VICTORIAN BAR NEWS

No. 89
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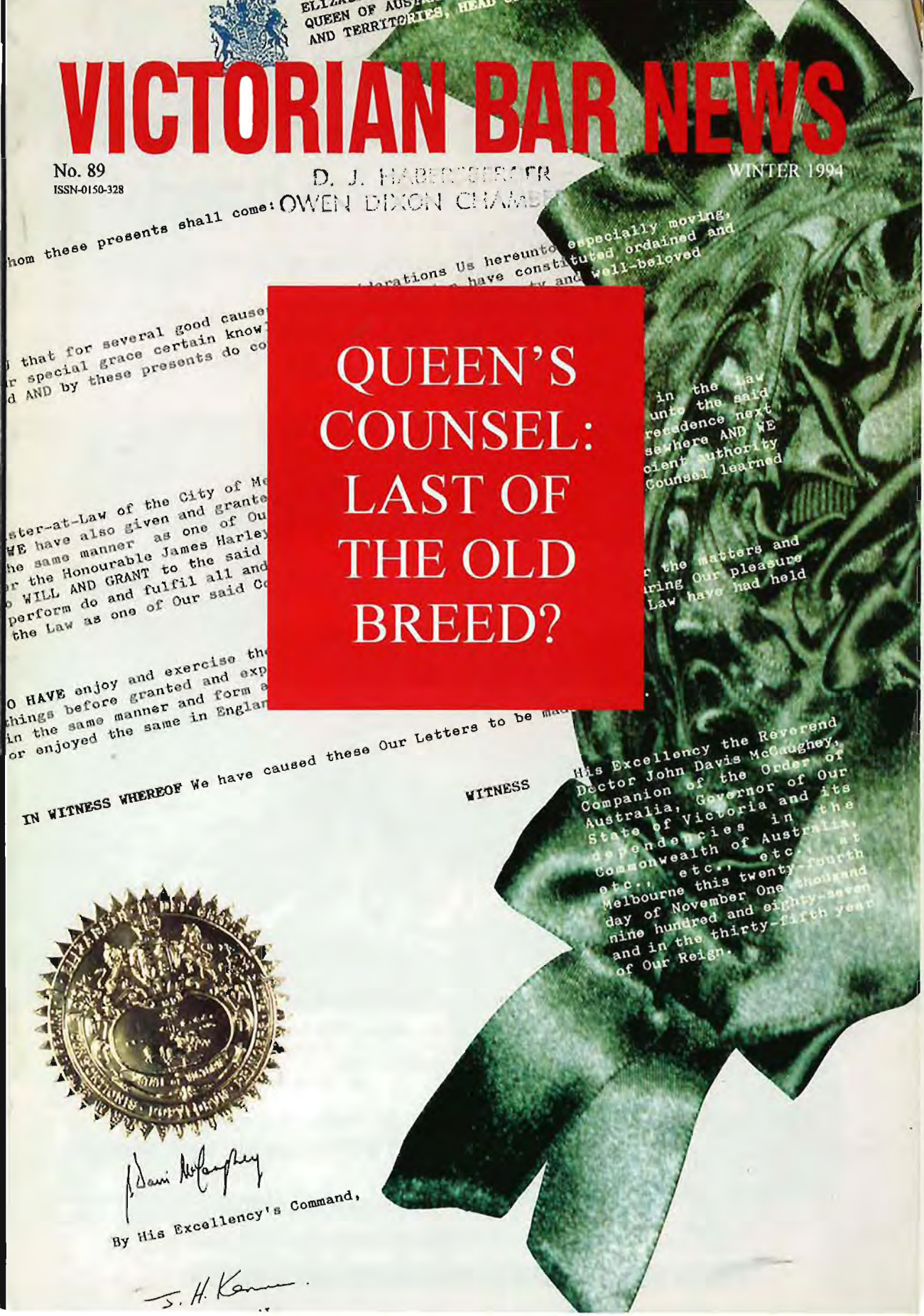
WINTER 1994

QUEEN'S COUNSEL: LAST OF THE OLD BREED?



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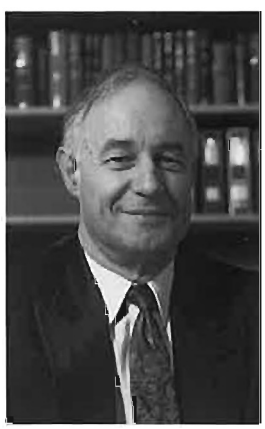

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EDITORS' BACKSHEET

WHY TRUST ECONOMISTS AND BUREAUCRATS?

REFORM OF THE LEGAL PROFESSION HAS gone mad. But the key question remains, why should we trust the people who are proposing reform and are to administer the "new" law industry? Why should we trust economists? Why does every newspaper seem to believe that the Trade Practices Commission provides all the answers for Australia? What must be avoided is the centralisation of the legal profession under a bureaucracy situated in Canberra.

Why should we trust this person called Fels? It has become fashionable for bureaucrats to use a professorial title. It gives a status to their pronouncements which ignores their existing function and which assumes that they are still operating in the rarefied and objective academic environment. It assumes that academics know more than they do. It treats people who have moved from academia to policy creation as though they were still academics — in the sense of being objective, not merely impractical.

Why should we put any faith into what Mr. Sackville says? There is no doubt that he is a very clever academic, but that's all. He has now left Victoria and gone to New South Wales. Why should we give any weight to his recommendations? It is just simply looking towards America. Abolition of wigs and gowns, T.V. in court. How ridiculous. Contingency fees are a laugh. The American legal system looks to our system and yet we want to adopt all their practices. It will bring lawyers into lower esteem and increase the cost of justice rather than lessen it.

The new proposals by the State Government at least are laudable to the extent that they have not given the game away entirely. It was of great concern to read that the State Government was quite willing to give away the powers over the legal profession to the bureaucracy of Canberra. There are no qualms about the appointment of an Ombudsman. However, what point is there to create another bureaucracy to govern lawyers?

There is no good record for economists or bureaucrats anywhere in Australia. They can be blamed for the troubles we are in now. Therefore why should the public believe that appointing a huge bureaucracy to administer lawyers will have any benefit? This is simply window dressing. However, State bureaucracy is preferable to the fear of a Canberra bureaucracy.

The American legal system looks to our system and yet we want to adopt all their practices. It will bring lawyers into lower esteem and increase the cost of justice rather than lessen it.

Those in power wish to remove the independence of the professions. Further, they wish to place the powers of the judiciary fairly and squarely under those of the executive. Independent barristers and judges have always been a thorn in the side of those who presently rule the nation. What is at heart is a systematic removal of forces independent of government and a further increase in the power of the bureaucracy and the executive.

The proposals in the Sackville report will do nothing for access to justice. There will be an increase of complaints against lawyers. Indeed what will happen is that the Westminster system will further slide away and disintegrate. The Government has contempt for this system and looks to all things American and non-British. Both solicitors and barristers must unite to at least prevent the placing of powers under the Trade Practices Commission and a bureaucracy in Canberra. If the State Government is weak enough to give this power away then the public will suffer. Let's hope this Government will

at least be able to see that giving up its power over the legal profession is not in the public interest.

It was interesting to read an article in the *Herald Sun* of 2 June. This was written by a person called Michelle Coffey who calls herself "Law Reporter". The article contained a picture of the solicitor-advocate Faris. If Ms Coffey is to call herself a law reporter perhaps she should get her facts right. In her article she says that Faris was a member of the Victorian Bar Council and as such was forced to hire his room from the Victorian Bar Council. Ms Coffey is unable to realise that the Bar Council is the body which governs the Bar, the Bar is the body of which Faris was formerly a member. If she can't get such simple facts right she shouldn't be putting under her name "Law Reporter". Further, her questioning of Faris went nowhere. Why did she not ask him whether he has passed on any of these marvellous savings, having left the Bar, to the public? Has he lowered his fees? It was interesting to note that on a recent radio programme Faris stated that the fees of Q.C.s were not a relevant issue in the debate concerning the law. Of course, Faris would state that to support his own position as a new solicitor Q.C. Undoubtedly in the future, Faris will seek to rejoin the Bar. We will accept him. Because that is the way that the Bar operates.

SUCCESS

We note that following Master Patkin's article in the last issue on Rule 8.05 the Rules have been amended by each of the Supreme Court and the County Court. We do not know whether to take credit — either in whole or together with the Master — but what does appear to be the situation is that the Supreme Court was the first of the two Honourable Courts to heed the words printed in the *Victorian Bar News*. Then again, they heeded our words differently.

The Editors

FOR THOSE WHO MIGHT HAVE MISSED THE response to Richard Yallop's "The Law on Trial" in the *Age Saturday Extra* (7 May 1994) we reprint this contribution to "Access Age" (12 May 1994):

Off the Scale

The Age (7/5) reports that access to the Victorian Bar's Ethics Committee is free of charge. As one who has used the service, I consider it vastly overpriced.

John O'Sullivan
Gisborne

CORRESPONDENCE

Dear Sir/Madam

This letter is to let organisations/agencies such as yours know that the Administrative Appeals Tribunal has recently produced a video to assist people in better understanding the role of the Tribunal. This video is part of our continuing program to increase public awareness of the Tribunal's role.

This video assists people in understanding how the Tribunal operates and the processes it uses and is available for purchase at a cost of $25.00. Your organisation/agency has been targeted as a potential purchaser of the video because of your dealings with the Tribunal and in case there is a need within your organisation/agency for staff or clients to learn more about the Tribunal. We believe that your organisation/agency will benefit from having an easily accessible resource such as this video to assist you in helping people who may have dealings through your organisation/agency with the Tribunal.

The video runs for approximately 10 minutes. A brochure is also available with the video at no cost. Further supplies of the brochure are available on request.

If you would like a copy of the video please write, telephone or fax:

Gordon Marshall
Human Resource Operations
Administrative Appeals Tribunal
GPO Box 9955
Brisbane QLD 4001
Phone: (07) 361 3014 or Fax: (07) 361 3002.

Please don't hesitate to contact me if you have any queries in respect of the video. I look forward to hearing from you or a representative of your organisation/agency.

Yours sincerely,
Gordon Marshall
Human Resource Operations

CHAIRMAN'S CUPBOARD

THIS IS MY LAST CHAIRMAN'S CUPBOARD so I thought I would say something about the Venetian Doges.

Events on St Vitus's Day in 1310 led to the formation of the Council of Ten. They were elected for a year. The Council acted in concert with the Doge and his six councillors. A state prosecutor was on hand to advise the seventeen of them on points of law. They met regularly, were overworked and never paid. The Council gathered intelligence and more importantly set up subcommittees to consider questions requiring speedy and efficient resolution. It is on this institution that the Victorian Bar Council is modelled. It is generally accepted that the Council did Venice good service, most of all by permitting Venice to respond quickly should anything like the Tiepoline conspiracy bubble up again but also in preserving a successful Republic surrounded by warring dictatorships in Lombardy, Tuscany and elsewhere.

The Bar has been under factitious attack for half a decade. This has led to change not welcomed by all but which is in some respects inevitable. The two essential elements of the Victorian Bar which are worth fighting for and hopefully preserving are the right to practise as independent barristers and to be housed in reasonable proximity to each other.

May I sign off with the observation that if governments are responsible, a Bar which responds to public pressure in a manner which is neither reactionary nor craven and which can accommodate the needs created by social change in a constructive manner should be a Bar which will remain standing.

The Bar Council has responded not only to implement change but also to dislodge repeated and false assertions about the Bar. It does not foment

Susan Crennan

debate. In my opinion, the greatest achievement has been the acceptance of a civil legal aid scheme which demonstrates a desire to solve one of the nightmares of the modern legal system, access to justice. The proposed scheme achieves this without the unacceptable evils of contingency fees.

The Chairman receives a great deal of support particularly in relation to public utterances although there are many at the Bar who telephone to suggest (often at some length) how they would have settled one's prose if only they had been asked. This, they variously assure you, would have made your correspondence more lucid/more opaque, more acceptable/more confrontational; you receive unsolicited advice on how to be more forceful/quieter, more politically acceptable/punchier, simpler/more exegetical and so on. Often this all occurs on the same day. Like every Chairman before me I am not ungrateful though it is hard to resist the torpor induced occasionally by trying to take in too many and various viewpoints.

May I sign off with the observation that if governments are responsible, a Bar which responds to public pressure in a manner which is neither reactionary nor craven and which can accommodate the needs created by social change in a constructive manner should be a Bar which will remain standing.

ATTORNEY-GENERAL'S COLUMN

IN THIS ISSUE I WILL EXAMINE IN DETAIL one Bill from the current parliamentary session, and will briefly foreshadow two reforms now proposed to be introduced in the Spring 1994 session of Parliament.

PUBLIC PROSECUTIONS BILL

Following an extended period of unnecessarily heated public debate and productive private consultation, I have introduced into Parliament the Public Prosecutions Bill 1994. This Bill has received broad votes of support both from the legal profession and the community. The current Director of Public Prosecutions, Mr. Bongiorno, has expressed his general satisfaction with the Bill as it now stands, and his willingness to work within the structures to be created by the Bill.

While the 1994 Bill is significantly different to the draft that was stolen in 1993, it still reflects all the aims with which this reform first commenced. It also maintains a number of the provisions which caused great concern to earlier commentators, but which have apparently been shown by further consideration to lack the sinister implications first suggested. Members of the Victorian Bar provided invaluable comment and input towards the drafting of the 1994 Bill, and this contribution is greatly appreciated.

The Public Prosecutions Bill 1994 addresses concerns regarding vital features of the prosecution system as set up in 1982. These features include an absence of formal checks and balances in the exercise of the prosecutorial discretion by the DPP, poor integration with the pre-1982 office of Prosecutor for the Queen, and an inadequate statutory and administrative basis for the operation of the Office of the DPP. The Bill also resolves an ambiguity and possible conflict that has developed in relation to the administration of the law of criminal contempt. The Bill does not diminish in any way the independence from government of the prosecutorial decision-making process.

The Bill maintains the statutory office of the Director of Public Prosecutions, and places on a statutory footing the positions of Chief Crown Prosecutor and Solicitor for Public Prosecutions.

Jan Wade, M.P.

The Bill also establishes an Office of Public Prosecutions, a Committee for Public Prosecutions, and a Director's Committee. The Bill renames the Prosecutors for the Queen as Crown Prosecutors.

DIRECTOR OF PUBLIC PROSECUTIONS

The Bill provides for the current Director to continue to hold his office until he attains the age of 65 years, but future Directors will be appointed on the basis of ten-year terms, with an eligibility for reappointment. The Bill provides the Director with a capacity, for the first time, to manage the work of the Crown Prosecutors, through the Chief Crown Prosecutor, at the same time it imposes on him or her a requirement to consult with the members of the Director's Committee before making any of a defined class of "special decisions".

DIRECTOR'S COMMITTEE AND SPECIAL DECISIONS

The Director's Committee consists of the DPP, who is chairperson, and the Chief Crown Prosecutor, and, if the decision involves review of a prior

decision of prosecuting counsel, a third counsel (either a Crown Prosecutor or counsel from the Private Bar) who will generally be the most senior of the counsel involved in the prior decision. The role of the committee is to advise the DPP in relation to the defined special decisions. The committee decides issues by majority vote, with the DPP holding a deliberative and casting vote. The Director may act contrary to the advice of the other members of the committee, but must in such a case submit a written statement to the Attorney-General setting out the decision and the reasons for it. The Attorney-General is required within seven sitting days of receiving the statement to lay the statement before the Parliament.

The Public Prosecutions Bill 1994 addresses concerns regarding vital features of the prosecution system as set up in 1982. These features include an absence of formal checks and balances in the exercise of the prosecutorial discretion by the DPP, poor integration with the pre-1982 office of Prosecutor for the Queen, and an inadequate statutory and administrative basis for the operation of the Office of the DPP.

Alternative procedures apply to ensure that the Director's Committee is not convened unnecessarily, and that a Director's statement is not tabled where it is in the interest of justice that its contents not be publicly revealed (i.e. in the course of a trial).

The special decisions to which the committee procedure applies include the entry of a *nolle prosequi* to a presentment signed by a Crown Prosecutor, the presentment of an accused where a Crown Prosecutor has declined to make presentment on charges for which a magistrate in a committal proceeding has discharged the person, the decision to appeal against or seek relief or remedy in respect of certain orders of the Supreme or County Court, and the furnishing of guidelines to persons involved in the prosecutions with respect to the prosecution of offences.

CROWN PROSECUTORS

Current Prosecutors for the Queen are to be entitled to be appointed Crown Prosecutors under the new legislation for the remainder of their current appointments. Crown Prosecutors will be appointed by the Governor-in-Council, either as Senior Crown Prosecutors appointed for ten years or as Crown Prosecutors appointable for up to ten years. They will be managed in their day-to-day functioning by the Chief Crown Prosecutor, who will serve a ten-year term, and who will be paid the salary of a County Court Judge. All Crown Prosecutors, including the Chief Crown Prosecutor, will maintain their independence in respect of their presentment and advocacy functions. It is anticipated that the Chief Crown Prosecutor will receive further responsibilities by means of delegations from the Director.

SOLICITOR FOR AND OFFICE OF PUBLIC PROSECUTIONS

The Bill establishes the Office of Public Prosecutions, which will be managed by the Solicitor for Public Prosecutions. The Solicitor for Public Prosecutions will be appointed by the Governor-in-Council, but will be responsible to the Attorney-General for the administration of the office, in the manner of a Department Head under the *Public Sector Management Act* 1992.

The Solicitor will be responsible for the briefing of private counsel and Crown Prosecutors to appear on behalf of the Director, subject to the authority of the Chief Crown Prosecutor, and will also have the performance of any functions delegated to him or her by the Director. The Office of Public Prosecutions will be responsible for preparing and conducting on behalf of the Director proceedings and matters in which the Director is involved, and for assisting the Solicitor and the Committee for Public Prosecutions in the performance of their functions.

COMMITTEE FOR PUBLIC PROSECUTIONS

The Committee for Public Prosecutions is to be comprised of the Director (who will be chairperson), the Chief Crown Prosecutor, the Solicitor for Public Prosecutions, and a person to be appointed by the Governor-in-Council. The last member will be chosen for his or her high standing in the community.

The committee will primarily perform advisory and co-ordinating roles within the prosecutorial system. As in the earlier draft Bill, it will not have a role in relation to the direct exercise of the prosecutorial discretion.

CRIMINAL CONTEMPT

The Bill provides for the vesting in the Attorney-General of the power to bring an action for

CCH UPDATE

Oliver Wendell Holmes (1841-1935) was a member of the US Supreme Court for 30 years and one assessment of him[1] is that "he has been characterised as the greatest intellect in the history of the English-speaking judiciary. His opinions are supreme for their penetrating character and originality of composition ..."

One of his most quoted judicial statements[2] was that "Taxes are what we pay for civilised society ..." and if ever there was a man who put his money where his mouth was, in the most high-principled way, it was Holmes who on his death left most of his $350,000 estate to the US Government.

Which is an obtuse way of making the point that whether it's a matter of maximising your payment of tax or minimising it the best thing we can suggest is to go to the relevant CCH publication ... which term these days has a broad meaning because we now provide information on tax (inter alia) on the printed page or per the computer screen.

For example, if you're a subscriber you have the option of receiving your ***Tax Week*** newsletters electronically. That is, you download the newsletter on to your own computer system or computer network and instead of distributing the printed version to your staff and colleagues, you can distribute the newsletter electronically by electronic mail within your organisation Australia-wide.

We also provide an electronic version of our ***Australian Master Tax Guide***.

■ ■ ■

Even though we're approaching the new electronic age at an ever-increasing speed, most of our publications at this time are available only in printed form; one of them is our ***CCH Journal of Australian Taxation***, in the May issue of which there's an article of interest to many members of the profession ... well, to those entering or exiting a partnership in particular. It's by Jim Richardson and Graham Leese (of Greenwood Challoner) and they examine the income and capital gains aspects of the introduction and retirement of professionals in partnership. They look at goodwill issues and the implications for individual partners with creeping acquisitions. All pretty useful stuff for those concerned with this problem.

On the question of whether goodwill is pre- or post- 20 September 1995, they make the point that where there are constant changes in a partnership "records will need to be maintained carefully so that the date of acquisition and disposal of partnership interests may be determined."

■ ■ ■

The development of Australian company and more lately corporation law has been followed with care and precision by CCH for over 20 years and today is covered by us in various publications,[3] and no one will deny that it's been more than somewhat complex on numerous occasions ... But look at the situation across the Tasman right now; under the heading "... which law applies?" our ***New Zealand Business Law Guide*** reports that: "From 1 July 1994 to 1 July 1997, there will be two Companies Acts in force. The Companies Act 1993 will apply to companies incorporated under the new Act and to companies that choose to reregister under that Act."

The Companies Act 1955, in a substantially amended form, will continue to apply to companies registered prior to 1 July 1994. It will also govern the registration of charges created by 1993 Act companies. All companies will be deemed to be registered under the 1993 Act from 1 July 1997.

■ ■ ■

The role of the expert witness has been commented on judicially many times, with US judges being particularly severe in their remarks. For example, Justice Robert Gardner said:

> "I am firmly of the belief that jurors are quite capable of seeing through flaky testimony and pseudo-scientific clap-trap. I quite agree that we should not waste our valuable court time watching witch doctors, voo-doo practitioners, or brujas go through the entrails of dead chickens in a fruitless search for the truth."

And Justice Curtis Bok put it neatly: "Expert opinion is only an ordinary guess in evening clothes". Which brings us to an actual example of expert psychiatric evidence:

> *Counsel:* Doctor, would you be surprised if you saw the defendant talking to himself?
>
> *Witness:* Not in the least.
>
> *Counsel:* Why is that?
>
> *Witness:* He doesn't have any friends.

■ ■ ■

In an important contract law decision[4] the High Court has ruled that a representation made after a contract had been formed couldn't be taken into account in appeal to it. The facts were that Brisbane Market owned a fleet of pantechnicons and engaged contractors (Tyson) to provide prime movers to which the pantechnicons were attached to move the produce. This arrangement was made by telephone between Tyson and Brisbane Market's transport manager. Tyson was to pick up the pantechnicon from Brisbane Market's premises the next day and be paid "the cents a kilometre that they pay anybody else".

When Tyson went to pick up the pantechnicon he spoke with the managing director of Brisbane Market and asked him if it was insured. The managing director said "yes", so Tyson didn't take any further insurance out.

The pantechnicon was damaged due to the negligence of an employee of Tyson's. Brisbane Market was awarded damages at the trial and Tyson appealed to the Court of Appeal which dismissed all his claims including one that the managing director's answer was misleading.

