VICTORIAN BAR NEWS

No. 88
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AUTUMN 1994

TRANSITIONS:
Welcomes: Justice Brown, Judge Williams, Chief Magistrate Papas
Farewell: Justice Steven Strauss
Obituaries: Sir Reginald Smithers, Justice Barry Maddern

INTERVIEW
Nick Papas C.M.

RULES:
Master Patkin comments on Order 14A of the County Court Rules and Rule 8.05 of the Supreme and County Court Rules
Rules of Conduct and Commissionspeak

OPENING OF THE LEGAL YEAR

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Cover:
Justices Ormiston and McDonald at St Paul's.

Welcome Justice Brown

Welcome Judge Williams

Welcome Chief Magistrate Nick Papas

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EDITORS' BACKSHEET

MASTER PATKIN

THIS ISSUE CONTAINS TWO MAJOR AND significant comments on the operation of the County Court Rules by Master Patkin.

We realise with some embarrassment that *Bar News* has not published a formal welcome to Master Patkin, who was appointed a Master of the County Court in on 8 August 1988. We apologise for that omission and hope to rectify our error in the next issue.

WE WERE WRONG

Unfortunately even editors of *Bar News* are susceptible to human error. That this is so is borne out by at least one of the letters which appears in this issue. Sometimes our proof reading is not perfect and we apologise for any paranoia induced thereby. One would have expected someone called Hyde to be thick-skinned.

We are not, however, racist. Our comments on the differential cut-off points for Malaysian and Australian students arise from a general concern as to the post-Dawkins state of tertiary education in Australia. Academic salaries are low. Promotion prospects are bottle-necked. "Elitism" even in scholarship has become a dirty word. Every kindergarten student is entitled to a Ph.D. CAEs which were set up to provide a particular form of education have been "converted" into universities or university campuses. Against this background we were curious to know whether the reason for the lower cut-off points for Malaysian than Australian students arose from the fact that the Malaysian students were fee-paying. If so, why should there be discrimination in favour of fee-paying Malaysians as against fee-paying Victorians? And if fee-paying Victorians should find it easier to get into universities than non-fee-paying Victorians does it mean that one can buy one's way into university?

DPP

Of more immediate significance to Victoria and the administration of justice over the last three months, however, has been the furore over the position of DPP. It seems that Mr. Bongiorno has not proceeded with prosecutions where the victims of crime think that he should have done so and he has clearly proceeded with prosecutions where the Police Association has thought that he should not do so. In some ways that should have assured the Government that he was on a fairly even keel and exercising his independent discretion in a responsible and independent way. For some reason it appears to have led to the opposite view.

However, it now seems that, despite previous indications to the contrary, the Government is prepared to ensure that the independent statutory office of DPP should remain independent.

This decision represents a triumph both for commonsense and the rule of law in this State. Any "watering down" of the powers and independence of the DPP would have weakened the office and the administration of justice in this State for many years.

The Government is to be congratulated on the strength and maturity which it has shown in resiling from its earlier stance.

AUSTRALIAN ADVOCACY INSTITUTE

On a more domestic note, this issue contains a report of the activities of the Australian Advocacy Institute in London and Edinburgh. It seems that we do have something that we can teach our English and Scottish cousins and that they recognise that fact.

BARRISTERS OUTSIDE THE BAR

Peter Faris has struck out into new fields with his decision to practise as a barrister otherwise than under the aegis of the Bar Council. He is not the first barrister to do this, the Honourable Mr. Justice Maddern, whose obituary appears in this issue left, the Bar on 5 September 1974 to set up his own chambers and to practise solely as a barrister. As the legislation then stood he was not required to obtain a practising certificate from the Law Institute to do so.

The legislation has now changed and consequently Peter Faris has obtained a practising certificate from the Law Institute, even though he will practise only as a barrister.

We wish him well.

The Editors

CORRESPONDENCE

Dear Mr. Elliott

RE: YOUR ARTICLE "WHO JUDGES THE JOURNALISTS?"

I recently read with interest the above article.

You have clearly focused upon an area which I believe many lawyers are concerned about but do not publicly speak about.

Do you have any practical suggestions as to how the problems created by this group of professionals can be addressed? Clearly many of our problems as a profession are a result of discriminatory articles produced by journalists. Rarely do you hear of issues such as the vast majority of the decisions of the Court which are proper and reasonable nor of issues such as the declining income of lawyers over time.

I wonder whether a system of discipline for journalists involving concepts such as misleading and deceptive conduct could be introduced to discipline irresponsible journalists.

Discussions with many practitioners in the A.C.T. indicate that they would be quite pleased to lend support to a movement to curb the excesses of the journalists to which you refer.

Yours faithfully
Peter R. Glover

P.S. I can happily indicate that I am not a relative of the Mr. Richard Glover referred to in your letter.

Dear Sirs,

Re: *Admission to Law Courses*

I refer to the article headed "Admission to Law Courses" which appeared in the Summer 1993 issue of the *Victorian Bar News*.

The article suggests that Monash University may be discriminating against Victorian VCE students in the selection of overseas school leavers for entry into the law course. The basis for this suggestion is that the cut-off scores for Victorian entrants in 1993, as published in *The Age*, appear to have been higher than the cut-off scores for international students as published by Monash in Malaysia.

The facts are as follows.

1. Selection into the law course is based primarily on academic merit, with reference to the VCE or other qualifications attempted by applicants.
2. The quota for full fee overseas students is set by the university and is in addition to the quota set for local applicants. As the local quota is the maximum number of places made available by Commonwealth and State funding, no local applicant is displaced by the selection of overseas students into the quite separate overseas full-fee quota.
3. For administrative reasons, selection of full-fee overseas VCE applicants must take place several weeks prior to the selection of local VCE candidates. The purpose is to enable successful applicants to make appropriate visa arrangements, and so on. To ensure that the full-fee overseas selection is fully competitive, selection is made on the basis of the VCE cut-off prevailing at the time, which is the cut-off score of the preceding year. For 1993 selection, full-fee overseas students were selected with reference to the 1992 cut-off score.
4. In 1993, selection into courses was, for the first time, conducted on the basis of a new scoring system, based on a broad-banded 168 point scale. The new scale replaced the Anderson score which permitted a finer differentiation of candidates. In order to determine the 1993 overseas cut-off, selection officers needed to convert the prevailing 1992 Anderson score into a VCE equivalent, using a conversion chart of estimated equivalences as produced by the Victorian Tertiary Admissions Committee. In the case of the Monash University law course, the 1992 Anderson score converted to an estimated VCE score of 145. The lowest VCE score of any full-fee overseas candidate offered a place in the Monash law course for 1993 was 146.
5. The figures published by Monash in Malaysia for 1993 are historical. They represent, for each category of combined degree course, the marks of the last applicant in fact to have been offered a place for 1993. They are not to be read as signifying that different standards for entry were applied depending on the precise course for which the student enrolled.

CCH UPDATE

Hastings K.C.

If you're born on 17 March, chances are you'll be christened or nicknamed Patrick. One such was that doyen of the London Bar, Sir Patrick Hastings KC, who at his height was described by one Lord Chief Justice as "one of the best advocates of this or any generation", but these days is almost solely remembered for the one-liner (which made the Sayings of the Week column in May 1921) — "I cannot help thinking that the English Bar is probably the oldest and tightest trade union in the world". ... but who would be better remembered for the generous compliment he paid his long-time court room rival, Norman Birkett,[1] when he said: "If it had ever been my lot to decide to cut up a lady in small pieces and put her in an unwanted suitcase, I should, without hesitation, have placed my future in Norman Birkett's hands. He would have satisfied the jury (a) that I was not there; (b) that I had not cut up the lady; and (c) that if I had she thoroughly deserved it anyway."

■ ■ ■

The major news from CCH in 1994 (so far), apart from the fact that in January we sold the one millionth ***Australian Master Tax Guide***, is that we've launched a weekly tax news (which we're calling the **CCH TAX WEEK**). Our advertising people say that it "provides you with a concise yet comprehensive coverage of the week's developments in Federal and State taxes" and it will have in it all the information (eg tax cases, rulings, legislative changes plus articles by tax experts) you'd expect to find in a CCH tax weekly.

So that practitioners can get a hands-on appreciation we're offering a one month free sub ... As our advertisers so cleverly put it "We're confident that you'll find it gives you the best coverage available of even the most taxing week!"

■ ■ ■

Although *Megarry* J (in a 1972 UK case) commented that the Companies Court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company, the statutory notice procedure has been used as a device for the collection of a debt owing by a corporation since that avenue was made available by the 80th section of the (UK) *Companies Act* of 1862. Lately, of course, a new statutory demand procedure (designed to reduce the number of last-ditch legal arguments over technicalities in statutory demands) has been introduced ... but as a recent report to our ***Australian Company Law Cases*** notes, "it is possible that the procedures will simply give rise to a different set of arguments" as the cases in that report illustrated. The issues which emerged from the cases then reported were:

1. Does the Court retain its inherent jurisdiction to refuse to wind up for improper purposes?
2. What should a statutory demand contain?
3. When is a statutory demand not a statutory demand, and what should the Court do when it isn't?
4. Is the Court's power to extend time under sec 1322 ousted by sec 459G?

A summary of the answers to those questions is:

1. Yes, see *Pacific Communications Rentals Pty Ltd v Walker* (1994) 12 ACLC 5.
2. In *Topfelt Pty Ltd v State Bank of NSW Ltd* (1994) 12 ACLC 15 *Lockhart* J laid down some rules for the drafters of statutory demands. (In that case the demand was set aside as defective because it didn't specify the amount of interest owing as at the date of the demand or the daily rate of interest.)
3. Where deficiencies in a statutory demand are so fundamental (eg failure to state consequences of non-payment) that it cannot be described as a statutory demand, the Court might dismiss the winding up application.
4. The Court's power to extend time isn't diminished by the fact that sec 459G(3) states that applications may "only" be made within 21 days after service of the statutory demand. (See *Re Cavetina Pty Ltd* (1994) 12 ACLC 44; but for a possibly contrary opinion, see *Texel Pty Ltd v Commonwealth Bank of Australia* (1993) 11 ACLC 1,059.)

■ ■ ■

In the December-January issue of our ***CCH Journal of Australian Taxation***, solicitor Peter Bobbin has contributed an article on search and seizure under the Superannuation Industry Supervision legislation which, he notes, provides various penalties for certain breaches by trustees and others associated with super entities.

He looks at the ISC powers which may be used for the purpose of obtaining evidence to establish a breach. As Peter observes, there is an obvious parallel here to the access powers of the Commissioner of Taxation ... but with quite distinct objectives. As a consequence, sec 263 and 264 of the Assessment Act have been narrowly interpreted whereas Peter considers that it's likely that the SIS provisions will be given a wide application.

■ ■ ■

Louis D. Brandeis, US jurist, once wrote: *Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants, electric light is the most efficient policeman.*

■ ■ ■

In the recently released second edition of Michael Hart's *The 100*, he ranks those whom he regards as history's top 100 most influential persons ... not the nicest, or the most benevolent or the most intelligent but the *most influential*.

Ten of the 100 studied law at some stage of their education. Some of them (eg Marx and Voltaire) dropped out of law and only two, Jefferson and Bacon, actually practised. None is in the list as a lawyer or because of his legal contribution to history, but rather for other reasons.

The 10, with Hart's ranking shown in brackets, were: Karl Marx (27), René Descartes (49), John Calvin (57), Hernando Cortés (63), Thomas Jefferson (64), Joseph Stalin (66), Voltaire (74), JF Kennedy (81), Francis Bacon (90) and Mikhael Gorbachev (95).

Two non-lawyers who are listed because of their contribution to law-making were Moses and Justinian.

■ ■ ■

Hart opens his book with this quote from Francis Bacon:

> "We see, then, how far the monuments of wit and learning are more durable than the monuments of power or of the hands. For have not the verses of Homer continued twenty-five hundred years or more, without the loss of a syllable or letter; during which time infinite palaces, temples, castles, cities, have been decayed and demolished?"

■ ■ ■

1. Later to become Lord Birkett of Ulverston.

Stanley Leaver

6. In 1993, 156 Victorian school leavers commenced law at Monash. The number of commencing international school leavers was 9. (The balance of the first year intake was made up mainly of graduates in other disciplines and transferees from other courses within the University.)
7. In 1994, the cut-off score for local VCE students will not be known until 26 January. Offers to overseas school leavers were required to be made by 10 January 1994. In accordance with the practice outlined above, the University used the 1993 cut-off score as the basis for selection.

Yours sincerely,
A.J. Duggan
Acting Dean of Law
Henry Bournes Higgins Professor of Law

That overseas students are admitted on the basis of the previous year's cut-off would, in fact, appear to constitute a preference, albeit a slight and historically driven preference, in favour of overseas fee-paying students so long as the cut-off point continues to rise. In any year in which the cut-off point falls, the discrimination will be reversed.

The editors are delighted to discover that the apparent discrimination is historically driven and that equality of opportunity is not being sacrificed to the pursuit of fee-paying students. We apologise for our suspicions.

Declan F. Hyde, Barrister-at-Law, writes as follows;

Dear Nosh & Elliopp,

Re; *page 69.* Bar News*; Summer '93*

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

Please give my regards and best wishes for Christmas and the New Year to Dongiorno Q.C., Shompson, Bevries and Zilken, and to all at Draftsman Press Pty. Ltd.

(Perhaps I'll do my Doctorate — and then get really paranoid.)

Dear Sir,

I refer to your article entitled "Admission to Law Courses" in the summer of 1993 edition.

The article reproduces one article with scores for entering into the Monash law course dated Friday 29 January 1993 and an undated article purportedly setting out cut-off scores for entries to the same courses. The latter publication contains lower scores for admission to the faculty and was published overseas.

A number of comments need to be raised. The article says:

"This (i.e. the publication of the second article) does not mean that overseas students **are admitted** in the Monash Law School ahead of Victorian students with better VCE scores but it is certainly the obvious inference to draw." (emphasis is mine)

Two other equally obvious inferences might be drawn (and I hasten to add that I have no connection whatsoever with the Faculty of Law at Monash University other than to be a graduate therefrom over 20 years ago). One is that the earlier article was published at the time of first round offers and the latter article was published after second and third round or any subsequent offers were made for admission.

The second, that it is demonstrably clear from the second article that all the law courses and variations thereof were full for the 1993 year because they were all marked with an asterisk. It does not follow that any overseas student was admitted to the Monash Law course ahead of any Victorian student by reason of the fact that the courses were all full in any event.

Notwithstanding the other equally competing inferences which might be drawn, even assuming the inference drawn by the article is the correct one, I say "so what?"

The State of Victoria is not short of lawyers; indeed I believe that Victoria is more than well served with the number of lawyers that it produces for its population, but it does seem to this writer that one way of providing further employment opportunities is to increase the size of the law school for the purposes of educating law students from other countries. It becomes obvious that to do so serves the dual purpose of creating export dollars on the one hand and employment opportunities on the other. Such a course is quite clearly desirable.

If, and when Victoria has a shortage of lawyers, then the situation might need to be reconsidered.

What needs to be remarked upon is that the snide language of the article carries within it racist overtones. As I remarked in respect of another controversial article that appeared about 12 months ago, it seems to be a habit of the *Victorian Bar News* that controversial articles do not carry a

by-line. One presumes them to be therefore editorial comment. This correspondent deplores the racist tones that are implicit within the article.

Yours sincerely,
Nathan Crafti

The article was written by one of the editors, who was alerted to the difference in cut-off scores by the parent of a VCE student who had failed to gain entry into Monash Law School but would have done so if she had been an overseas fee paying student.

It was premised on the mistaken belief that overseas fee-paying students were receiving deliberately preferential treatment. It would seem that such students do receive a preference but that it is not deliberate.

CHAIRMAN'S CUPBOARD

BARRISTERS, OF ALL PEOPLE, KNOW that it is possible to argue with equal intensity in favour of either side of a question. We live and work in times in which values shift kaleidoscopically and the legal system no less than other institutions is under pressure for change and subject to a great deal of intense debate. There is more than one side to the debate.

Governments will not shoulder the costs of the current justice system — this is the true source of the multiple inquiries into the legal profession. For example, it is the pressure to have one lawyer where that will do which lies at the heart of the calls for direct access.

Moreover, governments at both State and Federal level seek the laurel "Reformer of the legal profession". The Bar has become an especially attractive target for reformers because barristers are a highly visible symbol of the litigation process. It is easy to fasten on barristers as the "demons" in the cost of justice debate. Despite the simple pleasures of barrister-bashing, the real job is to analyse the system and think constructively about how it might be *downscaled,* as they say in America, so that costs are proportional to matters in issue without risking diminution in the quality of justice. Why, for example, should we not consider a special court list where parties agree to be bound by a result, on consideration of relevant documents and strictly limited oral evidence? Why should we read aloud passages from relevant authorities to judges who are perfectly capable of reading them for themselves? Doubtless many simple strategies might be devised which do not satisfy a Rolls Royce model of justice but which like the humble Camira will be sufficient unto the day.

The Bar Council has approved direct access rules in principle, despite appreciating deeply the

Susan Crennan

role of a solicitor and the assistance given by an instructor. Further it is not merely a question of the Bar appreciating the role of the solicitor. The work done by a solicitor in managing a case is absolutely essential.

Civil legal aid, or rather its virtual absence, drives a public perception that the costs of justice are too high. I emphasise, however, that the Bar does not seek to level criticism at government or the Legal Aid Commission each of which is stretching the Legal Aid dollar to the maximum. Rather, the Bar, together with the Law Institute, is seeking some constructive solution to the problem which may result in co-operative arrangements between the Legal Aid Commission and the profession such that between both the community's needs are met.

The Bar, together with the Law Institute, is seeking some constructive solution to the problem which may result in co-operative arrangements between the Legal Aid Commission and the profession such that between both the community's needs are met.

A recent profile of users of the Supreme Court in New South Wales indicated the preponderance of them were average Australians for whom the descriptions "very poor" or "very rich" were not apposite. In one sense this is not surprising. First, because unsung practitioners in common law commonly wait for success before being paid. Secondly, in the entire debate about the costs of justice half-truths and untruths are repeated as fact. It is the old story: the first time a newspaper prints a mistake, it's an error, the second time it's a fact. The dynamism of change can unquestionably pick up a speed against which the truth seems powerless. The time has passed I think in which we try to explain, yet again, as we have done at such length and so frequently, what we see as valuable in the legal profession.

As Lord Bacon once remarked, "knowledge is power". In one sense it is only the practitioners of the law who have the requisite knowledge to fix its problems. The Bar welcomes competition but knows that competition alone will not solve the problems. It is for judges, ourselves and solicitors to devise procedures to ensure that the costs of justice bear a proportional relationship to disputes.

If we do not improve access to justice in this way we can expect regulators and politicians to dismantle the professions, assisted in their costs-cutting drive by the ultimate credulity that "anyone can do anything". Thus, the suggestion in the Trade Practices Commission Draft Report that unqualified people can do certain legal work. This is an understandable, but erroneous, reaction to the notoriously lengthy and expensive litigation of the '80s and the present time. At risk in the debate, driven by the lack of proportion between costs and disputes, is our current system of justice and our own profession of barrister.

ATTORNEY-GENERAL'S COLUMN

THE AUTUMN 1994 PARLIAMENTARY Session will again see a heavy work load of legislation from the Attorney-General's portfolio being put to the Parliament. Three Bills in particular are being introduced to address significant problems in the administration of justice. One of these, the Public Prosecutions Bill, has already received considerable publicity since the leak of the draft Bill last year. The Bill is yet to go to before Cabinet, and the final consultation with the Director of Public Prosecutions has also not taken place at this time of writing. Within these restraints, it is not appropriate for me to discuss this proposal further at this stage. The other two Bills are the Sentencing (Victim Impact Statement) Bill and the Magistrates' Court (Amendment) Bill.

SENTENCING (VICTIM IMPACT STATEMENTS) BILL

The Coalition Law and Justice Policy contains a commitment for the formal introduction of victim impact statements into the sentencing process. The Sentencing (Victim Impact Statement) Bill is the first and most important step towards honouring that commitment.

It has been a particular concern to the Coalition that the criminal justice system demands a major contribution from victims of crime, but does not recognise their basic need to be heard. At present, victims of crime are generally only heard when their evidence in court is necessary to obtain a conviction. Sentencing courts have recently, perhaps in response to promised legislative action, sought

victim statements in a few individual cases. The Director of Public Prosecutions has also occasionally offered the court such materials. For the greatest number of cases however, where the prosecution is resolved by a guilty plea, and where neither the court, nor the prosecution agency considers a victim impact statement necessary, the victim is left with no opportunity to be involved in the public process.

It is anticipated that victim impact statements will be prepared primarily by the victims themselves, rather than by a specific agency such as the police. This system will by no means prevent victims of crime from obtaining assistance from professionals such as counsellors, psychiatrists and social workers.

The Government recognises the needs of victims of crime, and the importance of assuring that victims are not alienated from the criminal process. Section 5 of the *Sentencing Act* 1991 currently sets out the matters which the court must have regard to when sentencing an offender. The Sentencing (Victim Impact Statements) Bill will amend this section to include a further requirement that the court must have regard to material placed before it on the personal circumstances of any victim of an offence, and any injury, loss or damage resulting from an offence. This will have the effect of creating a statutory right for victims to present impact material to the court.

It is anticipated that victim impact statements will be prepared primarily by the victims themselves, rather than by a specific agency such as the police. This system will by no means prevent victims of crime from obtaining assistance from professionals such as counsellors, psychiatrists and social workers. Materials gathered for the victim impact statement should also be of use in the making of applications to the Crimes Compensation Tribunal.

This reform will not compel any victim to provide an impact statement. Such a requirement would be completely inappropriate, as the provision of the statement will open the victim up to possible cross-examination on issues raised in the statement. It will be extremely important that this possibility is explained to any victim of crime contemplating making an impact statement. The improvement of mechanisms for providing victims of crime with information regarding all aspects of their rights in the criminal process will be a vital next step in the process of recognising the victim's place in the criminal justice system.

Jan Wade, MP

MAGISTRATES' COURT (AMENDMENT) BILL

Subject to further consultation with the legal profession and other interested groups, I intend to introduce in the 1994 Autumn session a Bill to amend the *Magistrates' Court Act* 1989 and to make related or consequential amendments to other legislation.

1. **Implementation of Pegasus Proposals**

   The Pegasus Taskforce was made up of senior members of the judiciary and magistracy, representatives of the legal profession, the DPP and Legal Aid Commission and senior officers of the former Attorney-General's Department. It reviewed the criminal justice system and advised on methods to reduce delays in proceedings. The Bill is intended to implement three areas of practice as recommended by the Taskforce.

   (a) Conduct of Committals

   The Bill will provide for a committal mention system under which a mention must be heard within 14 days of the defendant being charged. It will then provide

the power for the court to set a timetable for the disclosure of information and other preliminary steps.

(b) Costs in Criminal Cases

i) The Bill will permit costs to be awarded against a legal practitioner in criminal proceedings and provide that the court may take into account the conduct of any persons which has unreasonably protracted or delayed proceedings. Provisions will be similar to those already applying to civil cases and criminal trials under the Crimes (Criminal Trials) legislation.

ii) The Bill will provide that where the court would presently award costs against an individual police informant, it should now award costs against the Chief Commissioner of Police. This will preserve the effect of the decision in *Latoudis* v. *Casey*, while removing an inappropriate threat for police informants.

iii) The Bill will ensure that a scale of costs can be prescribed.

(c) Disclosure

i) The Bill amplifies the 1992 decision of the Full Court of the Supreme Court in *Sobh* v. *Police Force of Victoria* that the material contained in police briefs should be disclosed under *Freedom of Information Act* 1982. The Bill will provide that police briefs should be available on request but that addresses and personal details of prosecution witnesses are not to be made available to the defence.

ii) The Bill will also provide for early disclosure by both prosecution and defence of reports by forensic and other expert witnesses.

2. **Closure of Proceedings in Magistrates' Courts**

The Bill will permit the closure of proceedings in Magistrates' Courts, and the making of suppression orders, in hearings about offences committed by an act of sexual penetration as defined in s.37 of the *Crimes Act*, including cases that involve evidence of consensual sexual relationship between adults. Currently that power is limited to matters involving a sexual offence.

3. **Sheriff's Fine Enforcement Power**

The Bill will permit the Sheriff to seize and sell property of fine defaulters under the PERIN system. The powers are similar to those exercised by the sheriff in civil cases. Currently the Sheriff can only collect the fines or imprison the defendant, or in the case of motor vehicle offences suspend the defendant's licence.

The Bill will also permit orders to be made against the Directors of fine-defaulting companies which do not have sufficient assets against which to execute, unless the directors satisfy the court that they were not aware that the company would be unable to meet its liabilities and they took all reasonable steps to ensure that the company would be able to meet its liabilities.

The Pegasus Taskforce was made up of senior members of the judiciary and magistracy, representatives of the legal profession, the DPP and Legal Aid Commission and senior officers of the former Attorney-General's Department. It reviewed the criminal justice system and advised on methods to reduce delays in proceedings. The Bill is intended to implement three areas of practice as recommended by the Taskforce.

4. **Miscellaneous Housekeeping Amendments**

The proposed amendments have arisen as a result of monitoring the operation of the *Magistrates' Court Act*, and through proposals by the court, police and legal profession. They relate to appointment of magistrates, destruction of records, the necessity to issue warrants at the proper venue, remand warrants, rehearings, powers of the County Court on appeal, accessories to summary offences, attachment of earnings, instant summaries, local laws, extension of the 12 months for commencement of proceedings rule in cases where the owner of a vehicle has nominated the driver, and inconsistency in legislative provisions for nominating the responsible driver. Further details have been provided to the Victorian Bar Council.

Jan Wade M.P.
Attorney-General

WELCOMES

JUSTICE BROWN

JUSTICE BROWN WAS ADMITTED TO practice as a barrister and solicitor in March 1974 and, in November 1978 she signed the Bar Roll and began reading with Peter Heerey, now Justice Heerey of the Federal Court. On 23 November 1993 Sally Elizabeth Brown was appointed as a Judge of the Family Court of Australia. Previous to this appointment it will be well known to members of the Bar that Sally Brown was the Chief Magistrate of Victoria, a position she held for the past three years. Her Honour was appointed from the Victorian Bar as a Magistrate in 1985 and was the second woman to be appointed in Victoria. In April, 1987 Her Honour was appointed Deputy Chief Magistrate and in September 1990 Chief Magistrate. In both instances Her Honour was the first woman to hold those positions.

During her time in these positions Her Honour

Justice Brown

has made substantial contributions to the Magistracy, particularly in the areas of domestic violence, sentencing, the computerisation of the courts, criminal delay reduction and the committal mention system. When Her Honour left the Magistrates' Court it was a testimony to her administrative and judicial skills.

At her Welcome to the Family Court, Justice Brown, in her inimitable style, unnerved many of the less robust members of the profession who were present by referring to the "F" Word as truly describing herself! Some of those who did not know of Her Honour's proclivity to associate herself with a minority group became decidedly uncomfortable when it appeared that Her Honour felt it was necessary to become more specific and that she should come right out and say it! Most thought that this may be going too far, given the suspected word was one normally written on a scrap of paper and handed to a witness in courts of lower jurisdiction. Indeed, when Her Honour revealed that the appropriate word to describe herself was none other than FEMINIST, there were still some who were not sure if this "F" word was not in fact worse!!! There are many other "F" words which could properly apply to Her Honour, not the least of which are that she is Fair, Fearless, Formidable, sometimes Frivolous but never Fickle.

One of the first engagements of Her Honour in her new position was to deliver the inaugural address to the Women's Bar Association of Victoria. If the members of this Association were looking for inspiration and confidence in the role an association such as theirs can play in the reduction of discrimination within the law for all women, Her Honour certainly delivered this. Her speech to the very mixed group of the profession, from the Chief Justice to junior members of the Bar, left no one in doubt that Justice Sally Brown is an outstanding choice for her new position, and she will bring a fresh and challenging outlook to her position on the Bench, and we wish her well,

JUDGE WILLIAMS

ROLAND GWYLLAM WILLIAMS WAS BORN on 31 August 1943. He was educated at St. Joseph's Christian Brothers College, Geelong, where he completed his secondary education in 1961.

After qualifying for the Degree of Bachelor of Laws in 1965 at the University of Melbourne, His Honour graduated on 26 March 1966.

It is said that the countless hours which His Honour spent on external research in places of public resort beyond the university provide a ready explanation for His Honour's acknowledged mastery of such important extra-curricular subjects as horse racing, Australian Rules football, tennis and golf.

His Honour entered into Articles of Clerkship with Mr. Donald L. Chisholm of the firm of Maddock Lonie & Chisholm and was admitted to practice as a barrister and solicitor of the Supreme Court on 1 March 1967.

Having signed the Roll of Counsel on 13 June 1968, His Honour read in the Chambers of the late Mr. John W. Mornane, who himself became a Judge of the County Court.

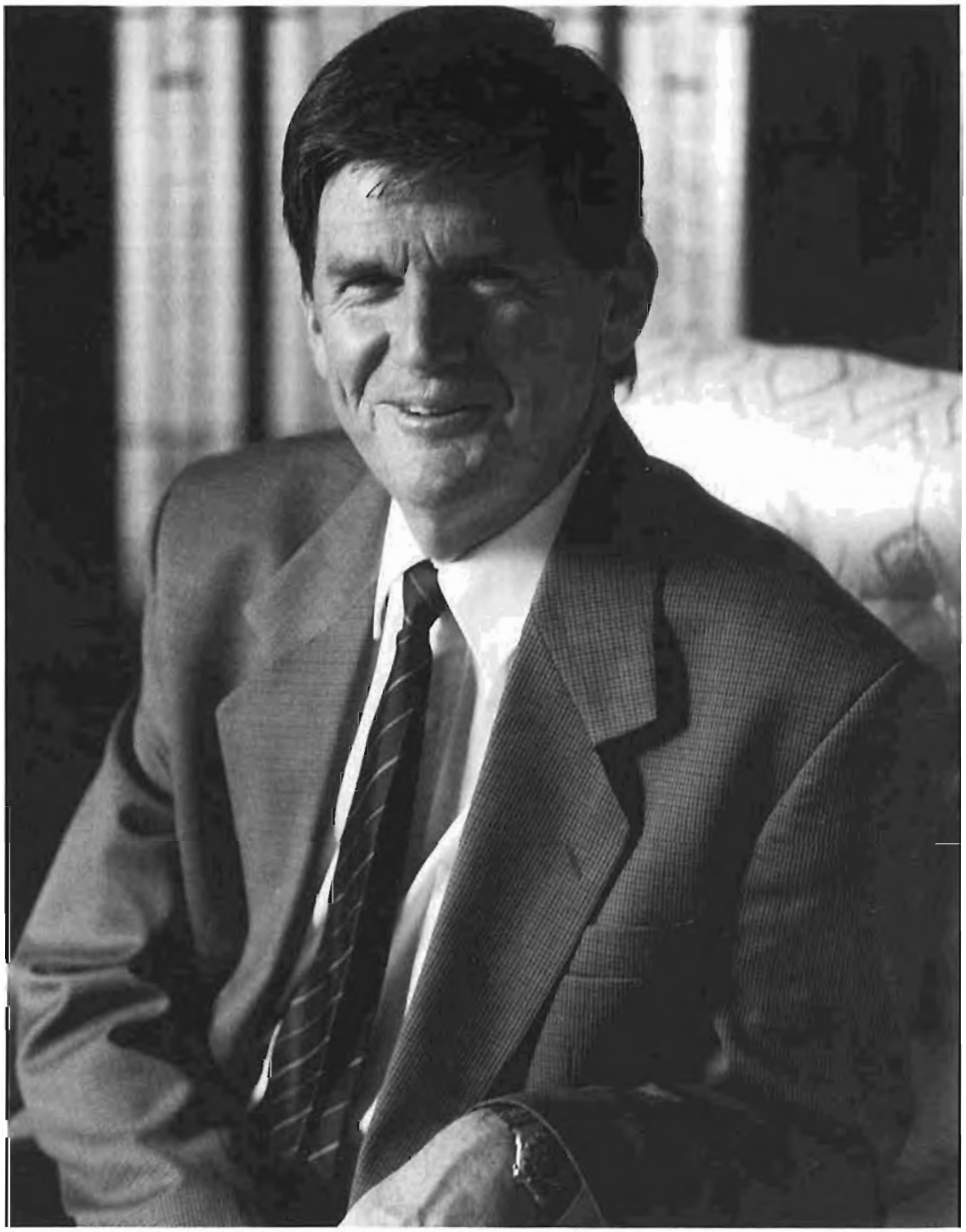
His Honour often speaks of John Mornane with great affection and admiration and one suspects that His Honour's own earthy common sense and *savoir faire*, his grasp of essential legal principle and his sound judgment have their genesis, at least in part, in the Chambers of Mornane.

At the Bar His Honour developed a large common law practice involving professional and medical negligence, workers' compensation and personal injury work. His Honour had four readers; O'Doherty, Laxton, O'Donnell and Fehring, who were the fortunate beneficiaries of His Honour's wisdom on matters legal and otherwise which was offered with abundant patience, care and generosity often long after they had ceased to read with him. In this connection it is noteworthy that His Honour was one who valued highly the *esprit de corps* of the Bar and fostered it selflessly and unreservedly.

In 1992 His Honour took Silk at a time when significant changes were taking places in the jurisdictions in which he had for so long practised. To some, such a move might have appeared foolhardy, given the impending contraction in available work, but His Honour embraced the challenge and conducted himself as one of her Majesty's Counsel with distinction and considerable success.

Despite the demands of his busy practice His Honour devoted himself generously to his family. In return, his wife Sandra offered him unswerving support and encouragement whilst working tirelessly with him in raising and educating his three children, Amanda, Michael and Nicholas, each of whom is a great credit to their parents.

During his time at the Bar His Honour established himself as a careful and painstaking lawyer, a shrewd and determined advocate as well as a charming man of gentle humour and great kindness.



Judge Williams

His friends at the Bar were many and his passing from it has evoked a sense of loss amongst them. Their consolation is that there has been added to the County Court bench a Judge especially well suited to the rigours of the task which he has undertaken, who they can expect will discharge the duties of his office fairly, wisely and with great compassion.

The Bar welcomes the appointment of His Honour Judge Williams and wishes him well.

NICK PAPAS C.M.

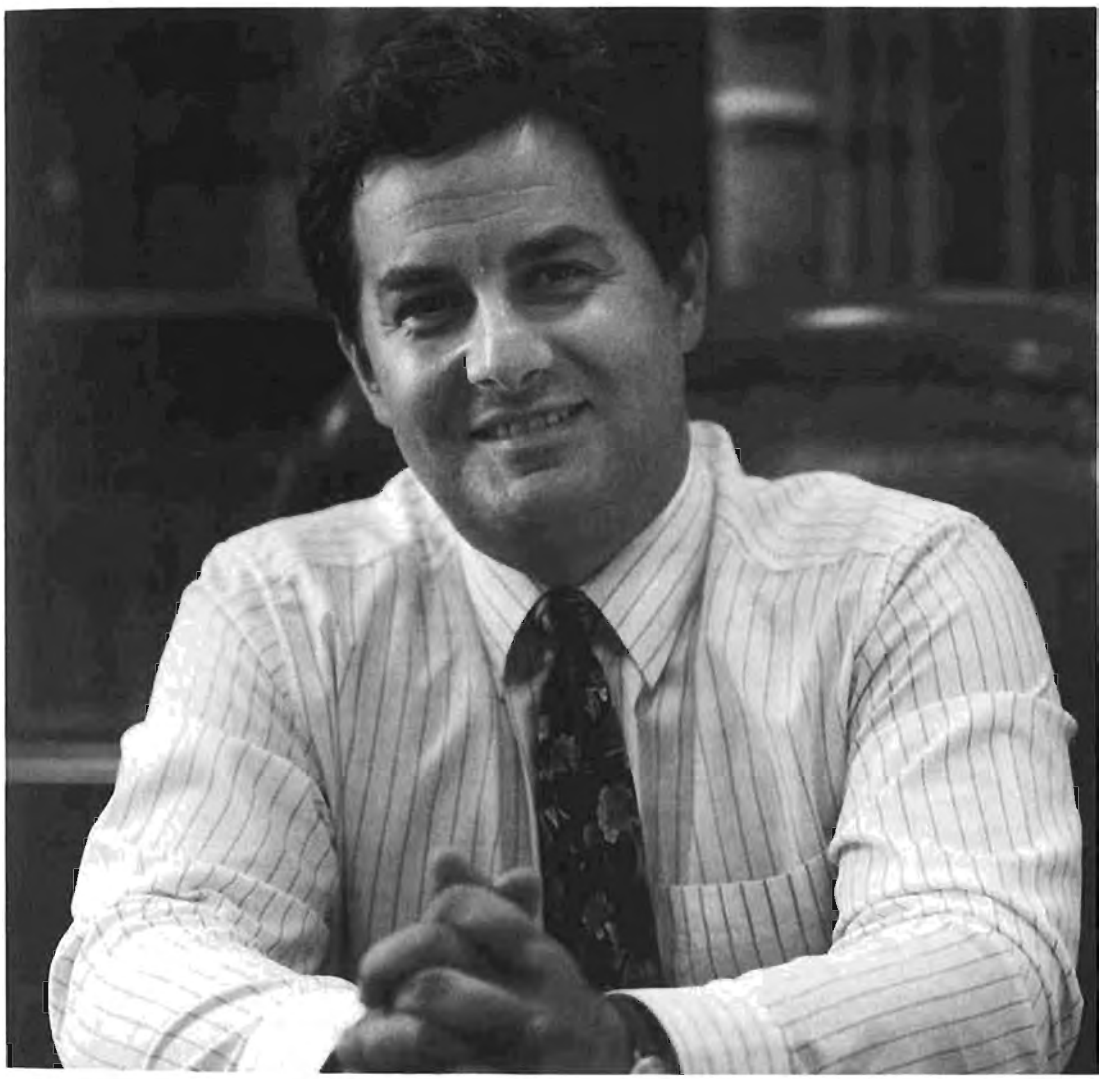
NICK PAPAS WAS RECENTLY APPOINTED Chief Magistrate of Victoria.

He was educated at Trinity Grammar. He obtained a Law and Commerce degree, majoring in accounting, at the University of Melbourne. He signed the Bar Roll in November 1982, having been admitted in April 1982. He read in the chambers of David Perkins.

During his university vacations he worked at Ellinghaus, Weill & Lindner, where he later completed his articles. His work included research and instructing in criminal trials. When he came to the Bar, he continued to have an interest in criminal law. Subsequently, he established a criminal practice at the Bar. He enjoyed a good practice as a junior, appearing in notable cases such as the "Russell Street bombing trial".

In August 1990 he was appointed as a Prosecutor for the Queen. After his appointment he appeared regularly in the Court of Criminal Appeal and recently appeared in the High Court in the cases of *Pollard* v. *R.* and *Pollitt* v. *R.* as junior counsel with Finkelstein Q.C. and Bongiorno Q.C., Director of Public Prosecutions, respectively.

He has always been considered by his colleagues to be a friendly, generous and enthusiastic person who enjoyed mixing with the Bar, professionally and socially. He is considered to be a per-



Chief Magistrate Papas

son who can be relied upon by others to discuss their particular knotty problem from a current trial or appeal at any time, notwithstanding that he has a busy personal life, as he and his wife, Jenny, have two young sons with even more energy than their father! He has contributed to the Bar in many ways. He was a member of the Criminal Bar Association for a number of years and recently was a member of the Editorial Board in relation to Current Criminal Cases, which involved a great deal of time summarising recent decisions of the Court of Criminal Appeal and important rulings of Supreme Court judges in criminal trials.

He is a person who directed his energies fully to any given task. His decision to become fit started with his joining a gymnasium as a beginner in the back row to becoming an aerobics instructor at the same gymnasium. In recent years he decided to become computer literate. He was well-known, at the Bar, as well as with the solicitors at the Office of the Director of Public Prosecutions, as a person who was very capable with the use of computers, especially with specialised legal software which he used in complex criminal cases. He was always available to assist people less computer literate than he, and gave a great deal of his time to instruct patiently those who knew absolutely nothing about computers.

