	**David Shavin**
Date of Admission:	1 March 1977
Date of signing Bar Roll:	1 May 1978
Readers:	G. Parncutt, Ms K. Howard, Ms J. Richards, N. Russell, Mrs. J. Reuben, Ms C. Zapparoni, M. Goldblatt, Ms M. Barker
Areas of Practice:	Trade Practice, Industrial & Intellectual Property, Com mercial and Communications Law
Reasons for Applying:	Looking for new challenges and experiences
Reaction to Appointment:	Excitement and trepidation at upholding standards set by those who have gone before

Full Name:	**Geoffrey John Digby**
Date of Admission:	2 April 1979
Date of Signing Bar Roll:	11 July 1979
Readers:	Jody Williams, Toby Shnookal, Silvana Wilson, Les Schwarz, David McAndrew, Joseph Forrest
Areas of Practice:	Building & Construction Disputes
Reasons for Applying:	The hope that I might never draw another building case, request for particulars
Reaction to Appointment:	Very excited and pleased

THE LAST TUESDAY IN NOVEMBER

(To avoid gender bias and any unwarranted allegations of male chauvinism, please read "he" as "he and/or she")

"THE LAST TUESDAY IN NOVEMBER" — whilst these words may seem to have a familiar ring they are not to be confused with the more familiar phrase "The First Tuesday in November" which signals to the racing cognoscenti the Melbourne Cup. However, among members of the Bar the first- mentioned phrase is equally significant as that is usually the day upon which The Honourable the Chief Justice informs successful applicants that they have been chosen, like the jockeys riding their mounts in the Melbourne Cup, to wear silk.

For several months prior to this eventful date, the bookmakers of the Bar have been touting the odds both as to the identity of those who have entered the race and as to the identity of final place-getters. If repetitive gossip is to be any guide, there are between 60 and 80 starters and the published results show approximately 8 to 10 place-getters each year.

On that last Tuesday in November there is no doubt that the place-getters experience feelings of euphoric pride, mixed with a sense of heightened responsibility and some trepidation.

It is the nature of practice at the Bar that some of the new silks simply continue their existing practice with the addition of the silk gown, rosette (optional) and a junior (now apparently also optional). Others find themselves remembering all too clearly their early days as junior counsel waiting for the phone to ring and hoping that the effluxion of time, and the fact that not all solicitors can remain blind forever to their enormous talent, will see an explosion in their practice that will rock the pillars of their bank manager's office.

Despite the public perception, engendered by ill-informed media reports, that Q.C.s have a licence to print money, the reality is that not all silks will be successful. Some, after several years of polite conversation in the halls and tea rooms of Owen Dixon Chambers, will look voraciously at the stuffed gowns of busy juniors. Some will make an instant mark upon the profession as prodigies of the senior Bar and yet others will slowly and with effort ascend the heights of Olympus in their practice as Queen's Counsel. Others will simply opt after one or two years as silk to become a juvenile judge or worse still a public servant of one form or another.

If the first metaphor be racing the second must be cricket, as the abolition of the two counsel rule has seen the ranks of senior counsel divide into a 1st XI and a 2nd XI. These team selections do not necessarily reflect upon the innate ability of the silk to "bat with patience unremitting" but rather upon whether he is prepared to have a runner in case of injury or other indisposition.

If the batsman plays with a runner then he is certainly, in the eyes of the Harold "Dickie" Birds of the Supreme Court, a man of the 1st XI. However, if a nouveau silk appears at the wicket without a runner it has been known for the umpire to question his credentials and the capacity in which he seeks to apply bat to ball.

It must be said that in this game of cricket the silk makes the selection decision for himself, no doubt juxtaposing commercial precepts with the desire to play at the highest level.

The significance of one's new role is never lost, even on holidays.

One of last year's tyros holidaying in London at Christmas visited Simpsons of Piccadilly to see whether they could outfit him with a new DAKs reefer and grey trousers. Being one of a dying breed of Anglophiles our new silk marched into the store wearing his best overcoat and bowler hat, seeing which the senior shop assistant said:

"Oh sir, we don't find many gentlemen wearing bowler hats anymore, they seem to be reserved for the very toffy gents from the City and the occasional Q.C. "

"Oh indeed," said the barely initiated, producing from his front coat pocket one of the few hundred newly embossed cards proclaiming his divinity.

The shop assistant read the card and responded:

"Well then sir, you're certainly entitled to wear your bowler (pausing to read further) . . . even if you are a colonial silk!"

By the time this article appears, a new batch of silks, like teacakes, will have been welcomed and consumed by the profession. They should enjoy their first euphoric weeks because their new role is one of challenge, and hopefully they will take some little pride in remembering the origins of their new title and if the new Republic is to come, as part of the constant search for the lowest common denominator, rejoice in the fact that no matter what substitute or panacea is hereafter offered - they can tell their children and grandchildren that they were appointed as counsel to Her Majesty the Queen.

Simon Wilson

WIGS AND GOWNS IN THE UNITED STATES SUPREME COURT?

"FORMAL DRESS IS NO LONGER REQUIRED for counsel arguing before the [US] Supreme Court. Counsel who possess a cutaway and striped trousers — morning clothes, although the Court sits partially in the afternoon — may wear them, and it is the tradition for Department of Justice attorneys to do so. But such formality is not necessary. Conservative business attire is satisfactory, preferably in a dark colour in keeping with the dignity of the Court. Women should wear dark two-piece suits. In selecting his or her attire, counsel should be aware that the Courtroom is generally air-conditioned. If vestless, gentlemen should keep their jackets buttoned."

Paragraph 14.9(c) "Dress" from Stern, Gressman and Shapiro, *Supreme Court Practice* (6th ed., 1986) 592.

Lewis F. Claiborne served in the U.S. Solicitor-General's office from 1962 to 1970 and later from the mid-70s to 1985 when, having attained the position of Deputy Solicitor-General, he again retired. Claiborne's English-born wife was eager to move back to London. In fact, it was her urging that had induced him to leave the SG's office the first time in 1970. She wanted to go home and the Ford Foundation offered him a fellowship and while living in London in the early '70s he was called to the English Bar.

Upon his return to the U.S. and the SG's office Claiborne was called upon to argue a case before the Supreme Court. With a colleague's encouragement, he proposed a departure from the SG's traditional garb of striped pants, dark vest and tails. As befits the brother of the Liz Claiborne of the Liz Claiborne women's clothing empire, Claiborne had already set himself apart from his colleagues in the SG's office by buying his own formal outfit. (Most of the attorneys in the SG's office resort to one of five sets of hand-me-down gear, varying in size and wear and tear; they choose the one with the nearest fit and, with the judicious use of safety pins, appear elegant only when viewed from a distance.)

Claiborne, who was acknowledged by the authors of the *Supreme Court Practice* as one of the two Deputy Solicitors-General who had graciously given the benefit of their experiences before the Court to the authors, explains:

"I was a full-fledged barrister. The rules of the Bar of England and Wales are that whenever you appear, whether in Great Britain or at a distant Bar, you must always appear in the wig and gown. Using that as a pretext, I called Warren Burger's chambers at the Supreme Court and asked if I could have audience with him. His secretary was rather testy, so I told her it was to talk about a subject dear to the Chief Justice's heart: proper dress in the courtroom for lawyers. He called me back immediately, all ears. By way of asking him if I could appear in my wig and gown, I told him about the British rules. Then he said that he himself should be in a wig and gown, and had been cheated out of it by Thomas Jefferson. I didn't follow, so he told me about an exhibit in the Supreme Court lobby showing Chief Justice John Jay in a magnificent red robe, with a proper gentleman's wig. It followed that Burger should be so adorned, and would be, if Jefferson hadn't changed the rules. I wasn't sure whether he was being humorous or not, but I brought him back to my predicament, and asked him what I should do. He said he thought it was entirely appropriate for me to appear in my wig and gown, but warned that others might disagree. I went down to the Solicitor-General's office — he was then Bob Bork — and told him about this conversation. He said I had been a damn fool to ask permission, that I should have just done it. In any case, discretion got the better part of valor: I, not forbidden either by the Chief Justice or the Solicitor-General, decided to go back to the standard getup of the SG, and so I did."

[From Caplan, *The Tenth Justice: the Solicitor-General and the Rule of Law* (1987) 162].

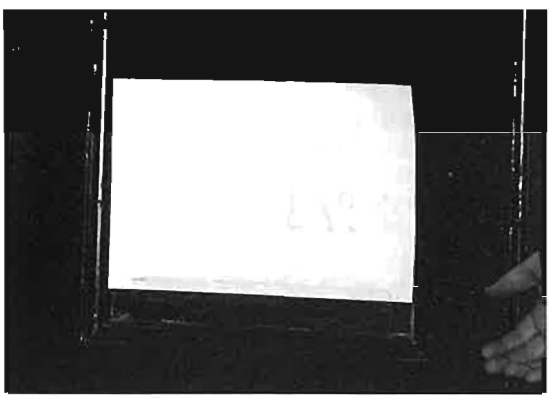
Brien Briefless

APPOINTMENT OF NEW MASTERS

THERE HAS BEEN A RUMOUR FOR SOME time that two new Masters have been appointed, but for reasons best known to the judiciary their names and even their existence has been kept under wraps. *Bar News* has now tracked down the new Masters.

Sources close to the Chief Justice suggested that one of the appointees, Master Fire Hydrant, "works well under pressure and maintains a steady flow of work". He copes well with inflammatory argument often pouring cold water on the heated debate between counsel. We were unable to contact Master Fire Hydrant but did locate his Chambers.

The other new Master, Master Fire Alarm, has Chambers off the Supreme Court courtyard near the stairs to the sixth court. We arranged to visit her Chambers. But when we got there Master Wheeler was about to go into conference with her. Consequently we were unable to interview her.



We have been told that she was a ringing success throughout her university career; and some of her old flames remember her as quite the belle at university social occasions.

She practised extensively in the coronial courts and often appeared in arson trials. In her early years in practice, on occasion and under pressure, her burning ambition caused her to blow a fuse and drop a couple of clangers.