The Court of Appeal dismissed Tyson's appeal on the ground that the evidence showed that the contract was formed in the telephone conversation between Tyson and Brisbane Market, that is, on the day before the conversation with the managing director. Tyson appealed to the High Court contending that the date of the contract was never in issue at the trial.

A majority of the High Court decided that Tyson had failed to establish that the managing director's answer to his question about the insurance had preceded the formation of the contract. Neither was the link in his chain of proof supplied by any agreement or concession, expressed or implied, by Brisbane Market.

■ ■ ■

1. In *The Oxford Companion to Law*
2. *Compania General de Tabacos de Filipinas v Collector of Internal Revenue*, 275 U.S. 87, 100 (1927).
3. Notably our ***Australian Corporations & Securities Law Reporter, Australian Company Law Cases, Australian Securities Commission Releases.***
4. *Tyson v Brisbane Market Freight Brokers Pty Ltd* (1994) Aust Contract Reports ¶90-043.

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criminal contempt. In exercising this power, the Attorney-General is required to obtain the advice of the Solicitor-General, and may not exercise the power contrary to that advice.

This provision has the effect of placing on a statutory footing, with an added safeguard, the practice that was generally followed in Victoria until 1992. The principal virtue of this practice is that it separates the functions of prosecution and protection of the integrity of the court proceedings. It thus avoids the conflict of interest that arises in principle where the Director prosecutes for a contempt on the basis that a statement or publication is prejudicial to the case for the defence.

The role of the Solicitor-General in this process ensures that the appropriate separation between political and quasi-judicial roles is maintained.

LEGISLATION FOR SPRING 1994

STALKING

New legislation to enhance the personal security of women in our community will be a priority in the next session. The specific aspect of the problem to be targeted will be the phenomenon of "stalking," an area for reform in which Victoria has fallen behind the other States. The existing criminal law in Victoria does not allow either the police or the courts to respond adequately to the behaviours encompassed by the term "stalking". The criminal law in this area is essentially oriented to dealing with actual threats or physical attacks. Offences under sections 20 and 21 of the *Crimes Act* 1958 which relate to intentionally or recklessly causing injury are not appropriate to cover situations where the behaviour complained of causes distress, fear, or intimidation but the person is not physically injured.

The new "stalking" offence is likely to cover behaviour such as following, telephoning or otherwise contacting the person, loitering outside the person's residence or some other place frequented, interfering with the person's property or possessions, leaving offensive material where it would be found or brought to the attention of the person, keeping the person under surveillance or acting covertly in a manner that could reasonably be expected to arouse fear or apprehension in the person.

South Australia, Queensland, New South Wales and the Northern Territory have all recently introduced "unlawful stalking" legislation.

In New South Wales the offence is restricted to "domestic relationships" whereas in other jurisdictions it is applicable generally. The proposed Victorian legislation will not be restricted to domestic relationships.

It is envisaged that Victorian legislation will be modelled on the legislation in other States and will require the act of "stalking" to occur on two or more separate occasions.

EQUAL OPPORTUNITY ACT AMENDMENTS

In 1993 the Parliamentary Scrutiny of Acts and Regulations Committee conducted an extensive review of the *Equal Opportunity Act* 1984. The committee received written submissions and oral evidence from a large number of individuals and organisations, and tabled its Final Report in November 1993.

New legislation to enhance the personal security of women in our community will be a priority in the next session. The specific aspect of the problem to be targeted will be the phenomenon of "stalking," an area for reform in which Victoria has fallen behind the other States.

Following the enactment of the *Equal Opportunity (Amendment) Act* 1993, which primarily addressed procedural and organisational issues, the Government now proposes to introduce in the Spring 1994 session of Parliament a Bill to implement a substantial number of the committee's recommendations. These recommendations address both practical and substantial issues arising from the operation of the *Equal Opportunity Act.* A wholesale revision of the Act will be required for the effective implementation of the committee's recommendations. One of the committee's recommendations is the prohibition of age discrimination, which accords directly with a commitment in the Coalition Women's Policy. Discrimination on the ground of age is widespread in our society and the proposed reform will recognise the importance of judging people on their skills and capabilities and not on age.

The committee's other recommendations are presently under careful consideration but at this stage no final decision has been made on which matters will be included in the new legislation.

Jan Wade, M.P.
Attorney-General

COMMON LAW BAR ASSOCIATION REPORT

SINCE MY DECEMBER 1993 REPORT THERE has been growing concern about the capacity of the County Court to handle its civil work load. The advent of WorkCover and the section 135B negotiation process has led to a choking of Lists in Melbourne and almost all Circuits — Morwell has reached crisis point. As at 31 March 1993 in Melbourne there were 4,095 cases which have been set down awaiting hearing (cf 2,721 at 28 February 1993) comprising approximately 2,270 juries, 1,600 causes and 225 WorkCover cases. The waiting time is 16 months for both juries and causes, nine months for miscellaneous causes and two months for WorkCover cases.

The Chief Judge received a deputation from the C.L.B.A. on 15 March. He urged that there should be no hasty action, it being his belief that the situation may well be alleviated in the next few months. An extra judge had been appointed which would free up one more judge for circuit. The Chief Judge indicated that in the event that there is no improvement drastic measures will have to be undertaken.

The problem has also been taken up with the Department of Justice, through the Courts Monitoring Committee. The Department is very much aware of the situation and has arranged for another two judges to be appointed now in expectation of retirements occurring later in this year or early next year. The first such judge has been appointed. The Department anticipates that a number of factors will enable a turn-around to be effected by approximately July this year.

Meanwhile, consideration had been given by the Committee to several measures which might be employed to address the issue, viz. approaches to the appropriate Ministers to alter the section 135B Conference procedures and the appointment of more judges, and the establishment of an alternative procedure utilising members of the Bar as Recorders to handle some of the actions awaiting trial. The Committee envisaged difficulties associated with each of these proposals. Therefore, at a meeting attended by interested members of the Bar, held on 29 March 1994, it was recommended that the hopes of the Chief Judge and the Department of Justice be given the opportunity to be realised, and that any drastic action should be put on hold. This course was agreed to and at the same time a subcommittee was appointed to investigate procedures which might enable actions tried in the County Court to be completed more speedily.

The Minister's April announcement that a further round of section 135B Conferences is to be conducted provides some hope that these problems are being addressed. Further, the appointment of the additional judges has enabled the Chief Judge to create 20 additional circuits for the year.

The Industries Commission, to which this Association with the endorsement of the Executive of the Victorian Bar Council addressed submissions, presented to the Federal Government its report on Workers' Compensation in Australia. It recommends the setting-up of a national compensation scheme to be run on standards set by a National WorkCover Authority. More importantly, from the point of view of the C.L.B.A., it concludes:

(On) the issue of compensation for permanent disablement, the Commission considers that remedies at common law are an unsatisfactory form of redress and represent a poor way of promoting prevention. Its preference is to remove access to common law in favour of statutory payments under an agreement 'Table of Injuries' to apply throughout Australia.

By a press release of 21 April 1994 the Prime Minister stated that the Government generally endorses the directions for reform contained in the Commission's recommendations. The Government, he says, will provide a detailed response to the report no later than August.

It is believed that the recommendations will get little support from the majority of States, largely because the envisaged scheme will be considerably more expensive to run than those in existence, certainly those in Queensland, N.S.W. and Victoria. In his press release dated 21 April 1994 the Minister for WorkCover stated that the Victorian Government would oppose any proposal to set up a scheme as recommended by the Industries Commission.

The Review of Professional Indemnity for Health Care Professions produced its interim report in February 1994. The report makes some sweeping recommendations and invites comment upon a large range of matters of concern to the C.L.B.A. They include :

(i) issues surrounding tort-based compensation for loss of earning capacity and a number of options designed to reduce the amount of damages recoverable;

(ii) the introduction of caps and thresholds for non-pecuniary damages;
(iii) amendments to the tax laws to ensure that the incentives for taking up an undifferentiated lump sum compensation settlement are minimised, and the incentives to use periodic payment arrangements are maximised;
(iv) the introduction of legislative protection for those who, in good faith, report breaches of standards in relation to patient care;
(v) patients' access to records;
(vi) widening the scope of the tort system of compensation to make it more accessible to those seeking compensation; and
(vii) alternative dispute resolution.

A sub-committee has been appointed to prepare submissions to the Review.

David A. Kendall

REPORTS FROM LAW COUNCIL

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

WORKERS' COMPENSATION PLAN UNJUST

THE LAW COUNCIL OF AUSTRALIA HAS condemned the Industry Commission's proposals for a national workers' compensation scheme as unjust, inequitable and unacceptably expensive.

Responding to the Industry Commission report on Workers' Compensation in Australia endorsed by the Prime Minister, Law Council President John Mansfield Q.C. said the scheme proposed by the Commission would add millions of dollars to the cost of workers' compensation while failing to preserve the rights and benefits of injured workers.

He said that one of the stated objectives of the Commission Inquiry was to reduce the cost of work-related injury and illness.

"The scheme proposed manifestly fails to achieve that objective," Mr. Mansfield said. "By the Commission's own estimates, the scheme would increase workers' compensation premiums to between 2.5 and 3% of wages.

"This is much higher than the premiums under most existing State compensation schemes. It is almost double the existing premiums in N.S.W. and Queensland.

"The result will be an additional burden on employers of hundreds of millions of dollars annually. Previous experience has shown that when premiums reach such an unacceptable level, benefit levels for workers are lowered to reduce costs."

Mr. Mansfield said the rights of the victims of workplace accidents should be the prime consideration in any workers' compensation scheme.

"Apart from the risks posed by the cost of the scheme to the preservation of existing benefits, the Commission's proposals fail to protect the rights of injured workers on a number of other important counts," he said.

"The Commission recommends the abolition of the common law right to sue for personal injury in the workplace. This would strip workers who have been injured through their employers' negligence of the right to pursue a claim for appropriate compensation through the courts.

"Instead, they would be forced to rely on a mathematical table which takes no account of their individual circumstances or the degree of negligence involved in the injury. They would also lose the option of taking a lump sum verdict.

"It should not be forgotten that the potential for successful common law claims provides a powerful incentive for employers to adopt safe work practices."

Mr. Mansfield said the proposed scheme was based upon inaccurate information and examples which had already been the subject of submissions from the Law Council, the Law Society of New South Wales and other constituent bodies of the Law Council.

AJAC OFFERS CHANCE TO ACT ON ACCESS TO JUSTICE

A REAL OPPORTUNITY TO DO SOMETHING practical about access to justice is offered by the report released today by the Access to Justice Advisory Committee.

If governments are as committed as they say they are to improving access to justice, they will respond quickly and forthrightly to the report's recommendations on such matters as legal aid, court fees and alternative means of funding litigation.

Substantially increased legal aid funding would provide an immediate and major boost in access to the courts for people without the financial means to exercise their legal rights in the courts. But much more is needed than the paltry $2.1 million allocated in the recent federal budget.

The Law Council a few weeks ago called on governments to provide an extra $50 million a year for legal aid. Even that would only bring legal aid availability back to the level of about seven years ago.

As the AJAC report says, while legal aid funding has kept pace with the rate of inflation, it has not kept pace with the increased demand caused by deteriorating economic conditions, changes in population, a greater emphasis on law enforcement, and a court decision imposing obligations to provide legal assistance in serious criminal cases.

The AJAC's call for greater legal aid funding reinforces the calls already made by the Law Council, the Australian Law Reform Commission and the Australian Legal Aid Office in the Attorney-General's Department.

The Government asked for the AJAC's advice. It has now got it, and it should accept it and act on it.

The same goes for the AJAC's strong support for further development of alternative dispute resolution methods and for schemes to provide financial, assistance to litigants who cannot afford to pay for legal assistance and do not qualify for legal aid. The legal profession itself has already acted in these areas, as it has in areas such as the removal of restrictions on lawyers advertising — another AJAC recommendation.

A further important recommendation is that court fees and charges should be reviewed. The Law Council has expressed deep concern at exorbitant increases in court charges and urged their review. The "user pays" approach to the courts is elitist, and should be abandoned. It is inconsistent with the primary objective of equality of access to justice, so firmly endorsed by the AJAC.

The Law Council strongly supports the AJAC's recommendations on such matters as continuing reform of court procedures, use of contingency or speculative fees in appropriate circumstances, and on a review of the ways in which legal costs are applied and regulated. Major changes have already been made in all these areas.

Some of the AJAC's other recommendations, while important, appear to have much less to do with access to justice than matters like legal aid, litigation funding and court fees. Most people simply want to be able to afford to use the legal system if they need to; they are not concerned about whether judges wear wigs, or whether cases are broadcast or televised, or whether lawyers are regulated by the profession or by statutory bodies.

If governments are "fair dinkum" about better access to justice, they will immediately take up the practical recommendations made by the AJAC, on which that committee is to be congratulated.

BREVITY

THE U.S. SUPREME COURT JUSTICE OLIVER Wendell Holmes Jr. wrote his opinions while standing at an upright desk explaining "nothing conduces to brevity like a caving in of the knees".

The Editors of *Bar News* hereby confer the "Oliver Wendell Holmes Jr. Award for Concise Judicial Opinions" on John H. Gillis of the Michigan Court of Appeals for his opinion in *Lawrence Denny* (Plaintiff-Appellant) v. *Radar Industries, Inc* (Defendant-Appellee) wherein Judge Gillis wrote for the Court (Lesinski C.J. and Gillis and Beasley JJ.):

The appellant has attempted to distinguish the factual situation in this case from that in *Renfroe* v. *Higgins Rack Coating and Manufacturing Co., Inc.* (1969) 17 Mich App 259, 169 NW 2d 326. He didn't. We couldn't. Affirmed. Costs to appellee.

This opinion, of total length six lines in two paragraphs, so flummoxed the usually verbose West Publishing Co. editors that it was published without the usual prolix West Key System headnote.

28 Mich App 294, 184 NW 2d 289 (1971)

WELCOMES

THE HONOURABLE MR. JUSTICE BATT

JOHN MICHAEL BATT Q.C. WAS APPOINTED to be a Justice of the Supreme Court on 8 March 1994. He is aged 58. He attended what was then known as the Melbourne Church of England Grammar School. He was an outstanding scholar being head of the school (dux in some other foundations) in 1952. His special interests were in classical subjects and foreign languages. He was awarded special exhibitions in Greek and Greek and Roman History, as well as a general exhibition, in the matriculation examinations of 1952. The exhibition in Latin eluded him then but it was expected that he

Mr Justice Batt

would complete the classics trio when he repeated matriculation, as was customary at the time, the following year. That was not to be. The record shows J.D. Phillips (Scotch) to have been exhibitioner in Latin for 1953.

That early success laid the foundations of a lifelong scholarly interest in philology and the ancient world. At the University of Melbourne, where he was a major resident scholar at Trinity College, he completed an arts degree with first-class honours in the School of Classical Studies in 1957, winning the Wyselaskie Scholarship in Classical and Comparative Philology and Logic. He was placed third in the final honours list in law in 1959 and was an editor of the *Melbourne University Law Review* in 1958–59.

In 1960, he was articled to G.V. Harris at Oswald Burt & Co. — where he followed by a year his lifelong friend W.F. Ormiston — and on 23 November 1961 he signed the Roll of Counsel. He read with N.M. Stephen who was also to become a judge of the Supreme Court.

Six years at the university did not diminish his zest for scholarship but they left little or no time for formal post-graduate study. In 1960, he was articled to G.V. Harris at Oswald Burt & Co. — where he followed by a year his lifelong friend W.F. Ormiston — and on 23 November 1961 he signed the Roll of Counsel. He read with N.M. Stephen who was also to become a judge of the Supreme Court. There was far less specialisation at the Bar then than now but most barristers were popularly assigned either to common law or to equity. Common law meant personal injury work. Equity meant wills and trusts. Other areas of practice were the province of all. Stephen's practice was certainly not common law in the language of the day but it was not confined to the wills and trusts of the "whispering" gallery where he occasionally ventured, almost as an honorary member. In modern terms it would be described as corporate and commercial. Far more than today, pupils tended to follow their masters in practice if not in temperament. John Batt acquired early experience in many fields which he has since vacated. Though never a narrow specialist, he developed a special affinity with tax and company work for which his industry and painstaking attention to detail suited him. He was as apt a teacher as pupil: Pritchard, P.J. Kennon, Bolton, Emmerson and Gunst read in his chambers.

A combination of cautiousness and modesty may have caused him to delay taking silk until November 1977. But he had no need to fear the consequences of what was then a risky step. The Commissioner of Taxation in particular valued his services and he appeared in many cases for the federal revenue. He was recently counsel for the respondent in *Coles Myer Finance Ltd.* v. *Federal Commissioner of Taxation* (1993) 176 C.L.R. 640, which raised important questions in the law of bills of exchange and the deduction of outgoings in calculating taxable income. He was elected a Fellow of The Taxation Institute of Australia this year.

He was one of the first members of the Victorian Bar to sit for the examinations of the Institute of Arbitrators, Australia. His application for exemption on the ground that he was Queen's Counsel was refused. He was told that if it was good enough for Sir Laurence Street it must be good enough for him. He became an Associate of that Institute in 1986 and a Fellow in 1991. As an arbitrator he was involved especially in matters arising under the *Retail Tenancies Act*. His interest in alternative methods for resolving disputes did not cause him to desert the conventional paths. From 1984 until 1987 he was a representative of the Bar on the Rules Committee of the Supreme Court. After a short stint as editor he has been consulting editor to the *Federal Court Reports* since 1990.

He served the Bar as a director of Barristers Chambers Ltd. from 1971 to 1980 and the wider community as a member of the board of management of the Mission of St. James and St. John from 1976 to 1989.

He married Margaret Hodgkinson in 1968. They have two children, David and Carolyn, who both have received first-class honours degrees in law from the University of Melbourne. The family lives in what was his childhood home in Malvern. Mr. Justice Batt is not known to support a football team or to have entered a racecourse but he is a connoisseur of the silversmith's craft.

Though diffident in manner, he has the gift of friendship. He has maintained friendships formed at school and university where others might easily have let them lapse. His intelligence, learning and conscientiousness and personal qualities of courtesy, tact and patience fit him well for the bench.

THE HONOURABLE MR. JUSTICE HANSEN

HARTLEY HANSEN WAS EDUCATED AT Melbourne Grammar School and the University of Melbourne, graduating LL.B. (Hons.) in 1965.

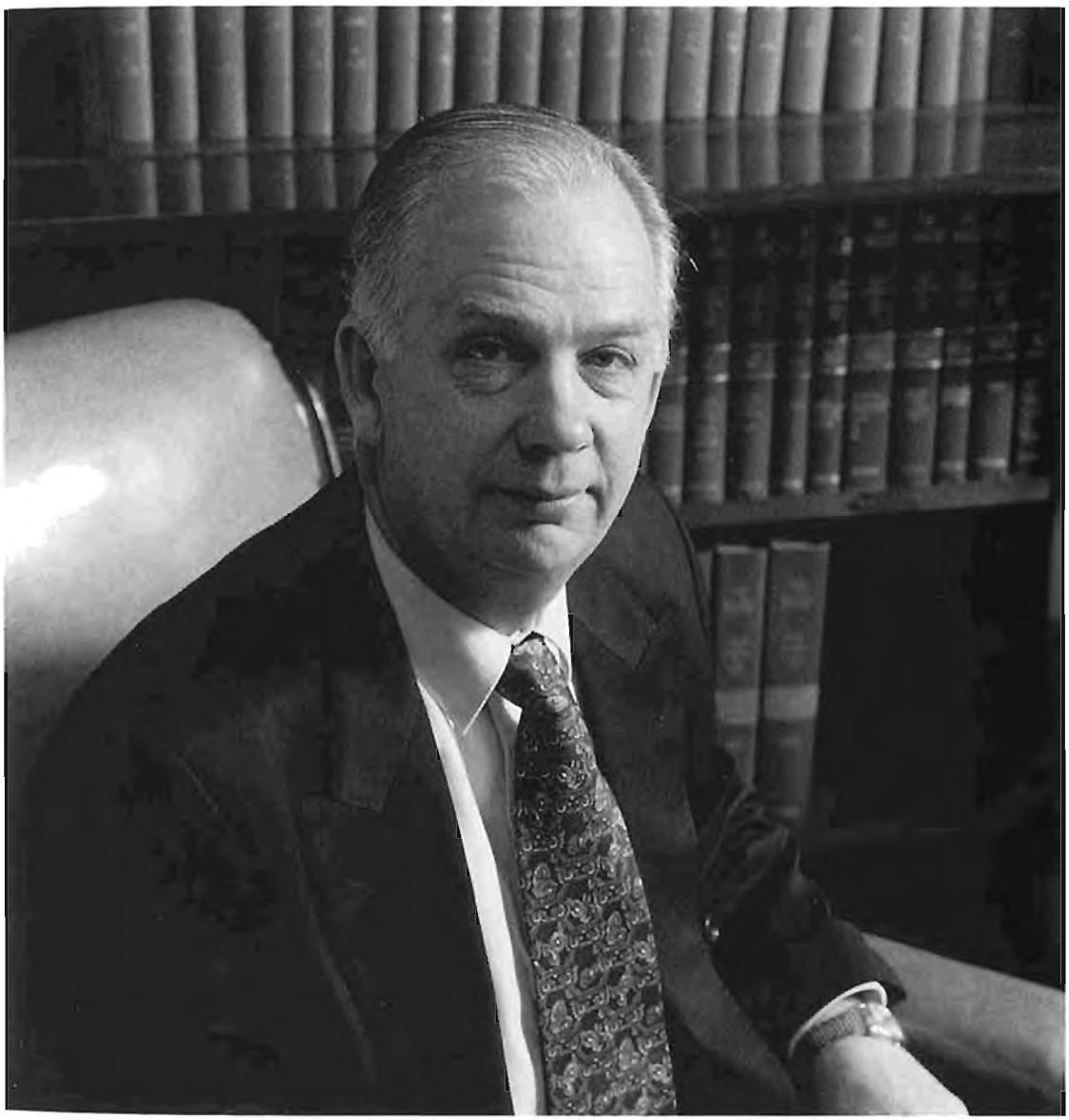
After completing articles at Whiting & Byrne, solicitors, he was admitted to practice on I June 1966.

Having signed the Bar Roll on 9 February 1987, he read with Daryl Dawson, now the Honourable Sir Daryl Dawson, Justice of the High Court of Australia.