He was born in Australia to parents who had arrived from Greece. He did not speak English until he began school and adapted very quickly. He will no doubt adapt equally well to his position as Chief Magistrate and with his unusual energy and zest for life he will be successful.

The Bar wishes His Worship a happy and successful time as Chief Magistrate.

FAREWELL

JUSTICE STEVEN STRAUSS

THE HON. STEVEN STRAUSS Q.C. RETIRED from the Bench of the Family Court of Australia on 3 January 1994. His celebrated past is well known and accordingly this article merely provides a pen sketch of his past and expresses gratitude for the significant contribution he made to the development of family law in Australia.

His Honour was born in Lauterbach, Hessen in Germany on 3 September 1921. This was the beginning of his long travel to the benefit of the Family Court of Australia. His father was an Arbitrator for the District Cattle Association, which must have implanted that first sense of justice and fairness which was the hallmark of His Honour's service both as a member of the Victorian Bar and as a Judge of the Family Court of Australia, including being a permanent member of the Court of Appeal.

The days in Germany following Hitler's rise to power and the rule of tyranny and oppression were experienced by His Honour and his family. He gained sponsorship to England on 3 July 1939. When only 17 years of age, he left Germany alone and travelled to England where he lived, but was later interned in May 1940. Such were the suspicions at the time that it was thought necessary to intern a student. The fear of fifth columnists in those dark days was obvious but, in His Honour's case, a trifle extravagant. He was interned at Kempton Park, Bury (Lancashire) and later the Isle of Man.

His Honour's journey to the unknown in the real sense commenced yet again when, as an internee aboard the *Dunera,* he was deported from England on 10 July 1940. This now famous vessel contained refugees, German internees including merchant seamen and also Italian internees who survived the torpedoing of the *Arandora Star.* There were some 2,500 internees aboard. Of that

His Honour's journey to the unknown in the real sense commenced yet again when, as an internee aboard the *Dunera,* he was deported from England on 10 July 1940.

Justice Steven Strauss

number His Honour was one of only 165 students who were part of that journey into history.

It was the belief of almost all those aboard that their destination was to be Canada. Indeed, it was not until the Dunera docked in Fremantle on 26 August 1940 that His Honour first learned his new destination was in fact Australia. There were political forces operating against the arrival of the ship for why should, it was suggested, the Government take on so many emigres that had not been administered through the appropriate processes in those straitened times?

His Honour's first view of Melbourne was on his 19th birthday. The *Dunera*, whilst travelling to Sydney, berthed in Melbourne on 3 September 1940. It then sailed to Sydney from whence His Honour travelled to and was interned at the Hay, Orange and Tatura internment camps respectively.

A long way indeed from the green hills of Lauterbach.

There were a number of refugees aboard the *Dunera* who also made a substantial contribution to Australia. They too, like His Honour, were later to render high service and dedication to their new home. His companions included Professor Fred Gruen, Professor of Economics (Australian National University), Professor Peter Herbst, Professor of Philosophy (Australian National University), Professor Felix Behrend, Professor of Mathematics (University of Melbourne), Professor Hugo Wolfsohn, Professor of Politics (La Trobe University), Felix Werdar, musician/composer, Max Bruch, actor, Herbert Baer, the first Jewish stockbroker in Victoria, and Walter Heine, one of the first businessmen to open trade relations with Japan after the War.

We wish His Honour much happiness and joy in his retirement. It can be truly said that the law relating to the family has been enriched by his presence, and he has left in the very heart of the law itself the indelible mark of precedent for all time.

His Honour's thirst for education resumed at the Tatura internment camp where, whilst working as an internee, he undertook his Leaving Certificate. He was released in February 1942 to join the Eighth Australian Employment Company — being part of the Australian Army. Again, his time was not wasted. He studied and passed four Arts subjects by correspondence. Precisely four years later he was discharged from the Army, and commenced studying Law at the University of Melbourne. He graduated in 1948 and in 1949 gained his Master's Degree in Law.

His Honour then undertook his Articles of Clerkship at Madden Butler Elder & Graham, his time for service being abridged to six months. He was admitted to practice in 1949, signed the Roll of Counsel of the Victorian Bar and read with Mr Douglas Little (later Sir Douglas) commencing 1 February 1950. Thereafter, and throughout his practice as a member of the Victorian Bar, His Honour enjoyed a very wide practice in various jurisdictions practising equity, commercial law, matrimonial causes and crime.

His Honour took Silk in 1965, being the first year that Sir Henry Winneke presided over the Supreme Court of Victoria as its Chief Justice. It was a celebrated (some say, controversial) year. Those others who took Silk included Edward Laurie, Sir Edward Woodward, Joan Rosenove and Bill Irvine. From the time of His Honour's appointment to the Bench of the Family Court of Australia, he has for more than 17 years been an integral part of the development of that area of the law. His Honour's participation from the beginning in the development of family law was yet another journey through uncharted seas. In September 1988, Elizabeth Evatt, the former Chief Judge of the Family Court, said that the question is whether the *Family Law Act* arises from, or reflects, changes in attitudes towards marriage and divorce or whether it will itself lead to such changes. His Honour has been an important part in the adjustment of marriage relationships within the Australian community. As a Judge of Appeal he had in many instances worked at the coalface of the development of family law and determined its direction. He has, through the law, adjusted human relationships in the social context. Some of his judgments are now over-ridden by the passage of time, for the law is ever mobile and malleable to social changes. Other cases set benchmarks. His Honour has been involved in many including that of *FERGUSON* **(1978)**, which determined that conduct had no relevance to property matters if it had no economic consequences; *OLIVER* **(1978)**, where he determined that the Court is entitled to look at the whole period of cohabitation including premarital cohabitation when determining alteration of property interests; *ABDO* **(1989)**, dealing with the reception of fresh evidence on appeal and *HARRIS* **(1991)**, dealing with the trend towards equality of contribution, and that property may include rights under superannuation schemes. His Honour would make his dissent clear. Practitioners well recall the case of *NEW* **(1981)** where his judgment starkly criticised the majority as being plainly wrong.

The Victorian Bar regrets that His Honour should now depart from the Family Court. His reputation was one of singular fairness. He gave the litigants a fair go. He listened patiently, and conducted himself with dignity. We wish His Honour much happiness and joy in his retirement. It can be truly said that the law relating to the family has been enriched by his presence, and he has left in the very heart of the law itself the indelible mark of precedent for all time.

OBITUARY

SIR REGINALD SMITHERS

SIR REGINALD SMITHERS, PROBABLY THE youngest judge ever to retire in his mid-80s, was a much loved member of the Victorian legal profession. The address set out below was given by Xavier Connor at a gathering of the friends of Sir Reginald Smithers at the RACV Club on Thursday, 20 January 1994.

We, the friends of Reginald Allfree Smithers, have come together not to mourn his death but to celebrate his life — and what a life it was.

He was born in Echuca and his family came to Melbourne when he was five years old. They lived in South Yarra and he ultimately attended Melbourne Grammar School. On leaving school he went into the Victorian Public Service and served in the Titles Office where he began doing a part-time law course. After two years at the Titles Office he left the public service and went into the employ of Shaw & Turner, a firm of solicitors practising in Melbourne. There he finished his course and was admitted to practice in 1924 as a barrister and solicitor of the Supreme Court of Victoria.

He had for a long time had his eye on the Bar and in 1929 he signed the Roll of Counsel and read with Clifden Eager. In his early days, and indeed throughout his entire career, he received much work from his great friend Bob Kennedy of the firm of Russell, Kennedy & Cook — and in the early days it was enough to keep the wolf from the door.

When World War II came he joined the RAAF, became a Squadron Leader and served in New Guinea and the Phillipines.

On returning to the Bar at war's end he continued to practice for a short time as a junior barrister until he took silk in 1951. It was at about this time that I came to know him really well and we remained firm friends thereafter. I frequently acted as his junior and was amazed and impressed at the manner in which he invariably dedicated himself to the cause of his client. No client ever had a more hard-working or more faithful advocate. In addition he had a brilliant way with juries and, over and over again, he obtained substantial verdicts for plaintiffs when the odds seemed to be stacked against them. And so he went on for the next decade or so as a leading jury advocate until in 1962 he was appointed a Justice of the Supreme Court of Papua and New Guinea.

During his time as a senior counsel he appeared in many important cases. I shall just mention one of them. He and I appeared for a quarry master in Fyansford near Geelong. He had carried on his quarry without incident while the quarry was surrounded by vacant land but, as houses crept closer to the walls of the quarry, explosives sent rocks into the surrounding properties at great peril to the householders, who joined together to bring an action against the quarry master seeking an injunction to have the quarry closed down. Reg was a very good judge of a case and he realised that it would not be enough to say that the householders had come to the nuisance but somehow there must be an end to the rock-throwing if our client was not to lose his livelihood. He was instrumental in arranging for the attendance and supervision of the blasting by ICI officers who used a far more sophisticated and advanced method of explosions than had been used by our client. In the result, after a long hearing, there was an injunction from Smith J. which permitted our client to remain in business as long as his explosive operations were supervised by ICI, who, as the suppliers of the explosives, were quite happy to perform this function free of charge.

There was very wide coverage of the case in the Geelong press with photos of Reg and Lou Voumard, who was on the other side. It was a very good result for Reg because at certain stages of the litigation it looked as if our client would be put out of business.

The case had gone over some weeks and at the end of the last weekend Reg drove me down to Geelong where we were staying at the Carlton Hotel. He wore sports clothes for the drive which included a rather jaunty pork pie hat. The case finished before lunch about mid-week and Reg and I proceeded to pack up and load our belongings into his car. As we were about to leave his room I opened a wardrobe and there was the pork pie hat. I said "you can't leave this behind" but our hands were full of luggage so I just plonked it on top of

Sir Reginald Smithers

the grey homburg he was wearing simply as a means of transporting it down to his car which was parked just outside the hotel. Before leaving Geelong he had to see a solicitor whom he knew well named Don Ingpen. I placed my belongings in his car and went off on an errand of my own.

For the rest of what happened I am reliant upon what Reg afterwards told me. He put his cases and bags in the car but in the event, became oblivious of the pork pie hat and did not remove it from where it was securely perched on the top of the elegant grey homburg — and thus attired he set off along the streets of Geelong for Don Ingpen's office.

He said at first he was impressed with the friendliness of the Geelong people — women and children giving him warm smiles as he strode along and even passing motorists giving him a

wave and a smile. Then he thought — well, this has been a very important case and we have had a great win with a lot of publicity — perhaps all these people are acknowledging this. He was a little non-plussed when even the drivers of motor cars with South Australian number plates gave him a smile and a wave — then he thought well, perhaps this very important case has been reported in the South Australian press. At all events when he reached Don Ingpen's office he was experiencing, for one reason or another, a warm inner glow. When he arrived at the office he met a receptionist whom he knew quite well and with his customary courtesy he raised his hats to her — when all was revealed.

In addition to carrying on a most substantial practice he found time to serve for many years on the Victorian Bar Council. He commenced to do this in the early '50s and ultimately became Vice-Chairman and then Chairman of the Victorian Bar Council. Together with Maurice Ashkanasy he played a leading part in obtaining chambers for young barristers and with Oliver Gillard he played a leading role in the move of the Bar from Selborne Chambers to Owen Dixon Chambers in 1960. As with his clients, he gave his all in service to the Bar, a labour of love which took up much of his time. At the time of his appointment to the Bench he was held in the greatest respect and warmest affection by his colleagues at the Victorian Bar.

His judicial career was unusual in that, unlike most judges, he did not serve on a single court but on a variety of courts. First there was the Supreme Court of Papua and New Guinea, then the Supreme Court of the Northern Territory, then the Supreme Court of the Australian Capital Territory, then the Australian Industrial Court and finally the Federal Court of Australia and the Administrative Appeals Tribunal.

In all these jurisdictions he distinguished himself by his fairness, his patience, his unfailing good humour and by getting the right result. He listened to witnesses, litigants, solicitors and counsel. He made sure that he understood what they wanted to say. As a result there are legal practitioners spread all over Australia and Papua and New Guinea who will testify today to his fairness and patience. No one walked out of his court feeling that they had not had a fair hearing. He was very diffident about his own judicial ability. He would often begin by saying "I don't know" — then he would get exactly the right result. When he retired from the Federal Court at the age of 85 many people said that not only were his powers not diminishing but that he was at the very height of his powers and performing better than ever.

During his busy judicial career he also found time to be Chancellor of La Trobe University for almost a decade and also President of the Australian Association of Youth Clubs. In this latter activity he displayed a great understanding of and sympathy with the problems of young people. To no one's surprise he was knighted in 1980.

He did not like being idle and it was typical of him that shortly after his retirement from the Bench and in his middle 80s he took upon himself an entirely new activity as legal consultant for the legal firm of Dunhills. There he revelled in working as a consultant with lawyers barely half his age. He continued working there until comparatively recently when he began to have problems with mobility.

It was typical of him that shortly after his retirement from the Bench and in his middle 80s he took upon himself an entirely new activity as legal consultant for the legal firm of Dunhills.

It is difficult on an occasion such as this to dispense with biographical material which is necessary to indicate the measure of a man's achievements. However, a mere recitation of those achievements gives little indication of the great human qualities possessed by Reg Smithers. He was a person of great wisdom and tremendous warmth. He had an absolute detestation of injustice and would do everything he reasonably could to avoid it. He was a sincere friend and an incomparable companion. He was, what for want of a better term, I call an enlivener. He was never dull — he sparkled. If there was a group having a desultory conversation about the weather and Reg joined them he would transform the situation in no time and would initiate a spirited discussion about some aspect of art, politics, religion, finance or what have you. As often as not he would do this by venturing some fairly challenging remark about an affair of the day — and the group would be away. I can still hear him saying "It's all very well for you Catholic chaps — you believe all these things; but how do you know, how do you know?" And that would be good for at least half an hour of spirited theology and philosophy.

He was famous for his chuckle. It is a very difficult chuckle to describe. Most times it was warm and friendly but occasionally there was a touch of wickedness in it. It had to be heard and I feel that most of you have heard it.

Justice Adrian Smithers

Xavier Connor delivering the eulogy

His Excellency Richard McGarvie and Mrs McGarvie

If someone said something he didn't think much of, he would say "Occhh". It was a very individual monosyllable which coming from him conveyed the absolute untenability of what had just been said. I was appearing against him one day in the Coroner's Court and was leading some evidence against Reg's client from a police witness who did not sound at all convincing. When one particular answer was given, from down the other end of the table came a highly audible "Occhh". I said "Your Worship, my learned friend is entitled to cross examine the witness or to address about his evidence but he is not entitled to make contemptuous monosyllabic sounds which can be heard all over the courtroom". The Coroner said " I hear what you are putting, Mr. Connor, but to tell you the truth when I heard the witness' answer I felt like going 'Occhh' myself". That was a very proper objection which got nowhere at all.

Another quality which Reg Smithers had in abundance was courage. He was always prepared to stand up and be counted whether he thought his views would find favour or not. Allied with this quality of courage was a capacity for leadership — and he led the Bar through more than one crisis during his time on the Bar Council.

Another quality he had, which is rare in people of great age, was his intense interest in what was going on in the here and now. He would talk about the old days if you specifically asked him about them, but in general he talked about what was happening this week, and I believe that this quality played a large part in keeping him mentally young.

The problem with talking about Reg Smithers is to know when to stop — but stop I must. His mortal remains are gone but for me I think he will, like Joe Hill, never die. I will go on hearing that chuckle — from time to time I will read or hear something and say to myself Reg would have gone "Occhh" to that — and I shall probably want to go "Occhh" also. All of us here have our own precious individual memories of him. That you have come here in such numbers today is a fitting tribute and I am sure a great comfort for his family. We celebrate the life of a person who was a leading barrister, an outstanding judge, a fine man and a great Australian.

I conclude with the words which Horatio spoke on the death of Hamlet: "Now cracks a noble heart; goodnight, sweet prince, and flights of angels sing thee to thy rest".

JUSTICE BARRY MADDERN

BARRY JAMES MADDERN'S INTRODUCtion to the practice of industrial relations came when, as a young man living in Geelong, he worked as an Employee Relations Assistant at the Standard Vacuum Refining Company's oil refinery at Altona. This was the 1960s, when the Geelong Road was not what it has become since. Australia came very close to losing a future leader when, on that road one evening, Maddern's Triumph Herald drove under a horse. Maddern survived, however, to complete his law degree part-time while working as assistant to the Industrial Relations Manager of Mobil Oil in Melbourne.

Maddern did his articles at Moule, Hamilton & Derham, articled to the then guru of industrial relations solicitors on the employer side, Mr. Stephen Alley. He signed the Bar Roll on 23 February 1967 and read with Keely. He developed a successful industrial practice from the outset. One may see his name occasionally in the Federal Law Reports as appearing in the late '60s and early '70s in the Australian Industrial Court. However his chief interest lay in industrial arbitration as such, where he succeeded Drew Aird Q.C. as advocate and advisor for the oil industry and Jim Robinson Q.C. as advocate for the National Employers in all major cases, especially National Wage Cases. In this endeavour Maddern was pitted against (and alongside) many very senior members of the industrial Bar: for example, in the National Wage Case which led to the introduction of wage indexation in 1974/75 other major parties were represented by McGarvie Q.C., Keely Q.C. and Macrossan Q.C.

Once, as an articled clerk myself, I was asked by Maddern what I thought of working in the area of industrial arbitration. I cannot recall my reply, but I can clearly recall his comment which followed: "It isn't law". I was later to observe what he meant by that. The major cases which occupied his energies required meticulous examination of mountains of factual material (much of it supplied by the client without the slightest clue why counsel would be interested in looking at that), a careful analysis of the issues presented by the claim and an inexhaustible capacity for lateral thinking. There was very little law in it, in the sense that rarely was the answer provided by a decided case or a statutory provision. Notwithstanding that, Maddern had an excellent library of reports of cases decided by industrial tribunals, and kept his own index of decisions of the federal tribunal, where he chiefly practised. He took pride in being able readily to inform a client (and eventually the tribunal) that what was proposed by the other side was inconsist-

Justice Barry Maddern

ent with something the tribunal had said or done in a comparable matter. Although the doctrine of precedent did not apply as such, even industrial tribunals derive some comfort from their own consistency.

Maddern's first chambers were on the 7th floor of O.D.C.E., and in 1973 he moved to the large room on the first floor originally occupied by Keely Q.C. and now (and indeed since Maddern's departure) occupied by Dalton Q.C. Maddern's success was such that he employed his own secretary from his very early days as a junior member of the Bar. It was, however, this very success which led to the event which served more than any other to distinguish him from others at the Bar in his line of work. Maddern's work was for the most part, right from the start, generated by his own reputation and contacts in the industrial relations community (not at that stage known as a club). He eventually came to the view that he derived nothing of value from the employment of a clerk. Having first unsuccessfully sought the waiver of his

clerk's percentage fee, he left the Bar on 5 September 1974. He did not, however, practise as a solicitor, setting up his own "chambers" in a strata-titled erstwhile residential flat at the "Paris end" of Collins Street. At this time it was not necessary for someone who practised only as a barrister to obtain a practising certificate from the Law Institute, and Maddern ascertained from the Attorney-General that if he were to undertake (which he did) to accept work only when briefed by a solicitor, he was legally entitled to practise as such although a member neither of the Bar nor of the Institute.

In practice, Maddern was a man of restraint and reserve. Although he had been educated at Geelong College, and numbered amongst his friends several influential members of the Liberal Party, he was not of the establishment. His dress was conservative in the sense of drabness rather than elegance. His address was East Malvern. There was economy in everything he did. No cent (nor minute of the day) was wasted. If it was his client's policy, for instance, for executives to travel by air in the economy cabin, Maddern readily did likewise. There seemed to be not an iota of self-indulgence in this man. Out of town, he stayed at hitherto unheard-of hotels of three stars at best (places, incidentally, which his solicitors and clients — when they imitated him — invariably came to appreciate). He boasted of lunching at a Chinese restaurant somewhere in Little Bourke Street of which no-one had heard, but which Maddern swore had a menu second to none. Maddern was a value-for-money man. For someone who made a career persuading industrial tribunals why workers in a particular case were not deserving of higher remuneration, this was a valuable quality but, in this instance, a genuine one.

Given the strength of Maddern's practice, his unique accommodation arrangements served him well until his appointment as a Deputy President of the Conciliation and Arbitration Commission on 21 April 1980. It is generally believed that no appointment (at least to a Presidential position) to the Commission would be made unless the appointee had the approval both of the organised employers and of the trade union movement. Maddern's role as the advocate for the National Employers was not, however, a point of disqualification in this regard, as he had maintained a tradition (established by Jim Robinson and Bob Hawke) of cordial relations and mutual respect between advocates appearing on the opposing sides of National Wage Cases (Maddern's main union opponents being Rob Jolly and later Jan Marsh). Once on the Commission, Maddern (as was always his style) worked with quiet dedication and efficiency. He never made a bad decision. He was polite to all who came before him. He did, however, have firm views as to the obligations of those who benefited from the system of awards administered by the Commission, and did not hesitate to make these known as the occasion required. While not in the softish mould of the renowned conciliators of the Commission, Maddern made no enemies, probably because he had no prejudices. When he was on the bench, the parties knew that there was no subterranean agenda at work: in this sense, what you saw was what you got.

Maddern was a value-for-money man. For someone who made a career persuading industrial tribunals why workers in a particular case were not deserving of higher remuneration, this was a valuable quality but, in this instance, a genuine one.

Thus it was no surprise on 17 December 1985 when Maddern was made President of the Commission upon the retirement of Sir John Moore. He was at the time by no means the most senior Deputy President, nor the most fashionable. One may contemplate whether it would work in practice to promote a relatively junior puisne judge to the position of Chief Justice in a conventional court: in the case of Maddern, the promotion was accepted by his colleagues on the Commission and welcomed by all who appeared before it. From that time Maddern's preoccupation necessarily became presiding over the periodical National Wage Cases which formulated and refined the detailed code of "principles" which set out the circumstances in which improvements in wages and conditions of employment would be awarded by the Commission. Maddern had always been a "principles man" in the sense that he felt that there ought to be a regulated system, that there ought not to be a free-for-all. He was also from the outset acutely aware of the virtually irresistible force of the "me too" syndrome which led to the "flow-on" phenomenon. He had seen this at work in 1968 and again in 1974, and he made it his business to fashion a system of wage fixation which allowed for flexibility as between industries and enterprises in the matter of improvements in wages and conditions. These ideas gave birth to "enterprise bargaining" (now recognised in the legislation itself), which is at base a means whereby a centralised structure of

wage and conditions fixation can act and react as would an unregulated labour market, without abandoning the protections to lower paid workers always assumed to be inherent in the former.

In delivering the eulogy to Maddern on 17 January 1994 Senior Deputy President Michael Keogh explained the pain which Maddern endured while presiding over the October 1993 National Wage Case. He was at the time racked by cancer, but only his closest colleagues knew. Others commented upon how unwell he seemed to be, and it was believed that all had not been well since a major operation which he underwent about two years previously. It was of his nature, however, that he would be neither hero nor martyr.

Maddern was in his mid-fifties when he died on 14 January 1994. He had lived a life of moderation and restraint. He drank little; he did not smoke; he always declined to participate in the late-night carousing for which industrial relations practitioners are renowned. When working interstate, he would excuse himself from any round of wining and dining by mid-evening, and only quiet preparation for the following day's proceedings would precede his night's rest. There seemed to be neither rhyme nor reason why his life should have been taken at such an early age.

It is the community, rather that the Bar especially, which can be proud of the achievements of Barry Maddern. In fact, one may infer that Maddern was not fond of the Bar as an institution, though he continued to have friends who were members of it to the end. Perhaps he respected it for its standards, while doubting the utility of its organisation. Notwithstanding this, the Bar should respect the memory of this conscientious lawyer who was once its member, and whose work as a practitioner was always as a barrister.

Chris Jessup

COMPETITION

PURSUANT TO THE INVITATION ON PAGE 6 of the Spring '93 edition of *"News"* I have identified the following twelve "emotional and sweeping generalisations and the like" in Barns' article reproduced at page 60 of that same issue of the *"News"*.

In order they are:

1. "heave a sigh of relief";
2. "in for a radical readjustment";
3. "the Hilmer dream";
4. "the constitutional curtain behind which the legal profession has hidden from the Trade Practices Commission scrutiny";
5. "Hilmer says that even if a law regulating the profession is anti-competitive it will not offend his proposed market conduct rules";
6. "thus the statutory monopoly which Queensland solicitors enjoy over the State's $180,000,000 conveyancing market would not be threatened";
7. "there's little doubt that the restrictive practices of the independent Bar Associations would fall under this regime";
8. reference to the Bar's "price fixing" practices;
9. certain practices are "prime candidates for the chop under the Hilmer rules';
10. "a Hilmer regime is likely to result in a major benefit for consumers";
11. "whether the threat of Hilmer will force the nation's lawyers to jettison the remaining obstacles to a rigorously competitive market . . .";
12. should the Victorian Law Institute competition policy be accepted favourably in Hobart "then the facelift will have begun".

Far from being impressed by this list of emotional and sweeping generalisations, I believe in this case Barns has been uncharacteristically restrained in his attack on the Bar but it is fresh in the respect that it is uncharacteristically inventive regarding the grounds for such attack. One can only admire Barns for his creative thinking in finding in the Hilmer report support for his attack on Bar practices. One is left wondering what unspeakable things the Bar did to Barns to generate such fanciful descriptions of the Bar's fees as "price fixing" especially since the Legal Aid Commission's proposal for bargain basement lump sum criminal quotes is being embraced by the Bar.

I look forward with bemused anticipation to his next effort.

Glen McGowan

Glen McGowan was the only entry in the competition. He wins a bottle of Essoign claret.

DINNER FOR STEVEN STRAUSS

ON 3 DECEMBER 1993 MEMBERS OF THE Family Law Bar Association and the Family Law Section of the Law Institute of Victoria attended a dinner at the Regent Hotel to farewell the Honourable Justice Steven Strauss Q.C. The occasion was also the Annual Dinner for the Law Institute Family Law Section and the Attorney-General, The Honourable Michael Lavarch, was the speaker.

In paying tribute to Steven Strauss, Paul Guest Q.C. on behalf of the Family Law Bar Association acknowledged his great contribution to family law in Australia which he described as "riding the unruly horse of family law through its various stages of its development, . . . working at the coal face of the development of family law . . . and through the law adjusted in a positive way human relationships in the social context".

On a lighter note, Paul Guest highlighted some of the more colourful and less serious of his judicial pronouncements which are immortalised on transcript, particularly his well-known views on property distribution and custody which were encapsulated in a comment to counsel who was complaining about having been called in at short notice during his vacation and house-moving which caused enormous disruption to his family. His Honour then said "Well, when you come here we will give your wife the children and give you the money. How is that?"

The Attorney-General also thanked Steven Strauss for his service to the Australian community and tribute was paid by Patricia Clancy on behalf of the Family Law Section of the Law Institute of Victoria.

Elizabeth Davis and Paul Guest Q.C.

Betty Strauss, Steven Strauss and the Honourable Michael Lavarch

TWO CULTURES — OR BRANCHES OF ONE TREE?

THE COUNTY COURT OF VICTORIA AND THE COMMONWEALTH ADMINISTRATIVE APPEALS TRIBUNAL

AFTER TEN YEARS AS A SENIOR MEMBER of the Commonwealth Administrative Appeals Tribunal hearing and determining applications for review of decisions made by the Commonwealth in various manifestations, a move to the County Court Bench produced in me a degree of culture shock.

It seemed worth recording some of the factors contributing to that shock while they were fresh in my mind. I do not intend to suggest that either institution is, in respect of any of the matters which I describe, superior to the other. Where I do not refer to a reason for a particular difference between the two, I do not wish to suggest that the practice of either body lacks reason.

But most lawyers are specialists, and thus inevitably become accustomed to particular ways of doing things. It may be of interest to point out, to people familiar with only one of the two systems, that both seem to work — that is, to give a reasonable degree of satisfaction. To put the matter at its lowest, it does not seem to be generally suggested that either is spectacularly unable to achieve justice for a good deal of the time.

My knowledge of the Tribunal is inevitably far greater than my knowledge of the Court. So far as the Court is concerned, I write after six months on the Bench, having sat, albeit briefly, in all major jurisdictions — crime, causes, juries in both, the Practice Court and WorkCover, and on circuit. I know little of the administrative organisation of the Court. But if I wait until I can write of the Court with a stronger base of knowledge the sharpness of the contrasts will be lost to me and I will never write at all. It is perhaps appropriate to state that any opinions herein expressed are my own, and not attributable to the Court or to the Tribunal.

Each body is wholly the creature of statute, but the Court (in an administratively different form and at that stage as a civil court only) was established in 1852 by *An Act to make Provision for the Better Administration of Justice in County Courts in the Colony of Victoria*,[1] and the Tribunal by the *Administrative Appeals Tribunal Act* 1975 ("the Tribunal Act"). This difference in age accounts for many things. It also means that the Court has existed long enough to embody a touch of romance, if only because:

> *"He held the Beechworth stage coach up, and robbed Judge Macoboy,*
> *Who trembled and gave up his gold to the wild colonial boy."*[2]

Judge Macoboy was appointed as a Judge of the Court in 1858, initially to Castlemaine, and later to Maryborough. His portrait may be seen outside the lifts in the public area of the third floor of the Court building. So far as I am aware, the Tribunal does not feature in Australian folk lore; save that it is recorded that Mr. Justice Vasta of the Supreme Court of Queensland (as he then was) thought it was a bus line.

The Court was established by the Colony of Victoria (in the days before responsible government); the Tribunal by the Commonwealth of Australia.

The Court is a local and specific example of a very old concept — the provision of machinery by the state to determine, according to law, disputes between individuals, and to try those charged with offences against the law: its purposes being so obvious and fundamental as never to need enunciation. The Tribunal embodies a very new concept: the provision of machinery by the state to provide, at the request of an aggrieved citizen, administrative review of administrative decisions made by officers of the state, with the overall purpose of improving the standard of government administration; and to do so in a court-like framework.[3]

Given that court-like framework, the Tribunal may be seen as a one branch from a tree, being the familiar common law adversary system of which the Court is another branch. I will resist the temptation to elaborate the metaphor.

Some of the differences between the two cultures may be attributable to the facts that the President of the Tribunal is required to be a Judge of the Federal Court of Australia;[4] that from the outset other Judges of that court have been members of the Tribunal; and that on its establishment, the Tri-

bunal was administered for some years through the Registries of that court. The administrative and procedural practices and assumptions of the Federal Court are — whether because of its youth or its initial geography or for whatever other reason — not necessarily those of the courts of the State of Victoria.

There has been a good deal of academic and other writing about the Tribunal; partly because it is new and developing, partly because of its anxious gestation in various committees of inquiry, and partly because of the existence of the Administrative Review Council, established by the Tribunal Act[5] to keep under review the system of administrative review, a role which it has fulfilled most energetically.

Commentators find the Court less interesting. Much is written these days about the court system as a whole, particularly with regard to case management and the appointment, training and attitudes of judges. Despite its antiquity, however, the County Court has not attracted much in the way of specific commentary.[6]

I am concerned here more with differences of form than with differences of substance. I have written elsewhere at length about the true nature of the Tribunal,[7] and do not need to repeat, for present purposes, more than a little of what I there said.

INTERNAL ORGANISATION

The Tribunal Act establishes a President and four different classes of members, although it establishes no formal hierarchy of authority.[8] In contrast, the *County Court Act* 1958 ("the Court Act") by which the Court is now governed, establishes only a Chief Judge and Judges.[9] Decisions of all classes of Tribunal members are of equal persuasive authority for members of other classes,[10] as are decisions of the Chief Judge and Judges within the Court.

All Judges of the Court hold office until attaining the age of 70 (for Judges appointed before the 1986 amendment, 72 years).[11] Although some members of the Tribunal have been appointed to age 65 or 70 under sub-sections 8(2) and(4) of the Tribunal Act, most recent appointments have been for fixed terms "of at most 7 years" (and sometimes much less) under sub-section 8(3). The implications of this distinction for the independence of the members of each body are obvious.

Administrative decisions in relation to members of the Tribunal, such as the allocation of chambers, circuits, or leave, are made without reference to any formal scheme of seniority. In the Court, such decisions in relation to Judges are made strictly on the basis of seniority.

Despite its members and administrators being spread across the whole of Australia, the Tribunal is potentially (and actually to an extent which has varied over the years I have known it) more centrally controlled than the Court.

Section 20 of the Tribunal Act provides (since 16 June 1993, the date of coming into operation of Act No. 31 of 1993) that the President:
"is responsible for ensuring the orderly and expeditious discharge of the business of the Tribunal" and "may give directions as to:

Despite its members and administrators being spread across the whole of Australia, the Tribunal is potentially (and actually to an extent which has varied over the years I have known it) more centrally controlled than the Court.

(a) the arrangement of the business of the Tribunal; and
(b) the persons who are to constitute the Tribunal for the purposes of a particular proceeding; and
(c) the places at which the Tribunal may sit; and
(d) procedure of the Tribunal generally; and
(e) procedure of the Tribunal at a particular place."

Section 24A provides that "The President is responsible for managing the administrative affairs of the Tribunal" and by section 24B the President in the exercise of that responsibility is "assisted by the Registrar of the Tribunal".

Those provisions have almost no counterpart in the Court Act save that section 7 of that Act requires the Chief Judge to appoint the days and times at which the Court shall sit and section 20 provides that the Registrar is "subject to the directions of the Chief Judge". Otherwise the Chief Judge is left to establish and maintain authority by force of personality.

In addition, the Tribunal's computer system places much management information in the hands of the President. The Court's computer system, extensive though it is, is not directed to that end.

Section 87 of the Court Act establishes a Council of the Judges of the Court which is required to meet annually, but in fact meets much more often than that and plays a significant role in the administration of the Court. There is no corresponding provision in the Tribunal Act, nor is there any corresponding informal structure.

Her Honour Judge Balmford

The Rules of the Court, including its forms and its scales of costs, are made by the Judges (subject to disallowance by either House of Parliament).[12] The Tribunal's Rules (including forms) are Regulations made by the GovernorGeneral;[13] procedure is established by direction of the President.[14]

BEFORE THE HEARING OR TRIAL

To begin with listing — an art all on its own. One is reminded (to digress) of Kipling's epigram:

> *"There are nine-and-sixty ways of constructing tribal lays .*
> *And every single one of them is right!"*[15]

The Court, as befits an old-established institution, observes the two traditional vacations, although with a degree of flexibility. The Tribunal routinely sits year-round (so that members take their leave entitlement, with the approval of the President, at any time).

Both Court and Tribunal are, these days, concerned to keep the list moving. This concern manifests itself differently in the two institutions. The Court has a running list, with reserve cases waiting to proceed at any time. A Judge out of court is perceived as not working. But once the matter is called on and commences, counsel are allowed all the time they think appropriate to present their case. The need to run a given matter for a week is taken for granted. However, some things are to change.[16]

The Tribunal lists cases for fixed dates, and if a case settles or is adjourned, it is assumed that the presiding member has reserved decisions to oc-

cupy the time thereby made available. But at callover, or at the outset of the hearing, the Tribunal will attempt to control the number of witnesses and the time to be taken by a case. A week's hearing is extremely unusual.

The Court lists in blocks — crime, causes and civil juries, WorkCover, the Practice Court. The considerable differences as between jurisdictions in practice and procedure, and even in the physical premises required, make this inevitable. A criminal trial requires a dock and a jury box. There are no procedural differences between the Tribunal's jurisdictions (save for some oddities in the Taxation legislation), and thus there is no need to list cases of like kinds together.

The Tribunal does not run a separate Practice list, although a directions hearing in a particular matter may be held at any time.

This leads on to the whole area of preliminary procedures. Section 37 of the Tribunal Act requires the person who has made the decision which is under review to lodge with the Tribunal:

"(a) a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision; and

(b) every other document or part of a document that is in his possession or under his control and is considered by him to be relevant to the review of the decision by the Tribunal."

The practice is for those documents, in the absence of objection, to be admitted into evidence, without the need for formal proof, at the outset of the hearing. Objections are extremely rare. This system removes the necessity for a great deal of expensive and time-consuming formal proof of matters which are not in issue. One or more preliminary conferences are held in each case, and practice directions have been given by the President with a view to ensuring that the issues are defined in the course of that procedure.

Thus in the Tribunal the pleadings, discovery and interrogatories which are taken for granted as necessary to a proceeding in the Court are unknown.

AT THE HEARING OR TRIAL

"[T]he Tribunal is not bound by the rules of evidence, but may inform itself on any matter as it thinks appropriate."[17] A similar provision governs proceedings in the Court under the *Accident Compensation Act* 1985.[18] But for the most part the Court must play according to the rules.

At this point, I would invoke some comments by the late Sir Richard Eggleston:

"Witnesses are very frequently put off balance by being told there are things that they must not say, usually hearsay, but sometimes relevant matters. . . . "

"In actual fact, I doubt very much whether there is as much time wasted by telling [ir]relevant facts as by asking whether facts are relevant or not. . . . "

"Of course, we tend to look at hearsay as if it were something to be avoided like the plague, but there is one Australian jurisdiction in which hearsay is resorted to to a very great extent, and that is the jurisdiction of the Conciliation and Arbitration Commission. Those who habitually practise in that jurisdiction have got a kind of understanding about what hearsay you can have and what you cannot, and hearsay is usually let in. I mean, it may consist of a statement by the Prime Minister . . . It may be a statement prepared by a witness as to the operations of a particular factory which is based on material supplied to him by his various departmental managers . . . if all these matters had to be proved by the strict rules of the Common Law what are in fact very long cases in the Arbitration jurisdiction would be very much longer. It is not, I venture to suggest, correct to take the view that all hearsay ought to be excluded."[19]

The experience of the Tribunal is the same. I have myself caused strong men almost to weep by saying "Of course, there is hearsay and hearsay".

Sir Richard has also said that "a trial at Common Law . . . has often been described in terms reminiscent of those applied to a sporting contest," going on to refer to the well-known passage from the judgment of Denning L.J. (as he then was) in *Jones* v. *National Coal Board*,[20] and later to describe the judge as, 'in truth, a mere umpire".[21]

The Tribunal, by contrast, is making an administrative decision, and must satisfy itself as to all facts necessary to its decision.[22] It cannot rely merely on the material which the parties may have chosen to place before it. For this and other reasons the Tribunal at times may operate on a modified version of the adversary system, best described as interventionist rather than inquisitorial.[23] There is no formal onus of proof in the Tribunal save that each of the *Freedom of Information Act* 1982 and the *Income Tax Assessment Act* 1936 prescribes a specific statutory onus.

The question of the appropriate degree of formality in the Tribunal is a vexed one, which I do not propose to discuss here.[24] Suffice it to say that the Tribunal sees itself as able, where appropriate, to be less formal than a court. It was no doubt my Tribunal experience which led me, in the Court, to deal as I did with the situation described in the following passage from my judgment in a case under section 93 of the *Transport Accident Act* 1986 where the plaintiff's mental and behavioural problems were very much in issue:

"After entering the witness box Mrs. D appeared to suffer difficulty in responding by either speech or eye contact to the Court officer who approached her to administer the oath. When she was given a glass of water her hand showed a distinct and significant tremor.

The matter was stood down while [her treating psychiatrist, who was present to give evidence] spoke to her.

"With the agreement of all concerned, Mrs. D was then given a seat at the end of the bar table, sitting between her solicitor and her son. Counsel remained seated, and I sat at the bar table between the two instructors. In this relatively informal situation Mrs. D became able to respond to questions, was duly sworn and gave her evidence, although with some hesitation, uncertainty and confusion. [The psychiatrist] subsequently said in evidence that her difficulty in the witness box had been a manifestation of a panic disorder from which she suffers."

A world without courts is difficult to imagine: a world without the Tribunal is within the memory of many people, whether decision-makers or parties, who are affected by its decisions.

There is perhaps a kind of atavistic tradition, apparent particularly in the architecture of the Court, that a court should strike terror into the hearts of parties and other witnesses, so that they are cowed into telling the truth. The architecture of the Tribunal's hearing rooms, on the other hand, is consciously directed to putting parties and other witnesses at their ease — to the same end.

Judges sit high above the action; the Tribunal will normally be raised by one step only, and not always that. Some Tribunal hearing rooms adopt a curved, rather than a rectangular shape, hinting at the "round table" principle.