With the modernisation of church procedure and the development of electronic aids in the ecclesiastical jurisdiction, she appeared in a number of exorcism hearings in which she was opposed to Booke Q.C. and Kandell.

The editors understand that in her new role she will spend much of her time on one of the Supreme Court circuits.

A warning for smokers! Neither of the new Masters will tolerate smoking anywhere in the precincts of the court.

WILLIAM WREATHCOCK —IMPERFECT ATTORNEY

LONG THOUGHT TO BE APOCRYPHAL ((1893) 35 *Law Quarterly Review* 105), there exists sufficient evidence to support the authenticity of the Highwayman's case: *Everet* v. *Williams* (1725). The most common source for the case is any of the fifth or subsequent editions of *Lindley on Partnership* which was founded upon the report in (1787) 2 *European Magazine* 360. The case is not to be confused with the old case, referred to by Holt C.J. in *Johnson* v. *Browning* (1705) 6 Mod Rep 216 at 217, 87 E.R. 969, wherein the plaintiff, complaining of a statement labelling him a "highwayman", lost the suit when the defendant succeeded in convincing the jury that the allegation was true. Immediately afterward, the plaintiff was arrested, convicted and sentenced to death. The case referred to by Holt C.J. was already "an old case" twenty years before *Everet* v *Williams*. Everet was referred to by Bacon V.C. in *Ashhurst* v. *Mason* (1875) L.R. 20 Eg 225 at 230.

Because contemporary reports are not readily available a number of writers have erred in supposing that the hanging of the parties was a consequence of the conclusion of the civil case, e.g., Curlewis (1906) *The Mirror of Justice* 110-111; Fitzgerald and Kewley (1978) *This Law of Ours* 226; Megarry (1955) *Miscellany-at-Law* 76-78; Oswald (1892) *Contempt of Court* 32-34 and *Lindley on Partnership* (15th ed., 1984) 149. The Note in (1893) 35 L.Q.R. 197–199 separates the eventual punishment of the parties from their 1725 civil action.

Briefly, the facts, well-known, are as recited by Tumin (1983) *Great Legal Disasters* 16–19 and reprinted in Mortimer (ed.) (1992) *The Oxford Book of Villains* 120–122.

A highwayman (John Everet) brought suit against his erstwhile partner (Joseph Williams). The lawsuit arose as a "negotiating tactic" dreamt up by Everet's attorney William Wreathcock. Previously Williams had entered judgment against Everet in the sum of £200 (this being the early 18th century before it was necessary or desirable to put value back into the pound). Thus Everet was facing debtor's prison until Wreathcock's ingenuity saw a way out. Unfortunately Wreathcock was too clever by half.

Everet sued Williams claiming (in euphemistic language) that they were partners and that Williams had failed to account to him for a fair and equitable partition of the partnership profits — the proceeds of their dealings with various gentlemen upon the roads or highway robbery.

It was never envisaged that the case would actually go to trial. Wreathcock merely wished Williams to reconsider his course of action that would send his ex-partner to Newgate Gaol.

Williams was made of sterner stuff than this — he defended and Sjt Girdler moved the court to refer the bill to the Deputy Remembrancer, it being "a scandal and an impertinence". Two weeks later the bill was dismissed. Wreathcock and his partner were hauled before the court and each fined £50 — a salutary lesson that one can be liable for one's partner's misdeeds — and Mr. Collins of Counsel, who drew up the original complaint, was ordered to pay the successful defendant's taxed costs — no need for 0.63 r.23 back then! Mr. Collins had wisely refrained from participating in oral argument before the Court. There the affair ended, there being no procedure available for an outraged court to refer it to the DPP or somesuch. Thus, Williams's robust defence did not entail such a risk as he might encounter today.

That the law eventually overtook Williams, who was hanged at Maidstone in 1727 for his subsequent infringements, may have given some satisfaction to the losing litigant Everet, but such satisfaction would have been short-lived. Three years after Williams, Everet (in the contemporary vernacular) "met with a fatal accident at a place near Tyburn turnpike", i.e., was hanged. He had been convicted of robbing two ladies on the highway near Hempstead on Christmas Eve 1729. One of his victims was to describe him as "very civil" during their encounter.

All the above merely serves to introduce William Wreathcock, Everet's attorney. Admitted to practice in 1717, he was commemorated in the following doggerel:

> The cries their attorneys call;
> one of the gown, discreet and wise;
> By proper means his witness tried;
> From Wreathcock's gang — not right or laws,
> He assures his trembling client's cause.

Wreathcock's success as an attorney was largely dependent on his ability as a suborner of witnesses — he employed a motley crew of professional perjurors known as Wreathcock's gang — to provide the necessary evidence to win the day for a Wreathcock client. Our modern phrase "man of straw" is derived from these professional witnesses whose trade sign was a straw in their shoe: men of no substance or worth.

To supplement his daily bread, Wreathcock organised a number of highwaymen by night. His activities earned him the sobriquet "the General" in that he did not actively participate but reaped the rewards gained by his underlings. Ten years after the *Everet* case he was enjoying an income of several hundred pounds pa and owned several estates.

It was the robbery of a clergyman, Dr. Lancaster, of £35 near Chelsea in June 1735 that brought Wreathcock undone. A man named Macrae was tried for the crime but the victim's word against the several who swore to Macrae's alibi saw the prisoner acquitted. Later, one of the alibi witnesses, Julian Brown — seriously ill and wishing to make peace in accord with his religious beliefs — confessed to participating in the robbery of Dr. Lancaster and, furthermore, both the robbery and the alibi defence at Macrae's trial were organised by "General" Wreathcock.

Consequently Wreathcock and others were tried for the robbery of Dr. Lancaster. The ultimate fate of the confessed perjuror Brown is not known and, of course, Macrae had been acquitted and could not even be tried for perjury given that he was incompetent to testify prior to the 1898 *Criminal Evidence Act.*

At the trial, Wreathcock conducted the defence on behalf of himself and his co-defendants. Brown testified regarding the robbery by Macrae and the part that he, Wreathcock and others took in it. Further, Brown's testimony extended to Macrae's acquittal — Wreathcock calling a meeting in Symond's Inn that night and organising the false alibi evidence.

Not surprisingly, the defence at Wreathcock's trial was also based upon an alibi — witness after witness swore that on the evening in question they had been in the defendant's company. On that day, so it was alleged, Wreathcock had been in Lord Hardwicke's Court all day and thereafter he, his clerk and a client had repaired to the Coffee House at Serjeants' Inn in Chancery Lane. There business discussions ensued until 8.00 p.m. when they moved on to the King's Head at Symond's Inn (at least Brown got that right) where all dined on liver and bacon and did not leave until the early hours of the next day.

The common sense of twelve good men and true accorded little weight to the sworn alibi evidence which had done so well in the past for Wreathcock's clients and Macrae. Wreathcock and his fellow prisoners were all convicted and sentenced to the same fate as that of Everet and Williams. Later, these sentences were commuted and the convicts transported to the green fields of Virginia for life.

Wreathcock's success as an attorney was largely dependent on his ability as a suborner of witnesses — he employed a motley crew of professional perjurors known as Wreathcock's gang

Eventually Wreathcock obtained a Royal Pardon, returned to Mother England and resumed practice as an attorney. During his twenty-year absence the Society of Gentlemen Practitioners (the precursor of today's Law Society) had come into being. In 1756 the Society set about having Wreathcock struck off. Shortly thereafter, Wreathcock was committed to prison for various misdemeanours and contempt of court — this was to provide further ammunition for the Society.

After several adjournments obtained by Wreathcock, the Society succeeded in early 1758 in having William Wreathcock struck off the roll of attorneys. It is of interest to speculate that had Wreathcock been of a later era, or had the American colonies rebelled earlier, it is (admittedly we are stretching our speculation here) entirely possible that Wreathcock may well have been transported for life to a newer penal colony and perhaps (?) have participated in the founding of the legal profession in Australia.

Curlewis (1906), *The Mirror of Justice*
Fitzgerald and Kewley (1976), *This Law of Ours*
Jefferson (1867), *Portrait of a Profession*
Lindley on Partnership (15th ed., 1984)
Megarry (1955), *Miscellany-at-Law*
Mortimer (ed., 1992), *The Oxford Book of Villains*
Notes (1893), 35 L.Q.E. 105 and 197
Notes (1955), 220 *Law Times* 177 and 131
Oswald's Contempt of Court (1892)
Sharpe (1988), *The Last Day, the Last Hour*
Tumin (1983), *Great Legal Disasters*

Brien Briefless

NOTES TAKEN AT AN ANNUAL GENERAL MEETING

[SAVE FOR THE SUBSTITUTION OF descriptions or pseudonyms for real names the following is an accurate extract from notes recording events at a company AGM]
[Secretary handed out Agenda and last year's minutes]
Chairman: Suggestion to hold an informal meeting, and formalise certain parts as has been agreed in the past.
Dissident Member: What parts are going to be formalised, and what parts informal?
Chairman: Don't you understand?
Dissident Member: But what parts are you specifically referring to?
Chairman: Like we have done in the past.
Dissident Member: What is your intention regarding the formalising of which parts?
Chairman: OK, we'll go around the table. [Arthur], do you understand?
First Non-Dissident Member: Yes.
Chairman: [Albert], do you understand?
Second Non-Dissident Member: Yes.
Dissident Member: I don't think there is a need to go through everyone here. If you can't tell me which parts are going to be formal and which parts informal then I want a formal meeting.
Chairman: Get fucked.
Dissident Member: You can't say that I'm a shareholder, I have rights.
Chairman: (Standing up looking down at Dissident Member) Get fucked, get fucked, get fucked.
Dissident Member: (To Secretary) I want this recorded in the minutes.
Chairman: No, the meeting hasn't officially started yet, there are no minutes.
Dissident Member: You were addressing the meeting as to whether the shareholders agreed to an informal meeting.
Chairman: I hadn't opened the meeting, it was only a suggestion prior to the meeting being opened.
Dissident Member: You can't do that.
Chairman: Yes we can. I don't want to be elected Chairman, I vote that [the Dissident Member] be elected. Chairman. Everyone agrees - you're Chairman. (No vote/or comments).
Dissident Member: I reject my nomination.
Third Non-Dissident Member: Let's get on with the meeting.
Chairman: [To Dissident Member] I don't want you sitting next to me, it's not right for you and not the secretary to be sitting next to me.
Dissident Member: OK. I'll swap with [Andrew] if you want. (Swap of seats then took place).