During his time at the Bar, His Honour built up a wide general commercial practice, which included building disputes and arbitration work. He was noted both for his thorough knowledge of all aspects of each of his cases, gained through his painstaking attention to detail, and his characteristic unruffled approach to even the most difficult litigation.

He took silk in November 1984, following which there was a significant demand for his services as an arbitrator.

His Honour's career at the Victorian Bar was



The Honourable Mr Justice Hansen

distinguished by his willingness and capacity to contribute his singular abilities to the service of the Bar.

In 1968 he became a member of the Library Committee, serving on that committee until the end of 1973. He served as Honorary Secretary of the Bar Council from 1973–1975, during which time he was involved in reorganising the Bar's administrative structure.

During his time at the Bar, His Honour built up a wide general commercial practice, which included building disputes and arbitration work. He was noted both for his thorough knowledge of all aspects of each of his cases, gained through his painstaking attention to detail, and his characteristic unruffled approach to even the most difficult litigation.

He was a member of the Bar Council from 1980–1983, 1988–1992 and again in 1993. He served as Junior Vice-Chairman of the Bar Council 1990–1991 and Senior Vice-Chairman 1991–1992. He was a member of the Ethics Committee from 1982–1991 and Chairman of that committee from 1988–1990. He was involved in the organisation of the Supreme Court's "Spring Offensive" mediation programme in 1992, served as Chairman of the Dispute Resolution Committee 1992–1993, served as the Bar's representative on LEADR since 1993 and was Chairman of the Rules of Conduct Committee since 1993.

Less well-known was His Honour's contribution to the Australian Bar Association over several years, including his work in the formulation of uniform rules of conduct for the separate Bars of Australia, which rules were approved by the ABA for adoption by its constituent bodies on 21 November 1992.

Successive Chairmen of the Bar Council relied on His Honour's encyclopaedic knowledge of the administration and established practices of the Victorian Bar and his wise counsel on difficult matters during difficult times. His elegant prose style improved much of the Bar Council's correspondence.

Whilst superficially of a conservative disposition, His Honour displayed a marked willingness and capacity to entertain new ideas or proposals for change relative to the Bar in particular or the law in general. This trait and his equable temperament enabled him to cope constructively with the many difficult issues that came before the Bar Council over the course of the last few turbulent years.

He was, however, never afraid to fight in defence of issues that he believed in and did so on a number of occasions, particularly between 1991 and 1994, displaying in such instances a hard edge of resolution.

With all that His Honour had to offer, it was a misfortune for the Bar that he did not serve a term as Chairman of the Bar Council.

His Honour's friends at the Bar are many. His amiable disposition and wry sense of humour made him a welcome companion at Bar gatherings. He would have been described by Samuel Johnson as "a clubbable man". His commitment to his family, his wife Ros and his three children is marked and his happy marriage has no doubt contributed substantially to his even temperament.

Given his temperament and his capacity for hard work His Honour is well suited to his new position. The Bar welcomes his appointment and wishes him well.

JUDGE DAVEY

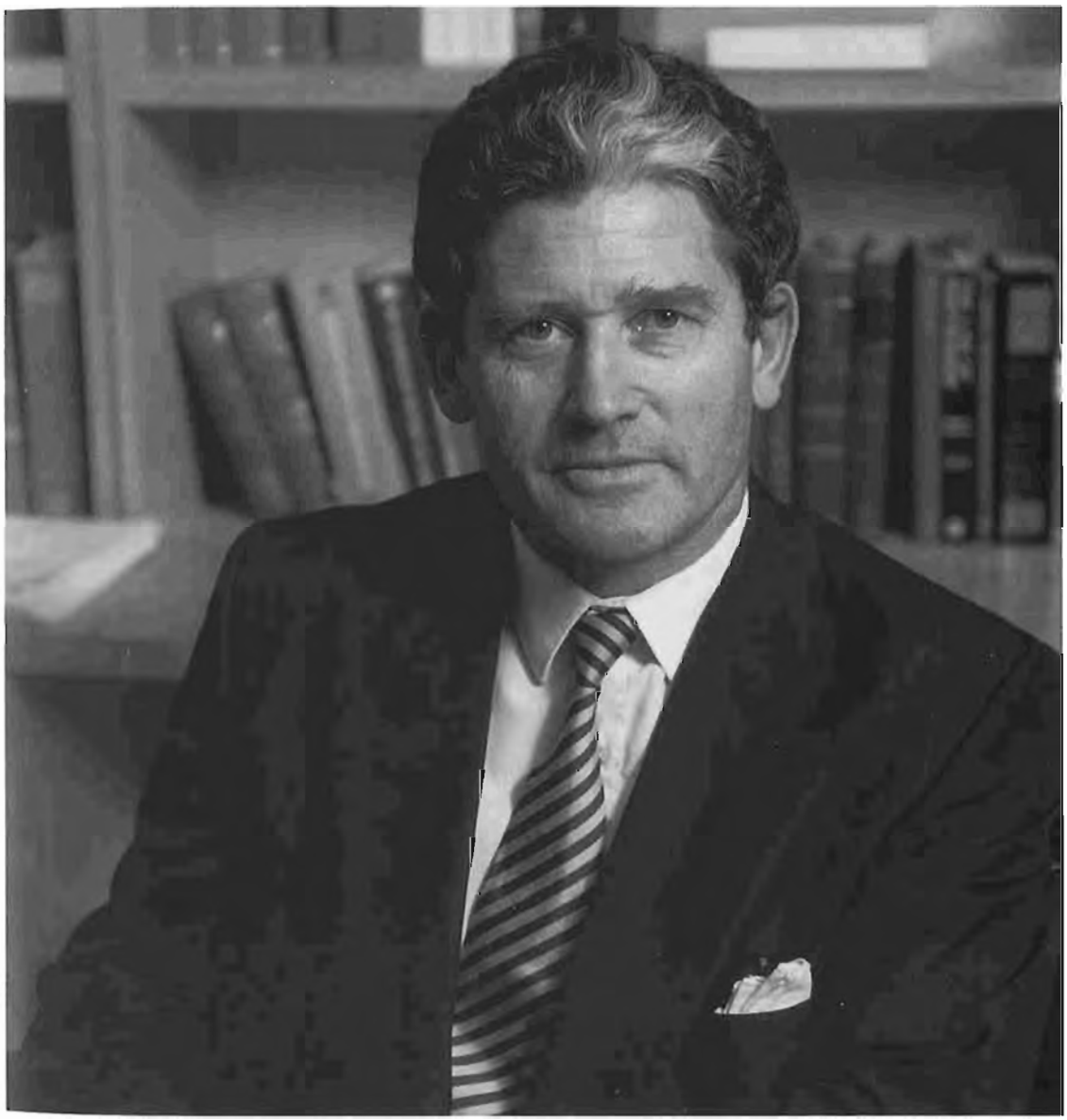
FREDERICK GEORGE DAVEY WAS BORN on 25 September 1938 and was educated at Melbourne Church of England Grammar School. During his years at the Senior School he was a keen Australian Rules footballer, playing for the First XVIII, obtaining First Colours for that sport.

His Honour attended the University of Melbourne and completed the degree of Bachelor of Honours with Laws in August 1961. As a student at Trinity College, His Honour distinguished himself both on and off the sporting field.

He obtained Blues for rugby union and weightlifting. He was a member of the State Rugby Union team during 1960 and 1961.

At his welcome on 11 April 1994, Crennan Q.C. on behalf of the Victorian Bar described some of Davey's more notable extracurricular exploits as a university student. It should be noted, whether due to selective amnesia or otherwise, His Honour expressed some difficulty in recalling them.

His Honour was articled to John David Moir of the firm of Gillett Moir & O'Hearn and was admitted to practice in April 1962. In 1962 His Honour



Judge Davey

was a research student in criminology and company law at the London School of Economics.

His Honour signed the Roll of Counsel in December 1962 and in 1963 commenced reading with Charles Frances. In 1965–1966 he completed a Bachelor of Commerce degree from the University of Melbourne and qualified as an Associate of the Australian Society of Accountants.

In November 1971 His Honour had his name removed from the Bar Roll to enable him to work as in-house counsel for a joint venture constructing the Greenvale Project in Townsville, Queensland. Following that project, His Honour practised briefly as a solicitor with Arthur Robinson & Co.

In August 1974 His Honour re-signed the Bar Roll. Since that time he has practised not only in the Supreme Court and Federal Court but as an arbitrator in building and property cases. In recent times His Honour had undertaken mediation training and has acted as a mediator.

His Honour had five readers, including the present Chairman of the Bar Council, resulting in the somewhat rare occurrence of the Chairman appearing to welcome the appointment of her own Master. The readers were Wartski, Clancy, Devine, Sexton and Potare. His Honour took Silk in 1992.

At the time of his appointment, His Honour was the Chairman of the Legal Resources Committee of the Bar Council. His Honour remarked at his welcome that one of the regrets of his appointment was his inability to complete the task of resiting the Bar's library, with which he was enthusiastically involved.

His Honour's unique mix of talents, combined with his experience as both an arbitrator and a mediator, his training in accounting and his business background, make him well suited to his new position. His Honour is also a caring and compassionate person with a keen sense of justice. Any litigant before his court can confidently expect to be listened to carefully and treated fairly.

The Bar extends its best wishes to His Honour and his family and wishes His Honour a long and successful career on the Bench.

MR. JOE BEDER M.

ISAAC JOSEPH BEDER (KNOWN TO ALL and sundry as "Joe") was appointed a magistrate in February this year after 31 years of service to the law in Australia, the United Kingdom and New Zealand.

Joe was born in Palmerston North, in the North Island of New Zealand, 54 years ago. After graduating in law at the University of Wellington in 1962, he worked as a solicitor in Palmerston North, then spent a brief stint working as a solicitor in London, returning to New Zealand in 1966 where he was admitted to the partnership of Dixon Beder & Edwards of Auckland.

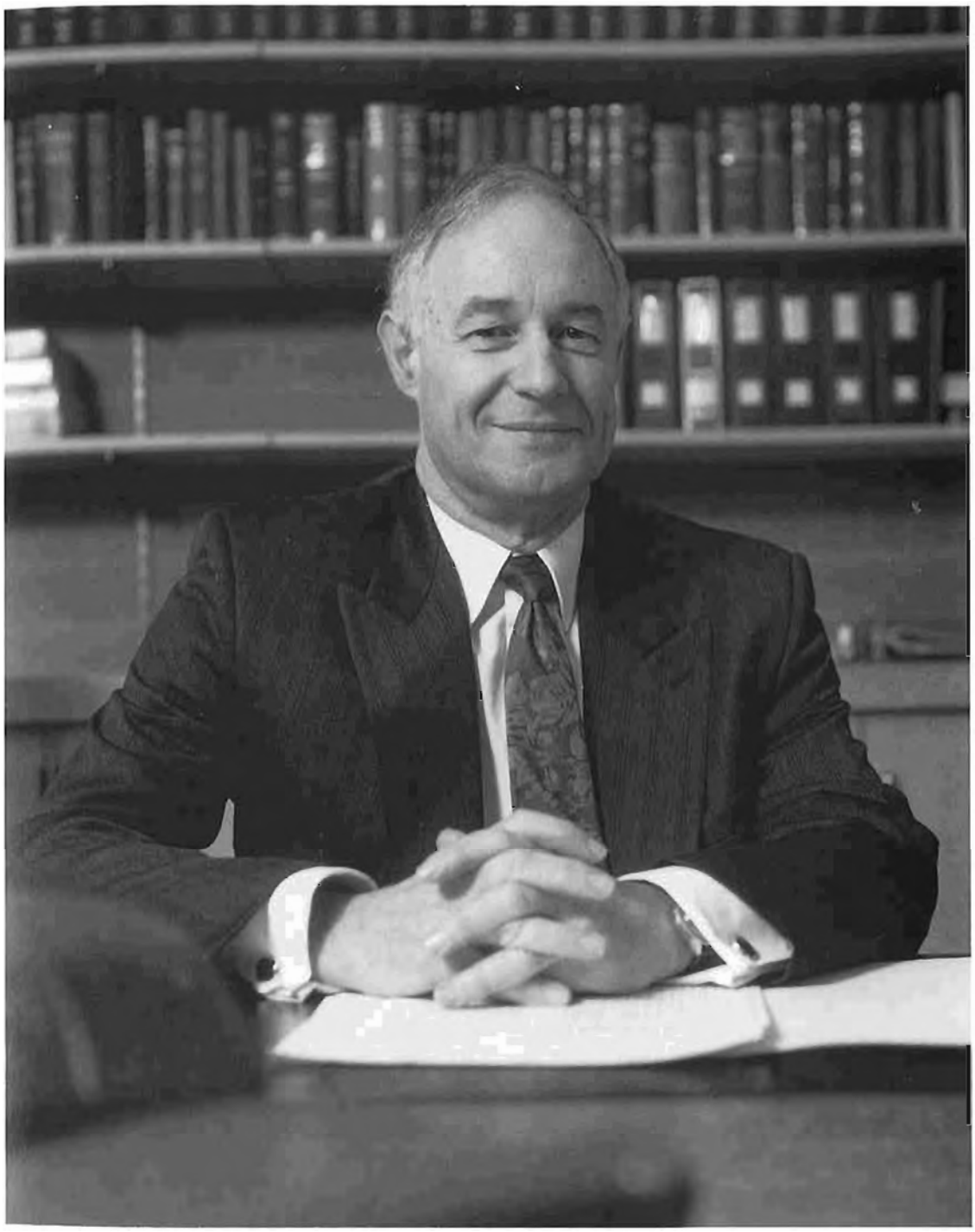
In 1974 Joe crossed the Tasman Sea and commenced practice in Victoria. After a short initiation in the Magistrates' Courts, he soon established a busy practice specialising in the unlikely combination of crime and family law.

In 1984 Joe first appeared in a civil case at the Morwell County Court. It was a fateful day for him. The civil list at that time was small and, for reasons which do not bear elaboration, Morwell was a much despised circuit. Happily for Joe, his debut at the circuit coincided with a huge growth in the court list which was caused by increases in the County Court jurisdiction and the many hundreds of industrial accident actions which emanated from the construction of the Loy Yang 'A' Power Station. Joe soon had half the civil list at Morwell which, by the time of his appointment, had become the busiest circuit court in Victoria. These were, at least until the early 1990s, halcyon days when pretrial conferences and section 135B(4) conferences were not even on the horizon.

Joe was a formidable opponent. He was always well prepared. He was a skilful cross-examiner and invariably made a compelling jury address. In addition, he had considerable jury appeal because of his common sense and genial, pleasant temperament. However, he needed all those qualities when appearing for defendant insurers at Morwell as the local juries were notorious for their generosity towards injured plaintiffs.

Joe's family in New Zealand were actively involved in horse racing and the love of the turf is in his blood. He is a member of four racing clubs. He has raced a few horses and has an encyclopaedic knowledge of the breeding of New Zealand thoroughbreds. He was able to successfully mix pleasure with business and regularly appeared for a variety of clients before the stewards and racing tribunals in thoroughbred racing and harness racing inquiries having first appeared as junior to Dove Q.C. in 1982 in the month-long Ararat Cup Inquiry. In 1993 his talents in equine matters were recognised when he was appointed a member of the Harness Racing Board.

Joe is married with two children — Jonathan, who is completing a post-graduate course in psychology, and Naomi, who is about to finish a law/



Joe Beder M.

arts degree. He had two readers, namely Marcus Clarke and Schamroth.

The bench of the Magistrates' Court is attracting many men and women of great ability. It bears no resemblance to the Magistrates' Court of twenty years ago. The court is fortunate to have amongst its magistrates a person of Joe's experience and calibre. On behalf of his many friends and colleagues, the Bar congratulates him on his appointment.

FAREWELLS

SIR JAMES GOBBO

SIR JAMES GOBBO WAS BORN IN MELbourne on 22 March 1931. Soon after his birth he returned to the native country of his parents, Italy. He returned to Australia in 1938. He was then aged 7 and spoke no English.

He was educated at St. Joseph's Christian Brothers College, North Melbourne and Xavier College. He matriculated in 1948 gaining the Exhibition in Italian and a General Exhibition.

In 1949 he commenced a combined Arts Law course at the University of Melbourne. He graduated as a Bachelor of Arts with Honours in 1952 and then continued his studies as the 1952 Rhodes Scholar for Victoria. At Oxford he obtained a Master of Arts.

He was called to the English Bar as a member of Gray's Inn on 16 June 1956 and was admitted as a Barrister and Solicitor of our Supreme Court on 1 October 1956. He signed the Roll of Counsel on 24 October 1957 after a year spent with Oswald Burt & Co. He read with the late W.O. Harris.

During his early years at the Bar he built up a large general practice including crime, civil juries, equity and commercial causes. He had eleven readers, Peter Martin, Henshall, Walker, Bailey, Byrne, Stanley, Heerey, Dunn, Buchanan, Harper and R.J. Evans. He took silk in November 1971 and became an acknowledged expert in the fields of local government, town planning and compensation for compulsory acquisition.

Despite a demanding work load as counsel he found time to lecture in Evidence at the University of Melbourne between 1963 and 1968 and to prepare the first Australian edition of *Cross on Evidence* in 1970. Between 1975 and 1978 he served on the Bar Council.

On 18 July 1978 he was appointed a Judge of the Supreme Court, a position he held with distinction until 14 February 1994. It is to state the obvious to say that Sir James enjoyed a stellar legal career. As counsel he brought to his practice a shrewd assessment of the strengths and weaknesses of his case, a complete and subtle command of legal principle and a skill for legal submissions and searching cross-examination. Above all, he was the consummate negotiator. As judge he showed great patience and courtesy to both counsel and litigants. For a number of years he was the judge in charge of the Valuation List, where the cases were frequently long and invariably involved difficult problems of law, characterisation and causation. He presided over the introduction of the *Land Acquisition and Compensation Act* 1986, which introduced a new code for the determination of valuation disputes. In a series of judgments between 1988 and his retirement he confronted many of the legal problems thrown up by the new Act and he has left a body of learned and perceptive judgments which have resolved most, if not all, of the teething problems of the new Act.

It is equally obvious that the contribution which Sir James had made to the law, both as barrister and judge, is but a small part of the service which he has rendered to the community. In 1973 his contribution to multiculturalism and to a whole series of charities had earned him the Commendatore all'Ordine di Merito, awarded by the President of the Italian Republic. In 1980 he received a Knighthood of St. John of Jerusalem, Rhodes and Malta. In 1982 he was knighted in the Federal New Year's Honours List "for services to the community particularly to migrants". In 1993 he was made a Companion of the Order of Australia "for services to the law, to hospital administration and to the community particularly through the promotion of multicultural affairs".

A selective but by no means comprehensive list of the community positions held by Sir James over the last twenty years includes :

Chairman of Mercy Private Hospital 1977–1987;
The Board of the Mercy Maternity Hospital 1972–1989;
Sisters of Mercy Health Care Council 1977–;
Chairman, Order of Malta Hospice Home Care Service 1986–;
Chairman of Caritas Christi Hospice 1986–;
President of the Italian Assistance Association 1979–1984, 1986–;
Chairman, Supervisory Committee Children's Protection Society 1982–;
Chairman, Task Force for Italian Aged 1983–;
President, Scout Association Victorian Branch 1981–;
Member Victorian Health Promotion Foundation 1988–;
Chairman, Australian Council of Multicultural

Sir James Gobbo

Affairs 1988–;
Trustee, World Wide Fund for Nature.

There is no reason to believe that the retirement of Sir James from the Bench will mark the end of his community service. He is still on the board of sixteen charitable and community organisations and has accepted the chairmanship of the Council of the Banking Industry Ombudsman. Indeed, there is every reason to believe that his retirement from the Bench will permit him to increase his other community and charitable involvements.

The Victorian Bar regrets His Honour's retirement from the Bench. We will miss his courtesy, his gentle humour, his determination to avoid time wasting and to get to the heart of the issue in Socratic debate with counsel. But the Bar's loss is the community's gain. We will watch with interest and a certain proprietorial pride his future career and selfless community work.

MR. JUSTICE MARKS

The Honourable Kenneth Henry Marks retired as a Justice of the Supreme Court on 28 January 1994 after having served the community in that office for almost 17 years. A Law/Arts course at the University of Melbourne commenced in 1941 was interrupted when he joined the Royal Australian Air Force in January 1943 and served as a pilot of Lancaster bombers. Whilst stationed in England he completed 15 missions over Europe before the war in Europe ended and he returned to Melbourne to complete the degrees of Bachelor of Arts and Bachelor of Laws.

Ken Marks' career in the law leading to his appointment to the Bench was distinguished by both his skills as an advocate and his work towards reform of the law and the legal system. He completed Articles with a well-known solicitor, Cedric Ralph, and was admitted to practice in Victoria on 1 September 1950. He signed the Bar Roll on the same day. Having read with Sir John Starke, a prominent member of the common law Bar and later a Justice of the Supreme Court, he developed a practice which, whilst involving many jurisdictions, saw him eminent in jury trials acting for plaintiffs injured in the workplace and other accidents.

Appointment as a Queen's Counsel in 1967 saw a broadening in his practice to include murder trials in both Victoria and the A.C.T., and leading briefs in appeals before the High Court. He was leading counsel for the widows of the men who died in the *Western Spruce* disaster at Port Welshpool before a marine inquiry into that disaster, and leading counsel for the State Electricity Commission of Victoria at the Board of Inquiry appointed to investigate the bush fires which ravaged western Victoria in 1976.

He was one of the architects of the *Motor Accidents Act* 1973, which established a scheme of no fault compensation for motor accident victims in Victoria. That scheme was humane and successful and was a precedent for other States in Australia. His concepts of fair and just compensation made him a leading protagonist against the introduction in Australia of the Woodhouse Commission scheme for compensating persons suffering personal injury. He was not against reform. He recognised the shortcomings of the common law remedies but feared that "claimants may now queue before the sagacious machinery of a government department". His solution was "If the much-vaunted proposal for a new system were allowed to compete alongside the old, and the new system was clearly an advance or improvement, then the old system would die a natural death". (See "A First in National No Fault" by Ken H. Marks 47 A.L.J. 516.) The chequered history of the scheme in New Zealand has more than vindicated the Marks stance.

His appointment to the Bench occurred during his term as Chairman, which followed two years as Vice-Chairman of the Bar Council.