The contrast is most apparent in the treatment of witnesses. The design of the Court's witness boxes is such that the edge of the box is high around a seated witness, to the extent that a witness invited to sit will often prefer to stand. The Tribunal's witness boxes are lower: over ten years I cannot remember a witness, invited, according to my normal practice, to be seated, who preferred to stand (apart from applicants with claims deriving from back injuries). The Tribunal's witness boxes are larger than those of the Court. Some of the Court's witness boxes do not contain a chair. Some, notably in the civil courts at 565 Lonsdale Street, are too small to contain a normal man when seated.

At my primary school, in the early 1940s, I was required to stand when I spoke to, or was spoken to by, a teacher. A soldier, of any rank, will stand when someone of higher rank comes into the room. Memoirs of life at the court of Queen Victoria describe elderly courtiers standing through the evening until Her Majesty chose to retire.

I do not see why these practices should enure to the discomfort of a medico-legal expert; the innocent driver of the other car involved in a collision giving rise to a culpable driving charge; the casual passer-by who assisted the victim of a stabbing; or any others of the thousands of people who give evidence before the Court every year.

Of course a witness who asks to sit will be allowed to do so; but my own view is that the offer should come from the Court, without any request being needed, and that the architecture of the Court should encourage sitting. This is a matter on which different Judges have different views and, subject to the architecture, is a matter for the individual Judge. I will merely add that, from where I sit, the dock often appears to be a great deal more comfortable than the witness box.

AFTER THE HEARING OR TRIAL

A decision of the Tribunal is required to be made in writing[25] and is, as a matter of practice, signed by the member who presided at the hearing. The reasons for the decision may be given orally or in writing: if orally, either party may require written reasons.[26] The Court is subject to no such requirements, and its practices for authentication of decisions are different.

Written reasons are the norm in the Tribunal, in part because of the statutory requirements. At one time, all decisions and reasons of the Tribunal were distributed to all members. The considerable increase in the size of the Tribunal over the years has rendered this course inappropriate, and the present procedure is for all decisions and reasons to be made available in each State Registry, and a bulletin of summaries (each prepared by or under the supervision of the member who presided at the relevant hearing) to be generally distributed. Thus all members are kept aware of all decisions. There is no corresponding procedure in the Court, although judgments of general or specialised interest will occasionally be circulated by the Judge concerned.

GENERALLY

Given its place in the mainstream of the legal system, the Court— while it may be criticised - does not have to justify its existence. That was something which the Tribunal certainly had to do in its first years, and to an extent still does. Litigants and persons charged with offences accept the need for an institution which can try the issues with which they are concerned. Understandably,

decision-makers in the public service did not at first appreciate having their previously unreviewable decisions reviewed by an outside body. A world without courts is difficult to imagine: a world without the Tribunal is within the memory of many people, whether decision-makers or parties, who are affected by its decisions.

The Tribunal is, for this and other reasons, concerned to encourage people to use it — explanatory leaflets are prepared and widely distributed, and there is machinery for consideration of the problems of publicising the Tribunal to different groups within the community. The Court does not, so far as I am aware, see any need to encourage either litigation or the prosecution of indictable offences.

The Tribunal often finds itself dealing with new areas of law — or at least, with the interpretation of statutes embodying new concepts, Freedom of Information being an extreme example. While of course this can and does happen in the Court, the bulk of the work of the Court is in long-standing mainstream areas of the law, although those areas are undergoing remorseless statutory and other changes.

The most fundamental of those areas is, of course, criminal law, and the Court's administrative activities are to an extent shaped by the need to be able to conduct criminal trials and thus to deal with people in custody and to provide facilities for jurors.

An untestable, subjectively-based guess is that cases of first impression are more common in the Tribunal than in the Court. The existence of two sets of law reports[27] devoted largely to publishing reports of decisions of the Tribunal would seem to bear this out. Many of the enactments conferring major jurisdictions on the Tribunal had rarely, if ever, been the subject of independent interpretation prior to the establishment of the Tribunal; those enactments are frequently and confusingly amended. Interpretation by the Tribunal, with time to hear argument and to consider its decisions, is intended to be of assistance to public servants administering legislation within departments.

Judgments of the Court are not published, and are frequently unwritten, but copies of written judgments circulate among members of the profession specialising in the relevant field. The absence of publication may account, in part, for the dearth of academic writing about the Court, which is mentioned above.

Tribunal members are given the resources — time out of hearings and personal secretaries — to enable the regular production of written reasons for decision. The Court is a trial court, expected to move fast, and proceeds, to an extent, on the assumption that errors can and will be corrected on appeal. Judges are not expected, and thus not given the resources, to reserve routinely, although where necessary time will be made available for the writing of reserved judgments. Of course, in the jury trials which constitute perhaps half to two-thirds of the work of the Court, the question of reserving does not arise.

Because of the differences in the nature of the work, a tipstaff replaces the personal secretary. In both institutions I have had the services of an associate.

One obvious difference between a judgment (or, in the Tribunal, reasons for decision) and a charge to the jury did not occur to me until I charged a jury on a disputed point of law which had been the subject of argument at the trial. In a judgment on such a point one would set out the relevant legislation, discuss the authorities on each side of the issue, perhaps consider the presumed intention of Parliament, and arrive by those paths, visible to an appeal court, at a reasoned conclusion. All this is irrelevant to the jury: having gone through that process for one's own benefit, one simply directs the jury that the law is such-and-such. The Court of Criminal Appeal would not know whether one had even been aware of the problem, let alone the basis on which one had decided it.

Many Tribunal members are not lawyers, but are appointed to the Tribunal for their expertise in fields relevant to the matters which come before it.[28] The Tribunal is thus constituted as an expert body, and is entitled to rely, in appropriate circumstances, on the expertise of its members. Davies J. in the Federal Court has approved the Tribunal's use, in the absence of evidence, of its own knowledge of the employment market.[29] Here, as elsewhere, the Tribunal operates on a boundary between the administrative and the judicial role.

The Court is constituted by a single Judge.[30] The Tribunal may be constituted by one or three members (the latter more common in recent years). Normally, but not invariably, the member presiding will be a lawyer. Non-lawyer members occasionally sit alone. I have discussed this elsewhere.[31]

Save in one jurisdiction, where it has a restricted power only,[32] the Tribunal has no power to order costs.

TRIVIA

To conclude with some trivia.

The Court is still using folded files, which I last encountered as an articled clerk in the 1950s.

Benches in the Court are constructed with a raked central portion, providing a sloping surface on which to write but inhibiting the free movement to right and left of documents, files and books. Benches in the Tribunal (and in premises constructed for the Federal and Family Court in which I have occasionally sat) are unrelievedly horizon-

tal, so that materials may conveniently be moved around.

The Court's forms, when they come to be reprinted, will, I expect, no longer require associates of certain judges to spend hours substituting "Her" for "His" before the word "Honour," but that problem does not arise in the Tribunal because there is no corresponding title, and in any case there have been women members of the Tribunal since 1980.

When people ask you what you do and you tell them that you are a judge, they understand what your job is — or think they do. This was not the case for a Senior Member of the Tribunal.

The Court has its Attorney-General, Chief Judge, and Registry all in Melbourne: the Tribunal has, for historical reasons, the rich tapestry of a Canberra-based Attorney-General, Sydney-based President, and Brisbane-based Principal Registry.

On any given day there may be some 45 Court sittings taking place throughout Victoria and some 20 Tribunal sittings taking place throughout Australia.

Tribunal members, sitting around the country, become aware of different practices of the legal profession in different States, each State regarding its own practices as immutable as the laws of the Medes and Persians.

Parties in the Tribunal are applicants and respondents. The Court sees plaintiffs, applicants, appellants, defendants, respondents, accuseds, offenders, prisoners — there are no doubt other species with which I have not yet been concerned.

Persons entitled to wear silk are rarely seen before the Tribunal — much more commonly before the Court.

The Court's normal oath is different from the Tribunal's (statutorily prescribed) oath; although the oath used in a *voir dire* or in the Practice Court is similar to that of the Tribunal. The Court's oath for interpreters does not specify the language into and out of which the interpretation is to be performed — the Tribunal's does.

Robes — it was odd in December 1993 to be sitting robed in Bendigo hearing WorkCover compensation matters argued by robed counsel in the same court (the Family Court is generous with its premises) in which I had sat unrobed, in earlier years, to hear Commonwealth compensation matters argued by unrobed counsel.

And finally: at the time of writing, both the Tribunal's Melbourne premises at 451 Little Bourke Street and the County Court building in William Street are clothed in apparently permanent scaffolding. Unity in discomfort, at least.

CONCLUSION

As a Senior Member of the Tribunal, I wrote, some eighteen months ago:

"The question is perhaps, not whether the Tribunal's procedures should be different from court procedures: but why court procedures should be different from the Tribunal's procedures".[33]

After six months as a Judge of the County Court, as I consider the two cultures, which are yet two branches of one tree, I still see that as a question worth asking.

Rosemary Balmford

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2. J.S. Manifold (comp.), *The Penguin Australian Song Book* (1964) 64. quoted in E.E. Hewitt, *Judges Through the Years*. Hyland House, Melbourne, 1984.
3. Rosemary Balmford: 'The Life of the Administrative Appeals Tribunal — Logic or Experience?' in *Administrative Tribunals: Taking Stock* edited by Robin Creyke: Centre for International and Public Law, Australian National University, Canberra, 1992.
4. Sub-section 7(1) of the Tribunal Act.
5. Sections 47–58.
6. This subjective impression was confirmed by a SCALE search kindly conducted for me by the Tribunal's Melbourne Librarian, Mr. Ken Birch.
7. Balmford, *op cit.*
8. Sections 5–7.
9. Sections 4 and 8.
10. Balmford, *op cit.*, sub-titled "Consistency of decisions".
11. Section 14 of the Court Act.
12. Section 78 of the Court Act.
13. Section 70 of the Tribunal Act.
14. Section 20 of the Tribunal Act.
15. "In the Neolithic Age."
16. See the *Crimes (Criminal Trials) Act* 1993.
17. Paragraph 33(l)(c) of the Tribunal Act.
18. Sub-section 44(1) of that Act as it presently stands.
19. "Is Your Cross-examination Really Necessary?" (1961) *Proceedings of the Medico-Legal Society of Victoria* vol. IX 84 at 95–97.
20. [1957] 2 Q.B. 55 at 63.
21. Sir Richard Eggleston, "What is Wrong with the Adversary System?" (1975) 49 A.L.J. 428 at 429: and see also P.D. Connolly, "The Adversary System — Is It Any Longer Appropriate?" (1975) 49 A.L.J. 439; and "'By Good Disputing Shall the Law be Well Known"' (1975) 49 A.L.J. 685.
22. *Kusardana* v. *Minister for Immigration and Ethnic Affairs* (1992) 35 A.L.R. 186.
23. Balmford, *op.cit.*, sub-titled "Inquisitorial or adversarial — or interventionist?" and see J.R. Dwyer, "Overcoming the Adversary Bias in Tribunal Procedures" (1992) 21 Fed. LR 252.
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25. Sub-sections 43(1) and (2) of the Tribunal Act..
26. Sub-sections 43(2) and (2A) of the Tribunal Act.
27. *Administrative Law Decisions and Administrative Appeals Reports.*
28. Sub-section 7(2) of the Tribunal Act.
29. *Ersoy* v. *Secretary, Department of Social Security,* unreported 1987 decision, cited in *Re Kadir and Secretary, Department of Social Security* (1989) 17 A.L.D. 220 227–228.
30. Section 7 of the Court Act.
31. Balmford, *op.cit.*, sub-titled "Constitution of the Tribunal".
32. Section 67 of the *Safety Rehabilitation and Compensation Act* 1988.
33. Balmford, *op. cit.* at 83.

THE COUNTY COURT MISCELLANEOUS CAUSES RULES

MANY READERS WILL BE AWARE OF Master Patkin's concerns about the deficiencies in the Miscellaneous Causes Rules. He has written a number of papers on the subject. The following paper has been prepared by the Master to highlight the complexities of the Rules, their deficiencies and the traps they create, particularly for counsel. It takes the form of a dialogue between the Master and the average inquisitive junior barrister. It is commended to those who may appear at any time in the County Court Practice Court as well as those who may been briefed at some other stage in a County Court cause including the trial or even an appeal. For those interested in a more detailed analysis of the subject, copies of the Master's paper "The Operation of Order 14A in the County Court" may be borrowed from the Bar Council offices.

The Barrister and Order 14A of the County Court Rules

Barrister I understand that there are some complexities and problems involved in the operation of Order 14A of the County Court Rules! I presume the problems only arise in the practice court?

Master No. The problems in relation to the administration of Order 14A can arise as well in a cause at trial or on appeal.

Barrister How does this eventuate?

Master It is possible that one of the self-executing rules in Order 14A could have operated and the proceedings may not exist at the time of the trial or appeal.

Barrister But Registry would be aware of the status of the proceeding not existing by reason of the operation of a self-executing rule?

Master No. The Court may not be aware that the proceedings have been dismissed because of a number of problems involved in the administration of Order 14A.

Barrister Thus a barrister involved in any cause in the County Court should ascertain the status of the case or advise that its existence is assumed and throw the responsibility upon the instructing solicitor.

Master Yes.

Barrister Could this situation apply to a building case?

Master Yes. Because the self-executing rules can operate on a proceeding before it is entered into the building cases list.

Barrister How is it that a proceeding can be dismissed without the Court appreciating the operation of one of the self-executing rules?

Master This can arise in two different situations:

1. the case may not be administered by Registry pursuant to Order 14A; and,
2. one of the self-executing rules may operate without Registry appreciating that fact.

NO ENTRY REQUIRED IN THE LIST.

Barrister If the case is not administered pursuant to Order 14A how can a self-executing rule in Order 14A operate?

Master Because the Order applies to certain causes of action *per se* and is not dependent upon any entry into a list (rule 14A.01).

Barrister How then does Registry come to administer the proceeding pursuant to Order 14A?

Master The solicitor when "issuing" the writ, now called "filing" the writ, or the court officer, must identify the proceeding as governed by Order 14A when the writ is filed. The number of the proceeding is then given the prefix MC.

Barrister Thus a proceeding without the prefix MC may still be governed by Order 14A?

Master Yes. I have discovered a number of cases that should have been administered pursuant to Order 14A. In most cases the discovery is not fortuitous. The barristers involved in applications have commenced their submissions by informing me they have no problems with the rules as the proceeding is not governed by Order 14A. I then ascertain the nature of the cause of action and to their surprise inform them that not only is the proceeding governed by Order 14A, but that it does not exist.

Barrister Are there particular causes of action prone to this problem?

Master Yes. Property claims arising from motor vehicle collisions and claims for indemnity arising from personal injuries. Registry officers are used

to claims arising from motor vehicle accidents, or claims for personal injuries, not being administered pursuant to Order 14A.

THE SELF-EXECUTING RULES

Barrister What are the self-executing rules?
Master There are four self-executing rules. The proceedings are dismissed in relation to each defendant if:

1. the plaintiff does not file an affidavit of service, or the defendant does not file a notice of appearance within the time to serve the writ (rule 14A.10);

For those interested in a more detailed analysis of the subject, copies of the Master's paper "The Operation of Order 14A in the County Court" may be borrowed from the Bar Council offices.

2. the plaintiff does not apply for or enter judgment in default of appearance or the defendant file a notice of appearance by a certain time (rule 14A.11(1));
3. the plaintiff does not apply for or enter judgment in default of defence or the defendant file a defence by a certain time (rule 14A.11(2));
4. self-executing rules associated with the counterclaim operate (rule 14A.12).

Barrister They seem simple enough, what are the problems?
Master A comprehensive analysis of Order 14A is contained in my paper entitled "The Operation of Order 14A in the County Court" a copy of which may be borrowed from the Bar Council Offices. To consider one of the first problems one may ask, "What is the first self-executing rule?"

THE FIRST SELF-EXECUTING RULE.

Barrister To serve the writ within 90 days of filing the writ as provided by rule 14A.06(1)(a), otherwise the proceeding is dismissed.
Master No. As I said above, unless the defendant files a valid notice of appearance, or the plaintiff files an affidavit of service of the writ within the 90 days, the proceeding is dismissed. Thus a common error when orders are made to reinstate the proceeding is to obtain a consequential order to extend the time to file the affidavit of service. Although the proceeding is reinstated, the proceeding is immediately dismissed again for the consequential order probably does not prevent the first self-executing rule operating again.
Barrister Thus the order should extend the time to serve the writ, even though the writ has been served, so that the affidavit of service can be filed within the time to serve the writ. A nice little trap.

THE SECOND SELF-EXECUTING RULE.

Master The second self-executing rule itself is not complicated. However one must appreciate the difference between filing an appearance pursuant to rule 8.05 and merely filing a notice of appearance. To file an appearance is more than merely filing a notice of appearance.
Barrister I note that the filing of the notice stops the operation of the self-executing rule.
Master Yes, provided the notice is valid. In some cases a notice of appearance is filed after judgment contrary to rule 8.07(1). Later the judgment is set aside and the question arises whether the filed notice of appearance stops the operation of the self-executing rule 14A.11(1).
Barrister I do not understand.
Master Assume the defendant applies to set aside a judgment in default of appearance, where the notice of appearance was filed after judgment. Orders are made setting aside the judgment and time is given for the defendant to serve a defence. I am of the opinion that rule 14A.11(1) could still operate to dismiss the proceeding. The question is whether the notice of appearance filed after judgment stops the operation of rule 14A.11(1). If the notice was a nullity then the proceeding must stand dismissed; however, pursuant to rule 2.01 the filing of the notice is an irregularity. An interesting question arises as to the status of the proceeding. Such a question can also arise where a notice of appearance is filed without authority. For example, a solicitor files a notice on behalf of three defendants, yet only intending to file it on behalf of one of the defendants. Does the notice stop the operation of the self-executing rule for all defendants?
Barrister I am now beginning to see that the rules are not necessarily as straightforward as they first seem.

STOPPING THE OPERATION OF THE SELF-EXECUTING RULES

Master An order extending the time for the plaintiff to file an affidavit of service of the writ, or for the defendant to file a notice of appearance, may not stop the operation of the first self-executing rule.
Barrister Why do you say "may"?
Master Well, as a matter of logic such an order should not stop rule 14A.11(1) operating to dismiss the proceeding, but as a matter of law such an order may stop the rule operating, for the Court

and barrister intended such order to stop the proceeding being dismissed.

THE RELATIONSHIP BETWEEN RULES 14A.11(1) AND 14A.10

Master The earliest time rule 14A.11(1) can operate is 72 days after the writ is filed. Thus the second self-executing rule can operate before the first, which operates on the 92nd day, and this fact creates some problems in the administration of Order 14A.

Barrister Is this one of the situations where proceedings can stand dismissed without the Court appreciating that fact?

Master Yes. It is important to realise that until Registry knows when the writ or counterclaim was served it cannot administer the second, third or fourth self-executing rules according to law. Rule 14A.07 requires the plaintiff to file the affidavit of service of the writ forthwith. What has happened is that if the defendant filed a notice of appearance on or before the 92nd day from the filing of the writ, Registry ignored the necessity of obtaining the affidavit of service. This means that where the writ was served within 20 days of the filing of the writ the second self-executing rule could have operated to dismiss the proceeding.

Barrister Thus in any proceeding where the writ was served within 20 days of filing of the writ the proceeding could stand dismissed yet be prosecuted to trial or beyond!

Master Yes. What is an unfortunate scenario in the administration of Order 14A occurs where Registry sends out letters to the plaintiff's solicitor warning that if the plaintiff does not file an affidavit of service on or before the 91st day, to stop the operation of the first self-executing rule, the proceeding will be dismissed. Accordingly, the solicitor files the affidavit of service on, say, the 88th day, stopping the operation of the first self-executing rule but thereby informing Registry when the writ was served. This fact is fed into the computer which triggers a letter to the parties' solicitors informing them the proceeding was dismissed on a day between day 72 and day 87 pursuant to the second self-executing rule. In many situations the plaintiff's solicitor does not file the affidavit to stop the operation of the first self-executing rule but rather to comply with rule 21.01(3)(b) when entering judgment in default of appearance.

Barrister But then the plaintiff did not receive a warning letter in relation to the operation of that self-executing rule?

Master That is correct. Registry cannot always warn the parties of the operation of the self-executing rules. The real problem is that, if the plaintiff does not file the affidavit, Registry never appreciates that the proceeding has been dismissed and the case can proceed to trial.

THE THIRD SELF-EXECUTING RULE

Barrister There are a variety of problems that occur in relation to the operation of the third self-executing rule (rule 14A.11(2)). Whilst, the self-executing rule cannot operate unless the defendant has filed an appearance the computer triggers the operation of this self-executing rule upon the defendant merely filing a notice of appearance.

Barrister Why shouldn't the self-executing rule be triggered when the defendant has filed a notice of appearance?

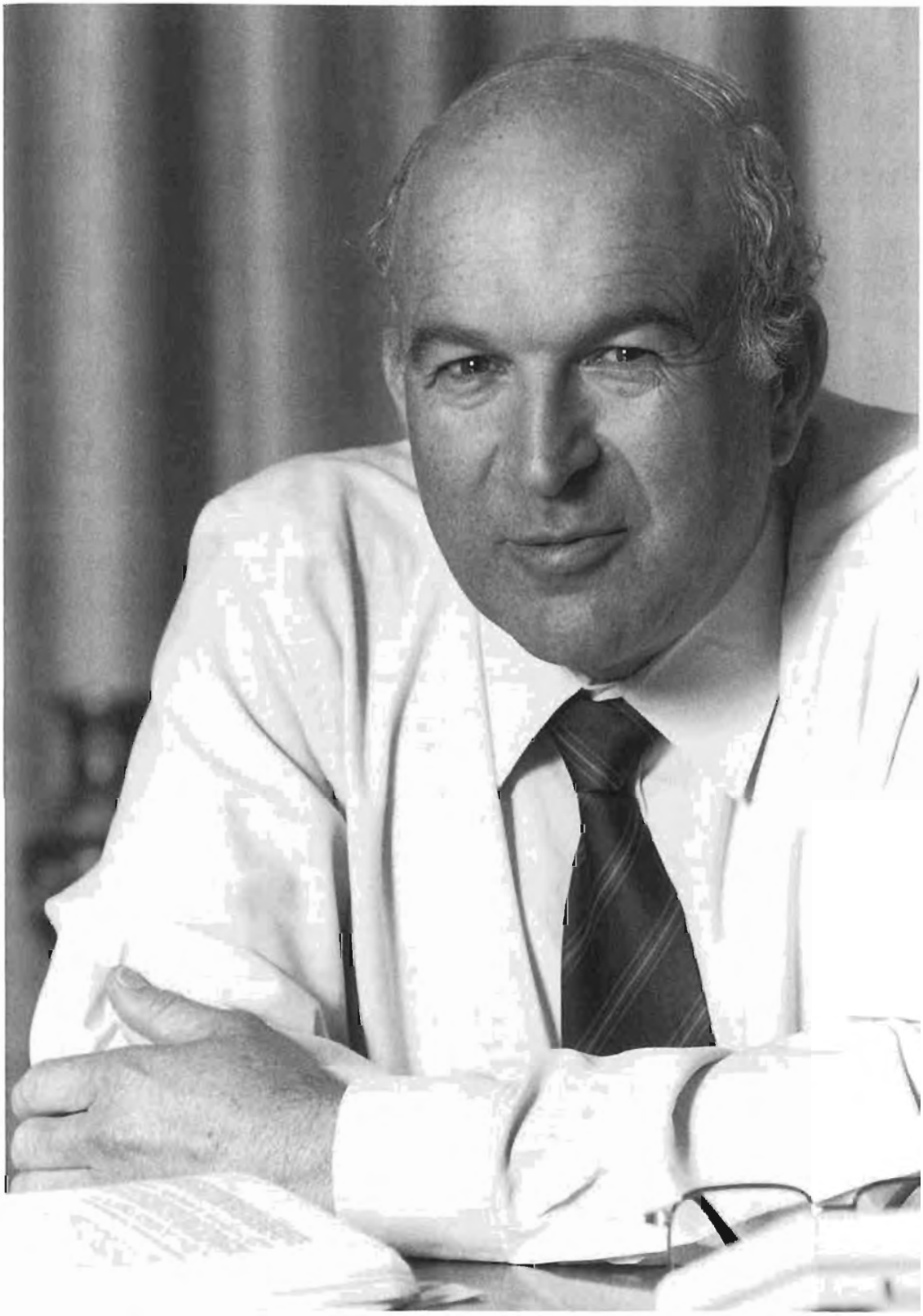
Master Until the defendant has filed an appearance there is no obligation to serve a defence (rule 14.04). Thus, until the defendant has filed an appearance, there cannot be any right in the plaintiff to enter judgment in default of defence. Not only does the computer automatically trigger the operation of the self-executing rule on the defendant filing a notice of appearance, but it also generates letters which are sent to the parties advising them of a critical date, by which the plaintiff must apply for or enter a judgment in default of defence, or the defendant file a defence, otherwise the proceeding is dismissed.

The earliest time rule 14A.11(1) can operate is 72 days after the writ is filed. Thus the second self-executing rule can operate before the first, which operates on the 92nd day, and this fact creates some problems in the administration of Order 14A.

Barrister The computer may specify a critical date for the operation of the self-executing rule even when there is no obligation upon the defendant to serve a defence and the plaintiff has no correlative right to apply for or enter judgment in default of defence?

Master Yes. In many cases the plaintiff's solicitor on receipt of the warning letter enters judgment in default of defence or requests the defendant to file and serve the defence. A variety of scenarios occur in the practice court depending on whether the plaintiff enters judgment or, on failing to do so, receives a letter from the Court advising the parties that the proceeding has been dismissed.

Barrister I suppose there are applications made to reinstate proceedings when the self-executing rule never operated in law?



Master Patkin

Master Yes. Or alternatively, if the plaintiff followed Registry's suggestion and entered judgment, it may be when the defendant applies to set the judgment aside, it is discovered that the judgment is irregular as the defendant had never filed an appearance. The defendant asks for costs because the proceeding was not dismissed and the plaintiff pleads that all they did was comply with the warning given by Registry.

Barrister What a paradox. Then the plaintiff should have entered judgment in default of appearance!

Master Yes. However, there may be problems when Registry is requested to search for an appearance pursuant to rule 21.01. Apart from this being an impossibility, as Registry can only search for a *notice* of appearance, problems may arise when the application is refused because the notice of appearance has been filed although rules 8.05 and 21.01 may not have been complied with (*vide*: the article on rule 8.05 which follows).

Barrister There seem to be a multitude of problems. Yet it is said that there are no problems with Order 14A.

Master There are lawyers concerned in the administration of Order 14A who state that there are no problems. I am of the opinion that the administration of Order 14A is riddled with problems. The problems can be minor, technical, very juristic, very unusual or matters that are serious and embarrassing to the Court and legal profession.

Barrister What are the serious problems?

THE PHILOSOPHY OF THE SCHEME OF CASEFLOW MANAGEMENT

Master The underlying philosophy of Order 14A is a scheme of caseflow management which is "court" rather than "party" controlled. The aim is to prevent delays by the parties and for proceedings to be finalised within a period of 15 months from the filing of the writ. Rather than have direction hearings to control the prosecution of the case Order 14A introduces a unique system of self-executing rules whereby the party with rights to enter default judgment finds the proceeding is dismissed if those rights are not exercised by a specified date, which I have previously termed the "critical date". The use of direction hearings to control the prosecution of a case requires considerable time, especially if the Court inquires into the history of the case, as distinct from granting orders by consent. The self-executing rules are a device to have court caseflow management with a minimum of judicial intervention, the scheme becomes "rule" driven. In the administration of the scheme the Court has publicised the fact that it would send out letters to the parties specifying the critical dates.

Barrister Thus it is vital to understand how to stop the operation of the self-executing rules.

Master Yes. But it is imperative that the Court in its administration of the scheme only sends out the letters when a self-executing rule is operating at law and any dates specified as critical dates are accurate.

Barrister Can the critical dates specified by the Court be inaccurate?

Master Yes, in certain situations. In the administration of rule 14A.11(2) Registry always allows 60 days from the date the notice of appearance is filed. Registry ignores rule 8.07(2).

Barrister I see from rule 8.07(2) that if the appearance is filed late then the defendant has less time to serve a defence.

Master If a notice of appearance is filed late and rule 8.05 is not satisfied, then Registry not only incorrectly triggers rule 14A.11(2), but it also specifies an incorrect critical date. If the defendant files a defence before that critical date, the computer says the proceeding is not dismissed. However, the critical date at law is earlier, and the proceeding is dismissed if the defence is filed after that date. So not only is the Court unaware that the proceeding stands dismissed, but it positively misleads the parties in its letters as to dates and as to the proceeding being alive and well.

Barrister The Court in its control of the case may set time limits for the conduct of interlocutory proceedings, set the case down for pre-trial conferences and then for trial and all the time the proceeding may not exist?

Master Yes, that in my opinion is the most serious problem in the administration of Order 14A. There are thus five situations where the Court controls the prosecution of the proceedings when unknown to it the proceedings may cease to exist. These are when:

1. the proceeding is governed by the operation of Order 14A by reason of the nature of the cause of action but Registry does not administer the proceeding pursuant to Order 14A and a self-executing rule has operated;
2. Registry allows the first self-executing rule to be stopped by an order that extends the time to file an affidavit of service of the writ;
3. by reason of the failure to obtain the affidavit of service of the writ the Court is unaware that the self-executing rule in rule 14A.11(1) has operated;
4. Registry incorrectly warns that the third self-executing rule is operating and/or inaccurately specifies a critical date and the self-executing rule is stopped by the defence being filed by that date, whereas at law the self-executing rule has operated;
5. some of the above problems occur in relation to a counterclaim.

Barrister You keep emphasising that the Court is unaware of the situation. Why?

Master The parties should know the data upon which the rules operate so they are in a position to know the status of the case.

Barrister Given that the Court itself provides warning letters and since the system is "court" controlled shouldn't parties be entitled to rely upon the Court operating its own system of caseflow management in accordance with its own rules?

Given that the Court itself provides warning letters and since the system is "court" controlled shouldn't parties be entitled to rely upon the Court operating its own system of caseflow management in accordance with its own rules?

Master I agree. The attempt to escape responsibility for the predicament by saying that the parties ought know of the situation is unacceptable. Another matter of concern is that Registry may send letters to the plaintiff advising that the proceeding has been dismissed when at law it is still alive. How many cases are settled or discontinued as a result of this advice is a matter only solicitors would know.

Barrister It is obvious that any barrister appearing in the practice court should understand how the self-executing rules operate. However, the operation of those rules is too complex.

Master I share your concern as to the complexity of the operation of the self-executing rules. There is a need to understand:

1. how to stop the operation of the self-executing rules; and
2. when reinstating the proceeding what orders to obtain to prevent the same or another self-executing rule operating;
3. how the operation of self-executing orders may be effected by any interlocutory orders made during the course of the proceeding.

Barrister Thus in considering the status of a case the history of interlocutory orders must be analysed to determine how the operation of the self-executing rules is affected by any orders made in the proceeding. I don't suppose there are any other problems I should know about?

Master Indeed! There are a variety of legal issues that can arise in relation to the operation of the self-executing rules, which are dealt with in detail in the paper on the Operation of Order 14A which I mentioned earlier:

1. Can the time to serve the writ be extended if the plaintiff has not attempted to serve the writ? Should the time be extended if 12 or 15 months have expired since the writ was filed?
2. Must an application to reinstate the proceedings be served on the defendants?
3. What are the grounds to reinstate the proceedings? What if the writ is 12 or 15 months old? When will the Court not reinstate proceedings?
4. Do the self-executing rules apply to added defendants, or to a third party joined as a co-defendant?
5. If a defence is struck out pursuant to a self-executing order is the self-executing rule in 14A.11(2) triggered and the proceeding dismissed retrospectively?
6. Do the self-executing rules apply to proceedings transferred from other courts?
7. Does an application for summary judgment stop the operation of the self-executing rule in 14A.11(2)?
8. Does an application for a default judgment which is not successful stop the operation of a self-executing rule in 14A.11(1) and (2)?
9. When is an application to stop the operation of a self-executing rule made? When the summons is filed or the application heard?
10. If a proceeding is dismissed and a later application is made to extend time, which is granted, does this mean that the proceeding was never dismissed?
11. What is the effect of the plaintiff filing a writ which is generally endorsed on the operation of the self-executing rules? What if the plaintiff amends a statement of claim before the defendant serves a defence?

Example number 4 illustrates not only the complexity of the operation of the self-executing rules but how orders in interlocutory proceedings may affect the operation of those rules. Few practitioners would appreciate that rule 14A.10 probably applies to an added defendant.

Barrister So if the proceeding is, say, four months old when a defendant is added, and the time to serve the writ is not extended, the proceeding would stand dismissed instantly the judge makes the order allowing the defendant to be added.

Master Yes. It sounds ridiculous, but the consequences of not applying Order 14A give rise to other questions. What if the application is made

two months after the writ is filed? Do the other self-executing rules apply? The problem arises not really because of the absurd consequences that follow, but because the operation of the rules is not understood. The problem should be considered when the application is made. It is even more interesting to ask if an order to serve an amended statement of claim by a specified date is made and this is not considered as extending the time to serve the writ. The logic of the rule is that the proceeding would stand dismissed.

Barrister Are the any other hidden traps in those examples?

It is even more interesting to ask if an order to serve an amended statement of claim by a specified date is made and this is not considered as extending the time to serve the writ. The logic of the rule is that the proceeding would stand dismissed.

Master The third party situation is intriguing. If an order is made joining a third party as a co-defendant after the 90-day period and the time to serve the writ is not extended is the proceeding against the third party defendant dismissed? Since the plaintiff need not serve the writ upon the third party there is probably no concern about rule 14A.10. In relation to rule 14A.11(1) the third party may have filed an appearance to the third party notice. Is such a notice relevant to the plaintiff? The order that joins the third party as a co-defendant should have regard to the operation of rules 14A.11(1) and (2).

Barrister The problem of a self-executing order striking out the defence is fascinating. If I understand the situation correctly it is as follows: a defence has been filed that has stopped the operation of 14A.11(2); the plaintiff later obtains a self-executing order that if the defendant does not file an affidavit of documents by a particular date the defence is struck out; that date passes; the self-executing order operates; and the defence is struck out. Does it follow as a matter of law that the self-executing rule in 14A.11(2) is resurrected and the plaintiff's proceeding is dismissed retrospectively? If this is the case an order has been obtained that results in the dismissal of the practitioner's own client's case due to a default by the other party.

Master You are quite correct. It may be the law that the self-executing rule is not resurrected just as the limitations problem is not resurrected once the writ is filed within time. However it would be safer to deal with the problem. How would you deal with this situation?

Barrister Obtain an order that 14A.11(2) does not operate if the defence is struck out.

Master Or ensure that the consequence of the operation of the self-executing order is that there be judgment for the plaintiff rather than the defence being struck out.

Barrister Have we time for any more of the examples?

Master Perhaps just one more: number eleven. There is no obligation upon the defendant to serve a defence until a statement of claim is served. So when should the self-executing rule in rule 14A.11(2) run?

Barrister When the statement of claim is served on the defendant if rule 8.05 has been satisfied.

Master Yes. And how will Registry know of this event?

Barrister I don't know. The plaintiff is under no obligation to notify Registry; however, they must file the statement of claim forthwith after service pursuant to rule 14.10.

Master Problems do arise with the administration of the self-executing rules in this situation as Registry often treats the generally endorsed writ as an ordinary writ, and rule 14A.11(2) is triggered when the notice of appearance is filed. Even if the matter is appreciated Registry triggers the operation of the self-executing rule when the statement of claim is filed and it should be triggered when the statement of claim is served. We haven't time to consider rule 14A.05.

Barrister I presume that is dealt with in your paper on the operation of Order 14A.

A SIMPLE APPLICATION TO STOP THE OPERATION OF RULE 14A.10

Master There are a variety of situations where the operation of the self-executing rules produce unexpected results. Assume that 74 days after a writ is filed the parties reach a settlement and the defendant has agreed to pay the money owing in the next two months. You are briefed to appear to stop the operation of the self-executing rules and the application is returnable on day 80. The reason for the application is that your instructing solicitor has received a warning letter from Registry that unless rule 14A.10 is stopped by the 91st day after the writ was filed the proceeding is dismissed.

Barrister First of all I would have to inquire whether the plaintiff has filed an affidavit of serv-

ice of the writ since the receipt of the letter from Registry. If not, then to prevent the first self-executing rule operating I would need to extend the time to serve the writ unless my instructing solicitor will file the affidavit before the 92nd day.

Master You assume that the defendant has been served with the writ and, if so, that the defendant has not filed a notice of appearance since the letter was sent by Registry and you have also assumed that the proceeding is governed by Order 14A. Just as some matters are governed by Order 14A when they have not been administered pursuant to that Order, so there are situations where Registry has administered the proceeding pursuant to Order 14A when it is excluded by rule 14A.01.

Barrister I will assume that the proceeding is governed by Order 14A, and no notice of appearance has been filed and no affidavit of service has been filed, but can be filed by day 110. Then I would advise my instructing solicitor to seek an order extending the time to serve the writ to day 112.

Master Need such application be served on the defendant?

Barrister Seems strange as the defendant has not filed an appearance.

Master However, a time is being extended, and rule 14A.13(2) would seem to require notice of the application. Service would probably not be required in this situation as it is difficult to reach a conclusion that the defendant's rights are being affected. However, you have omitted to consider if the proceeding has been dismissed by rule 14A.11(1)! What instructions should have been obtained?

Barrister The date of service of the writ. If the writ was served on or before day 20 then the proceeding may have been dismissed by day 80 and I need an order reinstating the proceeding.

Master Assume that the defendant was served on day 14 in Victoria. So the proceeding will be dismissed on day 86 pursuant to rule 14A.11(1). Registry is unaware of this fact until day 110 when the plaintiff files the affidavit of service of the writ. However, assume that the proceeding is dismissed before day 80; must the defendant be served with notice of the application to reinstate the proceeding? In this situation it can be argued that the defendant's rights are being affected!

Barrister It still seems ridiculous to serve the defendant who has not filed an appearance.

Master In this situation I do not require the defendant to be served; the law may be otherwise. However, when reinstating proceedings dismissed by rule 14A.11(2) I think that the defendant should be given notice of the application.

It is to be noted that we are considering this matter as if there was one defendant. Imagine a case has four or more defendants. In relation to some:

(a) the writ may not have been served; or
(b) may have been served within 20 days of the filing of the writ;
(c) the defendant in some cases may have filed an appearance (that is, complied with rule 8.05) or only a notice of appearance and the appearance may be in time or late;
(d) the affidavit of service may have been filed, or filed after the 91st day.

Barrister Obviously Order 14A becomes even more complicated with multiple defendants!

Master Another problem is that while the proceeding may not be dismissed when you analyse the case on day 75, it could become dismissed between day 72 and day 92, depending upon when the writ was served.

Barrister So if the proceeding has been dismissed I need to reinstate it, and if it could become dismissed then I need to obtain an order to stop the operation of the self-executing rule.

Master And it could become dismissed before the return day of your brief on day 80.

Barrister Then I should immediately warn my instructing solicitor of the situation, and seek an order immediately that stops the operation of the self-executing rule. Alternatively, I could allow the proceeding to be dismissed and seek to have it reinstated on day 80.

Master That assumes the Court will reinstate the proceeding.

Barrister Yes, but what are the situations when the Court will and will not reinstate the proceeding?

Master There is one situation where the Court should not reinstate the proceeding and that is where knowledge of the rule is appreciated and the party intentionally allows the proceeding to be dismissed.

Barrister So if the proceeding can be dismissed before day 80 I should immediately seek an order to stop rule 14A.11(1) operating. What order would you suggest?

Master There are a number of orders that the plaintiff can seek to stop the operation of the self-executing rule in rule 14A.11(1). The plaintiff could seek an extension of time for the defendant to file an appearance.

Barrister That is a strange request, to seek an extension of an obligation on the other party.