ENTRY FOR BAR DIRECTORY

NAME: Bert Briefless
(O'Briefless when touting at the Celtic Club).
BORN: 1940
ADMITTED IN VICTORIA: 1967 (I had to do my Articles twice).
APPOINTED AS Q.C.: As a Republican I object to this title, particularly since I have not yet been appointed. (I have applied again this year so leave blank).
PROFESSIONAL QUALIFICATIONS: Questionable.
AREAS OF CURRENT PRACTICE: Very few at present.
AREAS OF PRACTICE IN WHICH YOU ARE PREPARED TO ACCEPT BRIEF: All fields especially those in which I have no experience whatsoever.
OCCUPATIONS IN WHICH YOU HAVE ENGAGED: Professional punter, busker, Father Christmas at Myer.
LANGUAGE: Passable English
FEES: Outrageous (according to *The Age*, but nobody pays anyway).

ADMISSION TO LAW COURSES

WITH UNIVERSITY SELECTION FOR 1994 just around the corner, readers may be interested in a particular aspect of 1993 Law Admissions which have been drawn to the editors' attention.

In *The Age*of Friday 29 January 1993 the cut-off scores for tertiary places at Monash University for 1993 were published together with the cut-off scores for other tertiary institutions.

The cut-off scores for Monash University were also published in Malaysia.

The relevant extract from *The Age* and the full Monash statement published in Malaysia are set out below.

On the face of it, it would seem that the cut-off score published in Australia for entry into the Monash Law School was 157 but the published cut-off point in Malaysia was 150, 148, 147 or 146, depending upon the precise course for which the student enrolled. This does not necessarily mean that overseas students are admitted into the Monash Law School ahead of Victorian students with better VCE scores. But it is certainly the obvious inference to draw.

If that inference is the correct one, it raises interesting questions as to the statutory or other basis for discrimination and the economic, educational or political justification for such discrimination.

8 THE AGE, Friday 29 January 1993 — Tertiary Places '93

THE COURSES AND CODES

MONASH

Caulfield

MCAC	Accounting/computing	139.83%
MCACP	Accounting/computing	I
MCRH	Arts	I
MCRA	Arts/bus-accounting	I
MCRAP	Arts/business-accounting	I
MCRB	Arts/bus-banking/finance	I
MCRT	Arts/business-managt	I
MCRM	Arts/bus-marketing	152.95%
MCAA	Business-accounting	138.68%
MCAB	Bus-banking/finance	134.81%
MCABP	Business-banking/finance	I
MCAX	Bus-business admin.	138.68%
MCAI	Business-internat. trade	138.100%
MCAF	Business-management	139.79%
MCAD	Bus-manufact'g manag	124.100%
MCADP	Business manuf/managt	I
MCAM	Business-marketing	143.100%
MCVC	Ceramic design	I
MCCO	Computing	118.78%
MCCOP	Computing	I
MCEN	Engineering	111.60%
MCVF	Fine art	I
MCVG	Graphic Design	I
MCVT	Technology design	I

Clayton

MOAA	Accounting	I
MORH	Arts	130.88%
MORC	Arts/commerce	148.98%
MORE	Arts/engineering	130.83%
MORL	Arts/law	157.98%
MORS	Arts/science	142.99%
MOLM	Bus-management/law	157.100%
MOAI	Business systems	143.96%
MOAC	Commerce	136.92%
MOAL	Commerce/law	157.93%
MOCO	Computer science	125.93%
MOCE	Computer science/englin.	140.75%
MOCT	Digital technology	115.98%
MOAE	Economics	136.85%
MOLE	Economics/law	157.100%
MOEN	Engineering	136.65%
MOLW	Law	157.60%
MOHM	Medicine	160.60%
MOVM	Music	I
MOSC	Science	117.95%
MOSE	Science/engineering	140.96%
MOSL	Science/law	157.100%

Frankston

MFAC	Accounting/computing	133.100%
MFRH	Arts	122.84%
MFRA	Arts/bus-accounting	I
MFRI	Art/bus internat. trade	142.92%
MFRF	Arts/business managt	126.91%
MFRT	Arts/education	117.68%
MFAA	Business-accounting	129.67%
MFAG	Business-agribusiness	I
MFAX	Bus-business admin.	127.100%
MFAI	Bus-international trade	132.80%
MFAF	Business managment	128.100%
MFCO	Computing	I
MFVT	Craft	I
MFTC	Early childhood	115.68%
MFHN	Nursing	104.100%
MFTP	Primary	109.63%

LUNCH

IT BEGAN AS ONE OF THOSE SPRING DAYS that Melbourne can occasionally do so well — sunny, light breeze, forecast of 18°C but more likely to be 20°C — towards the end of a week that had begun the previous Saturday and continued through the Sunday churning out submissions that were never going to change His Honour's mind (and didn't!).

The Clerk had let me down badly and I had no brief for the day. I did have paperwork to do and some of it had become urgent. I couldn't get motivated. I felt tired and uninspired. I popped up the corridor to speak with a colleague. He appeared listless and uninterested. Ennui had set in and it was highly infectious.

Lunch loomed somewhat in the near future. There was no way I was going to work through lunch — or even get anything achieved before lunch. A sandwich was out! The prospect of a salad brought on wave after wave of limpidness. I wasn't in the mood to go up to the Essoign Club, to eat predictable food with equally predictable wine and to indulge in predictable conversation with others of a similar frame of mind. I certainly could not have faced more talk of how little work there was and how slow the money was in coming in.

Why not something a little different, perhaps a little more exciting than usual? I rang someone else's wife,

"How about a leisurely lunch?" "I'd love to," was the reply, "but I am rid of the kids for a few hours and I have so much I'd like to do now I have the chance. How about some other time?"

It was all getting to be a little difficult. I rang my own wife. "How about a spot of lunch?" "When? We can't do it next weekend, we're busy" was the response. That was soon followed up in rapid succession by "What, today!" "Why?" "I need more notice than that." "Who's going to pick up the kids?" "I have to get changed." "I would have to do something about my hair." "Do you *really* have to go out to lunch today?" "Oh alright, if you really insist."

I suggested we try Stephanies' special lunch menu. We went to Chinois. It wasn't too busy although the waiter was initially slightly troubled by our lack of a booking. "I told you it wasn't a good idea. Let us forget the idea. Some other time." Whilst we had that one-sided discussion we were led to a quiet table for two towards the rear of the restaurant.

Fortunately, the menu was not too large for the choices were already becoming difficult. "Look," she said "they suggest we share our courses." She decided that we would like to share the Chinois caesar salad with marinated, wok-fried eye-fillet followed by wok-fried Lakes Entrance rock ling with basil and a side-serve of stir-fried vegetables. The waiter soon got the idea "Would madam like to see the wine list?" With an incline of the head I was ceded the right to choose the wine.

Her choices were inspired. The salad came quickly and was tasty, refreshing, substantial and the eye fillet undoubtedly set it off. The rock ling was cooked just right and the slivers of ginger served with it made a delectable dish even better. The side dish of vegetable was an unusual selection of chinese cabbage stalks, button mushrooms, snow peas, chunks of large corn cobs and so on. It did not look all that much when it arrived but it turned out to be quite substantial. In keeping with the occasion the 1992 Henschke Semillon was a great selection — even if I say so myself (and I do!).

Those inevitable moments when the conversation flagged were enlivened by the couple at the table next to us.

There they were: father and two to three year old son. They did a rather good job of demolishing the chicken and vegeterian dish with the enormous side dish of Singapore noodles. The father did an even better job of reading the books about "Where did I come from" and "Potty time." Dad's luck began to falter when he thought it was time to go and visit the new member of the family and his son thought it was time for dessert. Although Dad appeared to prevail, they were negotiating about the possibility of calling into "this really good ice cream place" when they left.

Our perceptive, and appropriately attentive, waiter materialised beside us. "Madam, would you like to see the dessert menu now or wait a while?" I was content to take a slow stroll through the list. We waited and then she chose the sorbets with fresh fruit and also the cheese platter for us to share. The tangy lemon contrasted well with the passionfruit sorbet whilst the raspberry took up a conciliatory position between. The blue vein and brie came with a generous serve of shelled pecan nuts and ample, thin, small rounds of walnut and date bread. The brie was slightly disappointing but the blue vein was excellent.

The coffee was strong and well made and the second cup was not billed extra (I was most disheartened recently to be charged $3 for a second small cup of over-stewed filter coffee at a restaurant

near chambers.) The dark and white chocolate dipped fortune cookies were spirited into the handbag "for the kids".

She allowed the waiter to place the bill in front of me having checked it first — of course. She thought that for just over $90 it was good value. Naturally, I agreed. The food, the service and the general ambience were all faultless.

We then eased our way into the still bright, still warm, mid-afternoon. It was not easy hurrying her past the shops to the car. The trip back to reality and to the children's schools was uneventful save for "I suppose this is typical of your usual lunch"; "There you are gorging yourself whilst I am lucky to have time for a stale cracker and a cup of tea"; "Don't expect dinner tonight"; "No wonder you can never keep your weight down," and a lot more of the same.

Suddenly the thought of going back into chambers the next day did not seem so bad . . . even if it meant tackling the pile of paperwork.

I recommend Chinois without hesitation, but I would advise readers contemplating taking their spouses there to preface the invitation with an observation to the effect that "I really feel like doing something special"; "I have a need for a change from the tired, humdrum, takeaway"; "Darling I know it would put you out a great deal, but . . .". (If these lies will not suffice send a self-addressed, plain brown envelope to the editors who will provide such assistance as they can from their vast experience in such matters.)

(*Chinois*, 176 Toorak Road, South Yarra, 826 3388; fax 826 3463).