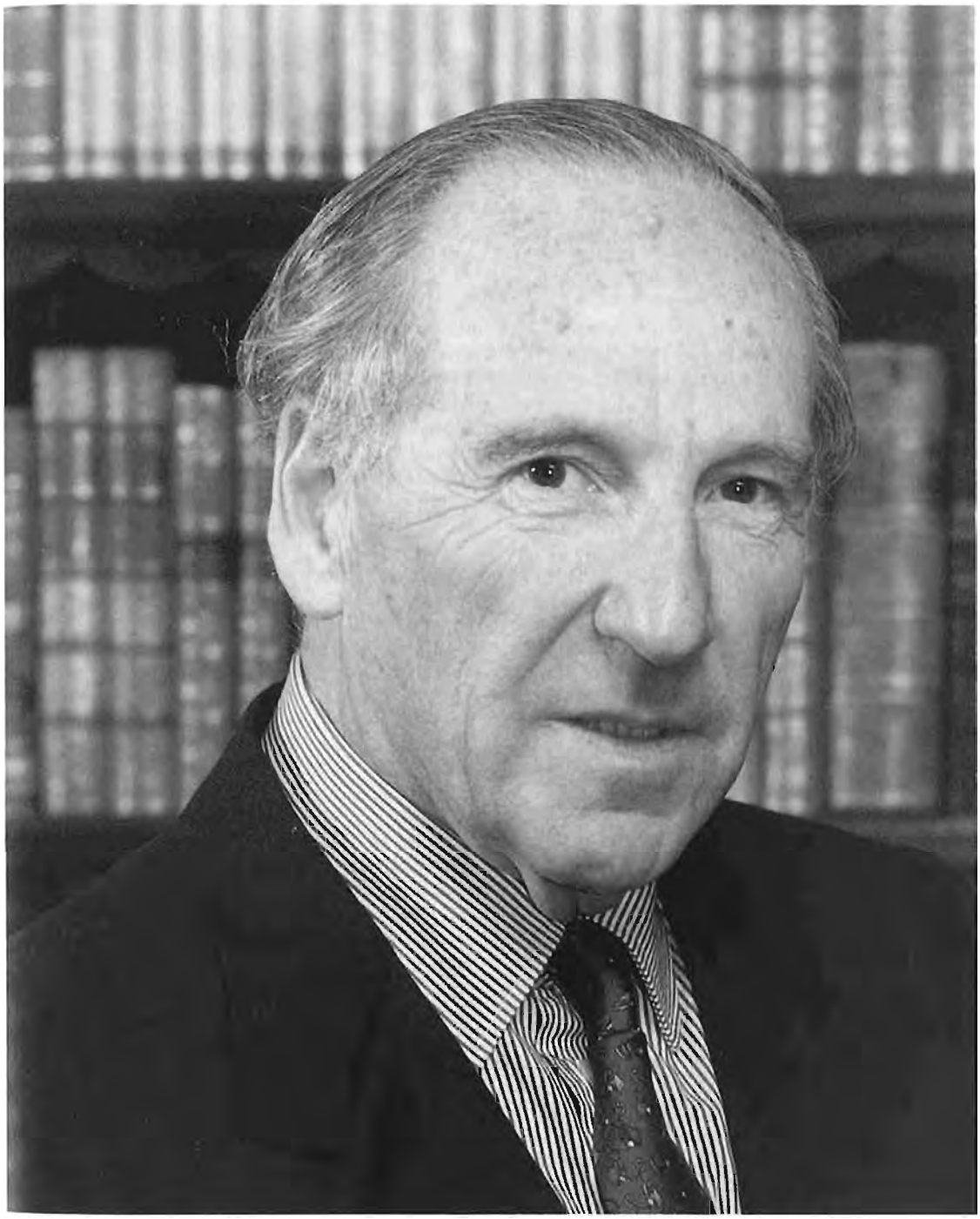
Whilst the skills and industry which he brought to the Bench enabled him to perform the work of the Court with distinction in all its jurisdictions, two areas require special mention. Appointed as the Judge in charge of the Commercial List when it was created in its present form in 1986, he implemented procedures for expeditious resolution of commercial disputes at a time when the 1980s boom was at its height. His work won the praise of the business community.

"A Judge must have the capacity to listen, to consider the arguments and to possess the humility to admit and correct error. It is my hope that those who come to this place hereafter are appointed for these qualities rather than those which might be dictated by a less than responsible populism".

In latter years, in the appellate work of the Court, he took a prominent role. His interest in that work was apparent from his involvement in the Court establishing an appellate division and from the manner of his own involvement in appeals. At his farewell, he said:

It is not sufficient to appoint Judges by reference solely to extraneous characteristics which might seem attractive to persons ignorant of the demands of a good justice system. A Judge must have capacity to apply the law honestly and as correctly as it can be applied in the circumstances. A Judge must have the capacity to listen, to consider the arguments and to possess the humility to admit and correct error. It is my hope that those who come to this place hereafter are appointed for these qualities rather than those which might be dictated by a less than responsible populism.

On the Bench he did listen to arguments put by counsel, and frequently, by thinking aloud, tested those arguments and pursued his aim to apply the law honestly and correctly, thereby adding to the thoroughness of the appellate process.



Mr Justice Marks

Shortly prior to retirement, he accepted an appointment to chair the Standing Review and Advisory Committee on Infertility. For a man who has more than a passing interest in literature, art and music, an abiding interest in horsemanship and swims to keep fit, he faces a busy retirement. The Bar wishes the Honourable Ken Marks and his wife, Sheila, health and longevity to enable them to pursue their interests which will bring them happiness.

OBITUARIES

A LONG ROAD — SIR GREGORY GOWANS

Sir Gregory Gowans

URBAN GREGORY GOWANS DIED ON 1 April 1994 in his 90th year. He signed the Roll of Counsel in January 1931, became a Judge of the Supreme Court in September 1961, and retired in September 1976.

Gowans was not in the habit of discussing his personal affairs, even with those who were close friends. Probably no members of the Bar now active in the law know anything of his origins or of the road which led him to the Bar; it will be of interest to give some account of these things. After his retirement he wrote what he named "Notes on Life," intended primarily to inform his grandchildren. A member of his family gave me, a few years ago, a copy, and most of what I have to say concerning his life up to the time of his graduation in law is drawn from it.

His parents were members of migrant families which first settled in northern Tasmania. After the discovery of gold at Coolgardie in 1892 and Kalgoorlie in 1893, members of each family moved to that area. So it came about that Gowans' parents were married at Kalgoorlie in 1897. Gowans was born at Boulder in 1904, the third in a family of five boys. The father of these boys was a carpenter and small-time builder, and as the gold rush population faded away money was scarce and living conditions harsh. Gowans describes their house as having a "galvanised iron lining, but it had not been given any outer covering". When in 1912 his mother died Gowans' father and the five boys had to look after themselves, with occasional periods of assistance from unsatisfactory housekeepers.

At the time of his mother's death Gowans was already attending a Christian Brothers school at Kalgoorlie, following his two older brothers. The oldest boy, Tom, who will be mentioned again, went on to become a pharmacist.

Gowans was an able student; at 15 he matriculated by passing the Leaving Certificate examination but as he was too young to be admitted to the University of Western Australia he remained at school for two further years. During this time Tom completed his qualifications as a pharmacist and was sent to Boulder to manage what was then called a dispensary. Tom at one stage became ill, and Gregory ran the dispensary for two weeks. He records that "nothing untoward happened".

Lack of money did not prevent boyhood from being remembered as a happy time in a colourful era — Afghans with camel caravans, wandering aborigines, electric lighting in houses for the first time, the construction nearby of a section of the Trans-Australian Railway, the community impacts of the 1914–1918 war and so on.

At the end of his schooling in 1921, Gowans won an exhibition to the University of Western Australia tenable for three years, extendable by two years if required to complete a course. The University, however, did not offer a law course, and Gowans, as a result of reading a *Life of Lord Russell of Killowen* by Barry O'Brien, wanted to study law. Therefore, he began an Arts course in Perth.

In Perth he had to earn money to pay for lodgings, and the needs of life apart from university fees. Some help came from the fact that Tom had decided to open a pharmacy in West Perth. The two brothers lived in a single room behind the shop, with a methylated spirit gas ring as the means of cooking. There was some prostitution in the neighbourhood. Gowans records that a good-looking girl who came into the shop asked him to partner her at a dance. He declined, but suggested an acquaintance as an alternative. This young man acquiesced, and shortly afterwards fell ill of a nasty disease.

The shop failed and Tom went back to Kalgoorlie, but not before another chemist had agreed to provide Gowans with accommodation and £1 per week in return for some assistance in the shop and the taking of night calls.

Professor Shann, professor of Economics, was told that Gowans wanted to do law. He himself was a member of a Melbourne Anglican family: he referred the problem to the Master of Queens College, who in turn referred it to the Rector of Newman, who referred it to his Archbishop, who caused a grant to be made of a scholarship tenable for two years at Newman College.

In his third year, Gowans became a house-master at Hale School, living in, teaching and playing a part in the general activities of the school.

After a successful final year of the Arts Course, Professor Shann, professor of Economics, was told that Gowans wanted to do law. He himself was a member of a Melbourne Anglican family: he referred the problem to the Master of Queens College, who in turn referred it to the Rector of Newman, who referred it to his Archbishop, who caused a grant to be made of a scholarship tenable for two years at Newman College. The University of Western Australia extended his exhibition for two years and transferred it to Melbourne. And so Gowans was ready, willing and able to enter the Law School at the University of Melbourne.

He was a successful student and in the Honours examination in February-March following the completion of his final LL.B. year he qualified for a Master's Degree. During his time at Newman he had had the same problem as in Perth — earning some ready cash and providing accommodation for himself in vacations. He had taken the Jessie Leggatt prize in Property and Contracts in his first year at Melbourne, and was disappointed when he did not win the Supreme Court Prize in the Final Honours examination, but he had been obliged to work to support himself during the summer when others were preparing themselves.

He did his articles with Rigby & Fielding and was admitted to practice early in 1928. After a further three years with Rigby & Fielding during which Douglas Menzies came to the same firm for articles, thus beginning a life-long friendship, he signed the Bar Roll in January 1931, reading with Sir Norman O'Bryan.

This was at the beginning of the Great Depression of the 1930s, and was a precarious venture for one without any outside financial support, but he weathered the conditions much more comfortably than some of his near contemporaries. There were, no doubt, many days when there was nothing to do, but this was balanced by cases in the High Court and briefs to assist Royal Commissions which were of great public interest.

The High Court appearances which he made in these early years were in the following cases:

Williams v. R. (No. 2) (1934) 50 C.L.R. 531;
Ex parte Williams (1934) 51 C.L.R. 545;
Roman Catholic Archbishop of Melbourne v. Lawlor (1934) 51 C.L.R. 1; and
Collty v. Clements (1936) 55 C.L.R. 697.

Royal Commissions which he was briefed to assist included are one on the subject of Industrial Life Insurance (1936), the Bush Fires Inquiry of 1939 and also, in 1939, one to investigate allegations of bribery of M.P.s relating to proposed legislation to regulate the milk-distributing industry and the money-lending business.

In 1937 he married and in December 1938 his first child was born. Combining this with his professional progress it is reasonable to say that at the outbreak of war in September 1939 he was established and settled in life.

During the war years, possibly in 1941, Gowans put himself down for service with the R.A.A.F. Before he was called to report, he was asked to join one of the wartime departments called "War Organisation of Industry". He accepted and stayed with the department until the end of the war, serving part-time only in 1945. He must have learned a great deal about the structure and needs of industry

and the use of labour forces which was useful to him later.

After the war his practice continued to develop, coming to include constitutional work and taking a slant towards industrial arbitration, which in turn often produced constitutional issues to be decided in the High Court. He took silk in 1947.

As a judge, Gowans was calm, courteous and patient. His knowledge of the law was occasionally an embarrassment to counsel who could not match it, but his court ran well.

I mention two incidents. In the boom times of the early '50s, various curious securities were being offered to the public by entrepreneurs seeking to raise money. One such entrepreneur was brought to Gowans for advice in conference. The advice related to the wording of the document which was to be issued to investors, probably an unsecured note. There was to be no doubt that the security was to be gilt-edged — the printer had been so instructed. Gowans produced a series of suggestions, all rejected by the client. Gowans then said "I am getting the impression that what you want is that the document should promise the investor nothing at all". The delighted client said "You've got it, Mr. Gowans, that's it exactly". Gowans considered this, and said to the client, "If that's so, I've got better things to do," got to his feet and saw the client out. Leaving chambers the client said to his solicitor "What's wrong with him? Is he a Commo or something?"

The second related to Gowans' belief in the importance of the independence of the Bar and the related duty to accept briefs which are offered. In industrial work he received most of his briefs from trade union sources. He insisted that it was his right and duty to accept employers' briefs, and some incident must have occurred to demonstrate this. Union interests demanded that he should not accept such briefs. He refused to comply, and as a result lost a valuable part of his practice to others who received union briefs. To this I might add another occurrence of which I have close knowledge. The breakaway of the D.L.P. from the A.L.P. was obviously a political division, but it also produced divisions within the Roman Catholic Church of which Gowans was a member. He wished to stand apart from both controversies, but problems arose inevitably over property divisions to be made between the two parties and Gowans, in fact with me, was briefed for the D.L.P. He knew that, in many eyes, this would identify him with the D.L.P. He did not want this and the embarrassments that went with it, but he accepted the brief and bore the consequences.

Between 1947 and 1961 he was a member of the Overseas Telecommunications Commission. He took an intense interest in the work of the Commission. His term saw the addition of coaxial cables to the existing radio systems; he took part in the planning of the London-Sydney system, which included the construction and laying of a cable from Vancouver to Sydney with a spur to Honolulu.

During the post-war years he went to London from time to time to appear before the Privy Council, mainly in matters relating to the Constitution, but ranging in subject matter from transport to excise. He also argued Ryan's appeal there.

In 1961 he was appointed to the Supreme Court. The events leading up to this were unusual. The government of the day had been under pressure to increase the size of the court and early in 1961 the then Solicitor-General asked Gowans if he would accept an appointment. Later in the year Cabinet took a formal decision on the increase and authorised the Attorney-General to submit a nomination. The Supreme Court judges then passed a motion opposing the increase. The Government gave way and abandoned the proposal for an immediate increase. The time factor in all this was that a long-standing policy had been, in effect, not to appoint judges over 57 because it was thought appropriate to look to 15 years of service before retirement and pension. Gowans 57th birthday fell on 9 September 1961. The Bar thought that it knew (probably by reference to McNab's odds) that Gowans was the intended appointee, and it certainly knew who the judges behind the motion were, and in Bar gossip the situation took on an atmosphere of personal antagonism which it should never have had. The resolution came when Sir Charles Gavan Duffy died in August, and Gowans was appointed to replace him. It is a mark of Gowans' reticence that, although we were at the critical time in the process of moving into rooms adapted to our design in Owen Dixon Chambers, he said no word to me about his situation. He eventually put the issue to me in the form "They say there aren't enough good men to go round. What they overlook is that there never were."

As a judge, Gowans was calm, courteous and patient. His knowledge of the law was occasionally an embarrassment to counsel who could not match it, but his court ran well. He was well satisfied with

the jury system, but he was, out of court, inpatient of the development of the civil juries list into a kind of insurance clearing house, in which much judicial time was wasted when settlements were announced.

As his seniority increased he was always available to junior judges for advice and in his later years on the bench was a valued adviser to the last two Chief Justices.

Through his career Gowans had difficulty in making himself heard — when he was at the Bar courts often could not hear him, and counsel have told me that they doubted whether juries heard very much of his impeccable charges. Douglas Menzies once told me that he thought that this had been damaging to him before the Privy Council. The tradition there was to attach more importance to the oral arguments than is done in some other appellate tribunals, and in particular in applications for leave to appeal it could be decisive.

Gowans' explanation when his friends spoke to him on the subject was that to try to think about voice production distracted him from the task of choosing the words to express his thoughts.

Out of court he had wide interests. He found contact with others easy, and his friends included people with a wide variety of activities in the arts, in business and in agriculture. Sir Douglas Menzies was his closest friend within the profession, and together they were a sparkling pair. He was a great walker and covered in his lifetime large areas of the High Plains, the north-eastern highlands, the Grampians and the Otways, with an occasional excursion to Gippsland and the Bannah Forest. He acquired a considerable knowledge of plants and trees, but he was not a botanist. He just liked to be there. In the 1960s he built a house at Lorne which gave him great pleasure, and it was a blow when his wife and he were no longer able to go there. He was a devoted husband and father. His family comprised a son and four daughters, and they were of course a central part of his life.

His last years had the inevitable sadness of a nursing home, but he bore himself with dignity until his death on 1 April 1994. He merited the salutations of the profession and the community.

George Lush

NUBERT SOLOMON STABEY

NUBERT STABEY WAS THE SON OF WORKing class parents who experienced and witnessed the depths of the Great Depression. It was an experience which affected him profoundly. He had an insight into the effects of poverty and the lack of educational opportunities which caused people to become powerless victims of circumstance. He developed sympathy for the underdog which was one of the hallmarks of his character.

Another factor which had a profound effect upon him was the full disclosure of the crimes against humanity committed by Nazi Germany in the name of racial superiority, especially against the Jewish people. He had a life-long detestation of bigotry and racism.

After a State school education, followed by employment as a clerk and war service in the RAAF, Nubert completed a law degree under the Rehabilitation Scheme.

He signed the Bar Roll in 1948.

As a barrister, Nubert strove for perfection in his service to the law. His practice became one predominantly in the commercial area, and he became one of the leading counsel in that field.

The cases which gave Nubert the greatest satisfaction were those where he represented an individual battling for individual rights.

Nubert often reflected on a case in which he went all the way to the High Court on behalf of a taxi driver who claimed to have been unjustly deprived of his right to work by the Transport Regulation Board. The High Court found for the taxi driver.

As a barrister, Nubert strove for perfection in his service to the law. His practice became one predominantly in the commercial area, and he became one of the leading counsel in that field. The cases which gave Nubert the greatest satisfaction were those where he represented an individual battling for individual rights.

Another matter of which Nubert was proud was his part in the Healesville Hospital Inquiry in which

he fought valiantly for an individual doctor who claimed to be a victim of caprice and misuse of power.

As a barrister, Nubert displayed the industry and courage on behalf of his clients which is often urged as a proud quality of an independent Bar but is seldom seen in such clarity.

Nubert was a fine master. He took most seriously his responsibility to educate his pupils, not only in the practice of the law but also the inculcation of the highest ethical standards of integrity. Nubert practised what he preached.

As a County Court Judge, Nubert was one of the first of the breed we now take for granted. He believed the County Court was a place where learning should be applied, and that the function of a judge was to fearlessly and honestly apply the law. Nubert was widely regarded as a compassionate and merciful man, qualities which should never be mistaken for weakness.

An insight into Nubert's philosophy can be gained from a conversation he had with his wife and two sons after he was invited to join the County Court bench. One of his sons said to him that the invitation was an honour, but wasn't his father frightened by the power which came with the office? He always was mindful of his power and exercised it in a way which demonstrated his belief in the essential dignity of people. On one occasion after he had released an accused on a bond, a relative berated Nubert as being too soft and suggested the accused would soon breach the bond. "That may be true," said Nubert, "But at least I won't have it on my conscience that I didn't give him a chance." That was Nubert.

Nubert was a devoted family man who never wanted to burden others with his problems. A few weeks before the surgery which preceded his death, Nubert postponed the surgery so that he could celebrate his grand-daughter's wedding. He never told anyone of the considerable pain he must have been suffering.

Nubert Stabey enriched the lives of all whom he touched. I will miss him.

Boris Kayser

GARTH SAMUEL HAROLD BUCKNER Q.C.

ONE OF THE LEVIATHANS OF THE BAR, Garth Buckner Q.C., died suddenly on 18 April at the age of 60.

Garth was called to the Bar in 1960 and read with Sir Ninian Stephen at Selbourne Chambers. His ability quickly became apparent, and he developed a busy commercial practice with a leaning towards local government prosecutions. Local government prosecutors were soon taught the value of careful attention to their paperwork.

Town planning law was then in its infancy, and as the area grew Garth's practice became more specialised in planning, local government and land valuation.

He took silk in 1977, and after Sir James Gobbo was appointed to the Bench assumed the mantle of leader of the planning and local government Bar, a position which he held undisputed until his death.

His advocacy was characterised by meticulous preparation, and a forceful but very logical presentation. Those who were briefed as his junior came to know well the late-night telephone call commencing with the words "It's me. Look, I've got the answer."

Those who prepared written material with him were cordially invited to express a view, but anyone inexperienced enough to accept this invitation found themselves in a dialectic that it was impossible to win.

Garth Samuel Harold Buckner Q.C.

He was capable of impassioned advocacy. His final address to the Planning Board in the Odyssey House case actually brought two hardened members of that tribunal to tears.

He was capable of appellate advocacy at the highest level. He appeared for the appellant in *Montana Hotels Pty. Ltd.* v. *Fasson Pty. Ltd.*, the last appeal to the Privy Council from Victoria, and quickly earned the respect of Their Lordships for his incisive grasp of the issues and his skilled debate.

As an opponent he gave no quarter and expected none. As a friend and colleague he was entirely the opposite. His courtesy and caring nature, and his genuine interest in other people, often surprised those who did not know him well. He would not suffer fools, but was totally without pretension.

He gave generously of his time to this Bar. He served as Chairman of Barristers Chambers Limited from 1987 until shortly before his death, and forcefully pressed the interests of the Bar during a very troubled period.

Garth eschewed the bon vivant. He was above all devoted to his wife, Sally, and daughters Claire and Eve, and hated being away from home. In the end he gave more to his clients than they were entitled to expect, and perhaps in so giving was taken far too soon. We shall not see his like again.

HMW

O.K. STRAUSS

OTTO STRAUSS WAS A REMARKABLE man. He graduated from the law school at Bonn in the 1930s. Being a Jew he did not find Nazi Germany congenial and made good his flight before the outbreak of war and reached Melbourne. His wife, Ilse, made her way to London but was trapped there for the duration of the war.

When it was over he brought her to Melbourne to join him. He had by now gained employment as a clerk in a shirt factory. Although this was no challenge to his intellectual capacities he regarded himself as an exceptionally fortunate man, as indeed was obvious.

In the middle 1950s he won first prize in Tattersalls lottery. He decided to use the money to support his wife and son while he studied at the University of Melbourne Law School which was where I met him. Despite the generation gap between his fellow undergraduates and himself he made many friends whom he kept till his death. He was tolerant of even the most scatterbrained of our activities.

Upon graduation he settled down to life as a solicitor because the risks of coming to the Bar at his age with a wife and son to support were, even in the relatively prosperous days of the 1960s, too high. And then he won the lottery again! This enabled him to begin practice at the Bar which he continued for the rest of his career. He did not reach the higher peaks of his profession but he didn't expect to do so. He was learned, studious and extraordinarily diligent, which gained for him a practice of broad range.