Master Yes. There are some novel situations that arise in the operation of Order 14A. If such an order is sought does the plaintiff have to serve a summons on the defendant? However, the plaintiff does not wish to prevent the right to enter judgment in default of appearance if the defendant is in default of the settlement agreement. Thus some other order is necessary. What about extending the time for the operation of rule 14A.11(1)? That is, extend the critical date for the operation of rule

14A.11(1) to day 140 which is a date after the money is due to be paid. Other orders could seek to dispense with the operation of rule 14A.11(1), or strike out the proceeding with a right of reinstatement. What would you suggest?

Barrister Extend the time for the operation of rule 14A.11(1) to day 140.

Master So you make the application on day 80 and obtain your orders:

1. the proceeding is reinstated;
2. the time to serve the writ is extended to day 112;
3. the time in which the plaintiff may apply for or enter judgment in default of appearance is extended to day 140.

So all is in order?

Barrister There is an obvious trap you are leading me into, but I cannot detect it. The proceeding is not dismissed pursuant to the first self-executing rule provided the affidavit of service is filed on or before day 112. Rule 14A.11(1) will not operate until day 140 and rule 14A.11(2) is of no concern as the defendant has not filed an appearance. So there appears to be no problem with the order.

Master What happens if the defendant files an appearance after day 80 and before day 140 or before the plaintiff considers entering judgment in default of appearance?

Barrister I suppose rule 14A.11(2) will then operate. But I cannot see any problem!

Master You assume that since you extended the time for the operation of rule 14A.11(1) that there can be no concern about the self-executing rule in 14A.11(2) operating before rule 14A.11(1), which has been postponed in operation until day 140.

Barrister I suppose so, but I must confess I am very confused.

Master Well, if the notice of appearance is filed on day 87 when does 14A.11(2) operate?

Barrister Sixty days thereafter; that is day 147. Thus it cannot operate before rule 14A.11(1). You had me worried, for if it did operate before 14A.11(1) then there is a real problem.

Master If the notice of appearance is filed on day 87 Registry send a warning letter to the parties advising them that the self-executing rule in 14A.11(2) is running and that the critical date is day 147. Of course we assume rule 8.05 is satisfied; if not the letter is erroneous as we discussed earlier. How is the self-executing rule stopped?

Barrister By the plaintiff applying or entering judgment before day 147 or the defendant filing a defence.

Master So if the parties' solicitors, relying upon the advice in the Court's letter, agree that the defendant will file a defence on day 139 there are no problems with rule 14A.11(2).

Barrister No; however, there is clearly a trap but I cannot detect it.

Master Then there would have been a problem if the notice of appearance was filed on day 79, instead of day 87. Then rule 14A.11(2) operates on day 139.

Barrister But that is before the extended day for the operation of rule 14A.11(1)! How can the third self-executing rule operate before the second?

Master It sounds strange. However, the order extending the operation of rule 14A.11(1) did not extend the time for the defendant to file the appearance. Thus there is a trap as it follows that rule 14A.11(2) can operate before 14A.11(1).

Barrister However, in this case the order is satisfactory as the notice of appearance is filed on day 87.

Master Unfortunately there is a problem as you have forgotten to apply rule 8.07(2).

Barrister Yes. I forgot about that rule; that's the trap you were aware of all the time. You said that the notice of appearance was filed on day 87 and the writ was served on day 14, thus the notice of appearance is filed 62 days late. So how does that situation affect the operation of rule 14A.11(2)?

Master Well, I said earlier that the effect of rule 8.07(2) was that, insofar as the appearance is late, the time to serve the defence is reduced, and thus the critical date for the operation of rule 14A.11(2) is likewise reduced. So if the appearance is 30 days late the critical date is not 60 days after the appearance is filed but only 30 days. If the appearance is 60 days late the time is reduced to what?

Barrister Nothing. But what does that mean?

Master The defendant must file the defence on the same day as the notice of appearance of appearance was filed. Technically after the notice of appearance is filed.

Barrister But in this case the notice of appearance is filed 61 days late. How does the self-executing rule in 14A.11(2) then operate?

Master The critical date probably remains at 60 days late.

Barrister Then that means the proceeding is dismissed on day 86 and thus the proceeding is dismissed retrospectively on day 86 when the notice of appearance is filed on day 87.

Master Yet Registry specified the critical date as day 147 and the parties relied upon the letter and proposed to file the defence on day 139. Whereas at law the critical date is day 86. Thus your proceeding has been dismissed, in spite of your order obtained on day 80, on day 86, when 7 days after your order the defendant filed a notice of appearance on day 87. Do you agree with that conclusion?

Barrister I will say yes.

Master You have assumed rule 8.05 was satisfied when the defendant filed the notice of appearance on day 87. If rule 8.05 was not satisfied then rule 14A.11(2) is not operating and the proceeding

has not been dismissed. If the Court is unable to determine if rule 8.05 was satisfied what is the status of the proceeding?

Barrister I suppose no one knows. But that is an untenable situation.

Master If the defendant's solicitor is not able to establish that rule 8.05 was satisfied, if it was the solicitor's invariable practice to follow the rule the solicitor may be able to rely upon the presumption of regularity. But what if there is no evidence to enable the presumption to apply? And what if the defendant is a lay person who had no idea of the complications of rule 8.05 and has no recollection of how the notice of appearance was filed and served?

It is how the other rules of court affect the operation of the self-executing rules that further complicates the operation of the rules.

Barrister You convinced me half-way through the analysis of your so-called simple application to stop the operation of rule 14A.10 that the operation of these rules can become ridiculously complex. The mind boggles; it is clear that in many cases all self-executing rules have to be considered. It is not only their inter-relationship that further complicates the law, but it is how the other rules of court affect the operation of the self-executing rules that further complicates the operation of the rules.

Master Yes. I have often said that considered alone a conclusion may be reached that the self-executing rules are simple to administer. However, the fact they overlap and can operate retrospectively creates problems. That there are four self-executing rules that can operate so closely together makes the analysis complex. I have mentioned the problem of multiple defendants; now assume counterclaims have also to be considered pursuant to rule 14A.12. Assume some defendants have filed counterclaims, the dates of service are different, the defences to counterclaim are different and counterclaims have been served on persons other than the plaintiff!

Barrister What can I say?

Master Combine the problems of Order 14A with rule 8.05 and the administration of the law becomes extremely complex. In some situations when it is uncertain whether rule 8.05 was satisfied the status of the case becomes unknown. The simplest order to stop the operation of the self-executing rules is to strike out the proceeding with a right of reinstatement when the matter has been settled.

Barrister So if the proceeding has been dismissed this explains why orders are required that reinstate the proceeding then strike it out with a right of reinstatement. Imagine trying to explain these orders or the law to instructing solicitors, or explain the operation of the rules to any judge or lawyer.

Master And in a nutshell. Everyone wants the explanation stated succinctly.

THE CONDUCT OF INTERLOCUTORY PROCEEDINGS

Master Assume Registry has sent out letters advising the parties that the time for the conduct of interlocutory proceedings has closed.

Barrister An application may be made seeking extensions of time only to be met with the observation that the proceedings may not exist.

Master More than that. Pursuant to rule 14A.13(1) the parties may consent to extend the times under rules 14A.06(1)(e) and (f) without a Court order. In addition, rules 14A.06(1)(e) and (f) do not apply to applications for a further and better affidavit of documents or further answers to interrogatories.

Barrister Thus the letters can be erroneous and misleading.

INJUNCTIONS

Master An application for an injunction is often made before the defendant has filed an appearance. On the return of the contested hearing all manner of orders can be made which can ignore the operation of the self-executing rules. The most common error is to make orders in relation to the defence and forget about the appearance.

Barrister Then 14A.11(1) can operate to dismiss the proceeding?

Master Yes. But even rule 14A.10 can operate; this is a common trap.

Barrister Rather embarrassing for the barrister who obtains incomplete orders on the return of an injunction.

THE OTHER RULES OF COURT

Master Other problems arise by reason of the operation of the general rules of court. For example, when Registry send out letters in regard to the conduct of interlocutory proceedings and state that the time for seeking discovery or answers to inter-

rogatories closes by a specified date there is an inference that the parties have such rights to conduct those interlocutory matters. However, if pleadings have not closed, because rules 8.05 and 14A.05 have not been satisfied, then the parties have no such rights in relation to discovery and interrogatories without leave of the Court. In addition Registry ignore the rules as to setting down a proceeding for trial in the administration of Order 14A.

Barrister Are you not highlighting matters that are an embarrassment to the Court?

Master Yes. One of the problems is that there is no problem. In raising the problems in the administration of Order 14A I often receive the reply that there is no complaint by the profession in relation to the administration of Order 14A. In a recent report on the scheme of caseflow management it is said that the scheme is spectacularly successful and that there are no problems.

The most serious manifestation of the problems in Order 14A will occur if a case proceeds to trial and verdict and later it is found to have been dismissed before the trial. What if the defendant appreciated the problem when the plaintiff executes on a judgment and costs of a five-day hearing and the proceeding stood dismissed before the trial?

Barrister Who pays the costs of a five-day hearing in the County Court? Who pays the costs if the matter is discovered in the Full Court on appeal?

Master What happens if the situation is discovered when the matter has been transferred to the Federal, Family, Supreme or Magistrates' Court? Or if upon an application to set aside a judgment at trial, which was undefended, it was ascertained that the proceeding did not exist at the time of the trial? Who pays the costs if the defendant takes the point?

Barrister The Appeals Cost Fund perhaps?

Master In another case a third and fourth defendant obtained an order the day before a trial to delay the trial, on condition they paid the plaintiff's and first and second-named defendants' costs thrown away. Later it was ascertained that the proceeding did not exist. What is the effect of the order as to costs? Do the third and fourth defendants appeal, is the matter referred back to the Judge, do the third and fourth defendants wait until execution and seek a declaration that the order is a nullity?

Barrister It is quite intriguing how a system so riddled with serious problems can exist for so long without adverse comment.

Master There seem to be a variety of reasons, one being that the problems have only manifested themselves in the practice court or registry. When practitioners are involved the problems have not generated public comment for they invariably arise by reason of an absence of knowledge of the rules.

One must remember that the scheme is experimental and it is always easy to be wise after the event. In addition, caseflow management has been successful in reducing delays in the prosecution of cases. There is a place for caseflow management not primarily for administrative efficiency, although that is not ignored, but for the benefit of the parties involved. Justice delayed can in some cases be justice denied. I am of the opinion that in the final analysis it is the parties' case and they, within reason, should have the final say in how the proceedings should be conducted. If the parties desire to stop proceedings to discuss settlement, or the plaintiff desires not to enter a default judgment, that should be the plaintiff's prerogative.

However, the Courts cannot tolerate considerable delay brought about by the practitioners in the conduct of interlocutory proceedings. It is in that situation that the Court should intervene; however, preferably by direction hearings and not self-executing rules.

However, the Courts cannot tolerate considerable delay brought about by the practitioners in the conduct of interlocutory proceedings. It is in that situation that the Court should intervene; however, preferably by direction hearings and not self-executing rules. If there is to be a system of caseflow management by rules then those rules must be simple and the Court must ensure that the scheme is administered according to law. Order 14A fails in achieving these essential objects. I am hoping that the future will bring a simpler scheme of caseflow management. **I hope that while the present scheme exists this discussion assists in dealing with cases involving Order 14A.**

R. Patkin.

THE RULES OF CONDUCT AND COMMISSIONSPEAK

FROM TIME TO TIME MEMBERS OF THE Bar may notice public reference, in connection with the Bar's rules of conduct, to something called "the boycott rule". They may be puzzled by this, and may search the Rules of Conduct for any reference to such a rule in terms. They will, however, do so in vain.

It may be useful to provide some brief historical material with respect to the use of the term "boycott rule," both to set the record straight and also to provide an interesting contemporary example of the adjustment of past events by the engineering of labels.

From 1 December 1891 to 4 February 1892 a short-lived association of barristers, in apparent response to the legal fusion of the profession in Victoria, purported to bind themselves by rules which contained a rule forbidding a member of that association from appearing in court with a person who was not a member, but which also contained a rule in the following form:

> No member of this association shall accept any retainer or brief from or act in any manner professionally for or upon the instructions directly or indirectly of any person who shall, or whose partner or partners, employer or employers, employee or employees shall act or practise or hold himself or themselves out as acting or practising otherwise than as solicitors have usually acted and practised previously to December 1st, 1891.

This rule was an attempt by members of that association to bind themselves not to accept briefs from any solicitor who practised as an amalgam pursuant to the new fusion provisions in the legislation. It could quite fairly have been described as a "boycott rule".

The 1891–92 rules were the subject of controversy, and were mentioned in Parliament. *Hansard* reveals that one Member of Parliament said (not in relation to any particular rule):

> We won't stand boycotting from the barristers or any other body.

Likewise the *Argus* of 5 December 1981 said:

> . . . we still hold that the existence of a separate and highly-trained Bar, observing the best traditions of the Inns of Court, is essential in the interests of skill and independent advocacy. But the preservation of the institution would be too dearly purchased if the price is to be a vulgar and indefensible boycott . . . Parliament having declared that solicitors shall be entitled to practise as counsel, the Bar ought, on every consideration of propriety, to allow them to do so if they please.

The references to "boycott" in Parliament and in the *Argus*, which are the earliest references available to me, appear clearly to have related to the rule set out above.

The forerunner of the Constitution recently adopted by the Bar, Counsel Rules, were adopted by a meeting of counsel on 21 September 1900. *Dean* says that there was no rule which prohibited a barrister on the roll from holding a brief with a person who was not on the roll, but the Committee of Counsel resolved on 2 March 1901 "that in future no counsel on the roll shall appear or hold a brief with anyone not of counsel on the roll". It will be immediately recognised that this rule did not, unlike the short-lived rule of 1891–92, have any aspect of a boycott about it. It was a rule which defined the conditions under which a barrister might accept a particular brief by a reference to factors directly relevant to that brief: it was not a rule prohibiting acceptance of that brief by a reference to the nature of the practice of, or other kinds of work done by, the solicitor by whom the brief was delivered.

In 1979 the Bar Council published its "Re-statement of Basic Rulings on Professional Conduct and Practice," which appear at page 16ff of *Gowans*. Rule 10 continued the substance of the ruling made on 2 March 1901. In 1993, the Bar adopted new consolidated Rules of Conduct and Practice, and r 4.7 thereof is the present-day equivalent of the rule under discussion.

As members of the Bar will be aware, the rule has come in for a certain amount of recent criticism by public bodies concerned to reform the profession.

In May 1990 the now-abolished Law Reform Commission of Victoria published an Issues Paper with respect to a reference it had received from the Attorney-General concerning the cost of litigation. Members of the Bar might recall that this was

The paper which stated that "the requirement of a law degree creates a substantial obstacle to entry to legal practice": perhaps thought to be bizarre at the time, the statement has subsequently been proved to be wildly inaccurate.

the paper which stated that "the requirement of a law degree creates a substantial obstacle to entry to legal practice": perhaps thought to be bizarre at the time, the statement has subsequently been proved to be wildly inaccurate.

However, returning to the question of appearing with non-members of the Bar, the 1990 Issues Paper said that one of the anti-competitive rules was the rule that a solicitor who instructs in a particular case cannot appear as junior counsel (page 21). No mention of any "boycott rule" here. Having consulted widely on the content of the issues paper, the Law Reform Commission in July 1991 published a Discussion Paper on "Restrictions on Legal Practice". The Commission again referred to the rule under discussion, and said that it was unnecessarily restrictive (pages 17–18). Again, however, no mention of any "boycott rule".

The Commission's Report No. 47 — *Restrictions on Legal Practice* — was published in May 1992, and for the first time described the rule as a "boycott rule". The Commission had in the meantime received the Report of the Tasman Institute in which the rule was described as "the boycott rule" and was put foremost in a list of "aspects of the system which exhibit monopolistic arrangements". The Institute freely referred to the rule as "the boycott rule" without citation.

The Commission's Report says the following of the rule:

> The origin of this rule was the barristers' boycott of 1891. It was designed to cut off solicitor advocates (and their clients) from the services of the senior Bar in cases in which more than one counsel was required. It was intended by this means to prevent solicitors' firms from training their own junior advocates, and to diminish the status of "amalgams" within the profession. The history of the Victorian legal profession shows that the boycott has been outstandingly successful to that end.

It is apparent from the reference cited by the Commission that its source is a book published in 1979 by the Law Book Company: J.R.S. Forbes, *The Divided Legal Profession in Australia*. Forbes describes, in a way which is unsympathetic to the Bar, how the "boycotters" of 1891–92 attempted to render practically ineffective the fusion provisions of the new legislation. Describing the "barristers' boycott" as "one of the most remarkable episodes in Australian legal professional politics" Forbes said that Madden (later to become Chief Justice) appeared at the head of a Bar Association intent on destroying the Act. He (Forbes) continued:

> The members proclaimed that they would not accept a brief from, or appear as counsel with, any lawyer who used the new rights of practice. Thus if a firm of (former) solicitors did any of its own advocacy, it might have to do all its own advocacy thereafter. If a particularly heavy case were entrusted to such a firm soon after fusion came into effect, it would have to conduct the whole trial itself, or hand the case over to a firm not under boycott, or find some outside advocate who was not a member of the Association, who was prepared to be branded "amalgam" and to come under boycott himself. Mere failure to join the Association was a ground for declaring a former barrister taboo. The Association made it clear that it would do all in its power to depress the professional status of "amalgams", and to put them at a disadvantage before the Supreme Court judges.

What Forbes was concerned with in this passage was the boycott in the true sense, that is to say, the refusal to accept a brief from any firm which performed, to any extent, its own advocacy work.

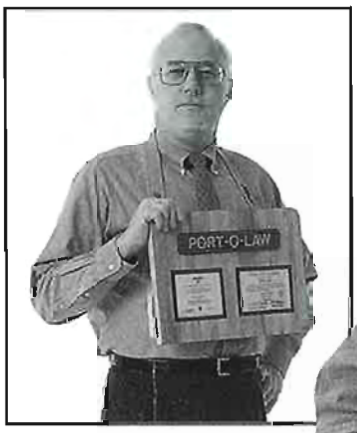
In mid-1993 the Bar Council received a confidential draft of the draft report of the Trade Practices Commission in its study of the legal profession, then in preparation. In that draft the Trade Practices Commission referred to r 4.7 of the current rules, and called it "the boycott rule". The Bar Council pointed out that this rule, as such, had never been referred to as a "boycott rule" and that the expression had its roots in the arrangements of 1891–92 which involved more drastic restrictions, and ones which could properly be called a "boycott". When the draft report itself was published in October 1993, it referred to r 4.7 as "the so-called boycott rule" and referred also to the correspondence from the Bar Council objecting to that label. Its footnote, however, concludes:

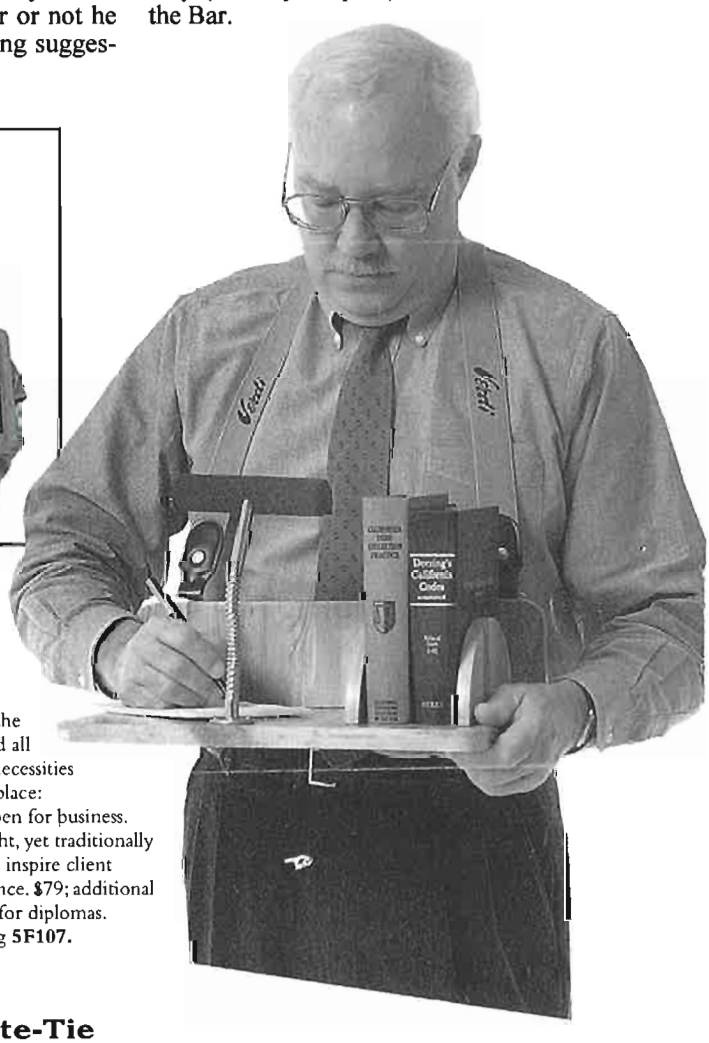
> The Commission understands that the term is common among solicitors in Victoria and elsewhere.

Little matter, then, that the label is misleading, in that the rule does not give effect to a boycott of anything. Little matter that its historical associations do not justify its continued use. Little matter that no authoritative professional sources were referred to by which the reader of the Report may judge the correctness of that usage. It is the Commission's understanding that the term is common among solicitors in Victoria and elsewhere. QED.

THE MODERN LAWYER

WITH THE GRADUAL PUSH TOWARDS A more competitive approach in the legal profession, the quality and speed of service provided by the individual lawyer may determine whether or not he or she survives in practice. The following suggestions put forward by Philippa Garner, author of the *Better Living Catologue* and *Utopia or Bust* may (suitably adapted) be of value to members of the Bar.





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A VIEW OF RULE 8.05 OF THE SUPREME AND COUNTY COURT RULES

RULE 8.05 CAME INTO EXISTENCE IN 1989 when the new Supreme Court Rules came into operation. The rule deals with a difficult problem where both the Court and a party should be advised at the same time of an event performed by the other party to the proceeding. Thus when the defendant appears to a writ the ideal situation is that both the plaintiff and the Court are aware of the performance of that event at approximately the same time.

When a defendant has to appear, after being served with the writ, rules 8.05 and 6.07 seem to require the defendant to:

1. file a notice of appearance, and on the same day;
2. serve a sealed copy of the notice on the plaintiff;
3. such service if delivered to the plaintiff is to be before 4p.m. If posted, which includes facsimile transmission, or delivered to a document exchange, such posting or delivery to the document exchange is to be on that same day.

The rule solves the problem of a party satisfying dual obligations of informing the Court and the opposite party of the event at approximately the same time.

Rules of Court can create obligations and rights on:

1. the filing of documents;
2. the service of documents; or
3. both the filing and service of documents as required by rule 8.05.

This article considers rule 8.05 and the problems it creates in the administration of the law and concludes that the previous rule for entering an appearance should be restored. That rule provided that in order to appear the defendant:

1. filed a memorandum of appearance (Order 12 rule 2). This was the only act required for the defendant to appear;
2. the defendant was also required to give notice of the appearance to the plaintiff on the day the defendant entered the appearance, or serve by post a sealed duplicate memorandum of the appearance on the plaintiff by posting the document on the day the appearance was entered (Order 12 rule 3). It is important to note that under the former rules the failure to give notice did not invalidate the entry of appearance;

THE PREVIOUS RULE

Under the old Rules of the Supreme Court the defendant filed a memorandum of appearance to enter an appearance. Thus the Court was aware of the event, but not the plaintiff until the sealed duplicate of memorandum of appearance was received by the plaintiff. The rule was unsatisfactory in that the plaintiff may not be notified of the entry of appearance, or the plaintiff could be advised late. The filing of the appearance sets time running against the defendant to serve the defence. When this time expires the plaintiff has a right to enter judgment in default of defence. It is unsatisfactory if the plaintiff is not aware of these times due to the defendant failing to serve the notice of appearance.

Where the Court is to administer the proceedings, or to know of the occurrences of events, the filing of documents is the preferable criterion. In the County Court, where principles of caseflow management apply to certain proceedings, it is imperative that the Court be aware of certain events. If those events are not the filing of documents, such as the service of the writ, the Court relies upon the parties informing the Court by the filing of an affidavit of service.

In the County Court, where proceedings are governed by Order 14A, a self-executing rule is running against the plaintiff when the defendant files an appearance. If the plaintiff does not enter judgment in default of defence by a critical date the proceeding is dismissed. It is vital that the plaintiff becomes aware of the defendant filing an appearance, and being informed as soon as possible after the defendant files the appearance.

An example of serving documents as the sole prerequisite of creating rights and obligations is illustrated by the present rules as to service of the defence. Rule 21 creates the plaintiff's right to enter judgment in default of "service" of the defence. Although the defendant has to file the defence pursuant to rule 14.10 it is irrelevant to the obligation and rights to enter judgment in default of defence.

Insofar as the rules require parties to only serve documents then the Court is unable to administer the prosecution of the case.

Pursuant to the former County Court Rules the defendant had to file and serve a notice of intention to defend to "give" such notice. The problem with

this kind of rule is that unless both limbs of the rule are satisfied, the defendant has not "given" such notice and in that sense nothing has been done. Another problem arises as to "when" the event occurs. The usual rule is that the defendant gives notice when the latter of the two events occurs. In this dual rule neither the Court nor the plaintiff will know if the other limb of the rule is satisfied unless they investigate the situation. If the plaintiff receives a copy of the notice of intention to defend it cannot be assumed that the notice was filed.

The fact that both limbs of the rules have to be satisfied means that knowledge of compliance with one limb is insufficient. The Court cannot assume that the notice of intention to defend has been "given" solely on the basis that the notice has been filed. Likewise the plaintiff cannot assume that a defence has been filed just because it is served.

RULE 8.05

Rule 8.05 deals with the problem by requiring both limbs of the rule to be satisfied at approximately the same time. The document must be filed and a sealed copy served within a few days of filing. This is the ideal rule. Then the Court can administer the proceedings and the plaintiff is aware of the filed document within the next few days.

Rules 8.05(1), (3) and (4) prescribe the mode of appearance and rule 6.07 provides how ordinary service is to be effected.

To file an appearance pursuant to rules 8.05 and 6.07 I will assume that the defendant must:

1. physically file a notice of appearance over the counter;
2. obtain a sealed copy from the court office;
3. on that day either:
   (a) place the sealed copy into the mail, transmit by facsimile, or deliver to a document exchange; or
   (b) deliver it to the plaintiff before 4p.m.

If the notice is posted the next day, or delivered after 4p.m., then despite the notice being filed and served there has been no appearance filed by the defendant. Rule 8.05(1) merely requires that the notice of appearance be served on the same day in accordance with paragraph (3). There is no limitation within that rule or paragraph (3) as to delivery by 4p.m. However, rule 8.05(4) allows by incorporating rule 6.07(1), service by mail, by facsimile or delivery to a document exchange on the day the notice of appearance is filed. It is unfortunate that "appropriate step" is not defined in rule 6.07(1). It may be argued that rule 6.07(4), which requires service by 4p.m., does not apply to rule 8.05(1).

Rule 8.05(1) may be clearer if the meaning of "the same day" was defined or its meaning was expanded by an express reference to rule 8.05(4). In rule 8.05(4) the limited meaning of "the same day," insofar as delivery after 4p.m. is concerned, could be made clearer by referring solely to rule 6.07 and not limiting it to 6.07(1), or by referring to both rules 6.07(1) and 6.07(4).

PROBLEMS WITH RULE 8.05 IN PRACTICE

To reach an understanding of rule 8.05 requires a careful reading of both rules 8.05 and 6.07. Its analysis is not easy. However, the complication is in the operation of the rule in practice.

The first problem with regard to the administration of the rule is the uncertainty in certain situations as to whether the rule was satisfied. Whenever a notice of appearance is received by a plaintiff's solicitor, anywhere in Victoria, more than one day after the date of the sealed copy, that solicitor cannot be sure rule 8.05 was satisfied.

Thus the problems with rule 8.05 are:

1. it is complicated to administer;
2. its description is misleading;
3. the Court is generally unable to determine if there has been compliance with the rule;
4. often the plaintiff is unable to determine if the rule has been satisfied;
5. in some circumstances the defendant cannot establish if the rule was satisfied.

Whether a rule of law is satisfactory does not depend solely upon whether it ideally solves a problem. There is no doubt that rule 8.05 solves the problem. Again the rule should not be complicated. In some respects, the rule is complicated. In other respects, as analysed earlier, the rule cannot be said to be complicated. However, whether a rule is satisfactory also depends on whether it is easy to determine whether it has been satisfied. It is in this area that rule 8.05 becomes unsatisfactory. The fact that rule 8.05 lies at the base of a system of hierarchy of rights and obligations creates difficult legal problems.

THE UNSATISFACTORY NATURE OF RULE 8.05

To describe rule 8.05 as "filing an appearance" is misleading to both the lawyer and the lay person. The word "filing" connotes the physical delivery of a document to the court office. In some courts a fee had to be paid on the filing of a document. Thus many lawyers still believe an appearance is perfected if the document described as a notice of appearance is filed. *Williams Civil Procedure* at paragraph 8.05.5 states that "Appearance by the defendant may be proved by production of a sealed copy notice of appearance". That description of the rule as filing an appearance contributes to the mistake made by practitioners that the filing of a document is the only act required to file an appearance. It is interesting for the lawyer to read rule 4.08 in Chapter 2 of the County Court Rules. Very few rules run time or create rights or duties from the filing of a notice of appearance. The rule should re-

fer to filing an appearance. In addition the rule may create different times for when a defendant is deemed to file a notice of appearance.

A reading of Form 8A of the Rules, the form of notice of appearance, itself infers that to file an appearance the defendant has merely to file the document. The indorsement required on the writ (Form 5A in the Rules) reveals that filing an appearance is more than merely filing a notice of appearance. However, the prescriptions of rule 8.05 are not properly described, and the notice is itself misleading. I am of the opinion it would have been preferable to retain the old terminology of the defendant "entering" an appearance and this is done by "filing" a notice of appearance.

The prescriptions of rule 8.05 are not properly described, and the notice is itself misleading. I am of the opinion it would have been preferable to retain the old terminology of the defendant "entering" an appearance and this is done by "filing" a notice of appearance.

Likewise the terminology of commencing proceedings by "filing" the writ is confusing. The old terminology of "issuing" a writ was clearly understood to mean the commencement of the proceedings. In the practice court all lawyers understood the summons was commenced when the summons was "issued". The "filing" of documents and the "issuing" of writs and summons was clearly understood. Now there is confusion, but most practitioners and judges still use the old terminology of issuing a summons or a writ.

The Court is generally in no position to determine if the defendant has complied with rule 8.05. Unless the defendant files an affidavit of due compliance with the rule, or the plaintiff supplies relevant information, the Court is in no position to determine if rule 8.05 had been satisfied.

As discussed above, in certain situations the plaintiff cannot ascertain if the defendant has complied with rule 8.05. In this situation the plaintiff is in a dilemma whether to enter judgment in default of appearance or defence. Where there are doubts the plaintiff should enter judgment in default of appearance. However, the rule is unsatisfactory from the plaintiff's position and there is no doubt that a simpler rule is required so that the plaintiff can ascertain if the defendant has appeared. The clearest rule is, as under the old rules, that one act is involved in appearing to the writ.

Where the question of compliance with rule 8.05 arises some time after the defendant has filed a notice of appearance the defendant is often in difficulty in proving whether the rule was satisfied.

If there are some facts that will enable the Court to rely upon the presumption of regularity then the Court may conclude that rule 8.05 was satisfied. However, often the defendant's solicitor was not aware of the technicality in complying with the rule, or the solicitor or clerk filing the documents is no longer in the employ of the defendant's solicitor or has no recollection of the events that occurred when the notice of appearance was filed. In these circumstances the Court may be in no position to reach a conclusion whether rule 8.05 was satisfied. This situation is intolerable and it does not assist the administration of the law to reply that the problem arises solely because the defendant does not comply with a rule of law. It also must be remembered that a lay person may file an appearance.

POSITION OF THE RULE IN THE HIERARCHY OF RIGHTS AND OBLIGATIONS

If the rule was not significant in the system then its inadequacies may be such that the problem with the rule could be either ignored or tolerated.

However, the rule is significant in that it lies at the base of a series of rights and obligations. Its importance is greater in the County Court for in Order 14A there is a system of self-executing rules that are built on the appearance by the defendant.

Ignoring for the moment Order 14A, the importance of the rule lies in three difference areas in the Supreme and County Court:

1. the entry of default judgments;
2. any rights or obligations that arise from the defendant filing an appearance; and consequentially
3. any rule that creates rights or obligations that depends on the "service" of the defence.

There are two distinct problems created by rule 8.05 when default judgments are considered. First, the concept of filing an appearance. Secondly, the doubts created by whether the rule has been satisfied and therefore which default judgment should be entered.

The concept of filing an appearance presents difficulties when a plaintiff attempts to enter judgment in default of appearance pursuant to rule 21. For the purposes of this discussion the relevant parts of rule 21 is rule 21.01(2).

The request to the Registrar of the County Court, or the Prothonotary of the Supreme Court, to search for an appearance is impossible. The Court Officer can only search for a notice of appearance. The rules need to be altered to require the request to search for a notice of appearance. This error of assuming that the filing of a notice of appearance amounts to the filing of an appearance continually occurs in the practice court.

However, what is to happen if the officer discovers a notice of appearance is filed? It is obvious that the intention of the rule is that if a notice of appearance is filed then judgment should not be entered. If the defendant entered a late appearance, but before judgment, then the plaintiff was not entitled to enter judgment in default of appearance under the old rules.

However, under the old rules all that the defendant had to do to enter an appearance was file the memorandum of appearance. Although the defendant was also obliged to serve the notice of appearance, it was not part of the obligation to enter an appearance.

Under the new rules the filing of a notice of appearance does not extinguish the plaintiff's right to enter judgment in default of appearance. The defendant does not file an appearance solely by filing a notice of appearance. The plaintiff can still enter judgment in default of appearance even if the defendant has filed a notice of appearance. The Court Officers should not stop the plaintiff entering judgment if they discover a notice of appearance has been filed. There is thus an inconsistency between the obvious purpose of the rule and the conclusion that as a matter of law judgment should be allowed if the defendant has not complied with rule 8.05. Within rule 21 there is the very confusion that exists within the profession about what is necessary to file an appearance.

In the County Court, the stopping of an application for a default judgment can have serious consequences. A self-executing rule may be running that will dismiss the proceeding if the plaintiff does not enter judgment in default of appearance by a critical date. In a number of cases a Court official has stopped the plaintiff entering judgment because a notice of appearance was filed. Subsequently the Court sent a letter to the parties informing them that the proceeding was dismissed because the plaintiff had not entered judgment by the critical date.

If it is the desire of the Court that the plaintiff should not enter judgment if the defendant has filed a notice of appearance then a rule to that effect should be inserted into rule 21. However, unless rule 8.05 is repealed, or amended, problems will arise as the filing of an appearance is a prerequisite to entering a default judgment in default of defence. The plaintiff will be caught between the two types of default judgment, not being able to proceed in either situation. The filing of the notice of appearance will stop an application to enter judgment in default of appearance, but if rule 8.05 has not been satisfied, the plaintiff cannot enter judgment in default of defence.

Unless the plaintiff is confident that rule 8.05 has been satisfied the question arises as to which default judgment should be applied for or entered. Obviously the plaintiff should apply for or enter judgment in default of appearance where there are any doubts about the matter.

The present state of knowledge of rule 8.05 is unsatisfactory and, on receiving a notice of appearance, the majority of practitioners apply for judgment in default of defence. If rule 8.05 was not satisfied such judgment is probably irregular.

The present state of knowledge of rule 8.05 is unsatisfactory and, on receiving a notice of appearance, the majority of practitioners apply for judgment in default of defence. If rule 8.05 was not satisfied such judgment is probably irregular.

I say probably, for a court could possibly rule that a judgment in default of defence is not irregular by reason of the defendant's non-compliance with rule 8.05. If a plaintiff receives a sealed notice of appearance then it is arguable that the defendant is estopped from alleging non-compliance with rule 8.05 renders the judgment irregular. The defendant cannot take advantage of non-compliance with the rules or, said in another way, the defendant cannot by serving a sealed copy of a notice of appearance then argue that no appearance was filed.

However, what if the notice of appearance served is not a sealed copy? Is the situation changed? What if the sealed copy is served weeks after the date of the sealed copy? In these circumstances the plaintiff, assumed to know the provisions of rule 8.05, is on notice that rule 8.05 may not have been satisfied.

None of these problems would arise if the filing of the notice of appearance was the only act required by the defendant to enter an appearance.

An example of rules that create rights that flow from the defendant filing an appearance are the plaintiff's right to summary judgment pursuant to Order 22 or summary judgment in favour of the defendant pursuant to rule 23.03.

Until the Court is satisfied that rule 8.05 is satisfied it is arguable that no order should be made pursuant to these rules. There may be attempts to argue that the filing of the notice of appearance or the service of the notice generates some kind of waiver or estoppel as to the defendant arguing the question of non-compliance with rule 8.05. The Court or parties may argue that rules 2.01, 2.03 or 2.04 may be used to overcome the problem. The issues may be different depending on whether the defendant appears on the summons in the practice court and upon the nature of the application and whether it is the defendant or the plaintiff taking the point. What arguments will be appropriate if the plaintiff raises the issue on a defendant's summons pursuant to rule 23.03? What is the situation if there is an unopposed application for summary judgment by a plaintiff? Should the Court require the plaintiff not only to verify the cause of action but also establish that the defendant has filed an appearance? What is the position if the defendant appears on the return of an application for summary judgment and argues that the summons should be dismissed as there has been no appearance filed? The plaintiff may argue that the defendant should not be in a better position by reason of non-compliance with the rules. These various legal issues are all generated by reason of complications that arise when the appearance by the defendant requires more than a single event. I am of the opinion that the rights to summary judgment only accrue if an appearance is filed. If the defendant appears, and takes the point, then generally he should not receive costs; that is the penalty for not complying with rule 8.05. I am of the opinion that the appropriate order is to dismiss the summons or, pursuant to rule 2.01, rectify the non-compliance with rule 8.05 and adjourn the application. To rectify the situation depends upon what elements of rule 8.05 were satisfied.

If the defendant only served a notice of appearance dated the 4th day of June then the following order can be made:

Order that the defendant file a copy of the notice of appearance served on the plaintiff on or before the 16th day of June 1993 and further order that the defendant be deemed to have filed an appearance on the 4th day of June 1993.

If the defendant only filed a notice of appearance on the 4th day of June then the following order can be made:

Order that the defendant serve a copy of the notice of appearance filed on the 4th day of June 1993 on the plaintiff on or before the 16th day of June 1993 and be deemed to have filed an appearance on the 4th day of June 1993.

If the defendant filed a notice of appearance on the 4th day of June and served a copy of the notice of appearance, but did not comply with rule 8.05, then the following order can be made:

Order that the defendant be deemed to have filed an appearance on the 4th day of June 1993.

Pursuant to rule 11.05(2)(a) time runs for the defendant to file a third party notice once an appearance has been filed. After 30 days from the time limited for the service of the defence the defendant must obtain leave to file a third party notice. If rule 8.05 is not satisfied time has not commenced to run. The third party filing an appearance must comply with rule 8.05. See rule 11.08(3). Rule 8.05 would not seem to apply to serving a notice of appearance on the plaintiff, see rule 11.08(2), but it does with respect to the defendant. See rules 11.08(1) and (3).

If no appearance is filed then a number of rules are affected. These are:

1. any rules that rely upon or relate to pleadings after the "service" of the defence;
2. any rule that creates rights or obligations on the "close of pleadings".

A variety of arguments can be developed to avoid the problem of non-compliance with rule 8.05 and the question whether a defence has been served. First it can be argued that if a defence is physically filed or served then any rule that is dependent on "filing" or "service" of the defence will apply. Waiver and/or estoppel can be raised.

Rules 2.01, 2.03 or 2.04 can be resorted to in order to attempt to salvage the situation.

However, it seems that rules 8.02 and 14.04 may result in the conclusion that until rule 8.05 is satisfied no defence can be served.

The following analysis assumes that no defence can be served if rule 8.05 is not satisfied.