Retired luncher.
(Approved for Publication by
Mrs. Retired Luncher)

PUT-PUT

AS WE ENTER INTO THE FESTIVE SEASON — ye of little faith may view it as no more than commerce-driven gift-giving — we have decided to emulate Jon Faine's Vroom! Vroom! column in the *Law Institute Journal* wherein our colleagues in the other branch of the profession are exposed to such executive toys as Mercedes 500 SLs, Porsche 968s and the BMW 850L (this latter being a 12-cylinder machine made up by joining two mundane 2½ litre 6-cylinder motors together to give a 5-litre "stereos-six" which is capable of "limping home" at 200 kph should its unfortunate driver suffer mechanical failure). In keeping with our reputation as the less ostentatious side of the profession we have aimed our sights a little lower — whoever it was that suggested that solicitors are the junior members of the legal profession were obviously not thinking of income. Consequently, we have chosen the title "put-put" representing the sound of an underpowered moped to reflect the aspirations of the average barrister. It is obvious that when Faine cracked the joke about Skodas having heated rear windows to keep your hands warm while you push them he was referring to the ultimate mode of personal transport to be acquired by counsel after they have scaled the heights.

Our first "executive toy" suitable for the impoverished barrister is the Taiwanese-made Balloon Helicopter (complete with whistle). This ingenious device utilises the exhaust air from an inflated balloon which is directed through ducts along the leading edge of each of the three rotary wings and thereafter expelled from nozzles at the trailing edge to produce the thrust that gives the motion to the rotary wings. The aerofoil profile of the wings provides the lift which propels the device to heights of approximately 15 metres during a flight of about 10 to 15 seconds. These flight characteristics have been modified by the aeronautical engineers, astrophysicists and hydrodynamicists at a leading Australian university which cannot be named here for fear of jeopardising its future research grant fundings.

One modification was to restrict the exhaust nozzles on the trailing edges of the wings to slow down the angular velocity of the device thus extending the flight duration at the expense of lift. This results in the balloon helicopter hovering (without ascending) for a flight duration of up to 45 seconds. Another modification was to increase the compression of the air inside the inflated balloon (supercharging) by placing an outer balloon over an inner balloon. The results were dramatic — while flight duration is slightly reduced an extremely rapid ascent to an estimated attitude of 25 metres is achieved.

All in all this delightful device — which does not pollute the environment with lead emissions — is highly recommended as an aid to while away those not-so-busy hours while counsel sits by a silent telephone or, for the festive season, it makes an ideal gift for that special person in your life who already has everything: your instructing solicitor.

Balloon helicopter, $2 from Bamix at 249 Elizabeth Street and Melbourne Central (and other suburban outlets).

Brien Briefless

JUSTICE AMONG THE TEA CUPS

FEW WHO KNOW THE HONOURABLE MR. Justice Cummins would describe him as a teddy boy. But while his brother Hampel was seeking snow in Central Australia, Cummins J. was cuddling a teddy and discussing the fine points of debating with Georgina Robertson at Ruyton Girls' School.

CROSS-VESTING: A WAY TO A NATIONAL PROFESSION

THE FOLLOWING EXTRACT FROM THE judgment of Wilcox J. in *Deputy Commissioner of Taxation* v. *Chamberlain* (1990) 26 F.C.R. 221 at 226–227 requires no comment.

"THE CROSS-VESTED WIG

At the commencement of the hearing on 1 September, Mr. K.R. Handley Q.C. announced his appearance with Mr. B.A. Coles as counsel for the Deputy Commissioner. However, Mr Handley immediately added that Mr. Coles was not admitted as a practitioner in the Australian Capital Territory. Mr Handley asked me to resolve this embarrassment by making an order for the transfer of the matter to the Federal Court pursuant to s 5(1)(b)(iii) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (C'th.). That sub-paragraph requires the Supreme Court of a State or Territory to transfer pending proceeding to the Federal Court when it appears to the Supreme Court that "it is otherwise in the interests of justice to do so". Mr. Coles had signed the High Court roll and was, therefore, entitled to appear as counsel in the Federal Court: see *Judiciary Act* 1903 (C'th.), ss 55B and C.

"In *Bourke* v. *State Bank (N.S.W.)* (1988) 85 A.L.R. 61 at 77, I suggested that the phrase "the interests of justice," where used in the cross-vesting legislation, should be read widely. I indicated my view that, under that rubric, a court was entitled to consider not only matters of jurisdiction 'but also adjectival matters such as the availability of particular evidence, the procedures to be adopted, the desirable venue for trial and the likely hearing date'. Notwithstanding this wide interpretation, if there were any significant countervailing factors, it is doubtful whether the desire of a party to use the services of a particular counsel would justify a conclusion that it was in the interests of justice to transfer a matter to another court. However in the present case there were no countervailing factors, Counsel for Mr. Chamberlain did not object to the proposed transfer. Whether or not the matter was transferred, it would be heard by the same person, sitting in the same court-room, and with any appeal going to the Full Court of the Federal Court. As Mr Handley frankly spelled out, the only practical effect of a transfer order would be that Mr. Coles could participate in the matter as counsel, rather than have to remove his wig and adopt the role of an adviser/assistant, Under the current rules of the New South Wales Bar, Mr Handley would not have been precluded from appearing without a junior counsel, appearing as such.

"The case for transfer was less than compelling, Nor was there any explanation as to how Mr. Coles had come to accept a brief to appear in a jurisdiction where he was not admitted. But, tenuous as the case was, I thought that, there being no countervailing factors, the advantage to the Deputy Commissioner in having junior counsel of his choice appear, as counsel, justified a conclusion that the transfer of the matter was 'in the interests of justice'. Accordingly, I made an order for transfer and all subsequent proceedings have been conducted in the Federal Court rather than in the Supreme Court of the Australian Capital Territory. Mr Coles remained at the Bar table, his wig triumphantly in place.

"This little farce illustrates the absurdity of the current requirement of separate admission to practice in the various parts of Australia. Increasingly, Australian lawyers operate as a national profession. Many firms of solicitors have offices in more than one State. Counsel now frequently appear outside their home State. In this Court, in which counsel who have been admitted anywhere in Australia may appear as of right once they sign the High Court roll, it is common to find counsel from different Bars engaged in the one case. Especially having regard to *Street* v. *Queensland Bar Association* (1989) 168 C.L.R. 461, the time has surely come to allow a practitioner admitted in any Australian State or Territory to practise in any other State or Territory, without the necessity for formal admission in the latter jurisdiction. There is no problem about professional discipline. Any complaint of misconduct by the practitioner in another State or Territory can be dealt with by the practitioner's home Supreme Court or professional body, in the same way as a complaint of misconduct in a federal court, or in an inferior court of the home State, would be dealt with. No doubt the present system benefits the airlines and some hotels, but it has nothing else to commend it. At a time when the Supreme Courts are under great pressures of work, they should at least be relieved of the burden of processing applications from, and then formally admitting, interstate practitioners."

SUPERANNUATION FOR BARRISTERS

1. VICTORIAN BAR SUPERANNUATION FUND

THE TRUSTEES HAVE BEEN ADVISED THAT the return for members for 1992–93, after tax and expenses, is approximately 10.3 %. The Trustees regard this return as satisfactory, and as according with their long-term objective that average returns should be substantially in excess of the rate of inflation.

Although the Fund has had attractive returns over recent years, it must be stressed that economic conditions are difficult to forecast and that no assurance can be given as to future returns.

That returns for the Fund have been attractive is attributable inter alia to the fact that the Trustees perform honorary services, so that the otherwise substantial costs of fund administration are minimised. In these regards members are especially indebted to Robson Q.C., Kennon, R. Brett and J. Beach.

2. SUPERANNUATION — 1993–94

The current year is particularly important for superannuation, since it is to be the last year during which the now existing favourable system of tax deductions for superannuation contributions will apply. From 1 July 1994 new limits for contributions will operate, under which deductible contributions will in many cases be lower than at present.

All barristers should hence give careful consideration to the amounts of superannuation contributions that they should make during the current year, especially since it is clear that in the past many individual barristers have not made anything approaching adequate provision for their retirement.

Barristers should not hesitate to discuss these matters with me or any other of the Trustees.

Chairman of Trustees
Victorian Bar Superannuation Fund

A THING ABOUT WORDS

OUR LANGUAGE IS SPRINKLED WITH THE vestigial remains of words whose original use has been lost, overtaken or abandoned. Clues can be found in some compound words — words made up by linking two other words. In many instances, the elements of the compound maintain a sturdy independent existence: *liftwell, businessman, housewife, bookcase.*

In others, however, only one of the elements survives independently. Take *quagmire* for example. A *mire* is *a piece of wet swampy ground, a boggy place in which one may be engulfed or stick fast. A quag is a marshy or boggy spot, especially one covered with turf, which shakes or yields when walked on.*

Quagmire once had a number of variants: *quamire, quakemire, qualemire and quavemire. Quake* is well-known independently, but its compound with mire is obsolete. *Quave* ("to quake, shake or tremble") has disappeared, but its cognate *quaver* survives. Another cognate *quaverous* ("tremulous, quavering") sounds well and suggests its own meaning, but has lost the battle to *tremulous. Quag*, although reported by OED as used in 1904, seems to be well along the path to extinction.

A curious aspect of *quagmire* is why it emerged in the first place. *Quag* and *mire* seem to be pretty near synonyms, except perhaps to serious bog fanciers. What greater intensity does a tract of boggy country get from teaming *quag* with *mire*? And why then does the onomatopoeic *quag* disappear whilst *mire* survives?

In a similar state of decline is *monger* ("a dealer, trader or trafficker"). It formed part of many mercantile compounds: *cheesemonger, ironmonger, costermonger, fishmonger* and so on. Even I can remember these words being in ordinary use. But in the past 30 years or so, in Australia, they have taken on an outmoded air, although ironmonger and fishmonger are occasionally seen. Perhaps this has happened as the specialised traders they describe have diversified their activities, or been absorbed in larger enterprises. So the *cheesemonger's* trade has been absorbed by the delicatessen; the *ironmonger's* by the hardware store; the *costermonger* (originally meaning "apple seller") by the greengrocer or fruiterer; and all of them by the supermarket.