His endearing eccentricities only served to heighten appreciation of his many virtues. My wife and my late mother were enchanted by his custom of greeting them by a Germanic click of the heels, a deep and courtly bow, and a kiss, gently bestowed, on the back of the right hand. The only sign of bile I ever detected in him was a profound, implacable, and totally understandable antipathy towards all things German. Although Ilse visited the country of her birth three times, Otto steadfastly refused to accompany her. Out of respect for his feelings I refrained from buying the VW I yearned for when I started to earn some money.

Upon graduation he settled down to life as a solicitor because the risks of coming to the Bar at his age with a wife and son to support were, even in the relatively prosperous days of the 1960s, too high. And then he won the lottery again! This enabled him to begin practice at the Bar which he continued for the rest of his career.

Otto's many friends mourn his parting but also rejoice at the good fortune which attended his life and our good fortune to have known him.

J.R. Hanlon

KEN BILLING

KENNETH HARVEY BILLING PASSED away at Bairnsdale on 1 April 1994, after a short illness. He will be remembered by his family, friends and his colleagues both at the Bar and in academic circles as a much loved and respected man, and a great and generous contributor.

He had, since he signed the Roll of Counsel in 1986 after reading with Michael Ruddle, combined academic duties as Head of Law at Victoria University, Footscray Campus, with an active practice at the Bar.

Ken Billing

Ken was always modest, so that many of his colleagues knew little of the richness of his background and experience. He had, since he signed the Roll of Counsel in 1986 after reading with Michael Ruddle, combined academic duties as Head of Law at Victoria University, Footscray Campus, with an active practice at the Bar. But that was only part of the story.

He was born in 1929. After graduating in Pharmacy and gaining professional experience Ken established his own pharmacy at Yarrawonga and later at Albury as well. In his years at Yarrawonga he gave distinguished service in Apex, Rotary and other service organisations, as well as writing and producing plays for the Yarrawonga Theatre Company.

Ken was always a man keen to use his talents to the full and to take up fresh challenges. In 1970 he sold his pharmacy businesses and came to Melbourne with his wife, Jan, and four children. He became a pharmacy consultant and the office manager of a legal practice. In 1973 he started an academic career by commencing his Bachelor of Business in Accountancy at Footscray Institute of Technology. Then he went to Monash and did his LL.B. as a full-time student whilst working fulltime and serving as the Honorary Treasurer of the Collingwood Football Club for several years. In due course he completed the original Bachelor of Business in Accountancy as well as in Catering & Hotel Management, and also in Hospitality & Tourism, followed by an LL.M. with a thesis on Suspended Sentences. He continues this work with service organisations throughout his life.

What is missing from this summary is a proper reference to the warmth of his family life, his great sense of humour and to the way in which he provided help and encouragement to many. Ken was always a great friend to people in difficult situations, and a most honourable member of the Bar. He fell ill suddenly in February 1994, on the eve of his retirement from the Bar and academia to settle at Lakes Entrance. His passing saddens us greatly.

Ian Bowditch

MURRAY DONALD CARN

MURRAY DONALD CARN WAS BORN IN Swan Hill in 1960. He grew up in outer eastern Melbourne, competing his secondary education at Boronia High School. He studied Law and Political Science at the University of Melbourne, receiving First-Class Honours throughout his study of politics. He was articled to Mr. Orm Thomas at the Melbourne firm, Ryan Carlisle Thomas, where he commenced a practice in industrial law. He signed the Bar Roll in November 1989 and read with A.M. North Q.C. and J.D. Loewenstein. He established a successful industrial practice in the Federal Court and the Australian Industrial Relations Commission. While still a relatively junior barrister, Murray made an outstanding contribution drafting the constitutions of two major, newly-formed trade unions; the Federal Firefighters' Union and the Maritime Union of Australia. He was instructed

Murray Donald Carn

and guided in his work by the pre-eminent industrial law solicitor, John Ryan. Murray was appreciated as a sympathetic, patient and conscientious lawyer by all the officials involved. He also undertook many criminal cases for the various legal services and the Legal Aid Commission. Murray is fondly remembered not only by the members of the eleventh floor, Isaacs Chambers, where he spent most of his time at the Bar, but by all those who knew him. He had an acute wit and a careful and charming disposition. He was an unfailingly polite and straightforward opponent.

Murray was keenly interested in social issues and in politics. This outlook was reflected in the nature of the work he chose and the way in which he approached it. Murray was an enthusiastic gardener, both at his home in Footscray and at his mother's home at Silvan in the Dandenongs. He had an encyclopaedic knowledge of tree and flower varieties and thrilled at imparting his knowledge of these and the joy he experienced in them.

Tragically, Murray contracted the AIDS virus in 1981 at a time long before the health authorities in the United States had published information they had about the illness. Murray struggled against the virus for an extraordinary length of time; however, it began to overpower him towards the end of 1993. It is a mark of his extraordinary strength of character and dignity that this long illness did not seem to touch his outlook and his capacity to respond to others with kindness and generosity. He remained cheerful and energetically focused upon his work, his hobbies and his friends. To those around him, there was no appearance of bitterness, or even of despondency despite the tragic consequences of his illness.

Murray's temperament and talents showed great promise which would have ensured that he would have contributed to the considerable changes currently being experienced by the Bar as it responds to the growing community demands that it become more socially responsible.

Anthony North

MABO: A VOICE FROM THE PAST

ABORIGINAL LAND RIGHTS — THE LONG SHADOW OF THE EIGHTEENTH CENTURY

It is interesting, in view of the decision in *Mabo* canvassed at some length in the summer 1993 issue of *Bar News*, to read what Dr. Robin Sharwood had to say on the subject in 1981.
The paper below was delivered at a meeting of the Medico-Legal Society held on 15 August 1981. The editors are indebted to Dr. Sharwood for permission to reproduce it here.

IN 1980, THE AUSTRALIAN BROADCASTING Commission's Boyer Lectures were given by Professor Bernard Smith, the distinguished art historian, who was in that year President of the Australian Academy of the Humanities.

The Lectures were entitled *The Spectre of Truganini* and to their published version Professor Smith added a brief introduction which opens with this compelling and ironical observation:

> These lectures, unlike several important legal judgments of the 1970s which have found that Australia was acquired by peaceful occupation and settlement, are based upon the historical premise that the country was acquired by the forcible dispossession of the indigenous inhabitants of Australia from their ancestral lands, a process that might be more fittingly described as invasion and conquest.

The purpose of my lecture this evening is to examine, so far as I can, just what it is that lies behind the incongruity between legal characterisation and historical reality, to which Professor Smith amongst many others draws attention.

Delivered by Dr Robin L. Sharwood at a Meeting of the Medico-Legal Society held on 15th August, 1981 at 8.30 p.m. at the Royal Australian College of Surgeons, Spring Street, Melbourne. The Chairman of the Meeting was the President, Dr. J. W. Upjohn.

For incongruity there undoubtedly is. And this incongruity is currently being drawn to our attention more forcefully and more urgently than ever before in the nearly two centuries since British settlement in this country began, for, rightly or wrongly, the *legal* characterisation of British settlement underlies the whole aboriginal land rights controversy — underlies it, and, to some extent, may be thought to have created it.

Professor Smith does not overstate the position in any significant way.

On the one hand, it is perfectly true, as he says, that in "several important legal judgements of the 1970s" the Courts found "that Australia was acquired by peaceful occupation and settlement". He is referring, undoubtedly, to the decision in 1971 by Mr. Justice Blackburn in what is popularly called *The Gove Land Rights Case (Milirrpum* v. *Nabalo Pty. Ltd.*[1] and to the High Court of Australia decision of 1979 in the cage of *Coe* v. *The Commonwealth.*[2] I shall come back to these cases later. It is sufficient to say now that they did find, as Professor Smith asserts, that "Australia was acquired by peaceful occupation and settlement". It is also desirable that I should at this early stage make two short comments on that finding: first, it was not new — the Courts were affirming a point which they regarded as long-settled and, secondly, the point was seen as a point of law, a point as to the legal nature and character of the British settlement — the Courts were not purporting to find the historical facts. Yet the contrast between the conclusions of the Courts and the historical reality is, indeed, very marked, and entirely warrants Professor Smith's irony.

The British colonisation of Australia was not achieved "by peaceful occupation and settlement". It was achieved in the face of fierce, bitter and unremitting resistance from the aboriginal inhabitants, who fought, and largely lost, a long guerilla war against those whom they conceived as invaders.

It is fair to say, I think, that for a very long time white Australians have been reluctant to acknowledge the grim and distasteful historical reality of the guerilla war, but the evidence for it is overwhelming, and is acknowledged by all modern scholars, so far as I am aware.

Let us go back to the very beginnings. Perhaps I may say here, in parenthesis, that most of this lecture is about "beginnings" rather than about current problems and attempts to solve them, which is why my paper is entitled as it is.

The English precursors of settlement were, of course, Dampier and Cook. Dampier touched on the west coast exactly one hundred years before the colonisation at Sydney Cove — in January 1688. The aborigines resisted him. "They did at first endeavour with their weapons to frighten us", he wrote in his published narrative, "who lying ashore deterred them from one of their fishing-places". The context of this first recorded act of resistance should not go unnoted — the aborigines were defending their resources. In 1699, Dampier returned to the western coast in the *Roebuck*. Although he published nothing about it, the logbook of that voyage, which is in the Public Record Office, records a scuffle with the natives in which a seaman was speared, a native wounded with a cutlass, and a shot was fired.[3] The first blood has been spilled.

Cook's first contact with the aborigines is much better known, being told vividly and at some length in his journal. Once again, as with Dampier, what he records is resistance. Indeed, he records a skirmish even more extensive than that experienced by Dampier in 1699. Here is the entry for Sunday, 29th April 1770, in edited form:

> Saw as we came in on both points of the bay several of the natives and a few huts, Men, women and children on the south Shore abreast of the Ship, to which place I went in the boats in hopes of speaking with them . . . ; as we approached shore they all made off except two Men who seemed resolved to oppose our landing . . . as soon as we put the boat in they again came to oppose us upon which I fired a Musket between the two . . . and one of them took up a stone and threw at us which caused my fireing a second Musquet load with small shott, and altho some of the shott struck the man yet it had no other effect than to make him lay hold of a Shield or target to defend himself.
>
> Immidiatly after this we landed which we had no sooner done than they throw'd two darts at us, this obliged me to fire a third shott soon after which they both made off . . .

As Manning Clark has written, "in this way the European began his tragic association with the aborigines on the east coast".[4]

It should be emphasised that there is no reason to attribute aggressive intentions to either Dampier or Cook, or, for that matter, to Arthur Phillip and the other founders of the settlement at Sydney Cove in 1788; quite to the contrary in fact. But their obvious and sincere desire for peaceful relations with the aborigines must not be allowed to obscure the unhappy and perhaps still unpalatable reality that the aborigines, for their part, opposed the coming of the Europeans and fought them with all the skills and weapons at their command.

Let us look at the events of the first year at Sydney Cove, for it was the experience of this initial period of settlement which would of necessity determine the attitude of the law to the act of colonisation.[5]

Governor Phillip had been expressly instructed to conciliate and protect the natives, an order which coincided with his own disposition and philosophy. His problem was that he could achieve very little direct and personal contact with them at all. His attempts to fraternize were rebuffed. His friendly overtures were declined. When official parties approached them, by and large the aborigines melted silently into the bush. Certainly there were some encounters, but all too often they were violent; convicts were generally involved, and on both sides there were robberies, beatings, bloodshed and killings. Phillip and his colleagues almost always blamed the convicts for these incidents, but, however provoked, they demonstrated all too dramatically that the policy of conciliation was failing. The natives were resisting the settlement, actively and passively.

And Phillip knew the reason why. In a despatch to Lord Sydney of September 1788, he warned that the natives might attempt to burn the crops, "for they certainly are not pleased with our remaining amongst then, as they see we deprive them of fish, which is almost their only support".[6] A month later he wrote: "The natives still refuse to come amongst us . . . they see no advantage than can arise from us that may make amends for the loss of that part of the harbour in which we occasionally employ the boats in fishing".[7]

In other words, Phillip saw that the natives were resisting because the white men were appropriating their resources.

Phillip felt that if he could only persuade an aboriginal family to live with them, some progress towards mutual understanding might begin, but all this coaxing to that end failed. Finally and very reluctantly, in late December 1788, he took a native by force for the purpose. The experiment was not a success. Although Phillip was to claim that the aboriginal (whose name was Arabanoo) became "perfectly reconciled to his situation and encouraged the governor to feel more optimistic about these strange, difficult and incomprehensible people, the unfortunate man died of smallpox less than 5 months after his capture.[8]

Other First Fleet diarists were as aware as Phillip that the aborigines were hostile, that what they were encountering was resistance, expressed both in open violence and passive non-cooperation and that the white men were regarded as invaders and expropriators.

Thus Watkin Tench, writing about the condi-

tions of the colony at the end of 1788, said bluntly that "unabated animosity continued to prevail between the natives and us" and described it as a 'state of petty warfare".[9]

But none of these other chroniclers seemed to see as clearly as did Phillip that what lay at the heart of the trouble was not the occasional foolish stealing of native possessions by convicts who had set up quite a trade in "souvenirs", or even the molestation of women, but the wholesale European take-over of aboriginal resources. David Collins, writing years after the event, could still express surprise that the natives should have stayed out of sight in the first weeks of settlement, when it would have been obvious that "their visitors were occupied in works that indicated an intention of remaining in their country".[10] Phillip, as we have seen, was not so naive, although even he could not appreciate, as we now do, the nature and scale of the European intrusion in aboriginal eyes and the shock it produced to the aboriginal economy, culture and psyche along the shores of Port Jackson.

It is neither possible nor necessary for me in this paper to take the details of the story any further. For reasons which I shall be explaining, I am concerned with things as they were at the beginning of British settlement in this country, and I am suggesting that the early experiences at Sydney Cove provided direct, unambiguous and powerful confirmation of the impressions gained earlier by Dampier and by Cook. The natives of New Holland would not welcome the Europeans. They would not cooperate in the establishment of settlements. They would resist encroachment upon their domains. They would fight.

In so far as it is relevant to look at the later history of the expanding British settlements, those conclusions are, in general terms, reinforced. As long ago as 1889, the New South Wales historian G. B. Barton, hardly a radical figure, summed it all up: "It was a war of races". [11]

So Professor Bernard Smith is amply justified in his claim that this country "was acquired by the forcible dispossession of the indigenous inhabitants . . . from their ancestral lands", and that the process looks much more like "invasion and conquest" than the "peaceful occupation and settlement" of the lawyers' assertion.

Why is there this extraordinary disparity between the findings of law and the findings of history? What can the lawyers possibly mean when they say that Australia was acquired by "peaceful occupation and settlement"? Are they talking the same language as the historians, and, if not, why not? Are they asking the same questions as the historians, and, if not, why not? What is the interplay in this matter between legal reasoning and what we perhaps too glibly call "the facts"?

To answer these questions, we must look at English law as it was in the last decades of the 18th century. In that age of exploration and expansion, it was important to know by what legal means a nation could acquire territory and establish colonies, especially in what (to European eyes) were newly-discovered lands, and what were the nature and characteristics of the colonies so established. The great international lawyers had been giving consideration to the matter since the previous century, but for Englishmen of the time of Cook and Phillip the clearest, most modern, most satisfactory and most definitive statement of the position had been that provided by William Blackstone in his famous *Commentaries* of 1765, a work of great authority and one of the run-away legal best-sellers of all time.

So Professor Bernard Smith is amply justified in his claim that this country "was acquired by the forcible dispossession of the indigenous inhabitants . . . from their ancestral lands", and that the process looks much more like "invasion and conquest" than the "peaceful occupation and settlement" of the lawyers' assertion.

Relying, then, principally upon Blackstone, English lawyers drew a distinction between two kinds of colonies.

On the one hand, there were "conquered" or "ceded" colonies, being colonies established in territories which were already inhabited and had passed into the possession of the British Crown by either of the processes of conquest or cession. On the other hand, there were .settled" colonies, where plantations of colonists were set down in uninhabited areas — in territory designated as 'terra nullius".

This is how Blackstone himself stated the distinction in the passage most often quoted:

> Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations.[12]

It was also clear law that the categorisation of a colony as either "conquered" or "ceded" (on the one hand), or "settled" (on the other), was a matter for the Crown, in the exercise of its prerogative in relation to the conduct of foreign affairs, and not a matter for the courts.[13]

For the legal regime of a colony, very important consequences followed from the choice of the appropriate category and this is where the link is said to begin with the aboriginal land rights controversy. If the colony were regarded as of the "settled" variety, then the legal assumption was that the territory, being "terra nullius", was without law, and the colonists brought the whole of the English law with them, so far as it was applicable. But if the colony had been "ceded" or "conquered", then respect was paid to the existing laws of the original inhabitants. These laws continued in force until changed or abrogated by the Crown.

Thus, had New South Wales been regarded as a "conquered" colony (clearly on the facts no question of "cession" arose), some account would have been taken of aboriginal law and some recognition given to aboriginal land claims of a proprietary or possessory nature. That, at least, would have been the theory of the thing.

The evidence makes it plain, however, that, from the beginning, the Crown treated the colony established in New South Wales (which at that stage comprised the whole of eastern Australia), and, in due course, all the other Australian colonies, as "settled" rather than "conquered". Definitive judicial recognition of this categorization was given in 1889 in the Privy Council decision of *Cooper* v. *Stuart*,[14] but it had been beyond serious dispute long before that. In 1979, the High Court of Australia, in *Coe* v. *The Commonwealth*, refused (in effect) to entertain any reconsideration of the issue, and, given that the issue never was one for judicial determination, at any rate in a municipal court (see Jacobs J.), I have no doubt that they were right.

Curiously enough, it is hard to pinpoint in time or to document any actual decision by the Crown to categorize New South Wales as a settled colony — or, to take the process of decision conceptually one stage further back, to classify the territory as "terra nullius". So far as I am aware, no one has ever come across, say, an opinion of the English law officers on the point, either before the despatch of the First Fleet when, presumably, they would have relied upon Cook's reports of the territory or after the establishment of the settlement when despatches from Phillip and others would also have been available.

Cook's own formal act of "taking possession" of the eastern coast in the name of King George III, on 27th August 1770, certainly implied that he, Cook, regarded the territory as "terra nullius". Under his additional secret and sealed Instructions, which he was to open only after he had observed the transit of Venus in Tahiti, he was ordered to discover whether or not there was a great southern continent, and, if there was, to explore it.

> You are also [ran the Instructions] with the Consent of the Natives to take possession of Convenient situations in the Country in the Name of the King of Great Britain; or, if you find the Country uninhabited take Possession for His Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors.

Cook "took possession" in the second form contemplated in his Instructions, as if the country was uninhabited, as if it was "terra nullius".

But of course Cook created no colony in New South Wales, and by international law, even in the 18th century, territory could be acquired only if a formal taking of possession were followed up by actual and effective occupation. So Cook's action could not finally settle the question, at least as a matter of strict law.

Nevertheless, in practice it appears to have done so. Governor Phillip's Commissions and Instructions, the Statute authorizing the establishment of a criminal court and other official documents all proceed upon the assumption (sometimes openly expressed) that New South Wales is already a territory of the Crown. By implication, then, the validity of Cook's action is confirmed, and thus, by implication, his assessment of the territory as "terra nullius". It is significant that the formal ceremonies which Phillip conducts upon the arrival of the First Fleet do not include any further 'taking of possession". They are ceremonies of a consequential nature, appropriate to mark the beginning of the actual occupation of new territory. Once again, then, the legal appropriateness and effectiveness of Cook's action is, by implication, acknowledged and confirmed.

Despite all this, it might, I suppose, have been open to Phillip, on the basis of his experience in the colony, to have advised the Crown that the classification of the territory as "terra nullius" should be reconsidered. No grants of land to private individuals appear to have been made before March 1791,[15] and up to that point a re-assessment of the legal character of the colony would, I think, have been possible, if it had been thought necessary or desirable; after land grants had begun, it would have been much more difficult, to say the least. But there is not the slightest evidence to suggest that Phillip wished to question the basic assumptions, or that he was under pressure from anybody, either at home or in the colony, to do so. New South Wales was a "settled" colony in the Blackstonian sense, and that was that.

We are, therefore, and at long last you might say, brought hard up against the central mystery of this whole story.

Why did the application of the Blackstonian distinction to New South Wales cause it to be categorized as a "settled" rather than a "conquered" colony? Why was the eastern coast of Australia regarded as "terra nullius"? Why did officialdom make these seemingly absurd decisions, when the plain facts were that this territory was not uninhabited, and that the incursions of the Europeans were resented and resisted from the earliest days?

Various theories have been suggested, or can be suggested, by way of explanation for this apparent mystery. Only two of them, I believe, warrant our serious attention tonight.[16]

"Occupancy" is not defined by reference to whether the lands are inhabited; it is defined by reference to whether the lands are cultivated. "Cultivation" is the significant criterion . . . the "cultivation test", if I can call it that, had, nevertheless, a very long and distinguished ancestry in legal, philosophical and, indeed, theological writings. It can be (and was) traced right back to the scriptural injunctions of the Book of Genesis.

The first possible explanation runs along these lines. Native peoples living in a simple, tribally-organised society do not count as "occupants" for the purposes of the law relating to the acquisition of territory. Because their community is not structured in a recognizably European fashion, because it has no civilized polity, it may be disregarded. For legal purposes, their territory is "terra nullius".

I think one can say fairly confidently that this argument may have played some part in the classification of New South Wales as "terra nullius". Undoubtedly the social structures of the aborigines were not "civilized" in the European sense. But one cannot be certain about it. The proposition does not seem to have been generally accepted until well into the 19th Century; it had certainly not been favoured by the great international lawyers of the 16th and 17th centuries. There is no argument along these lines in Blackstone, its standing in international law at the time would have been doubtful, I know of no contemporary reference to it specifically in relation to New South Wales, and actual British practice had not always reflected it - notably, British practice in the Americas and in India. Nor was British practice to reflect it in the later case of New Zealand. Nevertheless, it seems that there was some authority for such an argument in English common law at the end of the 18th Century, or so (at least) says Sir William Holdsworth,[17] and given that Australian aboriginal society was seen as quite astonishingly primitive, the point may have been taken.

There is, however, a second line of argument, a second possible explanation, for which the evidence is much stronger.

It turns, again, on the definition of what constitutes "occupancy" of territory for the purposes of the law of acquisition and the Blackstonian distinction.