Rule 14.08 provides that pleadings close 30 days after service of the defence or the last pleading. If rule 8.05 has not been satisfied then pleadings cannot close for the defendant cannot serve a defence until an appearance has been filed.

If rule 8.05 is not satisfied then pleadings cannot close and it follows that the parties do not have any rights to set the proceedings down for trial pursuant to rules 48.02 and 48.03. Assume a plaintiff seeks an order that the proceedings be set down for trial on the failure of the defendant to sign a certificate of readiness. The defendant raises non-compliance with rule 8.05. There is probably no doubt

that orders will be made to rectify the situation, such as deeming that the defendant has filed an appearance, and then orders can be made to set the proceedings down for trial. But the plaintiff may be at risk of an order that there be no order as to costs. What if the defendant is seeking the order and the plaintiff raises non-compliance with rule 8.05?

A variety of arguments can be developed to avoid the problem of non-compliance with rule 8.05 and the question whether a defence has been served.

If pleadings have not closed then pursuant to rules 20.02(1) and 30.02(2) the parties do not have rights to serve a notice for discovery or interrogatories without leave of the Court. Thus if rule 8.05 has not been satisfied there are many summons seeking an affidavit of documents or answers to interrogatories which could be dismissed.

There are specific difficulties in relation to parties seeking an order for discovery of documents. Rule 29.02(3) provides:

> A notice for discovery served before the pleadings are closed shall be taken to have been served on the day after pleadings close.

In a number of unopposed summons seeking an order for the respondent to file and serve an affidavit of documents I have ruled that the applicant must establish that rule 8.05 was satisfied. In the County Court, where Order 14A applies to the proceeding, the applicant must also establish that rule 14A.05 has been satisfied.

In those cases where the applicant is the plaintiff the practitioner appearing can rarely prove that rule 8.05 was satisfied. In some cases not even the defendant's solicitor could show compliance with the rule. This state of affairs is unsatisfactory and the problem arises from the difficulty of proving compliance with rule 8.05.

Where a defendant sought a self-executing order dismissing the plaintiff's proceeding for non-compliance with a notice of discovery I required the defendant to establish compliance with rules 8.05 and 14A.05. In this case the plaintiff's solicitor had filed a notice of ceasing to act as solicitor for the plaintiff and the plaintiff was unrepresented. There was no appearance on the return of the summons by the plaintiff. Counsel for the defendant was unable to show compliance with rule 8.05 and I made the following order:

"Order that:

1. The defendant be deemed to have filed an appearance on the 16th day of February 1993 and be deemed to have served a defence on the 16th day of March 1993.
2. Pleadings be deemed to have closed on the 16th day of April 1993.
3. Unless the plaintiff makes files and serves a notice of discovery within 21 days of service of a copy of this order then the proceedings be dismissed and the plaintiff pay the defendant's costs of the proceedings to be taxed on scale 'D'.
4. No order for the costs of this application."

THE REALITY OF THE ADMINISTRATION OF RULE 8.05

The reality of the administration of rule 8.05 in 1993, after four years of considering the rule in the practice court, is as follows:

1. many solicitors have no knowledge, of the rule. Of those that do appreciate the rule's existence, most do not worry about the technicalities of the rule. Few have a system to enable proof of due compliance of the rule;
2. many barristers and judges have no appreciation of what is necessary to file an appearance pursuant to rule 8.05. When they are informed they generally reply "how unfortunate".

The rule to date has not been significant in the Supreme Court. I have not heard of the issues concerning summary judgment, the setting down for trial, discovery or interrogatories being raised.

For some three years the Prothonotary and Registry offices accepted notices of appearance by mail. Thus for a substantial period of time the courts condoned a system that prevented due compliance with rule 8.05. Many of the problems associated with rule 8.05 apply to rule 14A.05 in the County Court.

ARGUMENTS IN FAVOUR OF RULE 8.05

It can be argued in favour of rule 8.05:

1. that the rule solves a difficult problem;
2. that the rule should not be discarded simply because many practitioners disregard or find compliance with the rule onerous;
3. that the rule is not complicated.

ARGUMENTS AGAINST RULE 8.05

While the rule solves the problem of dual obligations it should be rejected as it is too difficult for the Court and the plaintiff to know whether it has been satisfied. This uncertainty places the plaintiff in an intolerable position in regard to entering a default judgment.

The fact that the appearance by a defendant lies at the base of a variety of rights and obligations makes it an important rule and of necessity it is imperative that all parties and the Court can readily determine if the rule has been satisfied. The rights and obligations associated with the defendant filing an appearance are as follows:

While the rule solves the problem of dual obligations it should be rejected as it is too difficult for the Court and the plaintiff to know whether it has been satisfied. This uncertainty places the plaintiff in an intolerable position in regard to entering a default judgment.

1. pursuant to rule 8.02 no step may be taken by a defendant until an appearance has been filed;
2. the obligation to serve a defence and the correlative right in the plaintiff to enter judgment in default of defence flow from the defendant filing an appearance (rules 14.04 and 21.02(1));
3. the time running for the defendant to file a third party notice flow from the defendant filing an appearance (rules 11.05(1) and 11.05(2)(a));
4. the right to summary judgment by a plaintiff pursuant to Order 22 or the defendant pursuant to rule 23.03 depends upon the defendant filing an appearance;
5. the close of pleadings and setting proceedings down for trial depend upon a defence being served which depends upon the defendant filing an appearance (rules 48.02 and 48.03);
6. the close of pleadings and the parties rights to discovery and interrogation depend upon a defence being served which depends upon the defendant filing an appearance (rules 29.02(1)(3) and 30.02(2));
7. in the County Court the self-executing rule embodied in rule 14A.11(2) is triggered by the defendant filing an appearance. However Registry cannot determine if rule 8.05 is satisfied and trigger the rule on the filing of a notice of appearance on the basis that the defendant has complied with rule 8.05.

Registry likewise assume a defence is "served" if it is filed and ignore the provisions of rule 14A.05.

The importance of the concept of an appearance in the hierarchy of the rules of court is obvious. Whether the defendant has entered an appearance must be easy to determine. Rule 8.05 fails this obvious requirement. Interstate lawyers will need to comply with rule 8.05 pursuant to s.14(c)(i) of the *Service and Execution of Process Act* 1992.

THE PREFERABLE RULE FOR A DEFENDANT APPEARING

I am of the opinion that the prescription for the defendant to appear should revert to the former terminology of the defendant "entering an appearance".

The defendant should enter an appearance by filing a notice of appearance.

The defendant in another rule should be required to forthwith serve a sealed copy of the notice of appearance on the plaintiff. However, the failure to comply with this rule does not mean there is no appearance by the defendant.

The Prothonotary or Registrar should post a copy of the filed notice of appearance to the plaintiff as soon as possible after the notice of appearance is filed. This new rule will overcome the problem of the defendant failing to serve the notice of appearance on the plaintiff, or serving it late on the plaintiff.

These suggested rules present none of the difficulties that arise from rule 8.05. If the plaintiff does not receive a notice of appearance from the defendant or the Court, then a search of the file will generally reveal whether the defendant filed the notice of appearance before the plaintiff commences entering judgment in default of appearance. I say generally as there is the possibility that a notice of appearance could be filed in another proceeding and thus not be found when the plaintiff conducts the precautionary search.

Not all problems can be eliminated. However, the suggested rule seems preferable because all parties and the Court can easily ascertain if the defendant has entered an appearance.

R. Patkin

BAR NEWS INTERVIEWS NEW CHIEF MAGISTRATE NICK PAPAS

In January this year Graham Devries, on behalf of *Bar News*, interviewed our new Chief Magistrate:

Bar News: Has it been a hard act to follow Justice Brown?

Chief Magistrate: Yes. It has been a hard act to follow Justice Brown. Sally had enormous energy and enormous ability to get through work and I was able to see that very early on when I tried to plough some of the recent correspondence. Obviously I am following in the steps of a very popular and impressive former Chief Magistrate, but it has not taken long for me to forget about that and get on with my own approach to it. Because I have come from outside and because there is so much to do in terms of administering a Court where there are 93 individual judicial officers, I really have not had time to reflect too much on the act that I am following. I read through various old memoranda and see Darcy Dugan's hand on some, Sally Brown's hand on others. I say to myself sometimes, that is a good idea. Other times I say, why did they do that? Yes, it is a hard act to follow but it is not too overwhelming at this stage.

BN: And what changes will there be?

CM: I do not know that I can predict any changes at this stage.

I am toying with ideas in relation to a different style of administration in terms of maybe involving the Magistrates in decision-making in a slightly different way. But that is not something that is going to happen immediately. That is something that needs to be put to a meeting of all Magistrates and at some stage in the future there might be some fine-tuning. I think some changes will be imposed on the Court though. It might well be whilst I am in the process of learning as much as I can and asking questions of people, as only an outsider can. If I had actually been a Magistrate for any period of time or had been involved in the administration I probably would be not willing to ask some of these questions. I keep asking, "why is this done, why is that done?" and people look at me and say, "Ah well, I suppose I had better answer him because even though that is such a stupid question he had better know the answer". Sometimes the questions are not so stupid but they are well worth asking.

The changes that might be imposed are going to be imposed because of economic imperatives. South Australia has recently introduced a new independent authority that runs the Courts separate from Government. New South Wales is going down the path of autonomy for the Courts, whether it is going to be together or individually is not quite finalised. The Federal Court has its own administrative unit separate from Government. The High Court administers itself and has done for a long time and the Family Court does. We have a different approach. We have a benevolent, paternalistic department that provides our service and it may be that there will be some changes in the future and there might well be some movement towards a model similar to the other States.

BN: Or perhaps a privatisation of the Magistrates' Court.

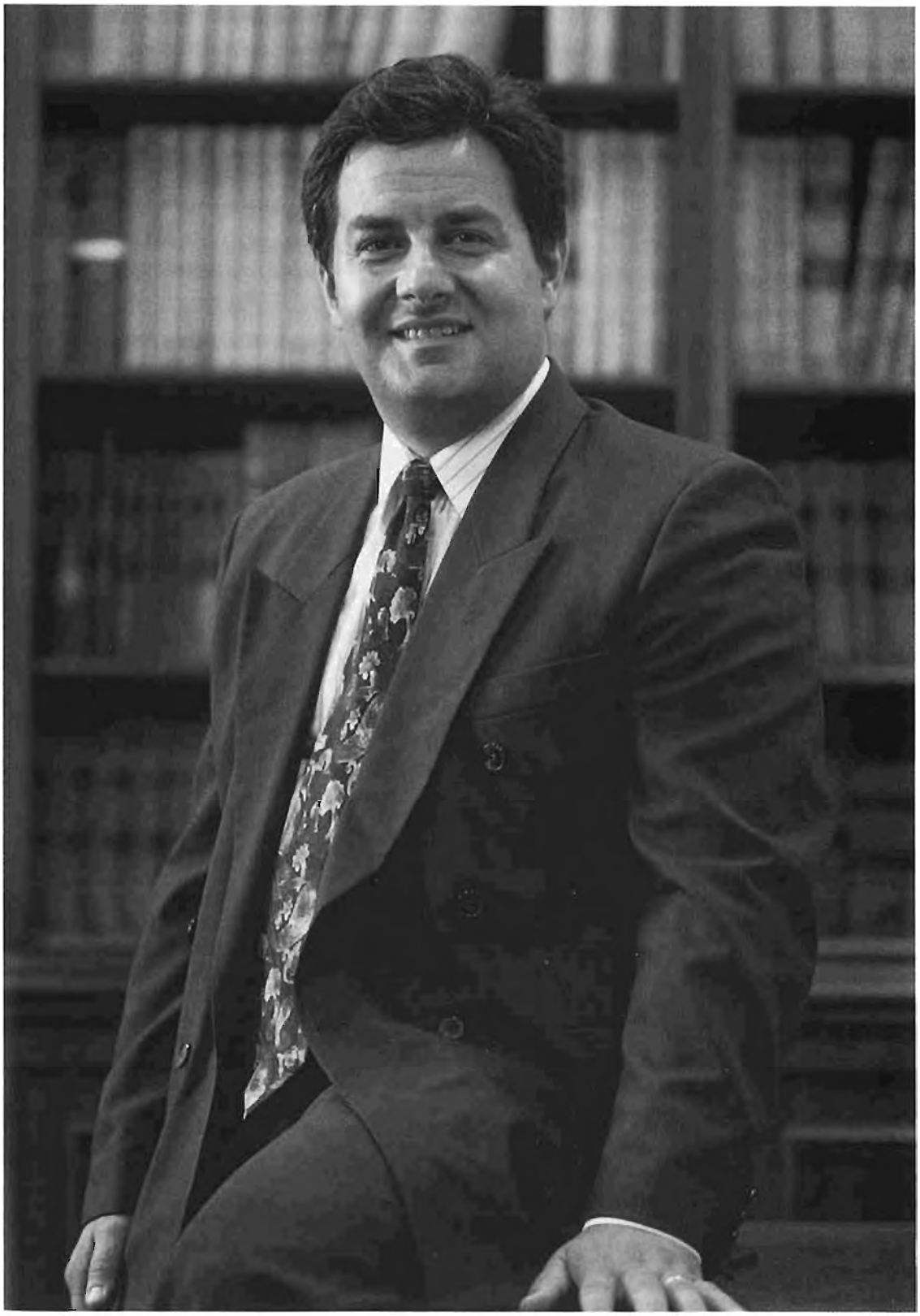
CM: (Laughing) I would like to see how we could do that. It might introduce some new techniques of justice. Have you got any ideas? I'll put them to a vote.

BN: Not at this stage. How did you enjoy your first few days in the glare of the media scrutiny?

CM: It was a real eye-opener for me and something that I had not been particularly used to. It has given me a new perspective on the media which I will not comment on at the moment. It has also helped me reassess myself, given my skin a bit of a thicker feeling to it. You can not take a job on without being subjected to criticism and I have got no problem with being criticised. My father told me a story in the middle of all the scrutiny, in his strong Greek accent. He said that when a diamond comes out of the ground it is dirty and discoloured and uneven of shape and only with vigorous rubbing and polishing does it end up looking particularly shiny and attractive. I thought that was a very good analogy. I just took that first initial blaze of publicity and criticism as a vigorous rubbing and polishing because I cannot expect to be in this position without being subjected to enormous scrutiny and criticism at times and I will just have to wear it.

BN: But you would not have expected it on Day 1?

CM: No, I thought I might have had a few months to ease into it. Anyway, it was a baptism by fire and it has gone now and I have survived it and I will continue to survive and it will take a lot more



Chief Magistrate Nick Papas

than ill-informed criticism to knock me off my stride. At the same time I will not hide, I expect to be subjected to careful attention and I am sure I will stand up to it.

BN: I would have thought that rather than baptism of fire it was a very vigorous shove in the deep end.

CM: I said to someone I knew it would be hot in the kitchen when I took the job but I had no idea it would be a bloody bonfire. I thought that was the best analogy I could give.

BN: Yes, your predecessor had a fairly high public profile.

Do you expect to maintain the same high profile?

CM: I hope not to. But I do not know that I have got much choice. There is an enormous amount of media interest in the Court and in issues that arise from the operation of the Court. As an example, today I had a journalist ring me and ask some questions about televising Court proceedings. I have probably got an unpopular judicial view and that is that it is an open court, it is a modern world and in certain appropriate circumstances I do not see how we can resist, in due course, the televising of courtroom proceedings. I should be heard on these things. I need to have a view.

I sit in Court One, generally, when I can sit. That happens to be the Court where all the high-profile Court criminals get brought through for bail or remands. I really do not have any choice in the matter, I do not think. But I will try to keep my head in as much as possible for as long as possible because I really need to concentrate on the workings of the Court.

BN: Do you aim to become "Beak of the Week"?

CM: (Laughing) I would not dare. Dugan had that flair and the ability well under control and I do not know that I could ever match him. I would hope to stay out of "Beak of the Week".

BN: The new Melbourne Magistrates' Court appears to be rising phoenixlike out of the dust of the old Law Courts Post Office. Are the building works on time?

CM: The building works are dramatically ahead of time. At this stage approximately six months ahead of time. We anticipate the shell being completed sometime in the middle of the year, fitout commencing at that time and a progressive handing over so that the Court will be in there towards the end of 1994. We hope to have the whole thing up and running by the beginning of 1995.

BN: What impact will that have on the operation of the Court as a whole?

CM: I think it will be a dramatic change in terms of Magistrates' facilities and for anybody who hasn't had a chance to look at how awful the facilities are here, the Magistrates will not know what to do with themselves. They did not manage to keep their shared en suite toilets but, notwithstanding that setback, they will all have individual Chambers, a proper area for meeting and a desk that they can call their own. Other than Magistrates' personal comfort there will be be an increased level of security for both Magistrates and Court participants, there will be many many more court-rooms available which will give greater flexibility both in criminal and civil proceedings and we will have the ability to co-ordinate the work much more efficiently so that in a very short time I would expect the business of the Court in the inner urban region will be dramatically improved. So I think it will have a very dramatic effect on the operations of the Court.

BN: And on Magistrates' morale, I suppose?

CM: Magistrates, as I said, just will not know what to do with themselves. The facilities here are so bad that even though I had been told about them, on my first day as I proudly walked around I looked at the Library where four or five Magistrates have to sit around totally displaced, I looked at La Trobe Chambers which are upstairs on this side, the La Trobe Street side of the building, where seven Magistrates have to share what used to be one small court-room upstairs. I went to the flat and looked at an old caretaker's arrangement where there are rooms dotted around where Magistrates are able to share two to a tiny room, and I was amazed. So I think morale will be dramatically improved once we get in that new building.

BN: So we won't have any more bad-tempered Magistrates?

CM: I can not guarantee that, I am sorry. Those who tend to bad temper might well be a little bit more pleasant, we hope.

BN: And does that mean that there will be more closures of suburban courts?

CM: I hope not. The current situation is in this inner urban region that we run this Court, which is the Melbourne Magistrates' Court in Russell Street, as the central criminal court. The civil work is done at 471 Little Bourke Street. Elsternwick runs as the court that deals with sex offences where there are children involved and where there is a need for the remote witness facility with the video arrangements that are in place. Brunswick runs as the security court for purposes of prisoners and others who are in custody for long committals. We also have use of Marland House in the short term for Commonwealth cases and other long cases and in the past have also used a court in Queens Road. All of those courts will be closed and the cases will be centralised into the new Melbourne Magistrates' Court. I left off WorkCover, a relatively new jurisdiction. At the moment we have three or four Magistrates sitting in WorkCover; they will also be coming into the Melbourne Magistrates' Court.

Prahran, which is the only other court in the inner urban region, will continue to operate at the moment and for the forseeable future. It is a busy court and I do not know that the new Melbourne Magistrates' Court could cope with the additional work if Prahran were closed. So I do not know if there are any plans for that. There are other courts opening though. Dandenong will open on 1 August 1994 and when that opens the salubrious surroundings of Oakleigh and Springvale will never be seen again and those who practised in those regions I do not think will be particularly unhappy about that.

BN: That's true. Is there any thought, once the new building opens, of centralising all Melbourne metropolitan area civil matters in the one complex?

CM: There has not been any thought given to that. I do not know that we would have enough court-rooms. The new court complex is going to have 32 court-rooms. Officially 30 court-rooms and two hearing rooms and a number of pre-trial hearing rooms and other such facilities available for the preliminary hearings that are currently conducted. Broadmeadows, I think, sits up to eight Magistrates or something of that sort one day per week to cover their civil work. Heidelberg also adopts that procedure as I understand it and sits as many free Magistrates as are available on the one day. At the moment I think that is the same day as Broadmeadows but that is being changed. I think it is going to Tuesday, Broadmeadows being Wednesday and Heidelberg being Tuesday. The southern region sits every day as I understand it and the City Court sits every day up at 471 Little Bourke Street. I do not know that we could cope if we tried to centralise it and I do not know that it would be an advantage because it would certainly be causing dislocation to people whose physical cause of action occurs in the Region. In other words, if it is a crash and bash and happened at Broady, is it fair to bring the locals all the way into the City to hear their cases?

BN: If it gave them a better chance of getting on and not being sent away and not reached, it might be worth considering.

CM: Is that a problem? I am not aware that we have got significant problems in the Regions about not being reached. I am told, and no doubt you will correct me, that the system that seems to be employed at the moment at both Broadmeadows and Heidelberg at least gives more chance of getting on in terms of there being so many Magistrates available and ready to go.

BN: I am not sure about Broady. I have not been there for a while but Heidelberg seems to have improved. I am not sure about Frankston - that went through a bad period last year.

CM: I do not know that we are doing that well at Frankston at the moment. The delays in the Frankston region are unacceptable both in crime and in civil. We are going to try and do something about that. When Dandenong starts on 1 August that will make a significant difference. We are going to have seven Magistrates at Dandenong and five at Frankston at this stage. That will provide a significant increase in the number of courts available for cases to be heard in that Region.

BN: As long as Magistrates are always available and are not taken off for other duties.

We are going to have seven Magistrates at Dandenong and five at Frankston at this stage. That will provide a significant increase in the number of courts available for cases to be heard in that Region.

CM: Well that is right. Because it is the Magistrates' Court of Victoria and because we have got limited numbers of Magistrates we have to try and prioritise as best we can. But my duty as Chief Magistrate is to provide a Court and a Magistrate wherever there is a need for work to be attended to. I think by and large the Magistrates' Courts have been performing pretty well. I think the delays in the Magistrates' Courts are certainly less than the sorts of delays that are faced in the superior courts in civil work and would not be surprised if there is a move towards broadening our jurisdiction further in the civil jurisdiction in the future, even though, of course, that is a matter for Government.

BN: Where do you see the jurisdiction of the Magistrates' Court going?

CM: I think realistically it can only go up both in crime and in civil proceedings. Our WorkCover jurisdiction is significant now and there is quite a significant overlap with the County Court jurisdiction as I understand it. We have got an Industrial Division. We have got a criminal jurisdiction that was expanded by the enactment of the *Sentencing Act*. Magistrates are now dealing with cases that even a few years ago there would have caused shock and horror at the prospect of a Magistrate dealing with a robbery. Nowadays, Magistrates are dealing with a whole range of cases a lot of which were listed as committal proceedings and are being settled under the Pegasus Project style of approach. A more pro-active approach has been taken so cases that were originally destined as County Court trials are ending up being heard by Magis-

trates as pleas: significant trafficking, significant violence cases.

I see the crime jurisdiction increasing and I see the civil jurisdiction increasing. At the moment it's a pretty healthy maximum but South Australia has $50,000 as a maximum now. I am not sure what New South Wales is. The other jurisdictions are all in the process of broadening their maxima and I would not be surprised if we have the same happen here. I mean, who would have thought a few years ago that a Magistrates' Court would have a jurisdictional maximum of $25,000? It was proposed to be $40,000 and it could be $40,000 before we know it.

BN: A little more than a decade ago the County Court's jurisdiction was no greater than the Magistrates' Court's jurisdiction now — both in crime and civil matters.

CM: That is right. It is cheaper and unfortunately the way life has gone there is an incredible emphasis on costs. An incredible emphasis on what it is actually costing the community in money, efficiency — the public dollar has to be accounted for. The courts are not immune to these sorts of pressures and we really are being placed under enormous stresses.

BN: How are those stresses impacting upon Magistrates and the Chief Magistrate?

CM: Well, the Chief Magistrate has his own imposed stresses because I have got such a steep learning curve. That is such a classic old phrase, "steep learning curve," but I have got so much to learn and so relatively little time to do it because those stresses of having to perform economically are the current agenda of the Government. The Government wants to see value, so the Court's budget has been reduced over the last few years and it is going to be reduced again. That means we have got to do more work for less money and as Magistrates, we are given less facilities in the sense of less clerks, less time, more jurisdiction. So the workload is increasing for Magistrates in terms of numbers and, in terms of the need to keep the work going through, there is the constant pressure. So I think, when we talk about stresses, the obvious, the pressure on staff, younger staff, less experienced staff to assist Magistrates — clerks who cannot stay in court for the whole hearing, who have to rush off and go and do something else. The sorts of nuts and bolts type of things that do not make the job as enjoyable and as efficient as it perhaps can be.

Going back to the Chief Magistrate, I have got to worry about budgets, financial planning and relationships with my Department. I apparently need to think of things like concepts of judicial administration. I used to think they were very interesting if someone else read them but now I have a stack of paper about a foot high on my desk with all the reading I need to do on the new style of theories of judicial administration.

BN: Case Flow Management?

CM: Case Flow Management, I must say, is very much a non-theoretical subject; it has developed very much in a practical fashion. I hope the Magistrates' Court is a classic example of efficient case flowing management techniques. Young barristers are well aware of the joys of the Mention List. There are callovers, there are committal callovers, there is contest mentions, there are in the civil jurisdiction pretrial hearings, compulsory arbitration under a certain financial sum. There are all sorts of techniques leaving aside the quasi-tribunals and jurisdictions that we have got outside the Magistrates' Court itself. So the times are changing and will continue to change.

There is an incredible emphasis on costs. An incredible emphasis on what it is actually costing the community in money, efficiency — the public dollar has to be accounted for. The courts are not immune to these sorts of pressures and we really are being placed under enormous stresses.

BN: Returning to your "steep learning curve". How did you find your acceptance as someone who came from outside the Magistracy?

CM: Good question. I think there was quite a degree of shock when an outsider was appointed Chief Magistrate. I think probably misplaced shock because if you look at other jurisdictions there has been no tradition necessarily of appointing Chief Judges or Chief Justices from within the Court. In fact, it has been said in those jurisdictions it is good sense to appoint them from outside so that the seniority approach is not affected. There would be a lot of noses out of joint if a Judge junior to others leapt above them to become Chief Justice or Chief Judge. But I must say, the Magistates have been totally professional, very warm, very friendly and so far not a ripple of concern has been directed towards me.

BN: If we can take the reverse situation for a moment. How do you see your role if you receive complaints about individual Magistrates, or groups of Magistrates?

CM: That is exactly the thing that raised its head very early on in my time here and I have very quickly taken the approach that I am not any Magistrate's boss, I am not their employer, I have absolutely nothing to do with what they do in court in the sense of their exercise of their judicial function. They are independent judicial officers who have taken an oath to conduct themselves in accordance with the law. I am at pains to ensure that I am not seen to be attempting to influence or in any way attempt to change the way they conduct themselves in the judicial fashion. However, when complaints are received I also think it is my duty to advise the Magistrate of the complaint and what I tend to do is simply to pass the complaint on, with the copy of the letter I have written back to whoever has complained pointing out the Magistrate is an independent judicial officer and that it is not my job to supervise or in any other way interfere with what they do in court.

BN: Does that include their style or their manner of dealing with people who come before them?

CM: Yes! I do not see that I can influence Magistrates based on allegations of subjective concern. You talk about style, you talk about manner. How many of us as barristers in the past have had to put up with shirty judges who have made us shake in our boots and sweat under our wigs and wonder what the hell we are doing in there and why we have chosen this profession. That is the way it goes. Most people have some personality traits that are unpleasant. I think most practitioners get used to that in the long run. It is a robust place going to court and it is not for retiring types to willingly undertake going to court. At the same time, members of the public, litigants, accused persons and police all deserve equal treatment and deserve polite and reasonable treatment. I just think a Chief Magistrate, as Chief Administrator of the overall system, has to have a very limited role indeed when it comes to those sorts of issues.

BN: And not even a counselling role?

CM: There might well be a counselling role. There is most certainly a personal relationship that develops between the Chief Magistrate and individual Magistrates and that might go down to the question of discussions about a particular approach to issues or a particular manner that might be expressed, but it is very much a balancing act and my preferred position is to say that I would not willingly become involved with a discussion with a Magistrate about anything that they do in court other than if they approach me. I hope that that would be what happens in the future.

BN: If I could return to another matter. You talked about the new WorkCover Area. Do you see the Magistrates' Court of Victoria in the future taking on any other jurisdictions such residential tenancies, small claims, credit tribunal, or other areas not yet thought of?

CM: I would hope not for the moment because I am sure we would not get any more money to do it. That is probably cynical. I expect we will be given more jurisdictions. I have no inside knowledge as to which or when. All of the ones you have mentioned might well transpose easily into the jurisdiction of the Magistrates' Court similar to how the Crimes Compensation Tribunal came in under the operation of the Magistrates' Court. I worry about the merging of the distinction between tribunals and the Magistrates' Court. I worry that a tribunal has traditionally been something that is more direct example of Government policy being placed under the auspices of what is a truly independent court process. I would be concerned if there was confusion in Government between what a tribunal does and what a court does. Tribunals would say, "yes, but we're independent and we exercise independent powers" but traditionally tribunals have not had tenure, traditionally tribunals have been an arm of Government policy in relation to areas of concern. I would be, whilst I would not say resistant to additional jurisdictions, I would be wary of the effect it could have if a Magistrates' Court became all things to all persons.

BN: What about the other side of the coin? Divesting some areas of the Magistrate's role. Such as the current, relatively small, arbitration jurisdiction.

CM: I do not know that I would necessarily have any opposition to things like that but we have got to be a bit careful. It is alright if people can opt to go into a court if they want to. So I use the analogy of speeding tickets, parking fines, all sorts of low-level infringements that can be dealt with by on the spot fine. If there was some analogy to be drawn with some very low-level civil disputes where an aggrieved party could opt to go for court rather than some low-cost alternative, there might be something to be said for that. I still believe very much in the importance of the Magistrates' Court to the people to be the cheap alternative. But the reality is (I said this at some stage to a journalist), I do not think I could afford any decent litigation and I do not know that many barristers could either.

BN: Yes, I read that recently.

CM: It is a worry. It has got to be. What service are we providing as barristers, as lawyers, as Magistrates, if we have ended up running a system where even well paid people cannot necessarily contemplate any length of time in court?

I could see an argument for matters of, say, $1,000 or less or maybe even $3,000 and less being dealt with within the auspices of the Magistrates' Courts but by a Senior Registrar using the arbitration procedures.

A compulsory mediation process with some sort

of powers of direction or some sort of powers of compulsion might be a good way of sorting out those small cases. Crash and bashes are a good example and still loom large in my fond memories of my civil days and I have no doubt I will go and do some civil work soon to remind myself of what that's like.

A $1,000 each side crash and bash where the parties are locked into some fervent belief in who was right and who was wrong, as far as I can see, is a total waste of time and always has been. Similarly with small building disputes, to use that horrible phrase; for example, the plumber who puts in a toilet and the thing does not work and the total cost of the job is $500 or $700. Where does the person go? Is that a small claim? I do not know if it is. But even if it is, the Court is set up, the Registrar is a professional, they understand what the judiciary do and my preference would be to see some sort of system like you postulated rather than an outside tribunal and that sort of thing.

BN: I am not convinced about the Small Claims Tribunal system.

CM: Neither am I. I suspect it probably works to a degree but I suppose we are all suspicious because we have never had a look at it because they won't let us in to have a look.

BN: Exactly. We were talking about the direction of the Magistrates' Court and a little while ago we were talking about the taking-over of jurisdictions of the County Court having occurred not all that long ago. Do you see the Magistrates' Court becoming more like the County Court in other ways such as transcripting proceedings; becoming a Court of Record . . .?

CM: The more we deal with, in terms of money and jurisdiction, the more we should be like the County Court. I am very critical of the culture that seems to have developed amongst some groups of people that the Magistrates' Court is simply an arm of Government, a public servant-type body. That has changed over recent years and with more outside appointments it will continue to change. I am very critical of the proposition that you go to court to be dealt with and you can go to gaol for a number of years in a Magistrates' Court and there is no record of what was said. I find it extraordinary that our facilities have got to the stage where as a court — we are said to be a court and subject to the usual rules that a court is, we are appointed for life and yet our litigants can be treated in that way. What is worse than running a civil case and being absolutely convinced you have a point of law and then we have the affidavit process of who said what and what was done and answering affidavits? I mean, it is totally unprofessional.

I think there is a good argument for the Magistrates' Court to be seen in a different light and to act differently. Now we have budgetary problems — recording costs money. I am told that Sydney is looking at reassessing its own "record all cases" policy. I think, though, in Victoria we are the only jurisdiction that does not record its Magistrates' Court proceedings.

BN: Will the new building have facilities for a central recording set-up such as they have in the Family Court?

CM: No. But it will have facilities for recording and we are introducing slowly, but surely, training for Clerks of Courts to be able to operate the tape machines. In due course, if the funds are available and the training is completed and there are enough machines, we can do it. It really is a question of having the budget for it and having the will to do it.

What is worse than running a civil case and being absolutely convinced you have a point of law and then we have the affidavit process of who said what and what was done and answering affidavits? I mean, it is totally unprofessional.

BN: Do you see the Magistrates' Court taking over any other style of the County Court or any other County Court-like aspects?

CM: I do not know that we would ever robe. There has been some talk of perhaps wearing a gown without a wig. That was an attractive proposition. It is a court and should be given some sort of formality in its appearance. The Connors/Marks report, which was a report into judicial remuneration that was completed in 1992, in fact made a finding, or gave the Government a recommendation — that was, of course, to the previous Government — that the Magistrates' Court should be renamed the Local Court and Magistrates should be called Judges to emphasise the fact that the Court is part of a triumvirate of Courts in the State. When I first read that I was a bit ambivalent about it but it is not as strange or perhaps petty as it might first seem. There does seem to be a sort of a distinction between the way the Magistrates' Court is dealt with and the Superior Courts. I myself as a barrister fell into it very early on: "only the Magistrates' Court!" The Court is doing a lot of very heavy work nowadays so it has really got to be looked at differently.

BN: It seems that Chief Magistrate Papas is not going to change things radically at this stage. Has the appointment changed the Chief Magistrate?
CM: Hm. It has. It has given me an opportunity to see that there is a world outside the Bar. It has given me a new perspective on what it is that Magistrates do and an increased level of confidence and belief in my ability, I must say. It sounds a bit egotistic but one is always a bit nervous about taking on new challenges and at this stage I am still confident I can do the job. I have not gone home and felt like jumping off any buildings yet, so let us hope it is all of a downhill path from now on in terms of getting a little bit easier rather than harder, but I suspect the more time I am here, the more I will learn, and the harder it will probably get in terms of the more I know.

I have a very great regard for the work of all the Magistrates now having been here and seen, even though it's been for a short time, the sort of work that is done. It really is a very professional and impressive group of people. So from that approach it has changed me. I am not saying I came here with a low regard for Magistrates but I came here very open-minded, I must say, and any impressions I might have gained as a junior barrister running around the Magistrates' Court regularly have been cast aside fairly quickly. They were misconceptions generally.

It has changed me because I do not have to work every night on preparing the next day's case. I can plan my day better. Weekend work is optional now. I have learned the words "budget," "finance," "planning," "strategic planning"; a whole lot of buzz words that a few months ago, I must say, I looked at with a bit of disdain. Now I find them quite challenging. So from that point of view I am turning into a bit of an administrator, which is a worry. But I am sure that is a positive thing for the moment.
BN: What about looking back now that you are outside of the Bar? Have your attitudes to the Bar changed? Has your appreciation of the Bar changed?
CM: I think my appreciation of the Bar has changed. My attitude has changed as well. I, of course, have had the advantage of being slightly away from the Bar for three or so years when I was a Prosecutor for the Queen. It has been quite a while now since I have been self-employed so, having had an increased regard for Magistrates, I have also maintained my regard for my colleagues at the Bar because it is easy for me now. I get a pay cheque every fortnight, I am given a car, I have a Shell card, I fly at the expense of the State if I have to go anywhere on official duties.

I hope I never lose the urge for hard work and decision-making but to be a private barrister and to be putting yourself in the firing line often in unpopular ways with unpopular issues is a very important thing, and I hope the Bar continues to maintain its independent stance notwithstanding the pressures that are constantly being directed at it. But, having said that, the Bar will change — I have no doubt about that. It has to because of the change in society apart from anything else. The Bar has to react to the pressures that are being placed upon it so long as the changes are reflective of providing the same service. I have always maintained in terms of why I was a barrister was because I was able as an independent individual to stand between the state and the individual. That is why I generally did crime.

If the Bar can still maintain that — that is, where barristers do not owe allegience to anyone — unlike how solicitors conduct themselves where they do owe an allegience to clients, big clients, corporate clients, government, then I am sure the Bar will continue to maintain itself even if I think it will be in a different light. I mean clerking has got to change. You have got building problems, I think. There are all sorts of financial pressures from everywhere. Times are changing for barristers but I am sure there will be a Bar and I am sure it will conduct itself in the same way and I will always be a supporter of it.
BN: Whither Chief Magistrate Papas in the future?
CM: Where does Chief Magistrate Papas in the future go? Chief Magistrate for a number of years. I do not know how many. But obviously five, seven, ten, something like that and then who knows. I might find administration so much fun I might end up as a CEO of some organisation. I hope not, because I have always loved the Law. I prefer not to make any predictions. I think that I will take on this job, do it as best I can. What I do predict is that you will not see me here when I am 55. I am very young now as you are probably well aware. I would think that ten years would see me out in this particular job, and from then on who knows.

I might come back to the Bar but I think that would be a bit difficult. The reality is having been Chief Magistrate and having done the sort of work that I would have done, my skills as an advocate would have to have been diminished simply because putting your case and arguing your case is totally different from adjudicating on it. Also with the administration I will be involved in and the joy that I am having from that at the moment I think I will end up doing something quasi-administrative somewhere.
BN: It would be a bit difficult to go back to the other side of the Bar table, I would imagine?
CM: Others have done it. We hear of judges in other States having done it but I do not know that that is a very good move. It really is a backward step, I think. I have embarked on a career very young as an administrative judicial officer and I do

not know that I can really get off that treadmill. I think I have cast my die in the direction of that sort of work but where it ends up, who knows?

BN: Has it had an impact on your personal life, apart from changing your working habits?

CM: No, I do not think it has. My friends who are not lawyers are a bit bemused by what is a Chief Magistrate. I have had the question asked a number of times, well "what is it you actually do?" So that takes a bit of time to explain. "Well, I'm the Chief Magistrate," I explain to people. "Yes, well what does that do?" "Oh, I'm just the administrative head of a group of Magistrates." "Does that mean you go to court?" "Oh yeah, I go to court." "Do you send people to gaol?" "Oh, I've had to sentence some people to gaol." Yes, I spend a lot of time explaining what the Chief Magistrate does. No, I do not think it has changed my personal life. I do not want it to change my life. I think that, this might sound like a platitude, you have to look after your family life first. A job, in my view, always comes second. It might take up a lot of time sometimes but ultimately you have to get your priorities right and I think my priorities are with my family rather than with my job. Having said that you have still to pay the mortgage so you have to do your job properly.

CONFESSION OF ERROR

IT HAS BEEN SEVERAL YEARS SINCE *Bar News* last reported on the judicial opinions of Richard M. Sims III, Associate Justice of the Californian Courts of Appeal, 3rd District. Here we reprint *in toto* his concurring opinion in *People of California* v. *Webb*, 186 Cal App 3d 401 at 412, 230 Cal Rptr 755 at 763 (1986).

"I write separately to fall on my sword.

The majority opinion treats with charity *People* v. *Foley* (1985) 170 Cal App 3d 1039, 216 Cal Rptr 865, which I wrote. Although *Foley* reaches a correct result, its analysis is wrong to the extent it suggests the trial court must always obtain a supplemental probation report where a defendant, who is ineligible for probation, is being resentenced. (See *id* at p.1047, 216 Cal Rptr 865). The *Foley* analysis is wrong because I inexplicably failed to discover the controlling statute: Penal Code section 1203, subdivision (9).

Needless to say, this is embarrassing. To be sure, there is some comfort in the knowledge that other judges have been imperfect. Some of their remarks were collected by the late Justice Robert Jackson in his concurring opinion in *McGrath* v. *Kristensen* (1950) 240 US 162 at page 176 [other citations omitted]. Of these, my favourite is that of Lord Westbury, who allegedly rebuffed a barrister's reliance upon an earlier opinion of his Lordship with the following: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion".

While these words lend some comfort, the fact remains that this is the third time I have had to consider the same issue. I signed *People* v. *Savala* (1983) 147 Cal App 3d 63, 195 Cal Rptr 193, which summarily disposed of the probation report issue in a footnote. Then *Foley* disapproved the Savala footnote [citation omitted]. Now, in the instant case, the issue surfaces again, like one of George Lucas' vile monsters, apparently immune from the attacks of mortal judges.