There are two curious features about this linguistic fade-out. First, in most cases the replacement word describes the shop where the trade is carried on, whereas the original *-monger* compounds described the trader himself. Secondly, there does remain a need for such words, as awkward constructions like *fruiterer* attest. Despite the supermarket mentality of our age, specialist shops exist which sell only fruit, or fish or cheese. At any good market there are people who trade only in a narrow range of goods. But although the London barrow-man, who sells fruit and vegetables, still calls himself a *costermonger,* the man who supplies apples (and nothing else) to the market does not. (*Costerd* and *custard* both mean apple: the so-called *custard-apple* is a pleonasm).

Some shop names refer to the trader, not the trade. (One example is grocer. It is from the old French *grossier*: a person who bought 'in gross' or in bulk. Its meaning has narrowed.) Another example is the butcher. It is inaccurate. A *butcher* is one who slaughters and sells meat. Strictly, he does more than the *fleshmonger,* but the shop still carries the (inaccurate) name of the trader who used to slaughter the animal before selling its meat. The butcher orginally specialised in goat's meat: the word comes from the french *bouc*, from which we get *buck*, a he-goat. It probably a very long time since a true butcher carried on business in an Australian shopping centre.

Nowadays, *monger* survives primarily in disparaging or facetious compounds such as *scandalmonger* and *rumourmonger.* It also survives, although not in common use, in *fleshmonger* meaning *a fornicator or pander.* Perhaps the butcher is wise to misdescribe himself.

Julian Burnside

MIXED METAPHOR AWARD

THE SUMMER 1993 MIXED METAPHOR award goes to His Honour Judge Strong in *R.* v. *Higgins*, 23 January 1992.

A witness had been to and from court a number of times without getting a chance to give evidence. Judge Strong commiserated:

"You must feel a bit like the jilted bride, coming along so often and not getting a guernsey".

A FAIRY TALE (CONTINUED)

NOW GATHER AROUND ME MY DEARS whilst I continue the tale of the VicBees. Despite my pessimism, they are still around eking out the most miserable of existences. No one seems to like them and no one seems to care very much if they disappear.

They have been viciously and variously attacked by JournoBees, MPBees, PSBees and EconoBees.

I suppose one can put the JournoBees' relentless attacks down to jealousy. It has been said that "those that can do and those that can't try to write about it" or words to that effect. JournoBees think they are members of a profession and ought to be looked up to. They appear to think that the best way of being looked up to is to drag down all the other Bees that are looked up to. They tried to take on the MediBees claiming that MediBees got too much honey for themselves — they certainly received more honey than JournoBees and richly deserved it.

Funnily enough the JournoBees got a lot of help from two other groups — MPBees and PSBees. Each group jumped on to each other group's bandwagon. Each group tried to outdo the other groups in their denunciation of firstly MediBees and then VicBees. As each group took its turn upon the soap box it became shriller in its condemnation than the group that had gone on before it. Each group fed the frenzy just like a school of sharks circling around an injured or ailing whale. Just as no single shark dared take on a fit whale no JournoBee, PSBee or MPBee felt confident to go it alone in attacking MediBees or VicBees. Rather they relied on outpourings of committees or conclusions of dubiously-qualified persons founded on the most questionable of "statistics". Sometimes, they resorted to accepting the help proffered by another group called EconoBees. Like JournoBees, EconoBees thought they ought to be accorded the status of professionals. Like many JournoBees, some so-called, self-appointed EconoBees looked more at home in the company of snake oil sellers than rubbing shoulders with true professionals.

In hindsight the support of many PSBees was not particularly surprising — after all the flower patches tended by VicBees must look particularly lush and colourful to PSBees peering out from behind their community-provided desks, across their community-provided offices whilst going about their highly secure but generally non-onerous tasks. Just like JournoBees they have developed a highly-refined ability to tell the doers how to do things better. Many of them, too, have tried and perhaps even failed at occupations that hankered after the recognition accorded to professionals and were more concerned at telling others how to do things better than doing constructive things themselves. Of course, I talk about TeacherBees and SocWorkBees. Interestingly, some failed TeacherBees and SocWorkBees have tried to turn into MPBees and/or JournoBees instead of PSBees!

As for MPBees — we all know how much they hate it when anyone else has more recognition than they do. Like JournoBees, MPBees aren't going to allow facts to get in the way of a good story or develop too strong a sense of integrity.

The campaign against MediBees went on for years and occasionally resurfaces. It eventually failed because the community realised that MediBees were essential and deserved some reward for the many years they had spent developing their not inconsiderable skills,

Unfortunately, the campaign against VicBees continued unabated. It seems strange that the groups who most need VicBees have been remarkably acquiescent in the constant attack on VicBees.

When and if the VicBees disappear, so will they and they do not seem to know or, if they do, they do not care. The groups I am talking about are the SolBees who exist in very small hives or in hives very far away from the big city hives. Some of these hives have as few as one SolBee in them. At present these SolBees rely on VicBees to do most of their foraging for them. When they need a particular type of flower or field foraged they can go straight to the specialist VicBee of their choice and be confident that they have the right Bee for the job. When the VicBees are gone they will have to rely on the good graces of the larger hives of SolBees to provide specialist foragers for them. When that happens those individual SolBees and small SolBee hives will find that at the end of the day there will be little or no honey for them. They also will notice that the Bees who came to them for

help will next time go straight to the big SolBee hives for all of the assistance they require. So be it. That seems to be their self-destructive decision.

In the meantime, life at the VicBee hives goes meandering along at a slower and slower pace. With less and less fields to forage in, and more and more attacks upon them whenever they dare to venture out of their hives, VicBees have more time to devote to their main interests. Discussions and meetings continue to be held about the best way to develop and maintain hives whilst the weeds in the great VicBee vacant plot continue to flourish — unfortunately the foraging therein remains sparse. Discussions and speculation continue about the role of ClerkerBees; whether and if so which VicBees should be made JudgeBees; and, whether some VicBees should continue to be allowed to don a more silky appearance and if so who should be so allowed. The amazing thing is that when the decision is made as to which few VicBees should be allowed to join the ranks of the silkier ones there are always dozens who claim to be more entitled to that right.

Ah the life of a VicBee is all too complicated for me to contemplate any longer. The time has come for sweet repose. Sleep well my dears and perhaps next time things will be easier to explain.

(To be continued).

VERBATIM

Horsham Magistrates' Court

15 September 1993
Coram: T. McDonald M.
Taylor v. *Volmer & Ors* (The Exorcist Committal)

Darcy for a Defendant (sotto voce at Bar table): "When a man does not pay his exorcist he gets repossessed".

County Court of Victoria

12 July 1993
R v. *Hackett*
Coram: Judge Meagher

Brustman for Defendant making plea:
I understand that, Your Honour, but
His Honour: If he wants to keep out of trouble, he's got to keep clear of the things that land him in trouble.
Mr. Brustman: Yes, Your Honour. Can I just finish what I was — I think I was at his life story at some point. He . . .
His Honour: I think I was telling you mine, Mr. Brustman.
Mr. Brustman: I'll give Your Honour a bond in that case.
His Honour: Thank you, Mr. Brustman.

County Court of Victoria

Practice Court
Coram: Judge G.D. Lewis

[His Honour is hearing an application for a speedy trial and has been informed that the proceeding has been set down on a particular date with priority and as the ninth priority matter.]
His Honour: When does a matter cease to be a priority matter?
J. Ruskin: When it is in the County Court.

County Court of Victoria

Coram: Spence J.

[Appeal from a guardianship order made in the Children's Court in the course of which it was alleged against the mother that the two children the subject of the appeal had "disclosed" that the mother defecated and urinated on them — "mum does/puts poos on I". The mother claimed that the children referred to shampoo as "poo". A psychiatrist gave evidence that he had interviewed the children and he considered that "poo" referred to defecation and not shampoo".]
Wiener for the appellant mother.
Witness: I formed the view that they clearly knew the difference between shampoo and defecation.

Wiener: The first time you interviewed them was 9 months after they were removed from their mother.
Witness: Yes.
Wiener: Did you ask them if they had ever used poo for shampoo?
Witness: No, and I can't imagine anyone calling shampoo poo.
Wiener: Well, what if there was a brand of shampoo called "poo's" and the kids said, mum put poos on I, that would be quite innocent, wouldn't it?
Witness: Yes, but I can't imagine anyone manufacturing shampoo by that name, and if they did I don't think it would sell very well.
Wiener: Dr. I've got a surprise for you, have a look at this (and produced from a bag a bottle of "pooh's" shampoo).
Witness was silent.

Australian Industrial Relations Commission

Australian Education Union v. *Minister for Education*
10 November 1993
Coram: Riordan SDP
Bromberg for Applicant
Giudice and Green for Respondent

Bromberg: . . . . We say Your Honour should not bite that apple at all, because if you bite that apple Your Honour, once, You will be chewing on it for a long time. We say your Honour . . .
His Honour: . . . You make me nervous when you tell me not to bite on an apple. I know what happened to the last fellow who was told that, cast out for ever.

Supreme Court of New South Wales

Coran: Levine J.
Fitzgerald v. *Hayllar Trading Pty. Ltd.*
Barry Q.C. and Brabazon for the Plaintiff
Higgs for the Defendant

Q. I think you said in evidence today that that occurred after he got out of the vehicle?
A. Yes.
Q. I suggest to you that you knocked Fitzgerald unconscious with your police baton?
A. At no time was he unconscious. I certainly knocked him, but at no time was he unconscious.
Q. You have been equivocal about where you actually hit him with the baton haven't you?
A. Yes, I agree with that, yes.
Q. You weren't equivocal when you were giving your report to the Internal Affairs Branch, were you?
A. I don't know, I haven't read the report at the moment, now.
Q. Didn't you say -—you will find it on the second page of your report — "I then drew my baton and struck with him about the arms and legs"?
A. That's correct, yes.
Q. That's what you said?
A. Yes.
Q. Was that the truth?
A. Yes.
Q. "During this Fitzgerald attempted to grab the baton from me and then I struck him about the legs and he fell to the ground"?
A. That's correct, yes.
Q. Were you trying to create the impression that his falling to the ground was as a result of your administering blows to his legs?
A. I wasn't trying to create any impression. I was simply telling whoever it was, the inspector, in the report, to the best of my knowledge, what happened. I didn't try and create any impressions at all, In the heat of the thing when you aim at somebody's arm and he moves, it's a possibility that you could hit him somewhere else. It's a possibility. You certainly don't aim to do that or try to do that.
Q. Is it a possibility that he threw the left side of his head violently against your stationary baton?
A. I've already said that that's a possibility, yes. It is also a possibility that he received that injury in a fight that he had had earlier on.
His Honour: Just a moment.
Q. Did you listen to that question that was asked of you? (Last question read out)
A. Oh' I'm sorry, I beg your pardon, sir. That is not a possibility. What I thought you said was is it a possibility that he threw himself and the baton came into contact. I beg your pardon, sir.