"Occupancy" is not defined by reference to whether the lands are inhabited; it is defined by reference to whether the lands are cultivated. "Cultivation" is the significant criterion. It is this criterion which Blackstone himself used in the passage already quoted. There he made the distinction between the two kinds of colonies turn on whether the lands concerned were, on the one hand, "desert and uncultivated", or, on the other hand, "already cultivated". He did not, in that passage, make any reference to "inhabitation" at all.

In the *Gove Land Rights Case,* Blackburn J. said that the phrase "desert and uncultivated" was "Blackstone's own",[18] and certainly I can find no trace of it in earlier decided cases. But the "cultivation test", if I can call it that, had, nevertheless, a very long and distinguished ancestry in legal, philosophical and, indeed, theological writings.

It can be (and was) traced right back to the scriptural injunctions of the Book of Genesis. Was it not God Himself who commanded man to cultivate the earth? Adam was not set down in the Garden of Eden to loll about there in graceful Michelangelesque attitudes. No — Genesis tells us that "the Lord God took the man and put him in the Garden of Eden to till it and keep it" (2.15). Adam and Eve were instructed to "fill the earth and subdue it" (1.28). "Adam was a gardener, "Adam delved and Eve span" — our literature is full of references to the origin of cultivation, of husbandry, in the very Word of God, and the impact of this on modes of thought over the centuries had been profound.

Thus Sir Thomas More, to take a famous example, stresses the moral duty of good husbandry in his book, *Utopia,* written early in the 16th Century.

> For they count this the most just cause of war [he says, of his Utopians] when any people holdeth a piece of ground void and vacant to no good nor profitable use, keeping other from the use and possession of it, which notwith-

standing by the law of nature ought thereof to be nourished and relieved.[19]

That passage positively bristles with ethical judgments about land use. Husbandry is a moral imperative. Man ought to cultivate the land, it is his duty to cultivate the land, and if he fails to do so he forfeits his right to call it his own. He must concede that right to whoever will undertake the responsibility of husbandry.

At the end of the 17th Century, this same idea is elaborated at considerable length by John Locke, in his *Two Treatises on Government.* Locke argues that property rights in land arise out of the cultivation of it — that by adding his labour to it, man acquires rights to it.

As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property.[20]

He does not require the consent of his fellowmen for that recognition of title, because what he has done is in direct obedience to the "command of God". Hence, argues Locke, where native peoples do not cultivate lands, those lands are available to the first comers who use them productively.

The theological and philosophical ideas enter the law primarily through the work of the influential writer Vattel, whose book *The Law of Nations* was first published in French in 1758, with an English edition as early as 1760, just five years before Blackstone published his *Commentaries*.

Vattel argued that —

The law of Nations will only recognize the ownership and sovereignty of a Nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or makes some actual use of them . . . Every Nation is . . . bound by the natural law to cultivate the land which has fallen to its share . . . and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.[21]

It is, I believe, generally acknowledged that Blackstone derived the "cultivation test" element of his colonial distinctions directly from Vattel, and thus incorporated it into the common law.

A very significant endorsement of this reading of Blackstone — significant both for its date and for its authorship — occurs in Chalmers's *Political Annals of the Present United Colonies,* published in 1780. Chalmers was something of an authority in the area of colonial law. In a passage which Blackburn J. quoted in the *Gove Land Rights Case* (at 202), Chalmers said:

No conquest was ever attempted over the aboriginal tribes of America: their country was only considered as waste, because it was uncultivated, and therefore open to the occupancy and use of other nations (Vol. 1, p. 28).

That passage may be historically questionable, but as an affirmation of the common law distinction in Blackstonian terms, including the "cultivation test" element, it is highly important. When that common law distinction in its Blackstonian expression is applied to Australian conditions as the British first perceived them, the categorisation of the country as "terra nullius" and of the colonies as "settled" becomes, at length, understandable. For the aboriginal peoples did not cultivate the land in any sense known to Europeans. They were exclusively hunter-gatherers. They did not plough or dig or plant crops. To use the language of Vattel, they "rather roamed over the land "than inhabited [it]".

The categorisation of the country as "terra nullius" and of the colonies as "settled" becomes, at length, understandable. For the aboriginal peoples did not cultivate the land in any sense known to Europeans. They were exclusively hunter-gatherers. They did not plough or dig or plant crops.

All the early observers took particular note of this. From many possible examples, let me cite the comment of Captain Watkin Tench in his *Narrative* of 1788: "To cultivation of the ground", he said, "they are utter strangers". And he and others of the First Fleet were merely echoing and confirming what Cook had recorded in his journal in 1770 (23rd August):

The Natives know nothing of cultivation . . . They seem to have no fix'd habitation but move about from place to place like wild Beasts in search of food, and I believe depend wholy upon the success of the present day for their subsistance . . . In short these people live wholy by fishing and hunting, . . . for we never saw one Inch of Cultivated land in the whole Country . . . We are to consider [he concluded, in a sentence which echoes Locke] that we see this Country in the pure State of Nature, the Industry of Man has had nothing to do with any part of it . . .

I am confident, then, that it is the "cultivation test" element in the Blackstonian distinction that explains, at least at a formal level, that original and apparently perverse classification of New South Wales as "terra nullius" and the Australian colonies as "settled" rather than "conquered".

We now have a much more sophisticated understanding of the relationship between aborigines and the land, and the extent to which they did in fact "manage" the land, by use of fire, for example, but it has taken us the better part of two hundred years to arrive at this understanding, largely because we had to develop the sciences of anthropology and archaeology in their Australian applications in order to do so. Legal anthropology, in particular, did not really begin until the late 19th Century, and its principal development has been in this century. That understanding has come two hundred years too late, so far as the categorization of Australian settlement is concerned. Or so I believe. I shall have something further to say on that point in a few moments, but before I do so I should add an important footnote (as it were) to my principal conclusion.

My contention has been that the "cultivation test" element in Blackstone's distinction provides the best explanation for the decision to regard the settlement at Sydney Cove as a "settled colony" in "terra nullius". I believe, however, that one can go further than that.

I strongly suspect that that same "cultivation test" would have prevented the recognition of aboriginal land titles of a proprietary nature even if the colony had been classified as "conquered", because the theory of the "cultivation test" (as we have seen) is that cultivation and use of land (in the European sense) is a necessary prerequisite for any valid assertion of property rights.

Similarly, if there had been an early examination in the Australian courts or by the law officers of the Crown of the question of whether the common law of a "settled" colony recognized what we now call "communal native title", and if it had been agreed in principle that such title could be recognized, I believe that the "cultivation test" would have led nevertheless to any aboriginal claim being rejected.[22] In other words, the "cultivation test", as it was understood and applied in the law at the turn of the 18th Century, stood in the way of any recognition of aboriginal proprietary interests in land, however such claims might be raised.

It might be a proper if somewhat unexpected conclusion, therefore, that, from the point of view of aboriginal land rights, the categorization of the Australian colonies as either "conquered" or "settled" had very little, if anything, to do with the matter. Whichever way the categorization had gone, the result would have been the same.[23]

Epilogue

This paper has been concerned with beginnings. My aim has been to explain why the original legal response to aboriginal society took the form it did.

But neither you nor I would be satisfied if I stopped short at that point. It is inevitable that at least two further questions should occur to us and it would be unrealistic not to acknowledge them. The first question is: could the situation have been handled differently? What might have happened, if another kind of legal response had been made? The second question is: what should we do now?

Let me take that first question. It can be stated in a number of ways, but its essential concern is straightforward. Suppose the first settlers at Sydney Cove had been prepared to give some sort of legal recognition to aboriginal interests of a proprietary nature in land and related resources such as fishing areas. How might this recognition have been expressed and with what results?

That same "cultivation test" would have prevented the recognition of aboriginal land titles of a proprietary nature even if the colony had been classified as "conquered", because the theory of the "cultivation test" (as we have seen) is that cultivation and use of land (in the European sense) is a necessary prerequisite for any valid assertion of property rights.

In the nature of things, one cannot give a sure answer to such a question, but I think we can make a fairly reasonable guess, because when the first settlers came to Port Phillip an attempt was made to bargain in legal form with the local tribes in relation to land. I refer, of course, to the so-called "treaties" which John Batman made with the chiefs of the Dutigallar tribe in June 1835, and which purported to transfer the ownership of some 600,000 acres of land from the tribe to Batman, an area which included the sites of both Melbourne and Geelong.

It is quite wrong, in fact, to call these dealings "treaties". They purport to be ordinary conveyances of land, drawn up strictly in accord with the forms of the time. They were drafted by an intelligent and able lawyer, Joseph Gellibrand, and Batman was quite open about the transaction. He formally reported it to the Lieutenant-Governor of Van Diemen's Land saying of his dealings with the chiefs:

I fully explained to them that the object of my visit was to purchase from them a tract of their country . . .

The Chiefs appeared most fully to comprehend my proposals and much delighted with the prospects of having me to live among them.[24]

There is no reason to disbelieve these assertions. Batman was a talented and honest man, who had already made a reputation in Van Diemen's Land for his compassionate and conciliatory attitude towards the aborigines. He and his colleagues seem to have been engaged in a genuine attempt (in the words of the *Australian Dictionary of Biography)* to initiate "a free colony on a basis consistent with the welfare of its Aboriginals".

As we all know, the attempt failed. Governor Bourke, by proclamation, declared Batman and his party to be trespassers and the land grants to be "void and of no effect against the rights of the Crown". There was, in this reaction, undoubtedly some concern for the position of the aborigines, but, as Glenelg, the Secretary of State, made clear, the real vice of Batman's transactions was that they ran counter to the established legal position. As he put it in a letter to Bourke:

It is indeed enough to observe that such a concession [i.e. that the aborigines could convey land] would subvert the foundation on which all Proprietary rights in New South Wales at present rest . . .[25]

Glenelg's comment was clearly correct, and official repudiation of Batman's transactions was thus inevitable.[26]

Yet, as regards the aboriginal tribes, the dealings were not grotesquely unfair, at least by the standards of the time. Take the grant for the 100,000 acres in the Geelong area — the present Bellarine Peninsula, more or less. The aboriginal population of that area was probably less than 500, perhaps even less than 300.[27] In return for transferring to him the ownership of the land — over which, incidentally, it is clear that Batman assumed the tribe would still roam — Batman transferred to them an immediate consignment of useful trade goods (blankets, knives, tomahawks, scissors, clothing, flour and the inevitable looking-glasses), and undertook further to pay a much larger and carefully quantified yearly tribute of the same nature for the indefinite future. He thought this was reasonable. Blainey reckons the tribute under both grants at £200 annually, in the money values of the time.[28]

Now, I suggest to you that the Batman transactions may be taken as a model of what might have happened at Sydney Cove, had Government been prepared, for whatever reasons, to recognize aboriginal land interests of a proprietary nature. I suggest that purchases along similar lines might have been made from the various Sydney tribes and then more widely as European settlement expanded — purchases negotiated either directly by the Crown or by private persons under some form of government regulation. By 1850 let us say, there would probably have been a large number of them.

But is it not clear, ladies and gentlemen, that if such transactions had occurred, they would now be generally regarded as unconscionable, as grossly one-sided, as unfair, as having been made by the aborigines in ignorance of what they were doing and perhaps under duress, as a kind of confidence trick? For is not that how Batman's transaction itself is generally regarded?

My answer, then, to the first question in this epilogue — might things have been very different? — is "no, not in the end result". Even if the proprietary interests of aborigines had been recognized at the beginnings of settlement, the chances are that we would still have an aboriginal land rights problem substantially similar to that which we have today, and perhaps even harder to solve.

That brings me to my second and final question: What should we do now?

I am sure there is no point at all in attempting to turn the clock back and re-define Australia as a "conquered" colony in the Blackstonian sense. The plaintiff in *Coe* v. *The Commonwealth* put forward that proposal, but it was, I think quite rightly, rejected. It is far, far too late in the day to embark upon so radical a re-assessment, even if it would do any good, which I doubt. I would respectfully agree with Mr Justice Gibbs, with whom Mr Justice Aickin concurred, when he said:

It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest.

That is how things are, and that is how they must remain. It is useless to suppose otherwise. A solution to the aboriginal land rights problem cannot be found by re-writing history. To quote Professor Stanner, a noted anthropologist in this field and a member of the Aboriginal Treaty Committee:

We can neither undo the past nor compensate for it. The most we can do is to give the living their due.[29]

The most practical way to give the living their due, I expect, is to enact legislative schemes which provide for the vesting of lands in identifiable aboriginal groups. As we all know, a major Report on how this might best be done was presented by Mr Justice Woodward to the Commonwealth Government in 1974, and such a course of action is now being followed by the Commonwealth and various of the States. Mr Justice Blackburn, who had been the judge in the *Gove Land Rights Case,* examined some of the problems associated with such a policy in an address to this Society in October 1974, an address to which I am indebted for more than one

point in my paper tonight.[30] But I do not intend to discuss the Woodward Report, the policy in general, particular legislation or the difficulties which have arisen in relation to this policy in some of the States and Territories. That is a major subject in its own right, and I have little competence in it. It is enough for me, in the context of this paper, to make the obvious point that action of this kind is at least part of the answer to the second of my two questions by way of epilogue: what should we do now?

It is part of the answer, but not, I suspect, the whole of the answer. It is too ad hoc, too transactional, too much like "band-aid" law or "band-aid" welfare. As long ago as 1968, in the Boyer Lectures of that year, Professor Stanner saw that something more substantial might be required.

> I believe [he said] that the path of statesmanship is to work while there is still time towards a grand composition of all the troubles that lie between us and the people of aboriginal descent.[31]

In 1979, a group of people under the chairmanship of Dr H. C. Coombs formed themselves into an Aboriginal Treaty Committee, and set out to achieve that "grand composition". The Committee is promoting its case carefully and responsibly, and its ideas are being accorded respectful attention, as witness, for example, the lengthy editorial notice of the book written for the Committee by Stewart Harris, entitled *It's Coming Yet,* in the *Australian Law Journal* for May 1980, a notice which looks on both the book and the cause seriously and favourably.

To use the term "treaty" for the proposed "grand composition" is, I think, unfortunate, as no "treaty" in any legally accepted sense of that term is remotely possible at this stage. What is envisaged is a formal negotiated agreement at a national level, on a range of issues relating to peoples of aboriginal descent. Such an agreement, as the writer in the *Australian Law Journal* puts it, would "need to be under-pinned by legislation of the Federal Parliament, and for abundant caution, by uniform statutes of the State Parliaments".[32] More recently, an aboriginal word, "Makarrata, has begun to be used in preference to the word "treaty". The word "Makarrata — a word of the Yolmu people of Elcho Island, north-east of Darwin — means "a settlement following a long dispute",[33] and it seems therefore an appropriate word to use, especially as the aim of the Committee is a political settlement rather than a legal settlement in any technical sense.

Let me quote from an article which Dr Coombs wrote about the proposal in *The National Times* in June 1980:

> We can now if we wish set in train action "to give the living their due" . . . We see such a treaty as recording aboriginal acknowledgement of the right of other Australians to share in this land, of the validity of property rights, legally and justly granted to, or acquired by, white Australians and the acceptance of the sovereignty of the Australian Parliament. We see it also however as recording White Australians' acknowledgement of the right of Aborigines:
>
> 1. To maintain and enjoy their distinctive identity, their traditional law, languages and culture.
> 2. To have acknowledged their title to land to which they can show valid claim in Aboriginal law and custom where this can be done without injustice to others who have acquired title to it.
> 3. To be helped to acquire other lands necessary for their social and economic purposes.[34]

To use the term "treaty" for the proposed "grand composition" is, I think, unfortunate, as no "treaty" in any legally accepted sense of that term is remotely possible at this stage. What is envisaged is a formal negotiated agreement at a national level, on a range of issues relating to peoples of aboriginal descent. Such an agreement . . . would "need to be under-pinned by legislation of the Federal Parliament, and for abundant caution, by uniform statutes of the State Parliaments".

There obviously must be the most careful examination of this far-reaching and quite novel proposal. Broad issues of policy and procedure must be identified and analysed, as must a mass of detail, even before serious negotiations can begin.

The relationship of such a settlement to the ILO Convention of 1957 on the "Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries" would also need to be considered. This Convention could well have a significant legal bearing on the matter. In November 1979, the Federal Government confirmed that it stood ready to ratify this Convention, but was awaiting the agreement to it of Queensland. As far as I know, that is still the position.[35]

Some literature about the Makarrata is now appearing.

In addition to Stewart Harris's *It's Coming Yet,* which I have already mentioned, there is an excellent *Current Affairs Bulletin* on the question, by Mr Bryan Keon-Cohen, published in February 1981.[33] I would commend both these publications to you.

I cannot go into this fascinating suggestion for a Makarrata in any further depth in this paper. I should report, however, that the idea has seized the imagination of many and has now taken firm root. I am convinced it is not just a stunt, as I originally feared. In March of this year, both the Federal Government and State Governments formally announced their willingness to negotiate for a Makarrata — an announcement, as I need hardly observe, of major moment in the history of this country.

The hope is that a Makarrata might be arrived at in 1988, the year of the bicentenary of European settlement. The symbolism would be obvious and appropriate. And it is with that thought that I conclude. The long shadow of the Eighteenth Century lies athwart the matter of aboriginal land rights in this country, and nothing can ever quite remove it. But at the end of the Twentieth Century, an opportunity arises to let in just a little light.

FOOTNOTES

1. (1971) 17 F.L.R. 141.
2. (1979) 24 ALR 118; 53 ALJR 403.
3. G. Rawson "Our Earliest Document", Melbourne *Age,* 4 Nov. 1950. I do not know if this information has since been published elsewhere; the incident is not mentioned by Manning Clark in Vol. 1. of his *History.*
4. *A History of Australia,* I, 49.
5. This is not just an historical point. Under the "inter tempora" rule of international law, the legal characterisation of any act is to be decided in accordance with the law at the date of the act, not with the law at the date of any later dispute concerning that act.
6. Despatch No. 7; 28/9/1788. 1 *HRA* 77.
7. Despatch No. 10; 30/10/1788. 1 *HRA* 96.
8. Phillip to Sydney, 12/2/1790; 1 *HRA* 145. Accounts of this episode are given by other First Fleet writers — e.g. Tench, Collins.
9. *A Complete Account of the Settlement at Port Jackson* . . . (1793), p. 7.
10. *The English Colony in New South Wales,* Whitcomb and Tombs Ltd edition (no date), p. 18.
11. *History of New South Wales from the Records, I,* 133.
12. *Commentaries,* I, 166–7.
13. Castles, A. C. *An Introduction to Australian Legal History,* pp. 2–3.
14. (1889) 14 App. Cas. 286.
15. A. Britten *History of New South Wales from the Records,* II, 117.
16. Two further robust explanations occasionally offered should, perhaps, be referred to by way of footnote, although they were not examined in the lecture as delivered:
    (a) "A colonising power will simply disregard the rules if this suits its purposes".

    I have no doubt that there is truth in this as a general proposition, but the official documentation in relation to the settlement at Sydney Cove suggests that the Government was in fact trying hard to follow the rules. In any case, Britain's "purposes" in forming the settlement are still a matter of much controversy.

    (b) "The aborigines were at first regarded as mere animals, and not really human"

    It is certainly true that the aborigines were seen as extremely primitive, and their way of life as dose to that of brutes" and "beasts". But the observers who really count (Cook, Phillip, Collins, Tench etc.) were also at pains to stress their essential humanity. Note, too, that, under the common law, blacks and whites were equally entitled to the protection of person and property: Blackstone, 1, 424, citing *Smith* v. *Brown* (1706) Salkeld 666.

    A more serious, but minor, argument deserving of mention is that the authorities may have preferred to categorize a colony as "settled" rather than "conquered" unless the facts were overwhelmingly against it, in order to assure the colonists the benefits of the 17th Century English constitutional settlement (a "conquered" colony was ruled under the prerogative, at least initially). But one may take leave to doubt whether this consideration would have weighed very heavily in the planning for a penal establishment, or even for a naval depot (if that theory be preferred). Again, the controversy about the true motives for the enterprise lessens the force of the argument.
17. Holdsworth *History of English Law, XL,* 232–248.
18. 17 F.L.R. 141, 201.
19. Camelot Series edition; p. 131. I am indebted to Professor Yarwood for this reference: Melb. *Age,* 10 Feb. 1981.
20. Dent edition, p. 134.
21. As quoted in Bennett and Castles *A Source Book of Australian Legal History,* 250–252.
22. In the *Gove Land Rights Case,* Blackburn J. held that the common law at the end of the 18th Century did not recognize "communal native title".
23. By a quite different line of argument, Hookey reached the same conclusion (namely, that the categorization was not very important) in his article on the *Gove Land Rights Case* in (1972) 5 Federal Law Review 85.
24. Clark *Select Documents,* I, 92.
25. *Ibid.* 93.
26. I respectfully adopt the view of Blackburn J. in the *Gove Land Rights Case* (at p. 257) that the Government was not merely relying upon the well-known rule that only the Crown can deal directly or authorize land transactions with native peoples, but was making the larger point that the law of New South Wales did not recognize any native proprietary rights at all.
27. See Blainey's estimates in *Triumph of the Nomads,* p. 108, which are supported by various estimates in La Trobe's *Letters from Victorian Pioneers.*
28. *A Land Half Won,* p. 87.
29. Stewart Harris *It's Coming Yet,* p. viii.
30. XII Proceedings of the Medico-Legal Society of Victoria, p. 352.
31. *After the Dreaming,* p. 252.
32. 54 ALJ 248.
33. Keon-Cohen, B. "The Makaratta", 57 *Current Affairs Bulletin* (Feb. 1981), No. 9, p. 8.
34. *National Times* 8–14/6/1980.
35. For this reference, and for certain other ideas, I am indebted to a paper by Mr Gervaise Coles entitled "The International Significance of an Aboriginal Treaty" delivered at a seminar in the Australian National University on 17 July 1980. The paper was kindly made available to me by Dr. H.C. Coombs.

INTERVIEW WITH CHIEF JUSTICE SIR ANTHONY MASON

By Susanna Lobez for *The Law Report,* Radio National

Chief Justice: I'm inclined to think that the expectations that have been engendered by the courts in the community are too high and I think that something ought to be done to lower those expectations. Certainly the community cannot afford to provide a system whereby everyone who sustains loss or injury will be able to sue and get compensation from someone else at no cost. It is unrealistic to expect that the community could afford compensation on that basis.

SL: Do you believe that's perhaps because there's too much focus on rights and not enough on responsibilities?