I well know I resemble the man at the fair who needs all three baseballs to knock over the milkbottles. The good coming from all this is the knowledge that, having taken all conceivable sides on the issue, I must certainly at some point have been right. Unfortunately, it too obviously follows that at some point I must also have been wrong. (See *Lodi* v. *Lodi* (1984) 173 Cal App 3d 628 at 632, 219 Cal Rptr 117). Moreover, I am painfully aware that *Foley* probably caused the preparation of unnecessary probation reports in some cases, and those probation officers and trial judges who were inconvenienced have my apologies.

This court has been of the view that "absolution requires something more than an unadorned confession of [judicial] error" (*Taylor* v. *Jones* (1981) 121 Cal App 3d 885 at 890, fn 3, 175 Cal Rptr 678 *per* Puglia, PJ). If that be true, then surely my destiny lies in that place to which more than one lawyer has wished that I would go."

MELBOURNE JUVENILE JUSTICE CENTRE

ON 3 DECEMBER 1993 THE MELBOURNE Juvenile Justice Centre was opened by His Honour Judge Cullity, the Chairman of the Youth Parole Board and Chairman of the Youth Residential Board.

Set out below is the text of His Honour's address at the opening of the complex. It canvasses succinctly the purpose and function of and the hopes for the future of the centre.

"To fully understand this Program Centre it is necessary to have a bird's-eye view of its clientele. I speak in general of a Youth Training Centre population; not in the particular.

(a) A formidable offending history having already received and sometimes failed non-custodial community-based options.
(b) Low educational standards with a history of truancy, non-conformist conduct at school, school exemptions.
(c) History of wardship and foster care placements.
(d) Poor self-esteem, many with a lack of confidence to survive in society.
(e) Subservient to peer group pressure.
(f) Lack of motivation for work.
(g) No idea of type of occupation like to follow; they have never given it a thought; no-one has ever inspired them to do so.
(h) No appreciation of the benefits of further schooling, education or training. Addicted to "street kid" lifestyle.
(k) Heavily influenced by alcohol and drugs.

The most common denominator, I'd say common to at least two-third youth in detention, is a disrupted, disadvantaged home environment.

So many have never known the love, support and security of a caring home environment.

I believe so many have been neglected, so deprived of the normal opportunities for reasonable childhood and adolescent development, that they have in fact been grievously offended against as children, and consequently afforded very little chance of following a normal teenage lifestyle.

Society cannot excuse itself by glibly saying "they were born bad"; "they were born criminals". That's nonsense. They may very well have responded to a bad environment.

In particular, I am quite satisfied with many of them it is probably impossible to over-emphasise the horrendous and lasting impact upon them of parental separation and in particular abandonment by a parent; mother or father.

Not for a moment do I suggest that is the only form of disruption; however, as we all know, it is very common.

Consequently, is it surprising many know real hatred and are violent, particularly those subjected to violence and other abuse in the home. Is it surprising many can no longer trust? Is it surprising that at least for the time, when very young, they crave but do not find love, affection and security? Is it surprising many find it so difficult to confide in those anxious to help them? After all, they have experienced the ultimate in real treachery.

So many resort to alcohol and drugs.

The community is rightly concerned for the victims of crime. In like vein it should not be overlooked, in the case of so many youth who offend, they have prior thereto themselves been seriously offended against.

Considering this background, it is essential that maximum use must be made of time spent in custody directed towards reversal of recidivist trends and aimed at pointing youth towards "a new horizon".

Nothing will be achieved if they merely sit on their butt, play pool, watch TV and react adversely to consequent boredom.

In the words of Sir Arthur Rylah on the introduction into Parliament of the Bill that set up the Youth Parole Board, it is essential that we develop positive and dynamic programs in youth training centres, suitable for various types of youth. An essential part of the treatment is skilled guidance and supervision upon returning to the community.

For years that objective has been at least in part frustrated, particularly at Turana, by the totally inadequate, indeed depressing buildings and facilities. You have only to look around at what we now have to work with in these modern, indeed state-of-the art, buildings and facilities to experience a sense of satisfaction and a surge of excitement.

At last we have got what we have wanted for years. It is now up to us to make it work.

On behalf of the Youth Parole Board may I pay a tribute to the work performed over the years by the youth workers, teachers and management at Turana. Those who have worked at the coal face

deserve commendation for persevering under the most difficult and taxing surroundings.

The nature of our clientele continues to change. We are multi-cultural. There is a discernible tendency for heavier-type offences to be committed at a younger age. Drugs and alcohol dominate the scene.

The techniques of training are not static and undergo constant review.

I salute the way in which in all the circumstances staff and management have devoted themselves to the interests of the trainees and achieve such good results.

It gives me great joy to be so closely associated with the opening of this new Program Centre.

I recall those excellent men and women who have sat with me on the Youth Parole Board over the years and with whom I have joined in our Annual Reports in stressing to Government the high necessity for the introduction, maintenance and funding of meaningful programs. They would all share my exhilaration on this day to observe this magnificent multi-purpose facility.

This is an ideal environment in which youth officers of positive vision dedicated to the personal attainment of a wide range of professional skills directed to the establishment of first-class exit programs for trainees will be able to exploit that training and skill to maximum effort. There is nothing negative about this place.

We applaud the continued involvement of TAFE personnel and their provision of such a comprehensive range of positive activities that will open the door to further education and career paths. So many trainees, prior to detention, have merely lived from day to day and never been challenged to give thought to a positive constructive future. The gauntlet will now land firmly at their feet.

We welcome on board the YMCA to direct a wide range of recreation programs that are guaranteed to be enthusiastically supported by the trainees.

This program area is the focal point, the boiler room, of this Melbourne Juvenile Justice Centre. Its proper operation will involve a real team effort involving management, youth workers, staff, TAFE, YMCA, and the health professional staff.

The buildings are static. It is the people who work therein who will breathe life and vitality into them. It is our commitment, our resolve, our vision, our energy, our determination, our perseverance and our co-operation one with the other aimed towards a standard of excellence that will mark the Melbourne Juvenile Justice Centre a "goer".

Let us occupy this Program Centre motivated by the philosophy expressed by Sir Winston Churchill many years ago.

Whatever be the role we play let us enter this Program Centre with a desire and eagerness to direct towards a new horizon those under our care who are paying their due to society in the hard coinage of punishment.

Let us engage in tireless effort towards the discovery of curative and regenerative processes with an unfailing faith that there is a future, if you can only find it, in the heart of every person.

As Sir Winston said, these are the symbols which in the treatment of crime and criminal mark and measure the stored-up strength of a nation and are sign and proof of the living virtue in it.

We cannot pass this opportunity up.

We cannot afford to fail.

It is a great honour to declare open the Program Centre of the Melbourne Juvenile Justice Centre.

In so doing I cast myself in the role of representative of those who have in the past and will in the future work at grass roots level with those in our community who need society to provide special measures for their disposition and support."

TRAVEL

CLIVE PENMAN: ALL AT SEA

WHILST IT HAS BEEN TRADITIONAL FOR large numbers of Counsel to flee Victoria during the "Long Vacation," whether in search of the sunshine so elusive in this State or promise of the "culture" that only a European experience can provide, such numbers are steadily dwindling because of changing economic times. For one member of Counsel economic circumstances have never changed and for him and family "OS" has only ever meant Phillip Island. During the Christmas just passed the Penman family decided to splash out: herewith follows Clive's account of a more ambitious than usual Christmas holiday.

"It all started at the beginning of the last school year. I thought we had had a good holiday. We had visited Healesville Sanctuary, the Zoo, the Penguin Parade, the Circus, Werribee Park and a one-day cricket match. We even spent a day at Elwood Beach on the one hot day of summer. But apparently that wasn't enough. The twins came home from school, during their first week back, positively distraught and abjectly jealous of their school chums who had regaled them with tales of Surfers' Paradise, Mission Beach, Perth, Port Macquarie, Cairns and even one trip to Disney Land. "Why do we always have to stay at home?"; "Why can't we go somewhere *decent* for *our* holidays?"; "Why do we always miss out?" And so it went on. I was the worst Dad in the world. Economic realities had nothing to do with it. Being available in case the big brief came up cut no ice.

"Thus it came to pass that I began to scour the travel sections of the newspapers searching out cheap but relatively exotic holidays. So it was when I became beguiled by the advertisements for holidays in Tasmania and particularly those that commenced with the car ferry trip from Melbourne to Devonport. Induced thereby I attempted to obtain information from the Tasmanian Tourist Bureau. Their telephone was permanently engaged. I hurried to their office in Collins Street and returned to Chambers with an armful of colourful brochures.

"I pored over the brochures and was soon convinced that a holiday in Tasmania beginning at Station Pier was for us. The idea of loading up the car and driving straight onto the boat, having a cabin for four, eating copious quantities of expertly prepared Tasmanian delicacies and allowing someone else to do the driving to Devonport convinced me. So the bookings were made, the children were informed and I became a good Dad again.

"Later in the year we discovered that we were to be among those allegedly lucky enough to experience the bigger, better, more efficient *Spirit of Tasmania*. Our car would be loaded quicker, the cabins would be more sumptuous, the service even better and so on. It never occurred to me to wonder how there could be improvement on the promises which induced me to book on the *Abel Tasman*.

"Thus it was with great anticipation and excitement we drove down to Port Melbourne around 3p.m. with a view to sampling the delights of a ship we were informed had available all of its facilities from 3.30p.m. We lined up with three other columns of vehicles, received our boarding passes, room key and booklets on the *Spirit*.

"For an hour nothing happened except that the queues got longer and the kids' excitement slowly dissipated. Around 4p.m there was a stirring of activity at the head of the queue as some workers came off the boat. The wind blew up and suddenly a gust rocked the *Spirit of Tasmania*. We heard a crunching sound above us and people were yelling "Get out of your cars"; "It's falling!"; "Get away". We quickly ascertained that the *Spirit* had rocked about 30 cm sideways which was sufficient to pull the gangway out of its pierside mountings, causing it to drop about a metre and then jam itself tight against the pier, at a crazy angle and away from the ship.

"If it had fallen further it would have crushed the car immediately behind us. We managed to drive forward and soon there was a clear area underneath the gangway. Then nothing, nothing-at-all, occurred for three hours. No information. Just a few TT line personnel wandering around aimlessly each with the same tale. "We don' know nothin' neither."

"Well after 8p.m a mobile crane turned up and activity recommenced. By then the kids were bored and adults around us had passed through

stages of disbelief, frustration, anger and amazement. No one could understand why the gangway could not have been braced, at least at the pier end, and why people and cars could not have been loaded by routes that took them on a wide berth around the gangway area. The mobile crane crew added a spice of excitement. There they were climbing all around and under this supposedly insecure structure without safety hats, safety harnesses and without keeping the spectators at a safe distance even when some clown started to smash the glass sides of the gangway with a sawn-off sleeper which eventually flew out of his grasp narrowly missing a bare-headed dogman attaching chains to the structure. The sparks showering from live cables pulled out of their mountings by bare hands added to the carnival atmosphere.

"Another hour later people started to be ushered onto the ship through the car entry gates. They dawdled on without any seeming sense of urgency on their part or on the part of the TT Lines staff. Ultimately the cars, and the passengers who had been forced to stay with the cars, were allowed to slowly drive on. That took in excess of two hours.

"Eventually the *Spirit of Tasmania* departed some four to five hours late. In the meantime we had little time to locate our cabin, go off for a meal and bed the kids down. The meal was tired and showed every sign of having waited a few hours for customers. Sometimes buffets are not a good idea! We had no opportunity to explore the ship - and missed the exciting times promised by the publicity.

"Next morning, still tired, we arose. The often hard-to-hear PA system repeatedly assured us that the Captain had made up time overnight and we would be leaving the Ship before 10a.m. That was some comfort to our daughter who had become nauseous through a combination of tiredness and constant motion. She certainly felt unlike partaking of breakfast. Our son was ravenous. So we went off for a buffet breakfast. "Our daughter won't be eating, she's unwell," said my wife to the cashier. "You still have to pay. You pay for bums on the seat not food you eat," he replied. We paid for her as we still desired some breakfast. She did not eat but spent much time in the toilets proving her mother's diagnosis correct.

"We did get to Devonport just after 10a.m. It took the Captain another hour before the ramps were lowered for the cars to exit. At 11.45a.m. we gratefully drove off the boat. We got to Hobart late afternoon. The first two days of our holiday had passed and we had lost our excitement, anticipation and zest and replaced them with frustration, tiredness, illness and anger.

"So it was at the end of the holiday that we drove back to Devonport with a certain sensation of dread. We again arrived in plenty of time. We arrived at 3.45p.m., some 15 minutes before the advised time. We were told we would not have long to wait to get aboard. How wrong the TT Lines lady was. We waited two hours in our car on baking unsheltered tarmac — it was Tasmania's first sunny day for weeks! We got progressively more angry, as did others in the same queue as us, at cars being loaded immediately they arrived sometimes more than an hour after us. When people remonstrated with the sole TT Lines employee charged with the task of directing cars onto the boat ramp, he suggested that he was loading according to size. That was an obvious lie as our queue had identical cars to those in the later-arriving but earlier-loaded queues. Perhaps he got confused as he had also the task of driving the prime movers which towed the many trailers onto the ship. He certainly had no help from his supervisor who strutted self-importantly in his red safety jacket and with his folder and did nothing. Nor did he gain assistance at any stage from his two colleagues who spent the whole afternoon in the "smoko" hut. It was Sunday after all! The supervisor when approached by neighbouring car drivers purveyed the same lie about car size and reassured us that last on was probably first off.

"We did get on. We did have time to explore the ship, to pass through the excellent Tasmanian displays and to watch vehicles arriving half an hour after the scheduled departure time drive straight on board. Clearly the message is: don't get there early, don't get there until right on scheduled departure time.

"With frustrations like that small things become more noticeable such as the filthy toilet seat (urine still remained from an earlier cabin occupant thereupon, as did that occupant's partially-used soap), the absence of a fixture to secure one of the little ladders used for top bunk occupants (it made mounting and dismounting the top bunk whilst at sea quite a hazardous task), the ineffective cabin air conditioning, the many cracked shower recess floor tiles, and the paper-thinness of cabin walls.

"We were all fit for breakfast the next day which was more the pity as the hot foods were all stony cold and inedible.

"There were some positive sides to the return journey: we did get off the ship fairly speedily (and not before time as far as the family were concerned), the evening buffet on the return trip was good value, the Tasmanian display on the ship, as I have said earlier, was impressive and most staff on the ship (with the noticeable exception of the buffet cashier and one waiter) very pleasant.

"As well, once we were settled in at Hobart we found the people delightful, the sights well worth visiting, the costs of food and sightseeing reasonable. The "Tastes of Tasmania" displays on the waterfront were magnificent albeit that a pall

overrode the area because of the failure of two-thirds of the Sydney-Hobart yacht fleet to arrive because of atrocious weather. The displays were entered and exited through a specially-created "rain forest" that was aptly named given that it rained on and off on each of our nineteen days in Tasmania.

"Notwithstanding the difficulties TT Lines staff have with coping with the newer, bigger and "better"(!!) ship and the rain, Tasmania was a great place for a holiday, especially with primary school-aged children.

"I would highly recommend a holiday in Tasmania but would suggest readers give consideration to a FlyDrive holiday instead of one which allegedly begins and ends in Port Melbourne — at least until the TT Lines get themselves better organised."

Clive Penman

P.S. I have to concede that when I did raise my concerns about my experiences with TT Lines I got a most sympathetic response although there was a reluctance to accept full responsibility for what we experienced. I am now more confident that with the passage of time the *Spirit* will begin to fulfil the many promises made on its behalf.

NO BLACK LETTER LAWYER

THE PHOTOGRAPH BELOW AND THE accompanying caption, which appeared in the *Australian Lawyer* for November 1993, may provide some encouragement for those practising in the Federal Court who find that the existing law is contrary to the case which they wish to put.

The 28th Australian Legal Convention in Hobart was a highlight of the Law Council's year. At the Federal Litigation Section's lunch were (from left) Garry Downes Q.C. (Chairman of the Section), Daryl Williams Q.C., MP (Shadow Attorney-General), Sir Anthony Mason (Chief Justice of Australia) and Chief Justice Michael Black of the Federal Reform [sic] Court of Australia.

MEDIATION WORKSHOP — A WEEKEND OF "HERBAL LAW"

A SUNNY MELBOURNE WEEKEND IN November last year witnessed thirty Victorian barristers being "re-framed" into would-be mediators at the hands of the Bond University Dispute Resolution Centre instructors Lawrence Boulle, Pat Cavanagh and John Wade.

It was not promised as the elixir designed to prolong life indefinitely, but it was prescribed as something bound to do us good. In other words, it was not offered as a panacea for the ills of the litigation process, but rather as a useful adjunct in dispute resolution or, as our instructors mused, "the legal equivalent of herbal medicine".

The themes did not take long to emerge — "Mediation is a voluntary process in which a mediator, independent of the parties, facilitates the negotiation by the parties of their own solution to their dispute by assisting them to isolate the issues, to develop options for their resolution and to reach an agreement which accommodates the interests and needs of the parties" (1. The Law Society of Western Australia Guidelines for Practitioner Mediators).

For barristers hardened to the concept of one-eyed advocacy of a client's cause within a highly-structured legal framework, something of a leap of faith is demanded — legal advice is not to be sought by the parties or proffered by the mediator. Rather it is an accepted principle of mediation that persons who are competent and informed may choose to arrive at an agreement which is not necessarily consistent with an outcome dictated by the "black letter" of the law.

This immediately raises very difficult ethical questions for the mediator, particularly when faced with a situation of clearly unequal bargaining power between the parties — to what extent is the mediator under a duty to ensure that the outcome at least broadly corresponds with general community expectations?

Another problem for most barristers acting as mediators is the necessity to avoid imposing a solution upon the parties. Early in the piece we were steered well clear of the concept of door-of-court head-banging aimed at gaining scalps on belts for the mediator. Against this needs to be balanced the

necessity to assist the parties to explore all of the available options for settlement, and to introduce imaginative, objective and practical alternatives for resolution of the dispute which may not have occurred to the parties. One of the undoubted attributes of the mediation process is the capacity for the outcome to be infinitely flexible. In this context the mediator is compelled to walk the tightrope in balancing the need to make a sufficient contribution to enable the parties to achieve an acceptable outcome against crossing the line into the realm of adjudicating the dispute. This may be particularly difficult where the solution for the parties appears to the mediator to be painfully obvious.

Another area of difficulty to emerge from the weekend arose from questions of confidentiality which may arise in the course of a mediation. The parties to the mediation may well agree between themselves and the mediator that all information disclosed during the mediation must be kept confidential. This however leaves it open for some later use to be made of the information exchanged at the mediation, short of disclosure of that information, for example the suggestion of a line of cross-examination which may be developed at trial. What too of a subpoena directed to the mediator by a third party to the proceedings at the trial who elected not to participate in the mediation and be bound by the mediation agreement? To what extent is the mediator under a duty to explain to the parties before him or her at the mediation the limits of the confidentiality agreement entered into by the parties?

What then of protection of mediators from suit at the hands of a disgruntled participant? Pursuant to Section 27A *Supreme Court Act* 1968 and Section 48C *County Court Act* 1958 a court appointed mediator to whom a proceeding has been referred under the Rules of Court enjoys the same protection and immunity as a Judge of the Court. However, this immunity would appear to stop short of protecting mediators who are appointed by the parties without a specific reference pursuant to the Rules of Court.

Some of these problems may be addressed by the introduction of a legislative safety net adopting some of the provisions of the *Commercial Arbitration Act* 1984. For example, a new "Mediation Act" may usefully provide power for the Supreme Court to set aside a mediation agreement, either wholly or in part, where there has been misconduct on the part of a mediator or where the mediation agreement has been improperly procured. For example, where undue influence has been exercised by the mediator or a party has been permitted to exert unfair pressure unchecked by the mediator or where the circumstances of the mediation are such as to unfairly overbear the free will of a party entering into the settlement e.g. a late night sitting ending at 2.30a.m. (cf. section 42 *Commercial Arbitration Act* 1984). A broadly based immunity from suit provision would also be desirable to ensure that a mediator is not liable for negligence in respect of anything done or omitted to be done by the mediator in that capacity (cf. section 51 *Commercial Arbitration Act* 1954).

Frank Costigan and Pat Cavanagh listen to Alex Chernov

Mediators of the future and their coach, John Wade

So much for some of the more theoretical difficulties of the process which need to be grappled with. But what of the practical skills required? In short mediation would appear to require the wisdom of Solomon and the patience of Job. Other superhuman attributes which appear to be more or less a necessity include persistence, the ability to listen, to maintain a tolerance to high emotion, to work through deadlocks, to maintain the momentum of negotiation, to remain impartial and be non-judgmental, and perhaps above all to keep one's feet firmly on the ground at all stages of the process.

The weekend course worked through guidelines for empathetic listening, dealing with the positional bargainer, developing skills for breaking deadlocks and the mysteries of re-framing techniques by which a substitute phrase may be introduced by the mediator in the course of discussion which is deigned to be "subjectively acceptable to all parties" and which "depersonalises the issues and diffuses tension". Thus:

"That crook hasn't paid me maintenance for months"

is re-framed by the mediator as:

"So you are upset that you have not received money that you feel is due to you according to an agreement reached between you"; or

"My wife takes forever to decide on things, she has to look at everything in the store and compare them all before she selects one"

is re-framed by the mediator as:

"So she's very careful about decisions".

The weekend raised a number of issues during the intensive workshop sessions as illustrated by the following telling exchange:

Mediator to disgruntled male participant (Paul Elliott as "Darryn Stevenson").

Mediator: "Good morning Darryn."

Darryn: "It's Mr. Stevenson to you."

Mediator: "I'm glad you have agreed to attend this mediation — at least that is a good start. Would you like to finish your cup of tea?"

Darryn: "It's coffee, not tea, and the water is cold."

Mediator: "I see, so your concern is that your morning beverage has been mis-identified, is that right?"

Darryn: "No, I just want a hot cup of coffee."

Mediator: "I see, do you have any other concerns or time constraints, for example the parking meter?"

Darryn: "I can't afford a car, and what's it to you anyway?"

Mediator: "I see, so your concern is . . . (Darryn walks out).

An important issue which arose during the weekend related to the appropriateness of mediation in dispute resolution. When, where, with which parties and in what kind of dispute should mediation be considered? Alternatively, when is it more appropriate to consider the more traditional alternatives of litigation or arbitration? A view was expressed by our instructors in their materials, suggesting that an answer lies in the potential for parties to settle once they have an appreciation of the incentives to do so:

"The success rate of mediation is often said to be 85% or higher. This is in addition to savings in time and costs as compared to litigation and arbitration. Even though most cases settle literally at the door of the court, mediation provides a setting in which the parties may negotiate a mutually satisfactory settlement much earlier in the piece. This consensual solution reflects the fact that the parties have come to terms with each other. Studies show that parties are more likely to adhere to an agreement reached through their own endeavours. Present relationships and goodwill are preserved, and future relationships are created. The outcome may reflect commercial realities and the Parties' intimate knowledge of their own situation" (2. Victorian Bar — Basic Mediation Workshop Materials, November 1993 — p.6).

A key feature of the mediation process is that it is capable of wide adoption to an extraordinary range of disputes in virtually every area of civil practice, each requiring a selection from the smorgasbord of variable procedures and approaches available. Everything from a therapeutic tension-reducing consultation designed to isolate the issues between the parties to a hard-headed negotiation towards a detailed commercial agreement may be accommodated.

The weekend left us stimulated by our highly skilled instructors and wanting to know more about the process.

For those who may be jittery about the "Grim Reaper" of mediation cutting yet another swathe into the domain of legal practice, let me attempt to reframe the concern as — how best do we adapt to developments in this important field? The opportunity is there to take positive steps towards expanding this much-needed facility in the provision of legal services.

Peter Vickery

NATIONAL NATIVE TITLE TRIBUNAL

THE NATIONAL NATIVE TITLE TRIBUNAL (NNTT) was established on 1 January 1994 and commenced operations on 4 January 1994. Justice Deirdre O'Connor, President of the Industrial Relations Commission (IRC), was appointed the Acting President of the NNTT and David Schulz, Registrar of the AAT, was appointed the Acting Native Title Registrar. Administrative support for the NNTT is being provided by the AAT pending the appointment of permanent members and staff to the NNTT.

Two registers have been established by the Acting Native Title Registrar under the *Native Title Act* 1993 and are open for public inspection on payment of an inspection fee of $20 per register. The Register of Native Title Claims records details of all claims for native title made under the Act in respect of areas of land and waters throughout Australia and the National Native Title Register records details of all native title determinations made at common law, the *Native Title Act* 1993 or otherwise in respect of such areas.

The registers can be inspected at any registry of the AAT.

VICTIM OFFENDER RECONCILIATION PROGRAMME

IN DECEMBER LAST YEAR THE Correctional Services Division of the Department of Justice established a victim-offender reconciliation programme to be based as an initial pilot programme at the Broadmeadows Magistrates' Court.

It is of importance that members of the Bar be aware of the programme, its purpose and the way in which it functions.

"1. PROGRAM RATIONALE

A growing body of international literature suggests a rising interest in victim offender reconciliation. This is evident from the many programs implemented in Europe, United Kingdom, United States, and New Zealand. The popularity of victim-offender reconciliation programs is due to a number of reported benefits associated with such programs. Benefits exist for the parties involved and for the community.

Victim-offender reconciliation programs represent a shift towards a "restorative" rather than "retributive" model of justice. Retributive justice is viewed as deflecting victim status from the victim to the state thus limiting the participation of victims in the justice process. Consequently the "real" victims of crime feel alienated from the criminal justice system. Furthermore, the adversarial nature of our criminal justice system shields the offender from the human consequences of their crime. The result of this system is frequently angry and frustrated victims.

Restorative justice views crime as a violation of one person by another and emphasises reconciliation between the parties. Victims are given the opportunity to let the offender know how the crime affected them. This impacts on the personal development of the offender. This may be in relation to their understanding and awareness of the consequences of their behaviour and a sense of responsibility towards the victim, and perhaps the wider community. Secondly, this form of justice emphasises a need for reparation to the victim rather than just punishment of the offender.

2. THE PROGRAM

The adult victim-offender reconciliation program is an innovative program to be implemented in Victoria, initially on a pilot basis. The pilot program will be based at the Broadmeadows Magistrates' Court.

The aim of the program is to bring together victims and offenders, in the presence of a skilled mediator, with the intention of reconciling issues that have arisen as a consequence of the crime.

3. PROGRAM OBJECTIVES

The objectives of the victim-offender reconciliation program are:

- to provide a criminal justice process which facilitates the reconciliation of concerned parties;
- to restore the victim's situation, as far as possible, to that existing prior to the offence;
- to promote the role of victims in the criminal justice system;
- to foster the rehabilitation of the offender by personalising the consequences of his/her offending behaviour;
- to ensure public confidence in the criminal justice system.

4. TARGET GROUP

The program will target adult offenders who plead, or are found guilty of property offences. Such offences include: car theft, shoplifting, theft, obtain property by deception, break and enter, wilful damage, and unlawful use of motor vehicle.

Offences of a sexual nature and domestic violence will be excluded from the program.

There will be no restrictions as to an offender's age, sex or prior offending history.

It is intended that the program will be open to all categories of identifiable victims, including corporate victims.

Participation by *both* parties in the program must be entirely voluntary.

5. PROGRAM STRUCTURE

The program will operate as a court-based presentencing option. Thus, following conviction or admission of guilt the court may adjourn sentencing to allow reconciliation between victim and offender to be undertaken.

The court may initiate the process, or may agree to a request from ether the victim or the offender to participate in the program.

Both victim and offender must show their interest and willingness to enter the process.

If an adjournment is granted by the court, victim and offender are contacted separately and their willingness to be involved confirmed. Both parties are then briefed independently on what to expect during mediation, what ground rules will apply, what might reasonably be achieved, etc. Any questions or concerns held by the parties can also be dealt with at this point.

A meeting between the victim and the offender in the presence of the mediator would then be organised. The primary emphasis of the mediation will be for the parties to address the issues which they have previously identified as important to themselves. For the victim this may involve: expressing directly to the offender the consequences of the offence for themselves, and the people around them; to express their fear, anger and/or outrage directly to the offender; or, even to receive some form of reparation directly from the offender. For the offender such issues may include: the need to explain their behaviour to the victim; or even more simply, to offer an apology.

During the mediation meeting agreements may be reached by the victim and the offender. Such agreements may include some form of reparation to the victim.

The results of mediation and details of any agreements are included in a report that is forwarded to the court prior to sentencing. This will allow the court to monitor the outcome of the reconciliation process and where appropriate, take these details into account when deciding a suitable disposition. The report would also enable the court to be notified in the event of an offender becoming unwilling or unable to meet the victim, or the offender failing to follow the terms of any agreements.

6. EXPECTED BENEFIT

This program is expected to provide a number of benefits for victims, offenders, and the community. These include:

For the victim–

- to express their anger towards the offender;
- to reduce their fear of offenders;
- to receive an apology;
- to receive restitution;
- to receive direct/indirect reparation;
- to obtain greater insight into offending behaviour;
- to challenge stereotypes.

Further, as the victim is actively involved in the criminal justice process, information such as the court dates, number and type of charges and the result of sentence would be more readily available.

For the offender–

- to understand the human consequences of their criminal behaviour;
- to increase their personal accountability for the offence(s);
- to directly make amends to the victim by way of restitution and/or reparation;
- to gain increased respect rather than resentment for the law;
- to reduce excuses and rationalisations for crime.

For the community–

- reconciliation has the potential to reduce the recidivism rate, reduce fear of crime and, through community participation, enhance respect for the criminal justice system.

7. PROGRAM RESPONSIBILITY

The program has been developed by the Community Based Corrections Branch, Correctional Services Division, Department of Justice, with the assistance of an Advisory Committee representing a number of organisations with an interest in the program. The membership of the Advisory Committee includes representatives from:

- Community Based Corrections;
- Western Region Magistrates' Court;
- Victoria Police Victim Liaison Unit;
- Coburg Community Corrections Centre;
- Vicsafe;
- Legal Aid Commission;
- Victorian Court Information and Welfare Network;
- Victims of Crime Assistance League;
- Victoria Police, Broadmeadows Police Station;
- Department of Criminology, University of Melbourne;
- Police and Emergency Services Directorate.

The Advisory Committee's role is to assist in the development of program guidelines, oversee the evaluation of the pilot program and to make recommendations regarding the future directions of the program.

Funding for the development and implementation of the pilot program has been made available by Vicsafe with additional resources being provided by Community Based Corrections Branch, Department of Justice.

Responsibility for the management and operation of the pilot program rests with the Coburg Community Corrections Centre.

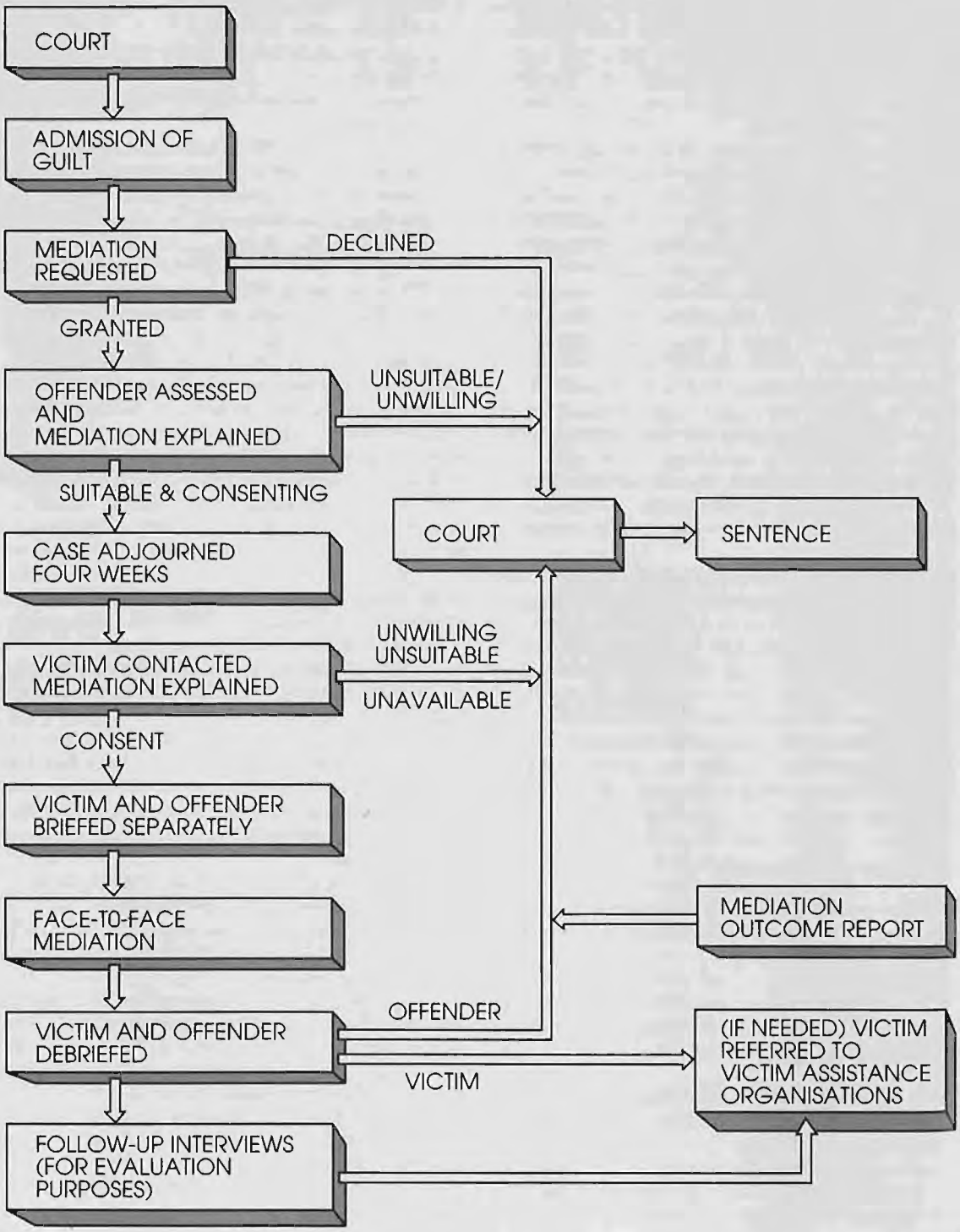
Further information regarding the program can be obtained by contacting:

Daryl Kidd, Project Manager, or

Robert Gugno, Implementation Officer, at Coburg Corrections Centre, 341 Sydney Road, Coburg, 3058. Telephone: 383 6955 Fax: 383 3958."

PROCESS FLOWCHART

***At any stage of the process either party can withdraw. The offender will be returned to court and the victim van be referred to a victim assistance organisation.**



A BIT ABOUT WORDS

THE ORIGINS OF MANY WORDS ARE FASCinating, even romantic. As various words become familiar in daily use, their histories are all but forgotten.

I will admit to a personal favourite: *halcyon*. *Halcyon* suffers a double injury — not only is its romantic history generally unknown, its true meaning is often mistaken.

Halcyon is now seen only in the idiom "the halcyon days," although it was once used as a verb. It is generally used as referring to days distant and more pleasant, shrouded in the contentment of selective memory. Properly used, it refers to the 14 days of calm weather at sea which, according to Greek legend, interrupt the storms of mid-Winter. It comes from *hals* (the sea) and *kuo* (to brood on). According to Greek legend, the kingfisher makes its nest on the water and hatches its eggs during the 14 days of calm at mid-Winter. Properly used, *halcyon* means the tranquil spell surrounding the Winter solstice.

Halcyon was the daughter of Neptune, keeper of the seas. She fell in love with Ceyx, the mortal king of Thessaly. Ceyx went to sea at mid-Winter and was shipwrecked. His body was washed ashore, where Halcyon found it. Distracted by grief, she took his corpse into the water, wishing for death to reunite them. But the gods took pity on her and turned the two of them into kingfishers. Out on the stormy seas, the two kingfishers mated, and made a nest on the sea. Neptune, concerned for his grandchildren, stilled the waves whilst the eggs hatched. The sea was still for 14 days — the halcyon days.

The zoological name for the kingfisher, incidentally, is Halcyon.

Thus, Dryden wrote (of Cromwell):

"And wars have that respect for his repose
As winds for halcyons when they breed at sea"

and Shenstone:

"So smiles the surface of the treach'rous main,
As o'er its waves the peaceful halcyons play".

•••••••••

Another, much commoner, word with classical origins is *clue*. Until very recently, it was spelt *clew* — the 1902 edition of *Webster's Dictionary* gives *clew* as the primary spelling; the 1933 *SOED* likewise.

The current primary meaning is something which guides or directs in anything of a doubtful or intricate nature, or which gives a hint of the solution to a mystery.

But that was, until recently, the secondary meaning. The primary meaning from the 12th Century to the end of the 19th Century was a ball of thread or twine. In Scotland and the north of England, *clew* still bears that meaning.

The connection between the two meanings comes from ancient Greece by way of Chaucer. Theseus, after a difficult childhood, set himself a number of heroic tasks. The greatest was to slay the Cretan Minotaur. The Minotaur lived in a labyrinth, which presented difficulties for anyone wishing to do the deed and see daylight again. Minos, the King of Crete, demanded that Theseus be sacrificed to the Minotaur. However, Minos' daughter Ariadne fell in love with Theseus and gave him two things to ensure his survival: a sword to slay the monster, and a ball of thread. He paid out the thread as he walked into the labyrinth, and used it to retrace his steps after slaying the Minotaur. He then took Ariadne away with him, but left her at Naxos, where she took up with the fun-loving Dionysus.

In "Legends of a Good Woman," Chaucer wrote:

". . . by a clewe of twine as he hath gon
The same way he may return anon
Followinge alway the thread as he hath come".

Thus the figurative sense was introduced. To all but the most pedantic, the figurative sense has overwhelmed the original literal sense. Nevertheless, the Second Edition *OED* (1989) gives as the primary meaning of clue:

"A ball of yarn or thread".

Julian Burnside

YES MINISTER

THE FOLLOWING PROVISIONS ARE TAKEN from section 23DNB of the *Health Insurance Act* 1973:

"(5) When performing a duty under this section, the Minister must comply with any relevant principles in force under sub-s (6).

(6) The Minister must determine in writing the principles with which the Minister must comply in performing duties under this section".

LUNCH

RECENTLY (THE *SUNDAY AGE*, 21 NOVEMber 1993), that noted journo Mark Shield matched watering holes with the trades and professions that patronised them. Thus he observed that the legal fraternity (and sorority) frequented the Snail 'n Bottle Restaurant, the Essoign Club, the Horse and Hound Tavern in Elizabeth Street and the Sherlock Holmes Inn. Curiously he neglected to mention the Celtic Club at the corner of La Trobe and Queen Streets which has had ever since its founding last century strong legal connections — perhaps exemplifying the link between the Irish and the law in this State. The club's current President is of course Master Gaffney and until 1988 that position had been held for many years by one particular practising member of the Victorian Bar. In fact, that President, one of Her Majesty's Counsel, features in the history of the club written by the late Dinny O'Hearn — within the volume there is a photograph of the then President looking as though he'd gone quite a few rounds with Brendan Behan and, so far as this writer's knowledge is concerned, "Bold Brendan" was renowned for the Guinness variety of rounds rather than the Queensberry style.

The club has seen a rejuvenation recently through the advent of gambling — one of the innumerable "you name it"-led economic recoveries Victoria has enjoyed in the past few years. At the time when the club first began operating its poker machines in 1992 the occasion was marked by the presence of the then State Treasurer. It is not known whether he was there to participate in the festivities or, as was unkindly said at the time, he was there to personally bring the Government's take promptly (that night) back to the depleted Treasury coffers.

In any case, the pokies have made all the difference — a non-profit social club has only a limited number of ways to dispose of pokie-generated profits and subsidising the dining room is one.

Almost a decade ago the premises were renovated — the decor is now one of many hues of green — and in a battle between the Licensing Authority and the Heritage Commission, the Heritage folks lost. Consequently the quirky (and very Irish Celtic Club) outwardly-opening doors leading to the lavatories have gone — lost to the current generation of club members and God knows how many classes of future architectural students.