Children's Court of Victoria

Seymour Children's Court
2 September 1993
Coram: Beck M.

His Worship (addressing a rather puzzled looking youth when sentencing): You are heading towards a void of self-destruction at 100 miles an hour. You have got to stop shooting yourself in the foot and get about the business of kicking a few goals.

County Court of Victoria

27 April 1993
Buclay Nominees Pty. Ltd. v. *Naneri Nominees Pty. Ltd.*
Coram: Judge Keon-Cohen

His Honour: The only opinion sought from Mr. Oldfield is in accordance with the schedule.

Denton: Yes.
Sifris: Yes, Your Honour.
His Honour: Well, then, how can he make decisions of fact?
Denton: He can't, Your Honour.
Sifris: Yes, he can't.
His Honour: Mr. Sifris, what decisions of fact do you expect him to make?
Sifris: No, we don't expect him to make any decisions of fact, Your Honour.
His Honour: So that's a long and involved way of saying you agree with the submission — is that right — with a shake of the head back and forth.
Sifris: That's right.
His Honour: Under no circumstances shall you be permitted to say yes, but I gather by inference from what you have conceded that you say yes?
Sifris: I do, Your Honour. I'm prepared to accept these orders as they are and . . .
His Honour: Is this the way commercial barristers and litigants operate these days, is it? No wonder I was never invited to become a commercial barrister. Common lawyers tend to say yes very quickly .
Sifris: I'm happy with the orders, Your Honour.
His Honour: As amended, I take it?
Sifris: Yes, Your Honour, as amended.

High Court of New Zealand

Auckland Registry
Lowe v. *Auckland City Council*
19 March 1993
Coram: Hammond J.
Appellant in person
No appearance by or on behalf of Respondent

The judgment in this case is set out in full below.

"There is, in Auckland, a handsome German Shepherd called Ben. He belongs to the appellant. The appellant did not register his dog, contrary to s.39(1) of the *Dog Control and Hydatids Act* 1982. He was fined $100.00 and Court costs in the District Court at Auckland. He appeals to this Court on the ground that the sentence was manifestly excessive.

The learned District Court Judge (who on an appeal is blessed with an anonymity not conferred on me) filed the following memorandum as to his reasons for the sentence imposed:

Minor Offences

Your Honour may not be familiar with the manner in which 'Minor Offences' are dealt with in this Court. Notices of Prosecution for minor offences are surreptitiously placed in the Judge's 'In Tray' at frequent and irritating intervals, usually in his or her absence. They come in stacks or bundles and are usually accompanied by numerous other prosecutions instigated by Government departments, local and other statutory bodies. At or about the same time there will also appear, equally mysteriously, applications for Second-hand Dealers' Licences, Auctioneers' Licences, Sharebrokers' Licences, Massage Parlour Licences, Immigration Removal Warrants and many others. Also not to be overlooked are stacks of Fines Enforcement files, applications for rehearings of minor offences such as overparking and all manner of similar misdemeanours. These are often carefully concealed beneath a pile of civil interlocutory applications and miscellaneous outpourings of our criminal, quasi-criminal and civil system. The aforesaid offence of non-registration of a male German Shepherd cross of a greater age than three months is, of course, merely one particular example of a minor offence. The range of minor turpitude is enormous. You mention but a few — electrical wiring regulations, bylaw breaches, underage drinking, failure to send child to school (truancy). (This one may now have been repealed). Others may be found scattered like grains of wheat amongst statutes and regulations.

The Disposal Thereof

The judge peruses the mountain of files with great care and then imposes whatever penalty he or she deems appropriate. No hearing is held. No defendant or counsel are present. No submissions are made. No tears are shed. No howls of derision are heard from the gallery. Fellow miscreants do not suddenly awake from slumber and bleary-eyed stagger drunkenly forward or in such direction as their condition impels. No anxious mother suckles a fretful child. There are no sideways glances or rolling back of eyes from counsel's table and certainly no titters are heard to run round the Court.

The Judge sits alone in his chambers and affixes his facsimile signature to the Information Sheet perhaps muttering silent curses to himself as he does so. He does not deliver a condemnatory monologue, at least not one that is recorded or intended for the ears of others.

I hope this short memorandum may assist Your Honour in dealing with this appeal.

The fateful moment for the hearing of the appeal arrived. The Court Crier and Registrar duly attended on me in my chambers. In full High Court regalia we processed through several levels of the High Court building at Auckland. Other processions of bewigged and black-robed Judges were likewise criss-crossing the building at 10.00 a.m. sidestepping each other in a manner reminiscent of line-out drills for aged All Blacks. The Court Crier threw open the door of the court-room and shrieked, "Pray silence for His Honour the Queen's Judge". One enters with decorum, hoping that this chorus of welcome has not caused too many in the crowded court-room to faint in the excited anticipation of it all. But nobody faints in this case; besides my procession, there is in the court-room only the appellant, looking quite purposeful, and a woman companion. There is no counsel present for the Auckland City Council.

The case is called. The appellant steps confidently forward. He announces that he is prepared to proceed. I ask him if he has a dog called Ben? And if so, did he register it? Yes, and no. Why did he not register it? Because he is on an invalid benefit, the exact amount of which is so pitiful that I forbear to mention it here. I ask if he had mentioned his plight to the relevant city officials. The appellant says that he offered to meet the registration fee on a time-payment basis. This was summarily declined. He was summensed, fined, and hence his appearance before me.

I gazed at the ceiling. Did you tell the District Court Judge of your problems? Yes sir, I did. *Nunc, vero inter saxum et locum durum sum.* (For the uninitiated — now, I really am between a rock and a hard place: the appellant says he did appear: the District Court Judge said he did not.)

There are countless admonitions in the law reports abjuring Judges in my position from tinkering with the sentences of Judges in the Court below. And worse, I recall that it was only a matter of several weeks ago that in the High Court I delivered, in stentorian fashion, a judgment saying that in areas where District Court Judges have greater expertise than High Court Judges, one ought to be especially careful in interfering.

One wonders, in those circumstances, on what basis one could possibly interfere. The most far-flung possibilities flash across one's mind. The late Professor Davis campaigned tirelessly in his years as a law professor and Dean of Law at Auckland to end discrimination between cats and dogs. In his view (expressed in the august pages of no less than the *Modern Law Review*) dogs are rigorously controlled, whilst, if I may be permitted the expression, cats are entitled to ponce about town, completely unregulated. Was there something in the new New Zealand Bill of Rights which would end this shameful discrimination and assist Mr. Lowe?

I began formulating an oral decision in my mind. Then I realised that I was mumbling aloud, and the Registrar was looking at me strangely, or perhaps more strangely than usual.

Pragmatism, some will say fortunately, took over.

The decision of the learned District Court Judge is quashed, and I substitute therefore a fine of $20.00. I urge upon the appellant the wisdom of the registration of Ben.

Cave canem (again, for the uninitiated, beware of the dog)."

THE LIST "W" ANNUAL DINNER

APPROXIMATELY, 80 PAST AND PRESENT members of List "W" visited the Old Melbourne Gaol on 19 October last to attend the 18th Annual Dinner of the List. Many wondered at the significance of the choice of venues with the consensus being that it had been selected as an ongoing reminder to the more prominent List "W" members of the Criminal Bar of their least successful pleas.

Whilst His Excellency the Honourable R E McGarvie and Judge Lazarus, the first and second Chairmen of List "W" respectively as well as Margaret Rizkalla, Rod Crisp, Sally Brown, Iain West and Len Brear were forced to tender their apologies, other appointees from the list were prominently present including Mr. Justice Ashley, Mr. Justice Mushin, Jill Crowe, John Klestadt, Peter Power and John Murphy MM.

Fortified by pre-dinner drinks, and a hearty first course, attendees were entertained by amusing and spirited addresses from Ashley J. and Judge Balmford with the latter being immediately inducted as an Honorary Member of the List. Amongst other things, His Honour revealed the diversions available to Practice Court judges whiling away the hours whilst counsel composed themselves for proceedings in Court 15. Undoubtedly, many of his listeners heeded His Honour's advice and rushed in at 7.30 a.m. the next day to pursue some of the more amusing extracts from the older volumes of the English Reports. Your correspondent hopes that their keenness was noted by Terry Laidler (ABC radio presenter) who puts such great store on office lighting being lit by 7.30 a.m.

Her Honour kept her observations to the 20th Century and successfully debunked the current myth that women have only come to prominence in the legal profession in this State in the last few years. It was appropriate that recognition was given to Victorian appointees to Federal jurisdictions (Her Honour Justice Cohen of the then Conciliation

and Arbitration Commission and Her Honour Justice Lusink of the Family Court — both of whom have now entered well-earned retirement) as well at to Judge Schiftan. Her Honour also graphically illustrated how radically attitudes to women in the legal profession have changed in the last decade or so.

There was no doubt that both guest speakers missed the gratuitous assistance provided to their predecessors at each of the previous 17 dinners by Peter Jones, whose absence was noted by all of those present with priors for attendances at such functions. Not all was lost, however, as John Bolton managed to convince the audience to join him in an enthusiastic rendition of his "I'm just a Magi's Court Hack". By the time another 18 dinners have been celebrated the list may have picked up the tune and timing.