CJ: I certainly think that plays a part. The rights revolution has displaced an older society in which there was much more emphasis on obligations, responsibilities and duties.

Because that society has been replaced and its values replaced by an emphasis on rights, I think that has played a part in engendering expectations that are unrealistic.

SL: Given the calls for greater access we're likely to see more litigants in person; how should the courts deal with them?

CJ: It's necessary to realise that the adversary system was not designed for litigants in person - it was designed for representation of parties by lawyers who were capable of presenting legal arguments in support of the parties' case. There is no doubt that the litigant in person is at a disadvantage in the adversary system.

It is, I think, rather difficult for trial judges to deal with litigants in person, because the trial judge is the independent arbiter between the litigating parties. It is difficult for him to become an adviser to a litigant in person and it's even more difficult for him to conduct a case in the interests of a litigant in person.

SL: You've said that a Chief Justice should engage in discussion with the media only as a rare occurrence, and Justice Kirby's spoken of a media led erosion of public confidence in the judiciary, and media harassment of judges. Do you believe there's a cold war between judges and the media?

CJ: The old tradition was that judges did not speak to the media. They preferred to work in an atmosphere of splendid isolation, thinking that that protected their judicial independence. For various reasons, including greater scrutiny of the judiciary and the need to enhance a better understanding of what the courts are doing, the old tradition began to break down in Australia and in the United Kingdom, Canada and New Zealand as well. The result is that judges are now beginning to speak publicly to a greater extent than before, and to give interviews. They will consider doing so when they are satisfied that there is a real opportunity of promoting better understanding of what the courts are doing.

SL: Would it be of assistance, do you believe, to follow the lead of some of the courts overseas and provide the media with perhaps a press release or a one page summary of court decisions in order to facilitate public understanding?

CJ: That's something to which we shall have to give attention. It would require additional work on our part, because it is not easy to provide an accurate summary of complicated judgments without running the risk of misrepresenting what the judgments say. So, it is something which I think the court would give very careful attention to, and I'm not completely satisfied at the moment that it is something that we would decide to do, but it's an important question.

SL: English judges have publicly come out and criticised politicians on both sides for their "tough on crime" policies and rhetoric — in your words, they've "entered the fray." Yet the isolation is said to be an essential part of judicial independence. Should judges talk about their own values, and about their own views on important social issues?

CJ: If I can first of all pick up on your reference to judges entering the fray, I don't think judges are disqualified from entering the fray, participating in public discussion of a judgment which has become the subject of strong criticism, but personally I think a judge is ill-advised to do so — the reason being that the totality of the reasons for the decision are, or should be, expressed in the reasons published for the decision. So what does a judge gain by entering the fray? There may be cases where there's a need to correct a misrepresentation or to put the decision in perspective, but generally

speaking, I think those matters are best left to the commentators to deal with.

As for judges speaking about their personal values, I do not favour that. I do not favour it because it is likely to convey the misleading impression that the case has been decided by reference to the judge's personal values. Judges don't decide cases by reference to their personal values. They decide cases on, and after, consideration of the legal arguments presented by the parties or their representatives. And in the vast majority of cases, the decision is made by reference to the findings of facts made by the judge or jury and the rules of law contained in statutes or regulations or embodied in the common law — the rules that are in all the books on the shelves lining the walls of this room and outside.

As for judges speaking about their personal values, I do not favour that. I do not favour it because it is likely to convey the misleading impression that the case has been decided by reference to the judge's personal values. Judges don't decide cases by reference to their personal values.

Now, there are some cases, and they are relatively uncommon, where the interpretation of a statute or the expression of a common law rule is in question, where it may be appropriate to have regard to community values of an enduring kind, such as freedom of expression, inviolability of property — values recognised by the common law, or other values regarded as fundamental rights or perhaps values more recently recognised, such as privacy and non-discrimination. So I don't accept that judges decide cases by reference to their personal values.

SL: Commentators have noted that in recent times your views on issues such as self incrimination and protection for organisations on tax law and on a Bill of Rights have changed over the years — how can individual judges change their positions on important issues without being criticised for inconsistency?

CJ: First of all I think the extent of the change on my part has been somewhat exaggerated — but that's by the way. It is inevitable with the passage of time that the views of an individual judge are likely to change. In my case, I've been a judge for 25 years. It would be strange indeed if all my views remained static over that period of time. If they did I would regard that as a worthy subject of criticism. Obviously the individual's views evolve over time, and they are to some extent shaped by changing circumstances and events. Now that doesn't necessarily protect the judge against a charge of inconsistency, because what he said 25 years ago does not precisely accord with what he says today - the charge of inconsistency remains, but the explanation is that as one would expect there has been an evolution in thinking.

SL: Well perhaps, Chief Justice, you can console yourself with the comment of Oscar Wilde, who, I think, said "consistency is the last resort of the unimaginative".

CJ: That's absolutely right.

SL: Sometimes it seems, Sir Anthony, that we're expecting judges to be somehow superhuman - more conscious of and protective of minority rights than politicians are or than the person in the street - is it right? Do you believe that judges act ahead of the community, that they lead the human rights charge as it were, before the majority's signified its support?

CJ: I'm not aware that judges are leading the human rights charge. It's governments and legislatures that have taken the initiative in the field of human rights. Australia has become a party to a number of international conventions, guaranteeing fundamental human rights. They include the International Convention on the Elimination of all Forms of Racial Discrimination which is being implemented in the *Racial Discrimination Act* of 1975.

They also include the International Covenant on Civil and Political Rights and the Optional Protocol to that covenant, which enables Australians to invoke the jurisdiction of the International Human Rights Committee — the Committee that recently made its decision or gave a recommendation in relation to the so called gay laws in Tasmania.

Most of the court decisions have been given by way of interpretation of those provisions. So I don't see that the judges are leading the human rights charge.

Standing in a somewhat different position are the court decisions in *Nationwide News* and the *Political Advertising case*, where the court did imply from the Constitution a guarantee of freedom of communication as to public affairs and political discussion, to use my words. But that implication was made in accordance with established principles of constitutional interpretation. In those cases the court reached a result which was similar to the result reached by the Supreme Court of Canada, much earlier.

So that, in terms of what the courts have done, I don't see the judges leading the human rights

Susanna Lobez interviews Chief Justice Sir Anthony Mason for The Law Report, *Radio National*

charge. No doubt there are some judges who do favour a Bill of Rights. And undoubtedly there are other judges who don't. So I don't see that the suggestion that the judges are acting ahead of the community is correct.

Sometimes of course, it may be that the very form of a statute requires the courts to make a decision that might not accord with community sentiment or expectation. But when that occurs, the court decision is by way of interpretation of a statute that a parliament has enacted — and thus it is the statute that has pushed the judges ahead of community sentiment. The hypothesis is of course that the statute accords with the will of the electorate, but that doesn't necessarily follow.

SL: Do you believe we have a well enough informed community? Would you recommend, for instance, compulsory legal studies for children in schools?

CJ: I don't think the community is sufficiently well informed about a number of aspects of how our institutions work, and their importance to us as a society and a community. And I include the court system in that — the legal system generally. Personally, I would like to see some expansion in legal studies at secondary school level. I think that would be to the benefit of all.

SL: We've discussed briefly already, Chief Justice, the role of policy and community values in a minority of High Court decisions. When an answer to a legal problem that's before the court can't be found in the case law or the "black letter" law, is it then that the court turns to public policy or its perception of community values?

CJ: In response to an earlier question, I indicated that the court's resort to community values in the sense of enduring community values is relatively uncommon. As for policy, it stands on a somewhat different footing. In the case of the interpretation of statutes, the court is naturally concerned with the statutory policy — the policy that underlies the statutes, the policy that gives effect. It is part of the relevant materials that one takes into account when arriving at an ultimate interpretation.

In the case of the common law, policy underlying the relevant common law principle is likewise important and, in some cases, the court considers public policy generally. Public policy can be very important, but of course, as you'll recall, public policy can also be an unruly horse.

But it's not correct to say that the court immediately turns to policy and perception of community values whenever a black hole appears in the law.

SL: How do judges perceive those public policies and how do judges perceive those community values — how do they filter through?

CJ: Judges don't live in a vacuum or immured in judges' chambers, as seems to be a popular myth these days. A lot of judges have a wide variety of contacts and interests, they inform themselves about the community as other people do. Many judges are widely read — their reading isn't confined to newspapers or watching television, even ABC television, and they build up a store of information about the society in which we live, in the way that other people do. And I think merely by hearing cases day after day, that assists in building up their picture of a society and understanding its values, the way in which it operates, the way in which its individuals are motivated.

SL: The High Court is obviously making decisions, perhaps a minority of decisions, about which people feel very strongly, which affect the wider community and which attract criticism from politicians, and historians and the media. I'm thinking particularly of the *Ad Bans cases*, the *Dietrich* decision and the *Mabo* decision, of which we've already spoken. Some say it's even usurping the role of parliament. Is the court being politicised, albeit unwillingly — or perhaps being propelled to making popular decisions, and how should criticism like that be handled?

As for the suggestion that the court is usurping the role of parliament, I don't think that's correct at all. So long as the court decision is not based on the Constitution, and so long as there is no constitutional inhibition, the Commonwealth Parliament and any State legislature can enact legislation so as to amend, qualify or expunge the decision of the court.

CJ: It's certainly correct to say that some recent decisions of the court have attracted more publicity and criticism, as well as approval, but it certainly wouldn't be correct to say that the publicity, criticism or approval is propelling the court into making politically correct or popular decisions.

The members of the court are exceedingly independent minded. They are not going to be influenced from performing what they consider to be their duty, and arriving at what they consider to be the right answer, by criticism or approval.

So far as criticism is concerned, I think that is a matter that must be left mainly to the commentators to deal with. For reasons that I've already given, I don't think it would be appropriate for the members of the court to enter into the controversy that arises as a result of the delivery of a judgment.

As for the suggestion that the court is usurping the role of parliament, I don't think that's correct at all. So long as the court decision is not based on the Constitution, and so long as there is no constitutional inhibition, the Commonwealth Parliament and any State legislature can enact legislation so as to amend, qualify or expunge the decision of the court.

One test, I suppose, is in how many cases have the legislators intervened and set aside a court decision. It's a comparatively rare occurrence.

SL: Chief Justice, a lot of rhetoric seems to go out

about judicial independence. What does the citizen have to lose if the separation of powers between parliament, the executive and the courts is blurred — if judicial independence is weakened?

CJ: Judicial independence is, in my view, as much an indispensable protection to the citizen as it has ever been. As a result of the rise of the welfare state, many of the rights and interests that the ordinary citizen has are rights and interests that are enforceable against government. That being so, for the protection of those rights and interests the citizen depends on a judiciary that is independent, neutral, objective and free from outside influence.

SL: And brave?

CJ: Indeed, fearless is the word that I generally use, but brave is just as good.

SL: Many people that I talk to in the course of getting taxis, and out there in the community, have the impression that the judges' life is a fairly easy one because they only seem to be at work between 10 and 4 of a day. How long actually is a judge's day?

CJ: I think that the notion that a judge has an easy life and works only between 10 and 4 is one that should be exploded.

Many judges, and I include myself in this, work most nights, many judges work over weekends.

And I should say that the demands on judges are much greater today than they were twenty or thirty years ago. There is a much greater volume of work — the courts are under constant pressure to deal with what seems to be up-to-date, an ever-increasing volume of cases coming before them. And I think that comes back to the comment you were making earlier about the community harbouring expectations of litigation that may be too high.

SL: Sir Anthony, do you find sometimes that your brain needs a holiday from the law?

CJ: Yes, I do, and that's why I read novels from time to time and why I read journals like *The Spectator*.

SL: What books have you enjoyed reading recently?

CJ: Well, there are two novels by a novelist who I'm very interested in — Maria Vargas Llosa, the Peruvian novelist who stood for election as President of Peru and was defeated by Mori, and the two novels were *Aunt Julia and the Scriptwriter*, which is based on part of his own life — he married his aunt — and a more recent novel, *Conversations in the Cathedral*. Another book I've recently read is *The British Constitution Now* by Ferdinand Mount, who is a political commentator and has been in the past a writer for *The Spectator*. They were the three most recent books I've read.

SL: If you were to be shipwrecked on an unoccupied island, what three things could you not live without?

CJ: I suppose I could ask you a series of questions with a view to identifying this island better, but first of all, I'd want my wife there, I really couldn't survive without her. I'd want books and I'd need some good food and wine. I think under those circumstances I could survive and enjoy myself.

SL: Is there any benefit to the community in this day and age, do you believe, of an independent Bar?

CJ: The independence of the Bar is some guarantee of independence of mind and integrity. I don't think that the barrister is as susceptible to pressure from a client as, say, the big firms of solicitors are. For example, if you have a major client, one of the largest companies in Australia, the loss of that client probably means a significant loss for the firm of solicitors that acts for the client. In that way, the firms of solicitors and even the small firms of solicitors who have a big client are subject to pressure of a kind that the barrister is free from.

SL: And that would also apply to firms that are quite often employed by government agencies?

CJ: Yes.

SL: The barrister is never employed by anybody?

CJ: No, well, he shouldn't be. Up to date, the barrister, according to rules of Bar associations, has not been at liberty to take up permanent employment by an employer. Now I'm speaking from my recollection of the days when I was in the profession. It's conceivable that there has been some change. You Susanna, may know more about that than I do.

SL: Well there are certainly moves afoot, Chief Justice. There's been criticism, Sir Anthony, of the make-up of Australian courts and perhaps some inaccurate generalisations about judges' backgrounds. Apart from merit as a lawyer in the selection of judges, is representativeness an important factor?

CJ: In my view merit, which includes integrity, is the paramount factor that should dictate judicial appointment. I don't consider representativeness, as such, a relevant factor, and that is because the judge does not give his decision as a representative of any section of the community. He's required to give an objective, independent decision.

But I can see that in terms of public confidence in the judiciary, there is a case for saying that the judiciary should be representative of the community. I think the community would feel more comfortable if it thought that the judiciary did not consist of judges who came from one section, or relatively few sections, of society.

Ultimately, I think we will have a judiciary that is more representative than it is today and in terms of public confidence, I would hope that was so. But at the same time, I think we should still insist on appointing those people to the Bench, those people whom we believe are best fitted to discharge judicial responsibilities, particularly at a time when we

are expecting maximum efficiency from the judges and the courts.

SL: As judges increasingly have this huge impact on the wider community, would you imagine something like confirmation hearings are ever likely to be part of the appointment process, as they are in the United States?

CJ: It's difficult to peer into the crystal ball and predict what is likely to happen, but I would be strongly opposed to the introduction of a procedure by way of confirmation hearings. Indeed, I think the experience of those hearings in the United States confirms the inadvisability of introducing them.

We must take good care to ensure that, under the guise of judicial education, judges are not subjected to indoctrination or attempts by interest groups and pressure groups to influence judicial decision-making in favour of such a group.

What we've seen and heard of those hearings in recent times indicates that they don't concentrate on what is the crucial issue, namely the legal ability of the candidate to serve as a Justice of the Supreme Court of the United States.

The hearings seem to engage in issues of a sensational kind. Take the Clarence Thomas hearings for example, the effect of which is likely to erode or undermine public confidence in the judiciary. The result is I am totally opposed to them.

SL: Would you in any way favour a wider group of people to be consulted about judicial appointments?

CJ: I wouldn't necessarily be opposed to consultation with a wider group of people by an Attorney-General. Indeed, I don't know what are the limits that Attorneys-General set for themselves in consultation.

We do know that they consult with presidents of Bar associations, presidents of law societies, the president of the Law Council of Australia and they consult with the Chief Justice or the President of the particular courts to which appointments are to be made. But in my experience, Attorneys-General consult more widely than that, but just how widely depends on the particular Attorney-General.

I notice one of the proposals mentioned by Mr. Lavarch, the present Federal Attorney-General, as one to which he's giving consideration, is the appointment of a Commission to consider appointments and make recommendations and another is to formalise the process of consultation so that the public knows the identity of the persons and bodies consulted. Now they're two proposals which deserve consideration.

SL: Would you imagine there'd be any merit, Chief Justice, in a term appointment of judges of perhaps five years? Do you think there might be dangers in judges being "birds of passage" on the way to another, perhaps more lucrative, career?

CJ: I'd be opposed to the proposal. I think there are dangers. One danger is the risk that a person appointed as a judge for five years would not dedicate himself to judicial service in the way that a person appointed for a long term undoubtedly does dedicate himself or herself.

Another danger arises from what will happen when the judge who's served for five years goes back into practice. When he or she goes back into practice, they do so as someone who has previously served as a judge. When they appear for clients in court or advise clients, the litigant on the other side must harbour suspicions that the other side has an advantage because they are represented by somebody who previously served as a judge. So I'm opposed to the proposal.

SL: In respect of judicial education, which has been popularly talked about in the last 18 months or so, Lord Devlin's warned against the risks that detailed judicial training may undermine the "independent cast of mind of the judge of our tradition". How do judges keep in touch with the community, its values and how do they become educated with ongoing social issues?

CJ: I'm not opposed to judicial education to the extent that it focuses on professional training. In addition, I've supported AIJA initiatives in relation to gender awareness seminars and Aboriginal culture seminars. But outside those fields, I am inclined to share the general caution uttered by Lord Devlin. We must take good care to ensure that, under the guise of judicial education, judges are not subjected to indoctrination or attempts by interest groups and pressure groups to influence judicial decision-making in favour of such a group.

I don't think that you need to send judges to classes in order to educate them about the community in which they live. They are part and parcel of that community.

SL: A judge I spoke to recently said one of the difficulties is that the best advocate in the world may not actually be a very good decision-maker. There's no sort of "P-Plate" period for judges. How is it that we can determine whether they're going to be good decision-makers? Decision-making is hard.

CJ: I agree with that. But overall I think we've done pretty well in the selection of judges. At the same time, I am in favour of judicial education, so long as it is confined to professional training. Other countries in the world run education programmes for judges on their appointment and it seems to me we would ease the path of new judges if we had such programmes.

There has been a school of thinking to the effect that barristers who are accustomed to work in the courts, to present cases in the courts, naturally know what has to be done once they are appointed as a judge. But that doesn't always follow.

Overall I think we've done pretty well in the selection of judges. At the same time, I am in favour of judicial education, so long as it is confined to professional training. Other countries in the world run education programmes for judges on their appointment and it seems to me we would ease the path of new judges if we had such programmes.

In a court like the Supreme Court of Victoria in the past, which didn't sit in divisional jurisdictions, you might find a barrister who had practised in intellectual property law required to sit in a common law case, indeed in a criminal case.

Now I would have thought in the case of a person with that experience, judicial educational programmes would be of considerable assistance. And if you move from the appointment of a barrister to the appointment of a solicitor who isn't as well acquainted with what goes on in the courts as a barrister is by reason of the barrister's daily appearance in the courts, then it seems to me that the case for the judicial educational programme is all the stronger.

SL: Sir Anthony, who were your judicial role models?

CJ: It may seem strange to say but I've never had a judicial role model. There's no judge that I've ever consciously attempted to model myself on. There are judges for whom I have had and still have profound respect and admiration, such as Sir Owen Dixon, who I think was an incomparable Australian judge and Lord Wilberforce, who in recent years retired from the House of Lords.

SL: What do you envisage will be the qualities that a Chief Justice will need to have to see in the turn of the century?

CJ: I think the requisite qualities are much the same as they have always been. But I think there will be more pressure upon a Chief Justice in time to come and that pressure I think will arise from the greater emphasis on judicial accountability and a feeling that the Chief Justice is the person who should be communicating with the public through the media and other organs.

SL: So someone will need to have the ability to be the public face of the law in Australia?

CJ: I think so. I think that's inevitable.

SL: I understand you're quite interested in architecture — you might be quite occupied on that unoccupied island.

CJ: Yes, I am very interested in architecture. But . . . I have the feeling that I have no architectural ability or artistic ability. Now I'm interested in gardening but I go to other gardens and I'm amazed at how constructive my friends are as gardeners or some of my friends are. And I realise that I myself lack the sense of design that they have. So that I take an interest in gardening regretting that I lack this sense of design and I'm sure it is a reflection of this inability I feel in the world of art and architecture . . . I wouldn't be any good as a designer.

SL: Who from history would you most like to dine with?

CJ: You gave me advance notice of this question and I spent some considerable time thinking about it and engaging in various fantasies. But ultimately I came to the very firm conclusion that I would prefer to dine with Cicero rather than anyone else. And as you'll recall, he was the Roman orator, advocate, philosopher and politician. I think that we could have a very interesting discussion.

SL: Do you imagine that your views would accord?

CJ: In some respects, yes.

SL: You certainly wouldn't run out of conversation topics?

CJ: I don't think so. He really was a multi-faceted personality and a great commentator on the events and personalities of his time.

SL: So there could have been a bit of salacious Roman gossip at this dinner party?

CJ: Well there could be, although his writings don't portray a great interest in that. I think I'd have to ask Ovid along to the dinner as well if I were interested in engaging in conversation of that kind.

SL: Chief Justice Sir Anthony Mason, thank you indeed for letting us see some facets of your personality and for talking with *The Law Report.*

CJ: Well I've enjoyed it Susanna. I'd like to thank you.

SOME MARGINAL NOTES ABOUT QUEEN'S COUNSEL

HISTORICALLY THE STATUS OF KING'S Counsel was conferred by the royal prerogative on senior members of the Bar. The rank originally conferred the privilege of sitting with the judges and King's serjeants within the bar of the courts in Westminster Hall, precedence in conducting business in the courts, and an obligation to conduct the King's business. It also involved certain disabilities. The origins of the office are obscure and its development was gradual. The first patent of King's Counsel extraordinary, as it was called, was issued to Francis Bacon in 1604. The history of the early patents is recounted by Holdsworth in the *Law Quarterly Review*, vol. 36, p. 212. The office appears to have had a fairly clearly-defined functions by early Stuart times. The importance of the right of precedence — or preaudience — in the common law courts cannot be emphasised too strongly. A declaration by the King in Council in 1671 gave "his majesty's counsel at law by letters patent under the great seal of England" precedence over the members of the older order of serjeants other than King's serjeants. This right led to an increase in the ordinary business undertaken by King's Counsel in courts other than the Common Pleas, where the serjeants retained their rights of exclusive audience until 1846, and it contributed eventually to the extinction of the common serjeants' order. After the Restoration the special function of advising and appearing for the Crown declined and in the eighteenth century King's Counsel came to be a class who through eminence or influence were given a rank superior to that of ordinary counsel. But some of the obligations and disabilities attributable to their former role survived. By 1835 it was not uncommon for King's Counsel to be granted licences under the sign manual (the sovereign's hand) to appear against the Crown. The licence fee was £9.3s.6d. By 1840, the fee had been reduced to £1.10s. (*Reg.* v. *Jones* 9 Car. & P. 401 at p. 404) [173 E.R. 886, at p. 888 n.(a)]. The fee and the sign manual licence were abolished in 1871 , but in England it was necessary to obtain a licence from the Home Office until 1920. In the nineteenth century King's Counsel were a group of senior counsel with a functional role the scope of whose professional activities was determined partly by history but mainly by custom and usage. As the title implied they comprised a class of counsel. Solicitors could not be admitted to the rank because they were not counsel and had no right of audience before the courts. At the end of the nineteenth century the Privy Council said that the exact position occupied by a Queen's Counsel duly appointed was "a subject which might admit of a good deal of discussion". "It is in the nature of an office under the Crown, although any duties which it entails are almost as unsubstantial as its emoluments; and it is also in the nature of an honour or dignity to this extent, that it is a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it is conferred". (*Attorney-General (Canada)* v. *Attorney-General (Ontario)* [1898] A.C. 247, at p. 252.)