While the 1992 introduction of the pokies may have "ruined" the ground floor — witness the removal of the billiard table and the lounge seating off the main bar-room — the first-floor dining-room has leapt ahead. Perhaps the club's recent purchase of the adjoining premises will restore some semblance of order to the ground-floor bar and lounge.

On the ground floor the dining facilities are limited to "snacks" — plastic-wrapped rolls and sandwiches which are, perhaps, in keeping with the gambling facilities. After all, the quintessential snack is the sandwich named after (but certainly not invented by) John Montagu, the Fourth Earl of Sandwich (1718-1792), who refused to leave the gaming tables at his club for 24 hours and replenished himself during that time with cold beef slices between bread. Those interested in the origin of the sandwich are referred to Frank Muir's *An Irreverent and Thoroughly Incomplete Social History of Almost Everything* (1976). Those uninterested in the origin of the sandwich but who do enjoy a bawdy tale are also referred to the same volume.

On the day we attended at the club we had as our guest the expatriate Englishman now resident in the United States, Sir Edward Coke, who had flown out from the U.S. to attend Melbourne's Spring Racing carnival. Given the misapprehensions forced upon him during his visit we can only give thanks that he was not present in the main bar of the Celtic Club when the Irish-owned and trained (and Irish-ridden) Vintage Crop won the 1993 Melbourne Cup. We proceeded straight to the first-floor dining-room which boasts draught beer and Guinness on tap although the Guinness is not always on tap — depending on the amount of custom — Apparently Wednesday through to Friday are dependable draught Guinness days. There is also a wide range of spirits and soft drinks available and a limited (but select) range of wines — we particularly recommend the Buller's Chablis at $13.50.

For that special occasion the club's cellar has non-vintage Moet for $67 — sadly, the prospect of such occasions has diminished somewhat with the

State Government settling its action against the Tricontinental auditors. We have been deprived of a French champagne-led economic recovery by those party poopers in Spring Street. Unless that well-known Australian abroad whose taste runs to vintage Krug returns (or is returned), a return to those heady days exemplified by the late Peter Clyne seems unlikely. Clyne had the grace to despatch red roses and a bottle of Dom Perignon to the Deputy Commissioner of Taxation to mark the occasion of their jousts, even when Clyne was the loser — now that is class, that is style. While an *arriviste* may well enjoy his Krug, we very much doubt that he would send a bottle to his adversary should Rozenes Q.C. succeed in prying Australia's best-known invalid from his Majorcan exile.

We also note, with disappointment, that the cellar does not include the excellent range of wines from the Port Phillip Estate. Perhaps the vigneron has been too busy of late to attend upon the club's sommelier to spruik his wines. We are uninformed as to whether the winemaker succeeded in selling a case to Justice Gaudron during his recent trip to Sydney even though she declined to buy his other case brought on appeal from the Federal Court and involving novel issues of civil procedure and criminal law. We understand this latter case did not tempt Her Honour's palate.

The club prides itself on its large legal membership. Dominating the dining room is the "Judges' Table" which, for many years, particularly on Fridays, saw many of the bench repair there for lunch — this ritual has sadly fallen away recently with a number of retirements and worse suffered by the stalwarts of the table. This is despite that many members of the judiciary remain as members of the club. Indeed, the club manager recites with pride the large number of judges who are members of the club although he does concede that one judge prefers the club further down the street.

Over our aperitifs our guest informed us of the recent decision of the U.S. Supreme Court not to hear an appeal from the Oklahoma Court of Appeals brought by Jacqueline Gordon. She had lodged an appeal against the decision that the U.S. Constitution and the First Amendment Free Exercise [of religion] clause is not violated by the imposition of attorney's fees against a grandmother [Mrs. Gordon] who sought and was awarded temporary custody of her grandchild during her son's divorce case. Because the grandchild was a minor the court had appointed an attorney to represent the child and Mrs. Gordon had availed herself of the attorney's services. Mrs. Gordon contended that she sincerely held religious beliefs forbidding her to engage or obtain counsel or to pay such counsel's fees. The general consensus at our table was that we all had clients with strong and sincerely-held beliefs against paying counsel's fees. The further general consensus was that in denying Mrs. Gordon a hearing those "old fools" (*per* President William H. Taft), "those nine bozos in Washington" (*per* Judge Learned Hand) and "those clowns" (*per* Solicitor General Charles Fried) had deprived us of interesting (and entertaining) arguments of counsel and similar opinions for the highest court in the U.S.

The decor in the Celtic Club dining room has already been noted: green with green and more green matching further green. One notes that the salt cellars on each of the tables are either empty or nearly so. Whether this is indicative of neglect by the staff or reflects the chef's desire that his patrons enjoy a healthy salt-free diet we are unable to say.

Back in November the range of entrees was staggering — one soup, four other entrees (seafood, vegetable and chicken) and eight pastas with seven choices of sauce. Between us we chose the thinly-sliced avocado in lemon and honey sauce (surely this is the food that the angels serve in heaven!), the chicken satay and a tomato and herb soup. Sir Edward elected to forgo an entree. However, the *maitre d'hotel*, Justin, was in an exuberant mood following a recent large gaming win and his imminent return to Queensland — in fact, this was his last day of employment in Victoria. Consequently Justin served our guest with an unordered bowl of the chef's special — "Justin's soup" — compliments of the kitchen. This soup turned out to be a bowl of draught Guinness complete with a sprig of parsley. None of us let on to our guest and we understand that since his return to the U.S. Sir Edward has been regaling his friends with the odd dining habits of the Oz-Irish.

The main course permitted four choices of fish and fifteen meat (beef, veal, pork, lamb, chicken and a roast) along with the aforementioned eight pastas with seven choices of sauce. We defy anyone to consume the pasta as a main ($6) because the size of the entree serving ($3) is more than sufficient. Perhaps to push custom on the slow days the pasta is priced at $5 and $2.50 respectively on Mondays through Wednesdays. Otherwise the mains are $9 or less and the most expensive entree, a smoked salmon salad (highly recommended by gourmets and gourmands alike), is $6.

While awaiting our mains (whole schnapper, blue eye, pork medallions and chicken with mushroom), Sir Edward continued to entertain us — apparently, Florida's Supreme Court has a woman judge who is strong on law and order and is colloquially known as "The Time Machine," "The Hanging Judge" or "Maximum Morphonios". Her idea of a life sentence is 130 years following the appearance before her early in her judicial career of an aged and wizened negro on a minor charge who claimed to have been born in the 1840s. She sentenced one James Cannady to 1,698 years in

prison. On another occasion she was presiding over the trial of an alleged attempted rapist wherein the prosecution case was that the defendant had cornered his victim in her office one evening. She managed to push him away and reach her desk where she kept a gun which she used to shoot her assailant before calling the police. The trial transcript contains the following interchange:

Prosecution Attorney: And where did you shoot the defendant?

Witness: In the groin.

Her Honour: Nice shot!

Another story concerning the judge (which our guest emphasised to us is denied by Her Honour) has her sentencing a sex offender to a stiff period inside. As the bailiff was leading the prisoner away she interrupted and, reaching down, lifted her robe exposing her legs and said to the prisoner: "Get a good look at these gams, Pal. They're the last ones you'll see for a long, long time!"

All in all, the Celtic Club is highly recommended for good cheap lunching. The trimmings (salad and/or vegetables) let the club down and those in a hurry for a quick meal, particularly from 1 p.m. on Friday, should go elsewhere. Arrive by 12.30 and order and you can usually be finished within 45 minutes. Unfortunately, the desuetude of the Judges' Table means that no longer can counsel expected in court in the p.m. time his or her exit by keeping an eye on their particular judge's progress at the table.

A further caveat is that, as good cooks go, he went, and the present chef does not offer as wide a selection as has been described above. The current menu is more pedestrian with at most two or three masterpieces demonstrating exceptional creativity. However, at the prices the foregoing warm recommendations still hold. Besides, given the state of our practices these days you have more chance of bumping into your colleagues at the club than at court.

The Celtic Club
320 Queen Street (Cnr. Queen and La Trobe Streets)
Tel: 670 6472 (bookings rarely necessary)

Lunch:	**Mon-Fri; Dinner: Fri evening**
Membership:	**$35 p.a. Country members less and temporary visitors' rights in accordance with the gaming laws are available.**
Cost:	**Approximately $20 per head including dessert, coffee and port (not including drinks)**
Licence:	**What a stupid question! Is the Pope Catholic?**

Brien O'Briefless

VERBATIM

Argeement in Court
Supreme Court of Victoria

Burns Philp & Co. Ltd. v. *Bhagat* (1993] 1 VR 203
Coram: Fullagar, Brooking and Tadgell JJ.

"Fullagar J.: I Argee in the judgement of Mr. Justice Brooking".

County Court of Victoria

Paterson v. *Commissioner of Australian Federal Police*
Coram: Judge G.D. Lewis

Lancy for Defendant: Well what's the furniture like?
Plaintiff: Rubbish! The house is tiny the furniture is rubbish. I've got no decent clothing. Look this suit I'm wearing is the first one I've owned and I only got this because Mr. Carmichael told me to, to look conservative.
Judge: And tell me, does Mr. Carmichael choose your ties too?

Supreme Court of Victoria

18 October 1993
Coram: Ashley J. and jury of six
R. Gillies Q.C. and Blanden for Plaintiff
R. Meldrum Q.C. and Campbell for Defendant

Meldrum cross-examining Maureen Molloy, Neuropsychiatrist
And I think you say, of yourself, that you concede that in figures, in numeracy, you are not as good as you are in words? — I am getting old; that's why.
Not just that, you were never as good at those as you were in words? — I got Honours in Mathematics. I was a lecturer in Mathematics in Physics. I am not bad. I can no longer do mathematical exercises easily? —Not when people present them to me when I am in the witness box.
Because you are under some stress? — Exactly.
And how much stress she is under in the test is something that we can guess at, from her reaction. But I mean the jurors here might have thought that

as you sat there you were in control of the situation, aren't very nervous and under very much stress; whereas you feel under stress do you not? — I don't think so.

In the Magistrates' Court of Victoria at Melbourne

Marks Photographics v. *Miller & Miller*
Coram: E. Batt M.
R. Cameron for Plaintiff (Respondent)
D. Flynn for Defendant (Applicant)

His Worship: How much is claimed?
Cameron: $2,000.
His Worship: For photographic supplies?
Cameron: No Your Worship, for a "Profilyser".
His Worship: What is a Profilyser?
Cameron: It is something that you use in a dark room.
His Worship: oh.
Cameron: Not that I have had any experience in a dark room.

Supreme Court of Victoria

26 November 1993
Wirragana Nominees v. *John Ing*
Coram: Master Wheeler
G. Gregoriou for Plaintiff
Defendant in person

Have you ever met Mr. or Mrs. Hodge? — I think Mr. Hodge died before I knew him and Mrs. Hodge — I don't know her. She is not — I don't remember talking to her. So you do not remember talking to Mrs. Hodge? — No. What did you say in relation to Mr. Hodge? — That he died, to my knowledge.
Did you ever meet Mr. Hodge before his death? — Afterwards. I don't remember. I don't think so.

Proceedings in Camera before an Unnamed Statutory Tribunal

In relation to your own therapy, has he ever had physical contact with you? —— He has hugged me maybe once or twice.
Has he – and interpret it as you will – in that hugging, would his hands – how close to your breasts would his hands have been? — Nowhere near them.
In what sense? — They were around my back.
And where were your breasts then? — At the front.
I am sorry, of course they would be at the front.
We don't need any anatomy lesson.
I am sorry, I apologise. How close were your breasts to Dr. . I apologise, Mr. President.

Federal Court of Australia

21 February 1994
Saunders v. *Gas & Fuel Corporation*
Coram: Jenkinson

Berkeley Q.C. (Explaining the position of the subject property in a misrepresentation case).
"It is about three or four doors down in Queen Street on the Elizabeth Street side, and three or four doors down from La Trobe Street towards Lonsdale. And it . . ."
Jenkinson J.: "Close to the Celtic Club".
Berkeley: "The Celtic Club — I never notice what is going on when I come out of that club, Your Honour".
Jenkinson J.: "Yes".

De Lacy da Lion Heart

THE OPENING OF THE LEGAL YEAR

THE OPENING OF THE LEGAL YEAR causes philosophical ruminations. Here we go again! Another year! What is the law? Am I that old? I should send out those letters of demand. What is provisional tax? Can an ordinary reasonable barrister pay such a thing?

Well let's clear the head, go to a religious service and be assured that the profession has been around for years and will be here for a long time to come. Being part of the law is a decent commendable thing. Being a lawyer means doing good.

But are such religious celebrations within the terms of the Hilmer Report? Now that the States have given away their powers over the legal profession to Canberra, can such ceremonies be tolerated? Does the Trade Practices Commission believe that the opening of the legal year is in the public interest? Can the guilds be allowed to parade their restrictive practices before the downtrodden consumers? The legal profession is now the law industry. Industries don't have openings to

their year and therefore law workers should desist from these archaic traditions.

Those present at St. Paul's Cathedral, St. Patrick's, the East Melbourne Synagogue and St. Eustathios Cathedral may well have been pondering these thoughts. The Governor attended St. Pat's, the Chief Justice St. Paul's. Maybe there won't be a Governor, or even a Chief Justice, if the political correctness becomes even more correct.

In any case, the excellent photographs on these pages testify that the profession is still celebrating its existence and will not lie down.

Unfortunately the winds of change have struck. The traditional reception in the Supreme Court library was out for budget reasons. Not even a cup of tea and a scone.

Let's hope that there is an opening next year. After all it is, and the profession is, in the public good. Not some type of para-industry!

LONG CASES LIST

THE CHIEF JUSTICE OF THE SUPREME Court has authorised the issue of a Practice Note announcing the establishment of a Long Cases List.

NEED FOR THE LIST

The introduction of that list arises from particular problems involving cases, the trial of which is estimated to last for a substantial period of time. Hitherto, those cases have taken their place in the ordinary lists. Although some priority has been given to particular cases, they have, nevertheless, been left vulnerable to the vagaries of the listing system.

In the case of long cases, such a situation is counter-productive to the efficient and least expensive dispensation of justice. Substantial work and expense are incurred in the preparation of long cases. It is entirely unsatisfactory for those cases not to be reached on or about their trial date, with the consequence they are put over for hearing some months hence. Such a circumstance has compounded the cost of long cases. Further, unless a long case has some certainty about the date of its commencement, it is particularly difficult for each party to organise, and have available, its witnesses. As a result of these, and associated, problems, there is a real need for long cases to have some certainty about the date upon which their trial is to commence.

In addition, there is a clear need for long cases to be allotted to a trial judge some time in advance of the date upon which they are fixed for trial. During the period between which a case is fixed for trial, and its trial, a number of issues can arise which, if not properly disposed of, can interfere with the efficient and expeditious hearing of the matter. Often long cases are bedevilled by preliminary applications at trial which only serve, first, to delay their commencement of the trial, and, second, to confound the issues at trial. Accordingly, the Court has recognised that it is important that the trial judge be allotted to a long case in advance of its hearing, so that any preliminary issues can be dealt with before the date of trial.

The difficulty with ensuring long cases a certain commencement date of trial is that, of necessity, such a concept involves such cases being required to finish within a fixed period of time. Otherwise, the next case will not have the similar advantage of having a certain date upon which it commences. The system contemplated by the Practice Note is one which has been in operation in the Federal Court, and in other jurisdictions interstate, for some time. Although it is inconvenient for the parties, and for the court, if a case does not conclude within its allotted time, so that it is adjourned part heard to a later date, there are a number of countervailing advantages. In other jurisdictions, the allotting of a fixed period of time to a case has been perceived as operating to focus the attention of the parties on the real and substantial issues of the case, and to limit the number of peripheral and irrelevant issues which are raised at trial. Thus, for example, most cases in the Federal Court finish within their allotted time span, and are not required to be adjourned part heard to another date.

ESSENTIAL FEATURES OF LONG CASES LIST

The details of the Long Cases List are contained in the Practice Note of the Chief Justice.

The following is a resume of the essential features of the list.

Entry into list.

(a) Entry into the list will not be automatic. Writs for cases which, it is anticipated, would become long cases, will continue to be issued in the ordinary way in the Prothonotary's office. After the delivery of the Defence, either party may then apply on summons to the Judge in charge of the Long Cases List, Mr. Justice Harper. Upon return of that summons, Mr. Justice Harper will decide whether or not the case is one suited for entry into the list;

(b) A long case, will, *prima facie*, be considered one which, on the parties' best estimate at the time, is likely to occupy more than ten sitting days at trial;

(c) In addition, the Long Cases List will be available to cases which are referred out of a specialist list such as the Building Cases List and the Commercial Causes List. Where appropriate, the Judge in charge of those lists may refer a long cause to the Long Cases List. Such a case will then come before Mr. Justice Harper for directions;

(d) It is not intended that, by being entered in the list, a case will thereby be accorded any preferential treatment over cases not in the list. Rather, its entry in the list will be intended to deal with the problems of long cases described above.

2. Cases in the list — interlocutory steps.

(a) Upon return of the Summons before Mr. Justice Harper, directions will be given as to the future interlocutory steps which are to be taken in the action;

(b) Mr. Justice Harper intends to hear applications in the Long Cases List on the first and third Mondays of each month;

(c) In all cases a standard direction will be given requiring each party to file and serve on the opposite party a statement setting out the issues (of fact and law) which the party filing the statement then anticipates will be the principal issues in contention at the trial of the action;

Each case in the list will be allocated to a particular Judge who will hear it at trial as soon as convenient after the case is entered in the list.

(d) The rules of the Supreme Court, and the general practice of the Court, will apply to cases in the list;

(e) The Judge in charge of the list will allot a Master to each case. If any interlocutory disputes arise between the parties (for example as to discovery) requiring an application to a Master, the parties may apply on summons to have those disputes heard before the Master allotted to the case;

(f) Each case in the list will be allocated to a particular Judge who will hear it at trial as soon as convenient after the case is entered in the list. However, it is anticipated that that allocation will normally not take place until after the first or second directions hearing before Mr. Justice Harper. In this manner, it is proposed to strike a balance between the benefits of early allocation to the Trial Judge and the necessity of clarifying issues before that allocation occurs, at least to the extent that a reasonably accurate estimate of the length of the trial can be made before the case is allocated to a particular Trial Judge.

3. Setting down for trial.

After the conclusion of the interlocutory steps, the Judge in charge of the list will then allocate to the case a Judge who will hear and determine the action. The case will be given a fixed date for trial. If, after setting down, any further directions are required as to the disposition of the case at trial, those directions will be heard before the Judge to whom the case is allotted.

4. Trial.

It is anticipated that each case in the list will commence on the date fixed for trial, or within no more than five days of the date upon which it has been fixed for trial. The hearing of the case will conclude no later than the time fixed by the Judge in charge of the list, with some (albeit small) flexibility being provided should the case be at a critical stage, or at a stage when it is nearly complete. However, at all times the intention will be that subject always to the discretion of the Trial Judge, the case which is being heard and determined will not interfere with the commencement date of the trial which is fixed for trial immediately after it.

FLEXIBILITY

Where a case which has been fixed for trial in the Long Cases List settles or otherwise does not proceed, it will be hoped that, with the consent of the parties, some other cases, fixed for trial at a later time in the list, may be able to be fitted into the hiatus thus created. For that purpose, the Judge in charge of the Long Cases List, and the Judges to whom cases have been allotted, will seek to identify with the parties "shorter long cases" (that is, those the estimated hearing length of which is between ten and twenty days) which might, on appropriate warning, be able to be heard at a time earlier than their allotted trial date. This system will require the active co-operation and adaptability of the profession. It will be hoped that some shorter long cases can be identified, which will be able to proceed for trial within a particular warning time (generally about three weeks).

MEDIATION

It is expected that most, if not all, cases entered into the Long Cases List will, at some stage, be appropriate candidates for attempted resolution by way of mediation. Practitioners will be expected to identify an appropriate time at which the case should be referred to mediation. Generally, it is desirable that mediation should occur before the costs incurred on a case become an obstacle to settlement. On the other hand, it is often necessary for a

case to undergo at least some interlocutory steps before the parties are in a position to be able to properly identify the issues which are in dispute.

USERS' COMMITTEE

The Judge in charge of the Long Cases List will appoint a Users' Committee, consisting of two representatives from the Law Institute and two representatives from the Victorian Bar. The function of that committee will be to act as a liaison between the list and the profession. Practitioners with difficulties, complaints and suggestions will be encouraged to communicate with the members of the committee. It is essential that any problems within the list be brought to light, rather than be permitted to fester without redress. The input of the profession as a whole will, doubtless, prove invaluable in improving and streamlining the techniques which will be utilised within the list. The names of the four members of the committee will be announced at an early date.

ROLE OF THE PROFESSION

Ultimately, the success or failure of the Long Cases List will very much depend upon all of us as practitioners. Barristers and solicitors alike will bear a responsibility for ensuring that cases in the list are properly prepared, and are presented in a manner which is relevant and efficient. The present plight of long cases is a serious problem in our system of justice. It is most important that our system be able to efficiently cope with those cases. In its early stages, the list will be introduced on a trial basis. If it does not succeed, then there is a real risk that we may all be cast back on to the present system.

David Habersberger
Maurice B. Phipps
Stephen W. Kaye

AUSTRALIAN ADVOCACY TEACHING GOES INTERNATIONAL

PREFACE

THE SIXTH DAY OF JANUARY 1994 WAS AN historic day for the English and Scottish Bars.

On that day the Australian Advocacy Institute commenced a series of Advocacy Skills Workshops in Edinburgh, concluding on 23 January in London at Gray's Inn.

This was the first time our "colonial" Institute had ventured to Great Britain and one could be forgiven for assuming a degree of reluctance in our learned Anglo-Scottish brethren in accepting the art of advocacy according to their descendants. How could Australians teach the English the art of rhetoric?

As explained by Mr. Justice Hampel, this was not the purpose of the exercise. The Institute's aim was not to teach advocacy but to offer a method of learning/teaching advocacy skills.

But first the glossary: England's Bar has barristers, Scotland's has advocates. An English reader is a pupil, a Scottish one a devil.

Interestingly though, the Scots are on the threshold of introducing a "devil's course" based very much on our Victorian Bar model. Presently the Scottish Bar does not have the equivalent of our Readers Course. A devil is required to follow an advocate for a period of nine months, during which time the devil cannot accept briefs and does not receive any payment. Until the introduction of the Advocacy Institute's workshops, the devils have had no practical advocacy training.

Temi Artemi

The advocacy teaching conducted by the Victorian Bar Readers' Course and the Australian Advocacy Institute is now recognised as the benchmark for advocacy training in England and Scotland.

In January, at the invitation of the Inns of Court and the Faculty of Advocates, Justice Hampel, Julian Burnside Q.C., Brian Donovan Q.C. from N.S.W. and I spent three weeks in Edinburgh and London, teaching advocacy skills and advocacy teaching skills to the Scottish and English Bars.

The results were spectacularly successful. Perhaps because we are used to them, or take them for granted, we do not realise how significant are the achievements of the Readers' Course and the Australian Advocacy Institute. One of the most remarkable aspects of our trip was the realisation that advocacy teaching in Australia is so highly regarded overseas. So many people said to us that they had not believed that advocacy could be taught until they attended one of the lectures or

The Edinburgh library

workshops we conducted that I began to feel we were meeting the participants on the road to Damascus.

EDINBURGH

Background

Scotland has a population roughly the size of Victoria's. There are 350 people at the Bar. They complain numbers have increased dramatically over the last few years, and that standards are dropping. Solicitors have just won right of audience in the higher court. The Bar is concerned to ensure it can provide specialist skills in advocacy in order to justify its continued existence.

Advocacy teaching was unknown in Scotland until last year. The Faculty of Advocates sent John Sturrock on a 6-week study tour of advocacy teaching in the common law world. Last September a team from the National Institute of Trial Advocacy in the United States (N.I.T.A.) was in Edinburgh running an advocacy workshop for their devils (readers).

In common with our experiences here, it was the junior Bar, who received the benefit of the N.I.T.A. workshop, and those senior barristers who had actually observed what "the Americans" did who accepted that advocacy skills could and should be taught.

The teaching

So, in a freezing early January we faced a group of 60 or so "heavies" in the Common Room of the Faculty of Advocates. Our brief was deceptively simple: to demonstrate that advocacy skills could be taught, to teach advocacy skills to the devils and to teach the senior advocates how to teach advocacy.

With Justice Hampel leading the charge, modelling advocacy as the art of persuasion at its finest, all four of us spoke of the need for advocacy teaching, its aims and methods, the training provided by the Victorian Bar Readers' Course and its N.S.W. equivalent and the Australian Advocacy Institute, and the qualifications and training of teachers of advocacy. The room resonated with phrases like professional accountability, pursuit of excellence, acquisition of skills, case concept, video review and learning by doing.

We now realise how radical this must have sounded to a Bar which has not seen the growth of advocacy teaching the Australian profession has over the last 15 years. However, the proposition that it is not acceptable in 1994 to foist onto the unsuspecting public an untrained advocate who will, eventually, by reason of the mistakes made at the client's expense, gain the necessary experience is as unacceptable in Scotland as it is in Australia.

We then conducted a half day teacher training session for those Scottish advocates who had been dragooned to assist us. We followed that with a two and a half day workshop.

One of the most challenging aspects of participating in an advocacy workshop is performance in front of one's peers. The devils and young advocates who we were to teach were nervous but full of enthusiasm. The senior advocates were either dubious or terrified.

The proposition that it is not acceptable in 1994 to foist onto the unsuspecting public an untrained advocate who will, eventually, by reason of the mistakes made at the client's expense, gain the necessary experience is as unacceptable in Scotland as it is in Australia.

The devils overcame their nervousness surprising quickly, and vied with each other for more opportunities to perform and be reviewed. The "trainee teachers" were slower to expose themselves, initially finding it easier to say a devil could improve than to say or demonstrate how to do it better. All agreed it was much harder than it looked to analyse what a devil was doing wrong, to articulate how to improve it, and to demonstrate how it could be done better.

There is a constant refrain at advocacy teacher training workshops that the analysis involved in teaching advocacy skills is of as much benefit to the teacher as to the pupil. Given the numbers invited to observe and do teacher training, one almost suspects a hidden agenda of improving the skills of the middle and senior Bar without having

to get them to attend a C.L.E. course aimed at them. Of course the explanation could simply be that uninformed criticism would be thereby minimised, and constructive advice or acceptance of the ideas more readily forthcoming from those who had participated. As the effect of solicitors' right of audience depends in part on the competence of the Bar, the spin-off effect of improving standards overall is of incalculable value.

Despite the considerable differences in substantive law, procedure and terminology between Australian and Scottish law, and the differences in accent and idiom, the similarities in advocacy techniques from organisation to persuasion were remarkable.

Once we were under way the mood changed from polite caution to an enthusiasm almost evangelical in its fervour. By the time we left, plans were being made to run more workshops, senior silks were falling over themselves to volunteer to teach at them, devils were addressing senior advocates by name (traditionally a no-no) and Burnside's ties were being criticised openly.

As we left Edinburgh they were planning a way of ensuring we returned for some concentrated teacher training and advanced advocacy workshops. They are planning to introduce a course for their devils, basing much of it on the better aspects of our readers' course.

LONDON

Background

There are over eight-and-a-half thousand barristers in (more or less) active practice at the English Bar. To become a member of the Bar, applicants must pass the Bar Exams at the end of the 12-month "practical" course run by the Inns of Court School of Law (I.C.S.L.), and find chambers to accept them for two six-month periods of pupillage. They cannot accept briefs in the first six (as it is called). Last year they imposed a quota of 1,000 on the I.C.S.L. course. Not everyone passes all stages. Even so, hundreds of new barristers are unleashed each year.

The I.C.S.L. course costs pupils 3,500 English pounds. The Inns subsidise it by about 700 pounds per pupil. It was revamped some years ago to give it a more practical orientation. They had consultants look at what barristers do, and designed the course around that. There are seven main components. They include interpersonal skills, conference skills, opinion writing, evidence and advocacy. Of the one-seventh of the course devoted to advocacy, several tutorials are devoted to the students presenting argument or dealing with a witness. There is no review of the type we are accustomed to here. They may be told if it is "good" or "bad". We were told that if a student is pushy,

Georgian rhetoric in an apt setting

he or she may do a total of half-an-hour actual advocacy in the whole course. It is possible to complete the course without doing any.

Part of the Lord Chancellor's reforms of the legal profession in the U.K. related to C.L.E. As a result pupils in their first 6 must do one day of compulsory advocacy training provided by their Inn.

There has been a surge in numbers at the Bar in recent years. That increase, concern about standards of new barristers, about the uneven quality of pupil-masters, the focus and content of the C.L.E. course, training and accountability of the profession generally, and the Lord Chancellor's reforms would probably have been sufficient impetus for the Bar to look at advocacy training.

Solicitors in the U.K. have just received right of audience in the higher courts. Before a solicitor is granted a right of audience, he or she must pass a prescribed training course in advocacy, and attain a prescribed minimum level of experience in appearance work. It will be about a year before any solicitors qualify.

This too clearly provides an impetus to improve skills, to ensure that the Bar is seen as a provider of specialist advocates.

In the 18 months since we had spoken to Michael Hill Q.C. and Marion Simmons, they had not only won the support of Gray's Inn and the other three Inns for the establishment of practical advocacy training for pupils, for the involvement of the Bar and bench in training and for the training of those who would teach the pupils, but also to invite us to assist them.

Our brief was again deceptively simple. We were to conduct two teacher training workshops, over two weekends, to judges and silks who teach at the compulsory one-day course. Oh, and by the way, as we were there, could we do a talk, just for an hour or two, about the need for advocacy teaching and explaining the technique we use and why we find it so effective? Just to a few people from the Inns who are interested. And we won't mind if they video it, will we?

Five little advocates

So there we were in the great hall of Gray's Inn. It was filled to capacity with judges from Lord Justices of Appeal to circuit judges, silks a-plenty, benchers of the Inns and a few juniors and pupils. And a professional film crew. As Justice Hampel started to explain the need for barristers to acquire skills without doing so at the expense of the client, Burnside and I looked at the mass of faces, polite but doubting. An hour of powerful talk later, and the change in atmosphere was palpable. I am a less than impartial observer but, even allowing for that, it was an inspiring argument for the need to teach advocates and the way it should be taught. The faces in the audience were alive and excited. With the audience eating out of his hand, it was over to us to mop up. A demonstration review of a pupil's leading of evidence in chief and an overview of the Readers Course had this eminent audience saying things like "we are ashamed we are so far behind".

The Teaching

The high following that lecture carried over to the weekend teacher training. Our trainee teachers ranged from Lord Justice Kennedy of the Court of Appeal and Mrs. Justice Bracewell of the High Court to circuit judges, masters, recorders and silks and some token senior juniors. Under strict instructions to call all participants by first name, I said brightly to one man "if your name is Roger, why are you described as H.H.J. on my list?" "It stands for His Honour Judge" he said apologetically. I decided to confine my comments to teaching after that.

The workshops comprised both group sessions, run by Justice Hampel, with occasional contributions from us, and breakout groups with three pupils, eight trainee teachers and one of Burnside, Donovan or me, with Justice Hampel roving between the groups.

In the group sessions we were not only describing our performance review techniques, but also demonstrating to them some of the more difficult aspects of teaching young advocates, such as analysis and development of a case concept, how to allow the pupils to develop the concept, and to restrain the natural instinct of the judge or barrister to tell them how they see it.

In the breakout groups we used pupils in their first six as our students. They would perform a short advocacy task, be reviewed by two trainee teachers who would in turn be reviewed by one of us on their reviews of the pupil's performance. Again, the trainee teachers found demonstrating what they were teaching one of the most difficult parts of the teaching.

The work is intense, and very demanding. We are used to pupils saying they are exhausted after a weekend workshop. To hear the teachers, all competent and experienced advocates and judges, say the same is an indication of the intensity of concentration required.

The Inns do not use the video review, which has become such a central part of our teaching, at all. Although it exceeded our brief somewhat, we included sessions on video review to show why we considered it to be so effective a tool. So taken were they by it that we are assured videos will be incorporated in the teaching of at least some of the Inns by their next workshops.

I had not known what sort of reception to expect from the Inns. I had been prepared for a degree of resistance, an attitude of "what do these colonials to whom we gave the common law have to teach us about advocacy?" I had thought people may have been defensive, as what we were demonstrating and teaching was by implication a criticism of their training.

It could not have been more different. The evangelical fervour that we felt in Scotland also seemed to have affected our English colleagues. We left London with the Inns planning further teacher training, revamped advocacy programmes for pupils, advanced courses, and return visits by us to assist in bringing it all about.

At the final session of the final workshop, one pupil said to the group that he had learned more from the weekend workshop about advocacy than he had learnt in his 12-month I.C.S.L. course and his first six months of pupillage. As we had seen him progress over the weekend, it was obvious to all that he had in fact improved noticeably and learned a great amount that weekend. This simple demonstration of what we had achieved was the greatest accolade we could have received, and the gratitude and recognition of our British colleagues is one of our proudest professional moments.

SINGAPORE

On the way home Justice Hampel and I spoke to representatives of the Singapore Law Society. They and their colleagues in Kuala Lumpur are also interested in having assistance in establishing advocacy training, and hope, as a preliminary measure, to send a representative here soon to ob-

serve the Readers' Course, and an A.A.I. workshop.

The achievements of the Victorian Bar Readers Course and the Australian Advocacy Institute are recognised as an international force.

FOOTNOTES:

1. Justice Hampel is the Chairman of the Australian Advocacy Institute. Julian Burnside Q.C., Brian Donovan Q.C. and Felicity Hampel are members of its teaching committee.
2. The A.A.I. is conducting four workshops in Melbourne this year:

25–26–27 March		Appellate Advocacy
6–7–8	May	Family Law
1–2–3	July	Basics
25–26	November	Communication Skills

Further details of these workshops and the other 15 being conducted around Australia can be obtained from the administrator of the A.A.I., Anne Craig on (06) 249 7600.

Felicity Hampel

POSTSCRIPT

Quite aside from the formal teaching aspects of the workshops; the course had its lighter moments: Julian Burnside Q.C., pausing before reviewing a student, remarked "Yes, yes, I think I've finally worked it out. We're on the other side of the world here and everything is upside down because you were asking leading questions in examination-in-chief and non-leading questions in cross-examination."

As another student was walking away from the Bar Table after cross-examining a witness for the first time, obviously relieved at the end of the ordeal, Felicity Hampel quite unexpectedly gave the student just two minutes to prepare a closing address, much to the student's dismay.

Overall the workshops were very effective, not attempting to impart too much information in too short a time. The reaction from the English and Scottish Bars was extremely positive. The teachers and pupils were enthusiastic, they enjoyed the novel approach and appreciated sharing their views in discussion with their colleagues. The outstanding success of the workshops was measured by the fact that both the English and Scottish Bars invited a team from the Advocacy Institute to return to conduct further workshops.

Temi Artemi

BUILDING CASES LIST

SUPREME COURT OF VICTORIA

Notice to Practitioners No. 1 of 1994

IN 1994 THE JUDGE IN CHARGE OF THE list will be the Honourable Mr. Justice Byrne. His Honour's associate is Mr. Peter Nugent (Tel: 603 6358 Fax: 670 8408).

The practice of holding monthly Building Cases List days for the disposition of interlocutory matters will continue.

Generally speaking, these will be held on the last Friday of the month. The following will be Building Cases List dates for 1994:

Friday, 28 January 1994	Friday, 29 July
Friday, 25 February	Friday, 26 August
Wednesday, 30 March	Friday, 7 October
Friday, 29 April	Friday, 28 October
Friday, 27 May	Friday, 25 November
Friday, 1 July	Friday, 16 December

Notice of orders sought on any of these days should be served and filed one clear day previously. Any exhibit to an affidavit should be delivered to His Honour's associate one clear day before it is proposed to be read.

On Building Cases List days His Honour will be available at 9.30a.m. to hear consent orders. Other matters will be heard as advertised in the Law List.

Where it is appropriate to do so His Honour will himself try questions which can be disposed of shortly and which may assist the resolution of the proceeding. For this purpose he may set aside such other Friday as may be available. Practitioners should consider whether such a question arises in their proceedings.

Where it is appropriate to do so His Honour will

also hear and determine other urgent disputes arising out of building projects which might otherwise be brought in the Practice Court notwithstanding that the proceeding has not been entered in the Building Cases List. Such matters include applications for interlocutory injunctions and applications under the *Commercial Arbitration Act* 1984. See also Notice to Practitioners dated 11 February 1993 (Williams, *Civil Procedure Victoria* [12,504]). Practitioners wishing to avail themselves of this facility should address themselves to His Honour's associate.

Documents for use by the judge must be filed in the usual way with the Prothonotary and not with the associate. The present practice of filing documents with the associate during hearing will continue.

His Honour meets from time to time with a Users' Group representing legal and other practitioners concerned with building disputes. Practitioners wishing to offer suggestions for the more efficient conduct of the Building Cases List may address themselves to any member of this committee. Members are:

George Golvan Q.C.
Owen Dixon Chambers West (Tel: 608 7703)

David Levin
Owen Dixon Chambers West (Tel: 608 7043)

Frank Shelton
C/- Minter Ellison
(Tel: 617 4617)

John Sharkey
C/- Sly & Weigall (Tel: 608 0411)

Ronald Fitch A.M.
Architect
(Tel: 589 3795)

Brian Gallagher
Building Consultant
(Tel: 801 9814)

This Notice to Practitioners is in substitution for that dated 1 February 1993 (Williams, *Civil Procedure Victoria* [12,500]).

Dated 1st January 1994

Peter Nugent
Associate to Byrne J.

Notice to Practitioners No. 2 of 1994

The practice of having Prothonotary's officers present in the ante-room of the Court on Building Cases List days has been discontinued. The Prothonotary has indicated that on these days an officer in the Prothonotary's office will be available to prepare Building Cases List Orders as a matter of priority.

Consent Matters

1. A consent matter is one where **all** of the terms are consented to.
2. His Honour will be available at 9.30a.m. to deal with consent matters.
3. The case will not be called on for hearing until a completed blue form has been presented to His Honour's tipstaff or associate. It would be of assistance also if two copies of the proposed draft order were also provided.
4. Proformas of draft orders are available from His Honour's associate.

Contested Matters

5. Contested cases will be dealt with as advertised in the Law List.
6. The case will not be called on for hearing until a completed blue form has been presented to His Honour's tipstaff or associate.
7. Where possible any party requiring an order should prepare a draft in duplicate and present them to His Honour's tipstaff or associate. Where parties seek conflicting orders each should comply with this direction.
8. Practitioners are reminded that Practice Direction No. 3 of 1992 (1993] 1 V.R. 250 must be complied with wherever possible.

"Truth in Pleading"

9. It is particularly important in a judge-managed list that the real issues between the parties be exposed in the pleadings. For this reason the requirements of rules 13.02(l)(a), 13.03 and 13.07(1) will be strictly enforced. The attention of pleaders is also drawn to rule 13.06. Where standard form contracts are pleaded it is sufficient that the term be identified by number.

   These terms should not be set out in full unless the precise words are of significance.
10. Evasive pleading will not be tolerated.
11. The requirements of rule 13.10 will be strictly enforced. It is the responsibility of the pleader to include in the pleading all necessary particulars. Unless good cause is shown, the costs of providing further particulars, including any request for these, will be borne in any event by the party in default.

Orders for Directions

12. His Honour's associate will ordinarily assume responsibility for the preparation of orders for

directions made on Building Cases List days. Accordingly, in each case where this is done the last paragraph of the order will state:

"This order be signed by a judge".

13. The associate will prepare the order. After it is signed he will send a sufficient number of copies to the practitioner for the plaintiff. It will be the responsibility of that practitioner to ensure that copies of the order are delivered to all other parties as soon as possible.
14. In the appropriate case a draft only of the order will be circulated to all parties with a request that any party who wishes to speak to its terms should give notice to the associate. Upon the expiration of the period set out in the letter without such notice having been given His Honour will sign the order in the terms of the draft.