Notwithstanding the obvious symbolism of the venue, or perhaps putting that to one side, it proved to be a well-chosen venue and one well suited to the nature of the evening. It may have even had a sobering influence on attendees (Betty King's shoes remaining at ground floor level this time, for instance) although your correspondent cannot advise as to whether the tempo picked up after midnight as he or she had to beat a hasty retreat lest their conveyance turn to a pumpkin.

[Unfortunately, no photographs are available of this function. It appears that the official photographers were provided with large wads of used small-denomination notes to not attend.]

SOMEBODY LOVES US

AT A TIME WHEN BARRISTERS (AND judges and lawyers generally) have become accustomed to a fairly constant barrage of criticism, it was encouraging to read the Victorian *Hansard* for 10 March 1993 and 14 September 1993.

GUARDIANS OF LIBERTY

On 10 March 1993 in his maiden Parliamentary speech Robert Dean had this to say of the Victorian Bar and the importance of the Independent Bar [*Hansard*: Legislative Assembly 10 March 1993 p.116].

"Over the past ten years I have lived and worked with a group of men and women totally committed to the professional execution of the law. It was an exhilarating environment, where the rules of honourable conduct outweigh other considerations; where mutual respect is an essential element; where in court the contest is unrelenting; but where out of court, firm and lasting friendships are retained.

We should not forget that whatever criticisms are levelled against lawyers — and as in all other professions there are some less worthy than others — the great majority, and I include those with whom I practised, follow self-imposed rules of conduct which place the client above all.

In moving for reform, therefore, we must venture behind the wearing of wig and gown and ensure that the dispensation of justice, as it is enshrined in the complexity of our legal system, is sacrosanct. In simple terms we must be sure not to throw the baby out with the barrister.

Within such an approach a number of areas are worthy of consideration by members of the profession, such as the need for a Court of Appeal, the efficient running of court lists, the question of whether the benefits of the commercial directions list should be extended to all lists, whether savings can be made from the computerisation of the filing of documents between solicitor, barrister and the courts, whether action is required to deal with the proliferation of tribunals which can lead to split jurisdictions and ridiculously high costs for the client sandwiched between the court and the tribunal, whether we can afford equal opportunity cases that are dealt with on a no-fault basis and whether the growth in arbitration be used to lower costs. These are some of the many areas that may need reform.

All civilised countries face the same problem. Their societies have become more complex, their legislation has burgeoned, the number of judicial bodies and access to them by the community has grown expediently and inevitably the cost to the community has grown in proportion. Each must find its own solution. There is no such thing as cheap justice.

Whatever changes are proposed for the practice of law in our community, two things must be kept in mind. Firstly, both common law and equity, under the guidance of Sir Thomas More as early as 1529, were the guardians of liberty long before Parliaments were developed; and, secondly, the adversarial system, giving the right to each individual to present his or her case at his high point has produced a system of dispute resolution which is the envy of the rest of the world and which is emulated by a large proportion of it."

In the Legislative Assembly on 14 September 1993, Mrs. Henderson, the member for Geelong raised with the Attorney-General the "recent attacks on Victorian judges in relation to the fact that women have been precluded from obtaining judicial appointments" and asked the Attorney-General

"whether she is prepared to take any action in regard to these attacks".

JUDGES ARE APPOINTED ON MERIT

The Attorney replied [*Hansard*: Legislative Assembly, 14 September 1993, pp.390–391]:

"Gender bias in the law is an important issue that must be and is being addressed by the Government. However it is being trivialised by unfair, uninformed and generalised attacks being made on our judges. I refer to the editorial in *The Age* last Friday which suggested that the judges had prevented the appointment of women to the judiciary. There have also been attacks on judges because they are male, because they are Anglo-Saxon or because they are in an older age group.

The facts are that judges are appointed by the Government. The judges who are currently on the bench of the Supreme and County Courts are in an older age group and were appointed for their expertise in the law. They have had long experience in our courts and they represent the students of our law schools in the 1940s and 1950s — and I can vouch for the fact that there were few women in our law schools at that time. I trust that in about 20 to 30 years time we will see reflected on the benches of our courts the fact that the majority of our law students are now women.

The criteria for the appointment of judges can be broadened by considering the appointment of government lawyers, academics and solicitors as well as barristers. The former Government, which left office without one woman on the County or Supreme Court benches, could have done much better. Women were available for appointment to the County and Supreme Court benches but they were not appointed by the previous Government. It is important to note that our courts have enormous powers over people's lives and that in making appointments we must look to the integrity of the people being appointed, their expertise and their experience. It is unfortunate that at present there are more men than women with the relevant experience and that is a difficulty in finding large numbers of women to appoint to the bench at this time. The Australian Institute of Judicial Administration is addressing the issue of gender bias and the law, and a pilot programme will commence in Victoria. The media should be paying attention to those issues. The attacks on judges for their sex, education or ethnic backgrounds should stop."

MOUTHPIECE

Mid-1993
Alfred: I suppose now is the time that people start to think about applying for silk?
Allen: I have never given it much thought. I suppose you are right. Why? Are you thinking of giving it a burl?
Alfred: No! No! Of course not!
Allen: You applied last year, didn't you?
Alfred: No I didn't! Who told you that?
Allen: It was strongly rumoured that you had.
Alfred: No I didn't!
Allen: Well you should have. You are better than most of last year's crop.
Alfred: Do you really think so?
Allen: Of course! Don't you think so too?
Alfred: I must admit, I have never really thought about it. Do you really think I would have made it?
Allen: Oh come now, of course you've thought about it. I bet you've applied for at least the last three years.
Alfred: Who told you that?
Allen: Well, are you going to apply? After all, since old Algernon retired there's been a shortage of silks in your field.
Alfred: No I am not! Do you really think I should?
Allen: Of course I do. Are you going to?
Alfred: I don't think so. My practice is so good now.
Allen: But you'd be able to increase your fees by at least 33% and reduce your work load accordingly. You wouldn't need to do as much paperwork, you'd have Juniors to do all the leg work and you'd see more of the family.
Alfred: You almost make it sound appealing.
Allen: So you are going to apply again!?
Alfred: I tell you I haven't applied and I don't think I will.

Late November 1993
Allen: Have you heard the new silks yet?
Alfred: Are they out yet?
Allen: Not officially. I am told that the letters go out today. Anyway, I believe that Agnes has finally cracked it as has Albert, Andrew . . .
Alfred: I can't stay and chat. I have things to do. I'll catch up with you later.
Allen: That's OK. I was going to the Clerk's office anyway. I'll go with you.
Alfred: I didn't say I was going there. I have urgent paperwork waiting for me. I'll be seeing you.
Allen: Didn't you apply?
Alfred: I don't know what you are talking about.

A little later the same day
Allen: Cheer up old man. There's always next year.
Alfred: Whaddya mean!? I am fine. I am just busy. I have so much work I don't know where to start.
Allen: Well what do you think of this year's crop of silks?
Alfred: I don't know who they are. I don't really take much interest. But if you must tell me, tell me.
Allen: Well as I told you this morning, Agnes, Andrew . . .
Alfred: Andrew!? You must be kidding!
Allen: I kid you not . . . Albert, Arthur . . .
Alfred: Arthur!! Oh come now, I'm better than he is.
Allen: Well you should have applied.
Alfred: Well I didn't!

September 1994
Allen: I suppose you have applied for silk again this year?
Alfred: That joke's getting a bit tired now.
Allen: What joke?
Alfred: The one about me applying for silk year after year.
Allen: Well I reckon you have applied. I saw you working the room at the Judges' Reception!
Alfred: Why would I want silk? I have a booming practice. Everyone knows that taking silk is a one-way ticket to disaster.
Allen: Well you ought to have applied. You are as good as last year's crop.
Alfred: I am glad you think so. Why don't you apply if you think it is such a good idea?
Allen: You'd have to be joking! Me a silk!
Alfred: Why not? If you think it is good enough for me to apply why don't you?
Allen: So you have applied?
Alfred: I didn't say that. It is you who has this hang-up about silk.
Allen: No I don't. Silk for me is totally out of the question. It just isn't my bag. Why do you say I should apply?

Late November 1994
Allen: Congratulations, and I thought you said you hadn't applied?
Alfred: I didn't say that did I? I believe congratulations are due to you as well.
Allen: Thanks. I didn't think I'd get it this year. It was my first application. You know it was all your idea. I wouldn't have applied if you hadn't suggested it.
Alfred: Mutter, mutter, mutter.
Allen: It's great being a Q.C. though, isn't it. Do you think much will change?
Alfred: I don't know. I haven't really thought about it. You'll have to excuse me, I have something to pick up from Ravensdale. I'll catch you later.

LAWYER'S BOOKSHELF

Commercial Leases (2nd ed.)

W.D. Duncan
The Law Book Company Limited, 1993
pp. vii–xi, 1–277)
Price: $55.00 (soft cover)

This book covers a wide variety of topics involving commercial leases. The first chapter deals with the role of estate agents and solicitors prior to the execution of a lease together with other pre-contractual matters, including representations. Chapter 2 deals with the construction of leases, including implied terms and rules of construction.

Chapter 3 deals with the description of the premises demised, amenities and fixtures. Chapter 4 deals with covenants and the effect of the assignment of a lease. Chapter 5 deals in the main with the procedures for rent review and the various clauses in a lease which provide for them. Chapter 6 deals with various types of outgoings, chapter 7 with repairs and chapter 8 with quiet enjoyment.

Chapter 9 deals with the assignment of leases and chapter 10 deals with the lawful or permitted uses of the premises, including improvements.

Chapter 11 deals specifically with the covenant to insure and the impact on commercial leases of the *Insurance Contracts Act* 1984 (C'th.).

Chapter 12 deals with options to purchase the premises, together with options to renew a lease. Chapter 13 deals with defaults under the lease, the measure of damages and rights of re-entry, including the procedures to be followed with respect to the giving of notices.