Liberty to Apply

15. Parties in the Building Cases List have a general liberty to apply. Practitioners are urged to avail themselves of this liberty if difficulties arise between Building Cases List days. They may do this by addressing themselves to His Honour's associate by telephone (603 6358), letter or fax (670 8408). In the appropriate case an application may be brought before His Honour on short notice.

Trial

16. When all interlocutory steps are complete and the proceeding is ready for trial His Honour will make an order fixing the trial date or referring the proceeding to the Causes List or to the Long Cases List. The order will normally dispense with compliance with rule 48.02 (Notice of Trial and Certificate of Readiness). The order will also recite that the proceeding is ready for trial and the estimated duration of the trial.
17. Estimates of likely duration must be realistic outside estimates.

    Where the estimate is less than 10 sitting days His Honour will, if possible, fix a trial date. The plaintiff should ensure that a copy of the order is delivered forthwith to the Listing Master so that she may give effect to it. Note that, even when a date is fixed, practitioners must attend the relevant callover or the date will be lost.

    Where the estimate is greater than 10 sitting days the summons for directions will be adjourned to the judge in charge of Long Cases who will assume responsibility for allocating a trial judge and a date.
18. As the proper despatch of business depends upon the accuracy of recitals referred to in paragraph 16 parties and their practitioners should be aware that amendments or other applications may be refused where they may have the consequence of causing an adjournment of the trial date or an extension of the trial beyond the estimated time. Practitioners should therefore ensure that the pleadings and particulars are in order before an order for trial is sought.
19. The order setting down a proceeding for trial will also include a provision empowering the judge in charge of Long Cases or the Listing Master (as the case may be) to exercise the powers of the Court in relation to the proceeding.

This Notice to Practitioners is in substitution for Notice to Practitioners No. 3 of 1993 dated 26 April 1993 (Williams, *Civil Procedure Victoria* [12,508]).

Dated 1st January 1994

Peter Nugent
Associate to Byrne J.

A FAIRY TALE (CONTINUED)

DID YOU ALL HAVE A GOOD CHRISTMAS? Was Santa good to you all? Did you keep all your New Year resolutions? Happy New Year to you all too! Now gather closer and I will continue the tale of the VicBees.

Many VicBees had a good Christmas. Indeed some of them flew far and wide to see how green were the faraway fields. Not as many flew away as in past years and most of them not as far as they have previously. Indeed, more than ever before hung around the Hives hoping to get extra honey whilst everyone else was away. It may have been they did not have enough honey to sustain them for a long trip.

Of course none of those who stayed said it was because they wanted or needed more honey. Some said they would go for a rest later in the year. Others said they didn't want to mingle with the hoi polloi (whatever that is). A few said they had pressing family or personal reasons to be near the hives.

Those who stayed used all sorts of ploys to get at the fields none of them said they really wanted to visit. They hung around the ClerkerBees as if they were QueenBees about to take off with a swarm to a new hive. They made more frequent contact with ClerkerBees than at any other time of the year. They made numerous calls upon those SolBees unfortunate enough not to be elsewhere, such as by a nice beach a long way away.

It didn't really work because there were only a few fields left and they were small with the scrawniest of flowers. They certainly didn't warrant the VicBee attention they got!

Before we can look to the future we should review what happened late last year. I think I told you last time about the breathless excitement which awaited the announcement of which VicBees were going to become SilkyBees. The announcement was a bit of a damp squib. Everyone knew before the announcement was made. Indeed they knew so well that everyone had three or four on their list who managed to evade the official list. Many VicBees who used to trade on their ability to know such things in advance suffered great shocks to their credibility.

Only a small number of VicBees became SilkyBees. They thought they were lucky being given the right to harvest more honey from the bigger fields. They also thought themselves lucky because it was said that they would be the last SilkyBees to be so appointed. Others thought that they had committed group hari kari because there were already many more SilkyBees than fields suitable to their special appetites. Of course, many VicBees who said that pretended that they hadn't thought of asking to be SilkyBees allegedly because of the lack of suitable fields. But in reality they had asked but hadn't been chosen.

Why did the new SilkyBees think that there would be no more SilkyBees? It was because the AGBee said that next year SilkyBees would be made out of all sorts of Bees — SolBees, GovBees, UniBees, in fact any sort of Bee. I am not sure what all the fuss was about. I mean there are already many RayonBees — VicBees who are sort of pretend SilkyBees and were appointed by friendly AGBees because they were GovBees who said they didn't have time to prove they could become real SilkyBees. Next year we could have the older style SilkyBee, the odd RayonBee and a whole lot of CottonBees. The CottonBees would not come from the ranks of VicBees but could strut around pretending they are as good as genuine SilkyBees. Some of them already behave as if they are SilkyBees. Although there are a few nonVicBees who would make good SilkyBees - very few indeed most of those who hanker to be SilkyBees would turn out to be mere caricatures of SilkyBees. In retaliation the VicBees would create a new group called SCBees. I think that means Super Charged although it could mean Super Charger.

In order to soften the blow caused by the AGBee's announcement, VicBees went through the comforting annual ritual of debating the future of their hives. Naturally, there was no serious discussion about the VicBees' goldplated bombsite. That has assumed the status of an icon — not to be touched. And why should it be touched? It is unique! There is nothing like it in the whole of the territory flown by VicBees. It may even attract the

attention of the ConservaBees. It could be the subject of a special "Mabo" claim, whatever that is. All I know is that it would give the bombsite a more special status than it has now. If not, it could end up on the Historical Building Sites Register or even the register maintained by the Protect Australian Weeds Co-operative. That would indeed be a coup for VicBees, albeit a rather expensive coup.

There was lots of discussion about the future of the Hives and especially about how future decisions were to be made and whether it was really necessary to make VicBees live in those hives. There was a very big meeting of VicBees, even though it had been decided in advance, and everyone had been put on notice, that the meeting could not decide such things and such decisions had to be put to a written poll. Although there was a lot of argument, huffing, puffing and the like about such questions at least a third of the total number of VicBees chose not to vote at all. It was a bit like the ballot to choose telephone companies. Although the ballot, by a moderate margin, decided to maintain the *status quo*, a lot of VicBees appeared to be unhappy with that *status quo*. It may well be that there were enough VicBees unhappy about their present lot that they may defy the rule preventing their living elsewhere and go and find their own hive. If enough of them did that, there wouldn't be enough VicBees left to keep the big jolly pink hive. That might serve the real owner of the hive right. Its refusal to lower its demands for honey to the levels asked by everyone else could mean that it might not get any more honey from anyone. Not many VicBees would be sorry in the end because they might not need to spend as much honey on future hives.

Other problems still plague the VicBees. For instance they still cannot fly anywhere without running into masses of rusty pipes surrounding all sorts of other hives. The pipes look like they are there to stay. Some appear to be holding up their hives or holding the hives together. Others appear to be part of the architecture of the hives like a big hive far far away in a place called France. It is just that in that hive the pipes are much bigger, brightly coloured, not rusty at all and appear to belong.

It might be a new year but life goes on and nothing much changes from year to year. Maybe that is why VicBees are called conservative.

Think on that my dears. It is now time to bid you good night.

I am sure I'll have lots more to tell you about the VicBees next time I visit.

(To be continued)

BAR CHILDREN'S CHRISTMAS PARTY

THE ANNUAL CHRISTMAS PARTY FOR barristers' children took place in its traditional setting in the Botanical Gardens on Sunday, 19 December.

The traditional Christmas weather re-appeared this year — balmy sunshine — and the traditional Santa, accompanied by his beer-toting elf, also reappeared.

In case readers cannot recognise the visage behind the beard in the photographs of Father Christmas in this issue it is indeed Simon Wilson on a return season. Engagements in London and the Freemason's Hospital, East Melbourne prevented his undertaking of this role in 1992 and 1991. Although his stand-ins filled in remarkably well, Simon returned for 1993. So popular was his return that Simon not only performed his usual role at the Botanical Gardens but also undertook a matinee at the Pink Palace. All Counsel who take their children to the annual picnic greatly appreciate the efforts put in by Simon and his stand-ins. More often that not they appear robed on extremely hot afternoons and remain that way dispensing endless presents, good humour and the occasional unforgettable *bon mot.*

We also remember with gratitude the efforts behind the scenes — or behind the Santa — of Spry, Derham and Pagone which make possible what is in every way, possibly for the children, but certainly for the adults, the most escapist event of the Bar year.

This year, while the children awaited the arrival

of Santa we were able to listen to the sounds of a rehearsal for a Peter Coombe concert which wafted gently across the lake.

Children fed ducks. Balls fell into the lake. Parents shouted. Ducks fled. Children teetered but did not fall.

As always, the atmosphere was not that of the late 20th century. It was in every way, except for the absence of crinolines and parasols, *fin de siecle*. Are we a century too late?

A LETTER TO SANTA

Dere Santa,

My Daddy is helpin me right this letta. He spels out the words I dont no. He is a bari~~sta~~ barrissta you no. He is reel good at spelin. Anyway I hope you are havin a good time at the nawth poll and that it isnt to cold. How iz roodolf. Was he good last year. Did his noze sine for you.

Anyway what I uuz gonna say was that my daddy took me to the bot/ah/ bo/t/t/ botanick gardens last year. Daddy had to help me spel that. And I met you there. It was the furst time I had eva met you. Gee you were real funny. I think you were funny. My Daddy said you were real funny. I din unnerstan many of your jokes but I thort it was reel growse meetin you like that.

I am glad you din ask me to kiss you. My sister thort it was real funny kissing you. She said you were reel prickly and she couldn get her arms allway round you. Thank you for the lollies. It was the firs time mummy let us take some lollies from other people. We would like to have got more but the girl in fron got nearly all the lollies. Next year could you frow them a bit more pleaz.

I wanna send you a photo of me and you but it did not cum out. Daddy was gonna take the pitcha but somering wen rong. Mummy reelly payed out on him. She said some reel rude words to him and said lots about lens caps. I dunno what they are. But I didn get my pitcher with you.

Thank you for the pressie. I did thort you were gunna give me a Sega. That was what my Daddy sed Santa wuz gunna give me. Maybe when you come again tonite I might get a good big one. If not can you bring me one next year. Mummy said that you are not to brake a windo or came in the skilite like you said you would.

It was really grate meetin you like that. Will you come bak necks year. I wanna have a reel good photo taken and me sista wants another kiss. Cood you also have Peter Cooms cum back again. He was reely reely cool. Thanks for the cool pressie.

Why do you think my skool is so grate. I asked my teacha if Santa had gone to Melbawn Gramma and she said no.

Thank you for cummin to our piknick and pleaz cum back nex yeer.

Merry Xmas to you an Missuz Santa and the Elvis and roodolf. Seeya nex year

pee ess my Daddy and mummy said that Simon Willson was reelly gud. Does that mean he will get a big present. Wot was he good at. Did he drive yore cart or did he make all the pressies.

LAWYERS' BOOKSHELF

The Law of Privilege

Suzanne B. McNicol
The Law Book Company Limited, 1992
pp. 1–501

Prior to publication, the author of *The Law of Privilege* kindly forwarded to me the proofs of the first two chapters at a time when I was presiding over the County Court trial of an alleged drug trafficker who was unrepresented. The Crown sought to call a solicitor who had acted for and advised the accused in respect of a number of real estate purchases in the names of entities both real and fictitious which transactions, as the Crown contended, had been financed from the proceeds of trafficking in heroin. The proofs directed me to the House of Lords decision in *Reg.* v. *Central Criminal Court ex parte Francis and Francis* [1988] 3 W.L.R. 989 where at p.1015 Lord Goff observed that a drug trafficker, in salting away his illgotten gains in the purchase of real estate, is still acting with the intention of furthering his criminal purpose. I was thereby fortified in holding that the communications between the solicitor and the accused were not privileged and that their contents could be given in evidence because they fell within the exception of communications in furtherance of a crime or fraud.

The expression of my gratitude for the proofs to a representative of the Law Book Company at the launching of *The Law of Privilege* prompted her request of me to review the book which in turn induced me to read the entire 485 pages, albeit at spacious intervals when time permitted.

This book displays immense research, clarity of expression, comprehensive summaries of all the leading authorities together with the essence of each judgment, concise definitions of all the principles of the law of privilege and their rationales and a multiplicity of footnotes identifying with faultless accuracy every conceivable authority, text book and article both Australian and international.

The work, with its informative index and ordered format clearly summarising the common law and statute law, will appeal to the practitioner seeking a quick but accurate answer; while the extensive commentaries should attract the academic, the student and others interested in Socratic debate and potential areas ripe for reform. Indeed the book is an indispensable adjunct to our libraries.

Specific chapters are devoted to legal professional privilege, the privilege against self-incrimination of an accused and of a witness in curial and non-curial proceedings, privileges labelled "marital," "clergy and communicant" and "doctor and patient," public interest immunity formerly known as Crown privilege and without prejudice privilege.

The author, Suzanne B. McNicol, an associate professor of law at Monash University at the age of 37, devoted four years to the preparation of this work, which she accurately describes as the first definitive book written exclusively on the law of privilege. To sum up in the apt words of the author:

"The extent to which the law can and should compel disclosure of confidential communications is explored at every stage, ranging from pretrial procedures of an interlocutory nature, to non-curial and quasi-curial proceedings of royal commissions, boards of inquiry and other administrative or executive agencies (including search warrants and Anton Piller orders) and finally to judicial proceedings (both civil and criminal) themselves. A strong emphasis is also given to the growing area of statutory attenuation and abrogation of privilege as well as to the doctrine of waiver of privilege."

F.G. Dyett

Local Government Handbook (Victoria)

By Lonie, Bryant and Groom
The Law Book Company Limited, 1993
pp i–xxiii, 1–124, Index 125–134

Lonie, Bryant and Groom's new *Local Government Handbook* may be 16 years in the coming but will no doubt be welcomed as it provides an informative and quick reference guide to councillors and council staff on the operation and workings of the *Local Government Act* 1989.

The first Victorian Local Government Handbook was written by Frank Lonie in 1936. It was so successful that it ran to a total of 9 editions with the last edition being printed in 1978. Since then the

Local Government Act 1989 has come into operation.

The Handbook comprises 30 chapters. One need only go to the Table of Contents for a complete outline of what is contained in each of those chapters. Sections of the Act are referred to in detail together with brief references to other relevant legislation.

Chapters 1–11 are introductory in nature and include the topics of the purpose, objectives and functions of a council and the liability of councillors. There is a discussion of section 76 of the Act which provides indemnity, in certain circumstances, to councillors, members of council committees and members of council staff acting *bona fide*. Chapter 11 deals with the new *Freedom of Information (Amendment) Act* 1993 which gives a statutory right of access to local government information from 1 January 1994.

Chapters 13 and 14 cover council proceedings and council staff. Special attention is given in chapters 15–24 to the operation of the financial provisions contained in the Act. This includes council budget, accounting, audits, borrowings and investment (*inter alia*). The final chapters concentrate on rates and councils' ability to levy same.

Chapter 30 concludes with a discussion on ethics and law as guides to choice. The learned authors suggest that where there is no rule of law provided in the Act or Regulations councillors ought draw on ethical criteria when choosing between different courses of action.

Those looking for a ready answer and an overview of the *Local Government Act* 1989 will find joy in this little handbook.

Lindus Krejus

Concise Legal Research

Robert Watt
The Federation Press, 1993
pp. iii–ix, 1–246
Price: Soft cover $25

This work by Robert Watt, a lecturer at Sydney's University of Technology, is a handy little text, designed to help both students and practitioners find legal material quickly, systematically and with confidence. It outlines the various methods of finding the required law, including the appropriate "search patterns" to adopt for particular situations.

At first glance, *Concise Legal Research* might seem rather basic for the practising lawyer. Its initial chapter, for example, is concerned with the rules of citation for cases and legislation, and subsequent chapters distinguish between primary and secondary source material. However, as the author explains in his introduction, the practitioner who has difficulty with even the simplest of legal research is not a rare breed, so there may well be quite a few of us out there who could do with the aid of the first few chapters.

For those who have some confidence in their legal research abilities, assistance might still be found from this work, especially in the area of foreign jurisdictions. The final four chapters, which highlight the laws of New Zealand, Canada, the United States and the European Community, as well as general international law, are particularly good, and should save many hours which might otherwise be lost in law libraries.

Anna Ziaras

MORE TRICKS FOR NEW PLAYERS

PURSUANT TO YOUR INVITATION ON page 61 of the spring '93 edition for "the worst opening sentences in a legal context" I offer the following.

The worst taste opening line in a legal book:

"It may seem somewhat presumptuous for a barrister whose first client was hanged to write a book on Advocates".

David Pannick, *Advocates*, 1992.

Glen McGowan

I.B.A. SCHOLARSHIPS

THE INTERNATIONAL BAR ASSOCIATION'S 25TH BIENNIAL CONFERENCE

THIS CONFERENCE WILL TAKE PLACE IN Melbourne from 9 to 14 October 1994.

The I.B.A. will provide "scholarships," i.e. free conference registration and travel for a specified number of young lawyers (under 35).

The following letter and scholarship information were received by the Chairman of the Bar Council just before Christmas. Application forms are available from Rachel Youngman, Section Administrator, Section on Business Law, International Bar Association, 2 Harewood Place, Hanover Square, London WIR 9HB, England. Fax 44 (0) 71 409 0456.

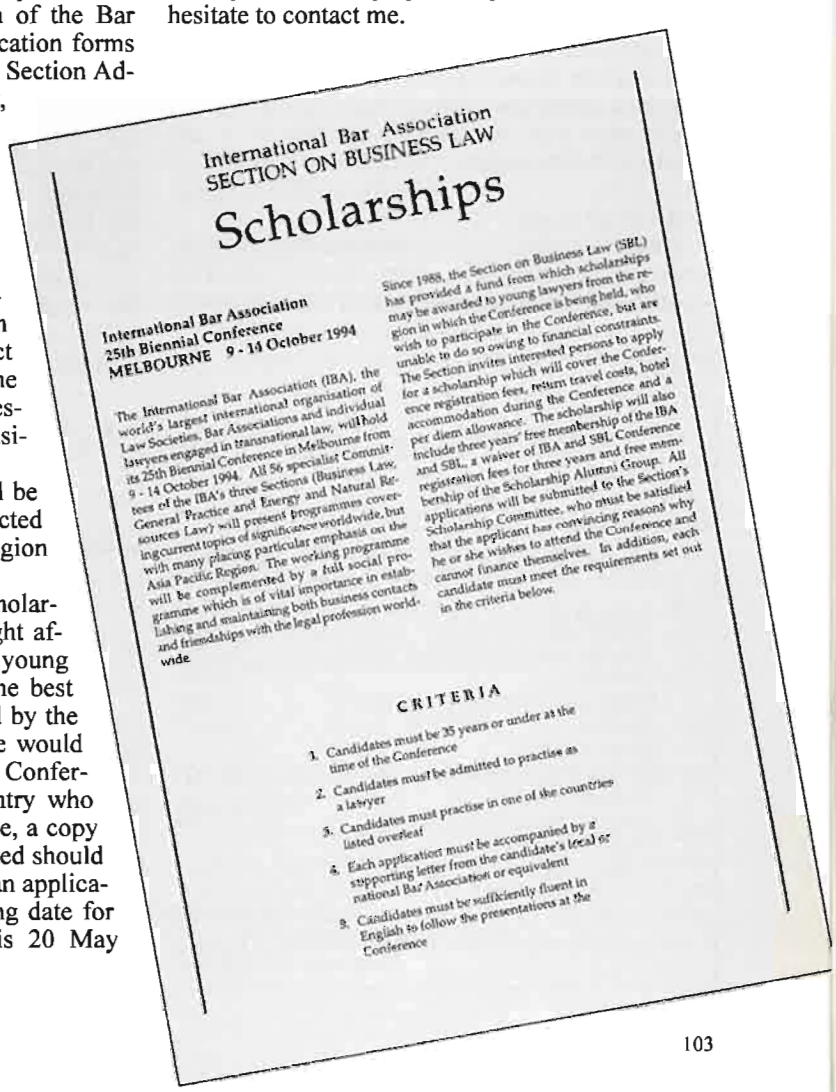
The major event of the International Bar Association (IBA) in 1994 will be its 25th Biennial Conference in Melbourne in October. We expect more than 2,000 lawyers to attend the Conference and participate in the sessions organised by the Section on Business Law's 28 specialist committees.

As in previous years, the SBL will be awarding scholarships to a selected number of young lawyers from the region in which the Conference is to be held.

During the past six years the scholarships have become increasingly sought after, and in order to ensure that young lawyers in your country are given the best possible opportunity to be considered by the Section's Scholarship Committee, we would ask you to publicise this aspect of the Conference to young lawyers in your country who meet the criteria set by the Committee, a copy of which is enclosed. Anyone interested should write to the address given to request an application form. Please note that the closing date for receipt of **completed** applications is 20 May 1994.

Publicity material for the Conference itself is available. We hope that you may be able to circulate this to members of the legal profession in your country and will be pleased to supply you with as many copies as you require.

If you have any queries please do not hesitate to contact me.



International Bar Association
SECTION ON BUSINESS LAW

Scholarships

International Bar Association
25th Biennial Conference
MELBOURNE 9 - 14 October 1994

The International Bar Association (IBA), the world's largest international organisation of Law Societies, Bar Associations and individual lawyers engaged in transnational law, will hold its 25th Biennial Conference in Melbourne from 9 - 14 October 1994. All 56 specialist Committees of the IBA's three Sections (Business Law, General Practice and Energy and Natural Resources Law) will present programmes covering current topics of significance worldwide, but with many placing particular emphasis on the Asia Pacific Region. The working programme will be complemented by a full social programme which is of vital importance in establishing and maintaining both business contacts and friendships with the legal profession worldwide.

Since 1988, the Section on Business Law (SBL) has provided a fund from which scholarships may be awarded to young lawyers from the region in which the Conference is being held, who wish to participate in the Conference, but are unable to do so owing to financial constraints. The Section invites interested persons to apply for a scholarship which will cover the Conference registration fees, return travel costs, hotel accommodation during the Conference and a per diem allowance. The scholarship will also include three years' free membership of the IBA and SBL, a waiver of IBA and SBL Conference registration fees for three years and free membership of the Scholarship Alumni Group. All applications will be submitted to the Section's Scholarship Committee, who must be satisfied that the applicant has convincing reasons why he or she wishes to attend the Conference and cannot finance themselves. In addition, each candidate must meet the requirements set out in the criteria below.

CRITERIA

1. Candidates must be 35 years or under at the time of the Conference
2. Candidates must be admitted to practise as a lawyer
3. Candidates must practise in one of the countries listed overleaf
4. Each application must be accompanied by a supporting letter from the candidate's local or national Bar Association or equivalent
5. Candidates must be sufficiently fluent in English to follow the presentations at the Conference

AN OVERSEAS PERSPECTIVE

THE EXTRACT SET OUT BELOW IS reprinted from the *Journal Readings of the USA* 1993 edition. It was forwarded to *Bar News* by a former member of the Bar who commented "My, haven't judges changed since I was at the Bar".

One hopes that the overseas readers are impressed by the restraint exercised by the Australian judiciary. But one wonders what they think of the quality and breadth of the English courses provided for immigrants to this country.

[Court Transcript]

CONTEMPT OF COURT

From the transcript of a pretrial hearing that took place on May 5, in a criminal court in Adelaide, Australia, before Judge Roy Grubb. In the transcript below, the prisoner is Yusuf Biyikli, a Turkish immigrant charged with "assault occasioning actual bodily harm"; Mr. Smart is the attorney for the crown.

[The charge is read]

Prisoner: Shut up, fucking poofter. You poofter, thank you.

His Honour: You just keep quiet, we will have a word with you in a moment.

Prisoner: Fuck to you. All right you poofter. All right, I fuck you. That is answer.

His Honour: It is said that you assaulted —

Prisoner: Fuck the English, fuck the colony, all right.

His Honour: If you don't shut up —

Prisoner: Fuck the judge too. That is not true.

His Honour: Do we assume this is a plea of not guilty?

Mr. Smart: Yes, I think we can assume that.

Prisoner: I fuck you, answer you, stuff you, poofter. Is that enough for you answer?

His Honour: That is no answer, but I take it as a plea of not guilty. In view of the outrageous outburst from the accused, I assume that the torrent of language from him is a plea of not guilty each count. Remanded for trial. Has someone been imprudent enough to grant a bail agreement?

Mr Smart: I hesitate to ask him.

Prisoner: Fuck you.

His Honour: Do you wish to ask for bail?

Prisoner: You ask yourself bail, poofter. Now ask me.

His Honour: I don't have to ask..

Prisoner: Fuck the bail, fuck Australia.

His Honour: I take it, then, you don't wish to seek bail.

Prisoner: Stuff that.

His Honour: No application for bail. The accused is reminded for trial in custody.

Prisoner: Fucking bastard, poofter, melon-arse.

CRICKET

CRICKET: BAR v. LAW INSTITUTE — FIRST XI

FINE WEATHER STRUCK ON 20 DECEMBER 1993 and for the first time in three years the Victorian Bar v. Law Institute annual cricket match was played on its scheduled date. Readers will be aware that the Bar had triumphed at the last encounter. Alas, the trophy cabinet is now lacking the Sir Henry Winneke Cup.

Although the team was chosen early, by the day of the match there were no less than four changes to the selected side due to injury and court commitments. Unfortunately, this meant that the Bar's ageing team aged even further.

As is his wont, Gillard Q.C. called correctly, and chose to bat on the placid Albert Ground track. However, the Bar was soon in trouble, losing Middleton cheaply in the early overs. After a good second-wicket stand between David Neal (14) and Neville Kenyon (13), wickets tumbled regularly. Only four batsmen reached double figures.

Gillard top-scored with a well struck 39 but could find no partners in the middle order, which was demoralised by the slow spin of Jim Ryan who finished with the impressive analysis of 3 for 8 off 6 overs. Andrew Donald wagged the tail and remained unbeaten on 12. The batting was so ordinary that byes contributed the second highest tally before the Bar compulsorily closed at 9 for 113. The solicitors used 8 trundlers in restricting the Bar to such a low score.

The Law Institute batted in the afternoon heat, but after an early breakthrough by Geoff McArthur, who bowled the solicitors' captain, Tony Cannizzo, in his second over, the opposition consolidated. The solicitors passed the Bar's score with only 3 wickets down, eventually reaching 4 for 178 from their allotted 40 overs. Tony Cavanough was the Bar's most successful wicket-taker, returning 2 for 33.

The team was Gillard Q.C., Cavanough, Connor, Donald, Kenyon, McArthur, Middleton, Mueller, David Neal, Paul Santamaria and Southall. Our thanks also to John Baring who scored so very efficiently.

BAR 2NDS CRICKET

MIRACLES DO HAPPEN! FIRST, THE BEST weather for four years saw the cricket matches run to schedule. Second, the Bar 2's won the toss (noting that five minutes before the toss only seven solicitors were present).

The Bar batted first. Against a steady but not penetrating attack, runs came from the efforts of Denis Gibson (32), John Jordon (24), Tony Neal (18) and His Honour Ashley J. (31 n.o.). Several deft acts from the new bat held by His Honour were noted as was the quick single he mercilessly, but correctly, called on the captain at the other end, whose feet at first refused the order. A run was scored.

However 6/139 off 39 overs was never going to be enough on a superb batting track and no Dean Jones — and expected talent after lunch.

Lunch, courtesy Phillips Fox caterers, was delicious. Our opponents were ever affable.

In post-lunch mood, L.I.V. were cruising at 1/71; the Bar's bowlers were without luck, with four retired (the L.I.V. 1st XI captain should note) L.I.V. reached 7/197 off 35 overs.

.....

The motto for the Bar — noting both 1sts and 2nds scores?

The Bar must seek Benson & Hedges' or Ford or Law Foundation sponsorship — for cricket scholarships, to encourage more able, experienced cricketers to come to and stay at the Bar playing cricket — for the mean age of the Bar's sides is INXS.

LEGAL FUN RUN 1993

BAR HOODOO CONTINUES

'TIS A SAD THING TO REPORT, BUT NO barrister has ever won the Legal Fun Run. The hoodoo continued in the 1993 event, held on a pleasant evening in early December.

Among the 184 finishers (152 runners and 32 walkers) were eight barristers and *no* judges. All of the barristers ran the 7.65 km course (two laps of the Tan) at varying velocities.

Fastest and best-placed barrister was Mark Purvis, who finished second overall for the third year in a row. This is a significant result in terms of the aforementioned hoodoo, because Mark has been at the Bar for, you guessed it, three years. As a solicitor, he won the event three years in a row. His only consolation is that he retains his unofficial title of fastest lawyer, because this year's winner works on his speech and fitness in the mail room of his employer as a mail clerk.

Michael Wilson, Mark Gamble and Rose Carlin were the first barristers' team, with Gamble's performance proving beyond reasonable doubt that he is a batter footballer than runner. Andrew Ramsay's non-appearance meant that the Wilson-Gamble-Carlin team was unopposed.

There were five barristers, including Ramsay, who entered, but did not risk an appearance. Perhaps one of these will appear to break the bar hoodoo in 1994.

RESULTS

M. Purvis	25.26 (2nd overall, 1st 31–40)
J. Tsalanidis	30.37
M. Wilson	30.40
A. Watson	32.50
A. Schlicht	33.46
T. Danos	34.33
M. Gamble	35.56
R. Carlin	37.13

Their master's voice

At the start

GOLF

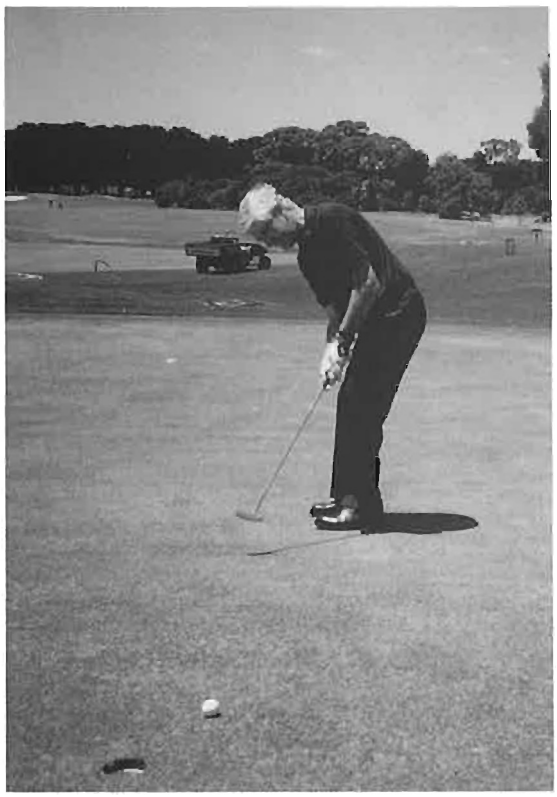
THE ANNUAL GOLF COMPETITION FOR the Sir Edmund Herring Trophy took place between the Bench and Bar and the Law Institute at Royal Melbourne Golf Club on 20 December 1993.

In perfect golfing conditions the Bench and Bar regained the trophy which it had lost in 1992. Fourteen pairs participated for the Bench and Bar team and scored a total of plus 49 against par. This was an average of plus 3.5 per team. Twenty pairs competed for the Law Institute and scored a total of plus 46, giving an average of plus 2.3. The Bench and Bar were therefore clear winners.

The leading pair were A Thompson and P. Linsdall for the Law Institute with a score of plus 11. The best performers for the Bench and Bar team were H. NcM. Wright Q.C. and Michael Croyle with a score of plus 10, a score which was matched by Jeremy Gobbo and Tim Margetts. Other good performances for the Bench and Bar were Robert Miller and Brian Keon-Cohen with plus 8 and Peter Lithgow and Gavan Rice with plus 7. The Bar was pleased to welcome Mr Justice Southwell from the Supreme Court and Judges Jones and Ross from the County Court representing the bench in the winning team. It must be conceded that of the 28 members of the Bench and Bar team, no less than eleven were members of Royal Melbourne. A protest by the Law Institute on the grounds of home course advantage by the Bench and Bar team was dismissed. The Bench and Bar team looks forward to defending the trophy in December 1994.

An awesome foursome:
T. Margetts, J. Gobbo and opponents.

Shepherd warms up



Doug Williamson practising on the putting green

WIGS & GOWNS SQUADRON ANNUAL REGATTA 1993

THE SQUADRON'S 7TH ANNUAL REGATTA was held off Williamstown on Monday, 20 December 1993.

The event was, as usual, well attended, both on the water and at the presentation festivities held at the Royal Yacht Club of Victoria.

The actual day was preceded by much "onshore" manoeuvrings. By courtesy of Kennon Q.C., whose carefully-garnered intelligence is much sought after by the whole Bar, at least the following questions were raised, namely:

1. Would Fox Q.C. make another raid to wrest the Holy Grail (trophy) or would Kenya prove more attractive?
2. Would "Seldom Seen McPhee" make a guest appearance?
3. Would the first real all-female crewed boat from Port Melbourne actually turn up?
4. Would Whitehead crew for Liversidge?
5. Would Titshall spit the dummy because a silly little rope was not in place?

More of which Anon.

For once the weather was superb and the sailing perfect, assisted by the soldier's course set by the Committee. In the best traditions of the Squadron "the Race" began with most of the fleet crossing the starting line within five minutes of their designated time — more or less. The fastest boat — *Blue Max* — of course had to be different.

In the worst traditions of the Squadron, Rattray Q.C. tried too hard, Klestadt M. was seen to be trying (??) to set a spinnaker, and the seamanship of some others left a lot to be desired.

However, all starters made it to the finish line, which in itself is a matter of record. The only reported casualty was Bert. G. Uren Q.C., who al-

Graeme Uren slightly dislocated

John Barnard contemplating a trip

leged he had dislocated a little finger on being tripped by helmsman Barnard Q.C. during the course of a particularly simple gibe aboard *Rosamund Duncan.* Judge Kellam's attempts at medical assistance are said by Barnard Q.C. to have constituted something (called *a novus actus).*

On the lawns of "Royals", whilst hungry crew tried to find where Pithouse had hidden the BBQ meat, the Committee deliberated on the race placings, bearing in mind the rigorous handicapping system.

After the race

For this event we were fortunate to have had donated two further trophies. Mr. Justice Rowlands of the Family Court, Squadron Member, Rear Admiral of the R.A.N., and Judge Advocate General of the Australian Defence Forces (in that order of course) generously donated a trophy to be competed for annually and to be known as the "Judge Advocate General's Trophy". He also donated a shield for services to the Squadron. We thank him for his generosity and were sorry that he could not be in attendance to present them himself. Perhaps next year.

Prize winners were:

(a) The "Thorsen" perpetual trophy to Pithouse and McIntosh on *Patrol.*

(b) 2nd place to Nicholson C.J. on the *Endeavour 24.*

(c) 3rd place to Judge Fagan on *Adams Rib.*

(d) J.A.G.'s trophy to Klestadt M. on *Blue Mist.*

(e) Services to Sailing Shield to Campbell.

The answers to the earlier questions were:

1. No and yes.
2. No.
3. No.
4. No.
5. Yes.

Our thanks to all who participated, on land and sea, and particularly to the Commodore and staff of the R.Y.C.V. for their facilities and services.

THE REAR-ADMIRAL'S CUP?

MESSAGE FROM THE JUDGE ADVOCATE GENERAL

I AM PLEASED THAT THE PREVIOUS J.A.G., Air Vice-Marshal the Honourable Chief Justice Nicholson, is to present the Judge Advocate General's Trophy at the WAG's Regatta 1993 and a special sailing award to Mr. E.C.S. Campbell for a general contribution to sailing and to the WAGS in particular over many years.

I believe that the close association between the Victorian Bar and lawyers in uniform is enhanced by the presentation of these awards for a sea-based sporting activity.

A number of service lawyers are members of the Bar and some reservists at the Bar are keen "yachties". However it is the broader association which is particularly valuable to the Defence Force which, like the rest of society, needs access to the learning and values an independent Bar maintains.

Best wishes for today and the forthcoming year.

Alwynne Rowlands

CONFERENCE UPDATE

1. The Australian Institute of Criminology will hold the following conferences.
   (a) **13–15 April 1994:** Youth Crime Prevention — Terrigal N.S.W.
   (b) **11–13 May 1994:** Ninth Conference for Librarians in the Criminal Justice System — Canberra.
   (c) **14–17 June 1994:** Aboriginal Justice issues II — Townsville.
   (d) **20–22 July 1994:** Access to Justice — Sydney.
   (e) **21–26 August 1994:** Eighth International Symposium on Victimology — Adelaide.
   (f) **Late September 1994:** Safety in Public Places — Gold Coast.
   (g) **18–21 October 1994:** Sentencing — Brisbane.
   (h) **22–25 November 1994:** Family Violence — Canberra.

   Contact Conference Unit, Australian Institute of Criminology, (06) 274 0223.
2. The International Bar Association will hold the following conferences:
   (a) **24–29 April 1994:** I.B.A. Conference on Energy and Resources Law — Barcelona.
   (b) **9–15 October 1994:** I.B.A.'s 25th Biennial Conference, Melbourne.

   Contact Ms Lorna McCleod, International Bar Association, 2 Harewood Place, Hanover Square, London.
3. **7–10 April 1994:** Australian and New Zealand Association of Psychiatry, Psychology and Law, 14th Annual Conference — Fremantle. Contact Aussie Bound Conferences (09) 387 6211.
4. **3–6 May 1994:** The Inter-Pacific Bar Association 4th Annual Conference — Singapore. Contact the I.P.B.A. 4th Annual Conference, Singapore Host Committee, c/- Kenair Skylinks, fax (65) 336 3613.
5. **11–14 May 1994:** Family Law and Conciliation Conference — Maui. Contact Carmel Morfuni, Secretary, Association of Family and Conciliation Courts, c/- K. Spurr.
6. **3–7 July 1994:** Australian Bar Association Annual Conference, Noosa.
7. **9–16 July 1994:** Australian Lawyers' Conference — Commercial Litigation and Family Law. Contact Gillis Delaney Brown, Solicitors, (02) 232 6655 — Bali.
8. **22 July 1994:** Conference on the Action for Misleading or Deceptive Conduct — Perth. Contact Mrs. M. Green-Armytage, The Centre for Commercial and Resources Law, the University of Western Australia (09) 380 3438.
9. **12–14 August 1994:** Intellectual Property Law Conference sponsored jointly by LawAsia and the Business Law Section of the Law Council. Contact Mr. John Healy, Secretary-General, LawAsia (09) 221 2303 — Perth.
10. **14–18 August 1994:** A.I.D.A. IXth World Congress hosted by Australian Insurance Law Association. Contact The Secretariat, A.I.D.A. IXth World Congress, (02) 241 1478.
11. **20–24 August 1994:** Annual Meeting of Canadian Bar Association — Toronto. Contact Canadian Bar Association, fax (613) 237 0185.
12. **21–27 August 1994:** Tenth Triennial Commonwealth Magistrates and Judges' Association Conference — Victoria Falls, Zimbabwe. Contact David Armati, Chairman Licensing Court of New South Wales (02) 289 8701.
13. **31 August–2 September 1994:** Seventh Conference on International Business Law — Singapore. Contact Ms Lochnie Hsu, Faculty of Law, National University of Singapore, fax 779 0979.
14. **7–9 October 1994:** North Queensland Law Association Annual Conference — Townsville. Contact Heather Watson (07) 772 2177.
15. **9–11 October 1994:** Fourth LawAsia Labour Conference — Beijing. Contact Judge D.D. Finnigan, Labour Court, P.O. Box 50411, Auckland, N.Z.
16. **11 October 1994:** Fifth International Criminal Law Congress — Sydney. Contact Ms Rosita Johnson, Law Council of Australia, (06) 247 3788.
17. **16–19 October 1994:** Thirteenth Aviation Law Association of Australia and New Zealand Conference — Hamilton Island. Contact K.K. Conference Management Services (03) 428 3155.
18. **23–27 October 1994:** Seventh LawAsia Energy Law Conference — Manila. Contact Mrs. May B.Y. Oh, fax Singapore (65) 224 4637.
19. **29 October–2 November 1994:** 38th Congress of the International Association of Lawyers — Marrakesh. Contact Uia (02) 232 1450.
20. **4–6 December 1994:** Second LawAsia Comparative Constitutional Law Seminar — Katmandu. Contact Professor Cheryl Saunders, Centre for Comparative Constitutional Studies, (03) 344 6206.