Chapter 14 deals with determination of a lease other than by forfeiture, chapter 15 deals with the recovery of possession on forfeiture and chapter 16 deals with the important topic of guarantees and the effect of an assignment of a lease upon a guarantee.

The advantage of this well written book is that whilst most of the references in the book are to the Queensland *Retail Shop Leases Act* 1984 those references can be used when referring to the various provisions of the Victorian *Retail Tenancies Act* 1986.

There is also a useful comparative table of statutes at the front of the book and an index including common words and phrases after the last chapter. This book provides the reader with a valuable insight into the area of commercial leases and the author should be commended for his clarity of reasoning and his use of cases to emphasise principles of law.

Leslie M. Schwarz

Handy hints on Legal Practice (2nd ed.)

Gordon D. Lewis and Amelios J. Kyrou
The Law Book Company Limited, 1993
pp. ix–xxiii, 1–334
Price: $45 (soft cover)

This is not a work of scholarship. It is a book concerned with the realities of the law as practised and designed to introduce the young practitioner to those realities.

The book deals with the basic problems of every-day practice from the "first interview" with the client (at p.5) to "Leaving the Law," which commences at p.287.

Its contents reflect very much the statement from Megarry quoted at the beginning of chapter 2:

"So often common sense, a knowledge of humanity and a flair for the business-like way of doing things matter far more than any knowledge of law".

The authors (like the walrus) tell of many diverse things. They warn of dangers of "doing good by stealth," and of the risks associated with receiving instructions otherwise than directly from the client. They canvass conflict of interest and the use of "Chinese walls".

They discuss sex in the office and precautions against negligence, but in unrelated chapters.

John Mortimer wrote the foreward to the first edition and Sir Ninian Stephen the foreward to the second. Mortimer said:

"A lawyer's duty to his client (you must do everything for him except deceive the court), his duty to his opponent and his duty to the tribunal before which he practises are discussed with admirable common sense".

Sir Ninian said:

"Now no longer need bitter experience and the ad hoc advice of others be the only sources of practical guidance through the minefields of the law . . . This second edition retains all the wisdom, and wit, of its predecessor while adding much that is new . . . The theme throughout is that common sense will solve many problems of practice in the law . . . *Handy Hints* furnishes much common, and some uncommon, sense and for the lonely and troubled practitioner it provides welcome company and wise advice."

Handy Hints is a useful book which should be given to every law student on graduation. Every young graduate needs to be told, as this book tells him:

"Don't tilt at windmills"; "Minimise the codswallop"; "know what the point is"; "get to the point quickly".

The reviewer would have found Part 1 of the book (which deals with the relationship with the client) exceedingly useful in his early years in practice. The fundamental advice as to how to conduct that first interview would have been invaluable. It might have given me the confidence and commonsense to talk to the client, rather than resort to big words and legalese in an attempt to convince him (or her) that I was "learned in the law".

Even experienced practitioners will find assistance, whether in the chapter on "Conflict of Interest," the three chapters dealing with mistake: "General Mistakes and Misapprehensions," "Common Mistakes in Property Matters," or the discussion of the law and the lore dealing with the problems of a practitioner facing an "antagonistic and antagonised bench".

I highly recommend *Handy Hints.*

Gerard Nash

CONFERENCE UPDATE

1. 28 to 30 January 1994 — LawAsia will hold the **First Regional LawAsia Conference on Business Law** in Bangkok. Inquiries should be made of Mr. Anek Srisanit, Chairman, Organising Committee, Anek & Associates, Suite 1901 Wall Street Tower, Surawonge Road, Bangrak, Bangkok 20500 Thailand (662) 234 6900, fax (662) 236 5835.
2. 19 to 22 February 1994 —The **Canadian Bar Association** will hold its mid-winter meeting at Jasper. Inquiries should be made of the Canadian Bar Association, 50 O'Connor Street, Suite 902, Ottawa, Ontario KIP 6L2 (613) 237 2925, fax (613) 237 0185.
3. 24 to 26 February 1994 — The Law Council of Australia and the Leo Cussen Institute will conduct the annual **Superannuation Conference For Lawyers** on the Gold Coast. Inquiries should be made of Dianne Rooney (phone (03) 602 3111).
4. The Australian Institute of Criminology will conduct:
   (a) 9 to 11 February 1994 — a conference on **Crime Against Business — A Community Response**, at the Novotel Melbourne.
   (b) 16 to 18 February 1994 — the 9th **Conference for Librarians** on **The Criminal Justice System**, in Canberra.
   (c) 23 to 25 March 1994 — a conference on **Super Crime**.
   (d) 3 to 6 May 1994 — a conference on **Making Australia a Safer Community** in Brisbane.
   Details in relation to each of these conferences can be obtained from the Conference Unit, Australian Institute of Criminology, G.P.O. Box 2944, Canberra, A.C.T. 2601; and in respect of the **Crime Against Business Conference** from Sally-Anne Gerull on (06) 247 0230.
5. 16 to 18 March 1994 — the **First National Conference on Child Sexual Abuse** will take place in Melbourne. Details can be obtained from Michael Tizard, Director, Children's Protection Society, 70 Altona Street, West Heidelberg, Vic. 3081, (03) 458 3566, fax (03) 457 6057.
6. 7 to 10 April 1994 — The **Australian and New Zealand Association of Psychiatry, Psychology and The Law** will hold its 14th Annual Congress in Fremantle. Details can be obtained from Aussiebound Conferences, 45 Kirwin Street, Floreat Park, W.A. 6014 (09) 387 6211, fax (09) 387 7312.
7. 24 to 29 April 1994 — The **Energy and Resources Law Section** of the I.B.A. will hold its 1994 conference in Barcelona.
8. 3 to 6 May 1994 — The **Inter-Pacific Bar Association** will hold its 4th Annual Conference in Singapore. Details can be obtained from the I.P.B.A., c/- Ken-Air Spalinks, 35 Selegie Road, Park Way and Shopping Mall, Singapore 0718, (65) 336 8857, fax (65) 336 3613.
9. 11 to 14 May 1994 — **The Family Law and Conciliation Conference** will be held in Maui. Contact Carmel Morfuni, c/- K. Spurr.

HOCKEY

Bar v. L.I.V., 7 October '93.

NOT NEARLY GODENOV

(With instructions for the Iambic Tetrameter: rhyme/syllables.)

Yes, like a wolf come down on the fold,
is how to put it, unless bold
enough for Pushkin. Scan with his gaze:
polymer lawn, score-board ablaze,
halogen suns, wet ball aglitter,
all players poised, the waiting hitter;
Civilization -vee- the Goths;
in goals, encased, the behemoths.

a/9 So, to rhymes with Pushkin: Whistle blows,
b/8 Burchardt to . . . (someone, can't recall).
a/9 Where's Balfe? In from Asia, late? Who knows
b/8 or cares? The war's begun. The ball,
c/9 confiscated by a Gothic lout,
c/9 makes distance and with a lucky clout
d/8 assails Tom (Goalie) Lynch, who bet
d/8 his boots — and lost — it finds the net.
e/8 (Where's Balfe?) The ghost of Plutarch roars:
e/8 'Confusion never reigns, it pours.'

a/9 War is hell. And some wars are heller.
b/8 Soldiers scragging at Duntroon
a/9 Sing 'Cinderella, dressed in yella,'
b/8 in studied insult. No platoon
c/9 of shirkers here. Imagine pluck, grit,
c/9 yet you haven't caught the sense of it.
d/8 Heroes belong in cenotaphs,
d/8 our forwards, wingers, backs and halfs
e/9 deserve no less (Balfe, a concession,)
f/8 for facing these hordes. Shakespeare tells
f/8 us 'Kill the lawyers,' (so does Fels,)
e/9 but first: which branch of the profession?
g/8 OK: Goths; young, two-a-penny,
g/8 Who'd have guessed there were so many?

a/9 Hang these portraits in a Hall of Fame:
b/8 Pic (1), Ms Sexton, goes for broke,
a/9 stick on fire, deprives a Goth of game
b/8 and manhood with the self-same stroke,
c/9 over-flies the centre, cunning, blurred,
c/9 dancing wingspan of a hummingbird.
d/8 Pic (2), Coldrey, (his praises sing,)
d/8 one step — then back to bench — hamstring.
e/9 Pic (3), Lynch, sipping a small tokay,
f/8 falls full-length, (skill or vertigo?)
f/8 and saves a goal. Pic (4) should show
e/9 a Tinney-unzipped pass to . . . OK . . .
g/8 Burchardt, (sound of trumpets, drum-roll,)
g/8 shooting — Pics (5) & (6) — A Goal!

a/9 Pardon my football voice. One to five
b/8 we trailed the Goths. Where's QC Rupe?
a/9 His porter, Hindu, barely alive,
b/8 ran in, fell, swooned, we had to stoop:
c/9 'Ill, on litter, Valley of the Moon,
c/9 (not to mention party in Rangoon).'
d/8 Thanks, Rupe. We failed again. One more
d/8 to nail our coffin. Six. The war
e/9 was done. Gibbon, on Gothic rampage,
f/8 puts history well: 'Rome was cactus
f/8 by four-ten.' Not bad; they sacked us
e/9 by less a margin. Return the sage
g/8 to bar and bench, where wisdom, grace,
g/8 are not a yard behind the pace.

Bar defence facing an Institute Penalty Corner

Institute goal scored as a result of Penalty Corner

A scramble in the Bar defence as Institute attacks (again)

A Bar free hit out of defence eases the situation temporarily. (From left, Andrew Watson, Peter Burke, Burchardt, Roger Young, Sexton and Lynch in goals)

Half-time conference — can we settle this, cut our losses and go straight to Naughton's

The Bar attack lines up for a Penalty Corner, with solicitors in the net

Sticks jubilantly thrust into the air as Burchardt scores the Bar's (only) goal from the Penalty Corner in Photo 6

A balletic leap from a solicitor thwarts another Bar attack

Coldrey J. (inter alia) on the Bench

Sexton, surrounded by solicitors, having an each-way bet on where the ball will be directed

Institute attacks

A quiet moment in the game

Roger Young slams a free hit into attack

Roger Young makes a tackle, aided and abetted by Sexton