Queen's Counsel were not appointed in the Australian colonies until about 1856 in New South Wales and 1863 in Victoria. It is said that there were doubts in the early days whether the Governor had power to issue letters patent appointing Queen's Counsel. By the time Queen's Counsel were appointed there was a separate Bar in both colonies and appointments were confined to senior members of the Bar. When the first appointments were made in Victoria, Chief Justice Stawell said that he believed it "would prove beneficial to the Bar by bringing it into closer correspondence with the state in which the profession exists at home," and added that if Queen's Counsel were to be introduced in the colony "care must be taken that the office shall exist in reality as well as in name; and that the conditions which are understood to be attached to the office, and which may in some cases be felt to be onerous, shall be accepted together with the title of distinction. A silk gown is, I believe always given at home on the understanding that it is to be retained for life, or given up only under special and unforeseen circumstances." The Chief Justice also stated the rules of professional usage that he believed to obtain in the United Kingdom defining the functions of Queen's Counsel and said that the judges concurred in the opinion that these ought to be enforced and observed in Victoria. Letters survive from subsequent years in which Chief Justices confirmed particular practices.

The first set of regulations adopted by members of the Bar in 1884 contained a statement of professional usage covering the practice of Queen's Counsel. This was confirmed by the Bar Commit-

tee in 1901 and it has been recognised since then that the Bar Council may define the rules of conduct for practice by Queen's Counsel, subject to the powers of the courts, State and federal, to regulate the conduct of proceedings before them and to the over-riding power of Parliament. In 1957 the Bar Council resolved that it was the practice of the Bar of Victoria to follow those rules of conduct in regard to Queen's Counsel which were observed by the Bar of England so far as they were applicable to conditions in Victoria and so far as they were not contrary to any established practice of the Victorian Bar. Before then and after then numerous rulings were given about particular points, some following what the English practice was believed to be, others establishing rules of practice for Victoria. The Chief Justice of the Supreme Court was consulted where necessary, but by and large the matters were regarded as lying within the scope of the Bar's self-regulating function. It was by resolutions of the Bar Council, following resolutions of members of the Bar, that in recent times changes were made to the rules of practice entitling junior counsel to fees at the rate of two-thirds of those of Queen's Counsel

NEWS RELEASE

From the Office of the Attorney-General
(26 November 1993)

NEW QUEEN'S COUNCIL LAST OF OLD BREED

Announcing the annual appointment of new Queen's Counsel, the Attorney-General, Jan Wade, today signalled a shake-up in the system for appointing QCs in the future.

Mrs Wade said that whereas Queen's Counsel traditionally had been appointed exclusively from the Bar, they would in the future be drawn from all walks of the legal profession.

"The time has come for us to recognise that you do not necessarily need to be a barrister to be a good lawyer. Solicitors, government lawyers and academics are just as worthy of professional recognition, " Mrs Wade said.

Mrs Wade said the Chief Justice had also indicated that while the primary criteria for appointment should be professional excellence, he regarded as relevant an established record of voluntary services to the profession in providing legal services in the public interest.

Mrs Wade said she would be reviewing the procedures for the appointment of Queen's Counsel with the intention of having a new structure in place for the next round of appointments.

Media Inquiries: Anne Stanford 661 5799
November 25, 1993

REVERSION IS IMPOSSIBLE

A Queen's Counsel may cease to hold that rank, apart from death, by any of the three ways by which (subject to statute) office by commission or patent from the Crown may be lost: surrender, revocation and merger. See *Marks* v. *The Commonwealth* (1964) 111 C.L.R. 549, at pp.589–590. Merger occurs when a holder is appointed by similar means to higher, inconsistent office, such as a Queen's Counsel being commissioned as a judge. Sir Owen Dixon told me of the time a former Supreme Court judge, who had resigned to take a consular appointment, was seeking to rejoin the Bar; his status of Queen's Counsel had ceased by merger when he became a judge and had not revived on his resignation. If he had rejoined the Bar the appropriate course would have been for new letters patent to be granted giving him the precedence he had lost with his appointment to the bench. Sir Owen Dixon considered it wrong for former judges to be referred to as Queen's Counsel unless a new patent issued and he considered that it should issue only in the exceptional case of a former judge's resuming practice at the Bar. The position of Queen's Counsel is in contrast to that of the old serjeants. Since serjeanty was a degree, and possibly also an estate, it was said to be "indelible," that is it did not merge in another office. Professor Baker (*The Order of Serjeants at Law*, p.51) likens the degree to that of knight, which does not merge in a peerage. King's Counsel, however, like King's serjeants, held an office conferred by patent which merged in a higher office such as that of judge. Professor Baker says that a judge who ceased to be a judge was still a serjeant, but if he had been a King's serjeant that office would not revive. He refers to the seventeenth-century cases of Serjeant Pemberton and Serjeant Hutchins. The doctrine of merger does not apply to appointment to a judicial office by other than a commission or letters patent. Hence a County or District Court judge who was a Queen's Counsel on appointment is properly referred to as Judge Blank Q.C. The growing legion of former superior court judges who profess to be Queen's Counsel are imposters. A retired member of the Supreme Court of Judicature does not refer to himself as Q.C., as reference to the *English Who's Who* shows. The current Australian practice may be regarded as a symptom of the country's fondness for pseudo-titles.

J.D.M.

with whom they were retained and requiring Queen's Counsel to appear in all cases in courts accompanied by a junior.

The appointment of Queen's Counsel was controlled after 1857 by prerogative regulations made by the Governor in Council. To the best of my belief the regulations always contained a provision to the effect that, except in the case of barristers who were or had been law officers, no barrister should be appointed to be Queen's Counsel except on the recommendation of the Chief Justice to the Governor in Council or of the Attorney-General to the Governor in Council on the nomination of the Chief Justice. It will be noted that the regulations always provided for the appointment of *barristers*, not barristers and solicitors, notwithstanding s.5 of the *Legal Professional Practice Act* 1958. That Act maintained for certain purposes the functional distinction between persons admitted to practice as barristers and solicitors who practice as barristers (e.g. s10 and Part II A) and those who practise as solicitors (e.g. Parts IV, V and VII).

After the fusion legislation in 1891, a solicitor, Henry Cuthbert, was appointed Queen's Counsel in 1899, but that appointment seems to have been in recognition of political services rather than of eminence within the profession, much less of eminence in practice before the courts. This remains the only award of silk in Victoria to a practising solicitor. Since 1900, however, appointments have been made of former barristers and persons on the Bar Roll, though they had not practised as barristers, who held public office. Such appointments were at first opposed by the Bar Committee on the ground that the value of the distinction would disappear "if it ceases to represent an actual status in the practising Bar and so ceases to be in reality the recognition of professional success and achievement". The Chief Justice in reply affirmed the value and purpose of the title as being "to distin-

guish distinguished men and by honourable promotions to make way for capable juniors" but defended the practice of conferring it upon barristers in official positions upon the ground that it would induce able men to transfer from the Bar to such offices and enhance public respect for the offices. It is conventional in the United Kingdom to confer silk upon barristers in certain public positions, both political and official, and upon those holding certain academic and functional positions such as the editors of law reports. This is the closest to the honorific use that has been made of the status of Queen's Counsel in the United Kingdom or Victoria. A formal distinction is made in appointment between practising silk and silk *honoris causa.*

Within the Bar the functional role of Queen's Counsel has been maintained to ensure that the best use is made of the special skills and assumed abilities of those who are appointed to the rank. If the status is not to become purely honorific, or merely to reflect seniority as in Canada, this is the main justification for the formal recognition of a distinction between senior and junior counsel. The distinction of function does not hold for solicitors who practise before the courts. Not being subject to the Bar's rules for the distribution of activities between senior and junior or to the duty to accept briefs when available but only to the courts' rules of practice, they would be Queen's Counsel only in name and right of precedence to be heard. The essential character of the position would be changed from one of function to one of honour. Such a change would almost inevitably lead to the making of radical changes in the role of barrister Queen's Counsel.

The functional character of the position is also reflected in Queen's Counsel clauses in insurance policies, superannuation trust deeds and other commercial documents which are predicated upon the independent status of a barrister.

It is interesting to note that in the States where a separate Bar has developed from a fused profession a rule of practice has been adopted that appointments to silk will be made only from those practising as barristers. The main justification for the recognition of solicitor silks in those States was to identify senior counsel to whom court work might be "briefed out" in important cases. With the separate Bars providing specialist counsel, the need for this form of recognition has all but disappeared and (with, to my knowledge, a single exception) silk is now given its proper function. Even in Tasmania where there is only a very small separate Bar, I believe that silk will not be conferred on a practitioner who intends to continue to practise as a solicitor. A proposal made in South Australia in a discussion paper in 1990 that Queen's Counsel should be appointed from amongst solicitors as well as from the separate Bar was strongly opposed by Chief Justice King of the Supreme Court. In a letter to the Attorney-General which was subsequently released for publication, the Chief Justice mentioned the undertaking which had been obtained from applicants for silk that, if appointed, they would confine themselves professionally to the proper work of a Queen's Counsel. He said of the undertakings that "it was virtually impossible in practice for a Q.C. to observe [them] while a member of a firm and it was impossible to secure observance". He added: "The discussion paper dismisses the objection that 'larger firms may acquire the services of "in-house" silk thereby increasing their profile' with the comment that 'there was little evidence of this in the past when Q.C. were permitted to practise in firms in partnership with other practitioners'. The comment is not in accordance with the facts. There was a keen desire on the part of the large firms to have a silk in the firm and it was seen as a considerable competitive advantage." Chief Justice King summarised his position "by stating that the proposals in the discussion paper as to the appointment of Queen's Counsel are retrograde and deplorable. Theories may be spun in other jurisdictions, but in this State we have had practical experience of Queen's Counsel practising in firms and the detrimental consequences of such practice. In other places the grass on the other side of the fence may appear greener to some, but there is no excuse in this State for reverting to a system which has been experienced and discredited. I foresee that, if the proposals were implemented, silk would come to serve no useful purpose but would become a mere empty honour or an appendage conferring a competitive advantage upon a large legal firm. It would lose the respect of the court as it has in Canada and would cease to have significance in the justice system. I suspect that in time it would also lose the respect of the public and cease even to be a competitive advantage. It would be better to abolish the rank of Queen's Counsel altogether."

Since that letter was written Queen's Counsel have ceased to be appointed in some Australian jurisdictions, the most notable being New South Wales. With the co-operation of the Supreme Court, however, a system has been established in that State for designating a class of Senior Counsel upon whom the superior courts have conferred privileges similar to those enjoyed by law by Queen's Counsel. The procedure for recommending counsel for silk in New South Wales differed from that in other States and Territories. Recommendations were made to the Attorney-General and thence to the Executive Council by the president of the Bar Association. The new system involves some elements of the former New South Wales practice for silk but introduces others from elsewhere. The Chief Justice, the President of the Court of Appeal and other judges now have defined roles

in the processes of consultation and appointment. Designation as Senior Counsel has no legal authority, and it is perhaps doubtful whether a federal court could properly accord precedence to Senior Counsel over Queen's Counsel whose right of precedence derived from letters patent but the point is likely to be of small practical significance. Senior Counsel thus is a form of professional degree, not unlike the fellowship or membership of a medical college, instead of a legal office. It is closer in character to the old degree of serjeanty than to the order of King's Counsel which superseded it. The new New South Wales system has removed the executive government from the selection of Senior Counsel in favour of the courts and the governing body of the Bar. It is hard to divine the real reasons for the Government's decision. Public statements were obscure and even contradictory. Comparisons with the recognition of senior status in other professions were unhistorical. The public special features of practice at the Bar were ignored or minimised and an historical anomaly that was anachronistic two hundred years ago was emphasised as though still significant. If the containment of the costs of litigation was the object, the decision is hard to justify. The yielding to others of the selection of barristers who are to be publicly recognised as holding senior status tends only to reduce the Government's ability to control one element of costs. Excessive costs from overservicing by counsel are more likely to be reduced by the Government's maintaining ultimate control over the appointment of silks and regulating their conditions of practice. The two-counsel and even the two-thirds rules should be powerful *competitive* forces which invest the decision to apply for silk with a high degree of risk.

Within the Bar the functional role of Queen's Counsel has been maintained to ensure that the best use is made of the special skills and assumed abilities of those who are appointed to the rank . . . The distinction of function does not hold for solicitors who practise before the courts . . . The essential character of the position would be changed from one of function to one of honour.

Much of the misunderstanding of the State's role in the selection of silks can be attributed to the absence from Australian polities of an office corresponding to that of the Lord Chancellor. The Lord Chancellor is both a member of the United Kingdom government and the head of the judiciary. Though not necessarily non-political, he has by virtue of his office a degree of detachment which an elected politician may find hard to attain yet he is publicly responsible in a way that a Chief Justice cannot be. The present Lord Chancellor, Lord Mackay of Clashfern, a Scot and hence an outsider to the legal establishment of England and Wales, has recently described his part in the appointment of Queen's Counsel in an article published in the English counterpart of this journal: "Queen's Counsel are the leaders of their profession, recognised as such by the State on their merit as advocates. Their merit for this purpose is judged by the judiciary and the professional community, on the basis of whose views I make my recommendations to The Queen. Appointment as practising Queen's Counsel is essentially promotion to a functional rank, rather than an honour — although of course it is incidentally an honour as well. It allows clients, both lay and professional, to identify readily those advocates whose eminence is recognised, and who are able and adept at arguing complex cases before the higher courts. The appointment of Queen's Counsel also helps me to identify the pool from which potential candidates for high judicial office are usually drawn. I therefore regard recommending Queen's Counsel as one of the most important responsibilities of my office."

The office of Lord Chancellor cannot be replicated in Australia. Yet its functions are functions of government which have to be distributed amongst other offices derived from the United Kingdom system of government: the presiding officers of upper houses, Chief Justices, law officers and even cabinets. The distribution of some functions has been adventitious rather than systematic, and this has contributed to popular misunderstanding of the roles of certain constitutional officers. The division of functions in the appointment of silk in Victoria between the Chief Justice, the Attorney-General and the Executive Council, partly formal, partly informal and depending upon convention, typifies the complex arrangements that have to be made for the exercise of some of the Lord Chancellor's powers in a State of Australia. If the office of Queen's Counsel is to be retained, it is important that the role of each be recognised as only part of a complex function for which a single officer of State is responsible in the polity in which the position originated.

J.D. Merralls

BAR NEWS INTERVIEWS MASTER PATKIN

MUCH TO ITS EMBARRASSMENT *BAR NEWS* discovered some six years after the event that it had never welcomed Master Patkin on his appointment to the County Court (*vide*: (1994) 88 Vic B.N. 5). It now appears that *Bar News* was not alone — the appointment of Master Patkin, like those of his predecessors; was acknowledged neither upon his first day of sitting nor at a subsequent Bar Dinner.

To set the record straight, and by way of making amends, *Bar News* recently interviewed Master Patkin. Before turning to the interview perhaps a few words about the pre-Practice Court Rex Patkin.

After completing his Secondary School at Melbourne Grammar Master Patkin proceeded to RMIT (as it then was) and in 1956 commenced a five-year Aeronautical Engineering Course with a view to completing a degree in Sydney.

By the completion of the RMIT course, Master Patkin found his interests were more with people than machines and turned his attentions to law with a view to specialising in Industrial Property. Being by then married with two children, Master Patkin supported his family in the earlier part of his University of Melbourne Law Course by teaching maths and science part-time at Brighton Technical School and, in the later part by means of monies borrowed from the student fund. He completed an Honours LL.B. degree in 1964.

From there Master Patkin went on to articles at Russell, Kennedy & Cook (1965) followed by five years of tutoring and lecturing at the Monash University Law School whilst completing an LL.M. With a thesis on the Law of Options behind him he found it easy to opt for the Bar ahead of an academic appointment at Otago University, N.Z. To better fit himself for the Bar he spent six months with Clement Hack & Co., Patent Attorneys. His plans to read with Alf King (as he then was) were stymied by the latter's taking of silk. Likewise, he was unable to complete his reading with Richard Searby due also to the latter's taking of silk and so he turned to John Lyons. During his early years at the Bar he continued to lecture at RMIT and tutor at Monash.

He gravitated slowly to the County Court Practice Court, where he became the undisputed "King". Although Master Patkin, more often than not, turned up armed with a great swag of briefs, and had seniority over almost all other practitioners appearing in that court, there were few occasions, if any, where other less well-endowed, less senior practitioners missed out on their opportunity. It would appear that there were benefits in having a single Practice Court. Having a family now expanded to four children, Master Patkin needed not only to work his way through those briefs but also to maintain a sizable paperwork practice principally in Industrial Property.

Somehow, he also managed to fit in a series of appearances for Mr Penhalluriack in the much-publicised "Sunday Trading" cases. In all, the Penhalluriack saga extended over 32 separate hearings ranging from the Magistrates' Court through the County Court, Industrial Court, Supreme Court and on to the High Court.

Throughout all, Master Patkin indulged a passion for tennis and following football. If his attempts at coaching "The Age Dream Teams" are any guide he appears to have been more successful in the former than the latter although it is rumoured that tennis has now been supplanted by the computer. He was also an avid sailor in his younger days.

On now to the interview:

Bar News: May I, on behalf of *Bar News*, belatedly and somewhat ashamedly bid you welcome on your appointment as Master?

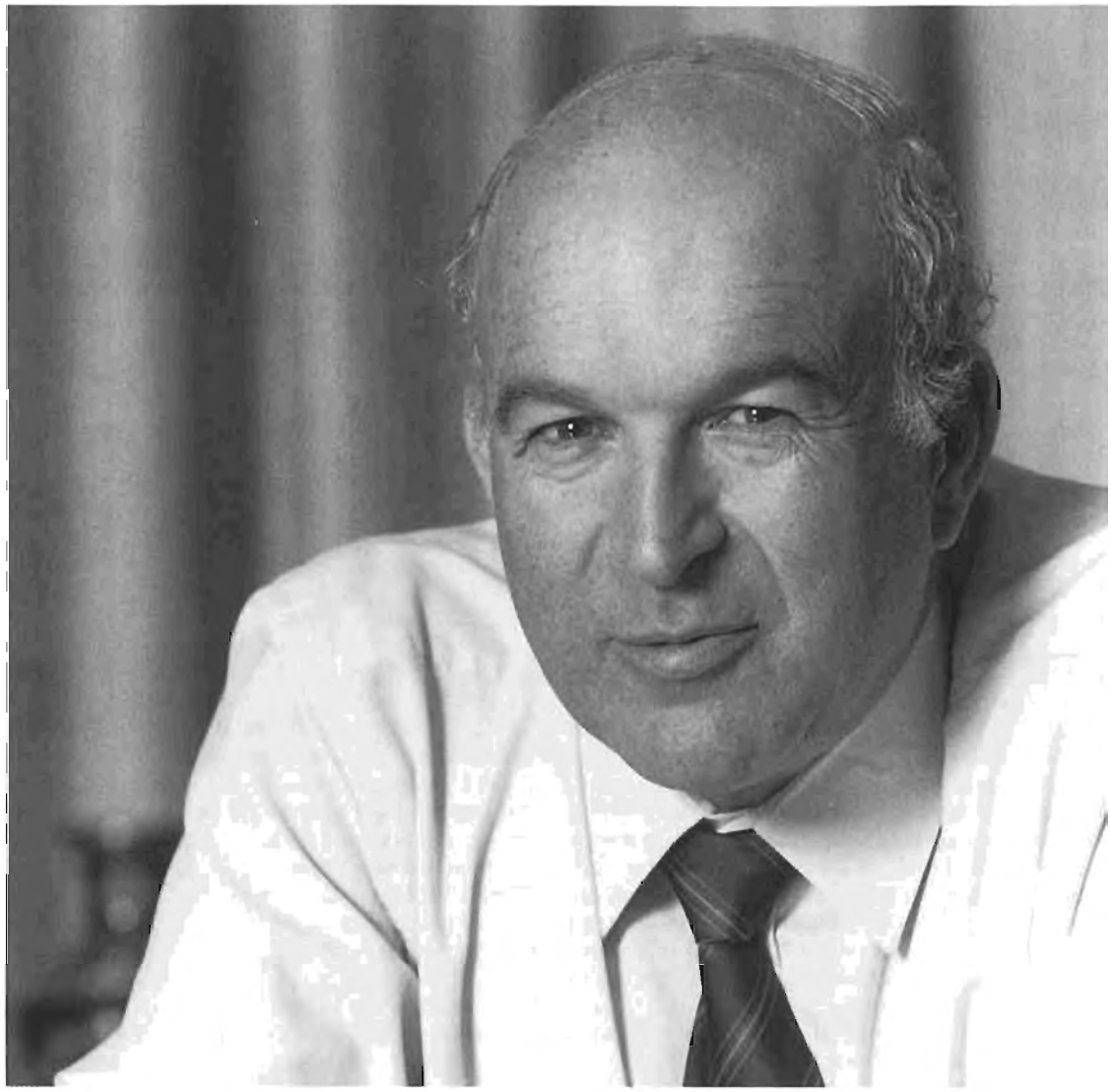
Master Patkin: Yes, as I have said a number of times, a welcome is better late than never, but the relevance or significance of the welcome didn't really concern me. It was really the attitude that the members of the Bar showed to me in my position as a Master of the County Court, and there has been no problem about that whatsoever.

BN: There is no doubt that prior to becoming Master you were the undisputed "King" of the Practice Court. What was your record number of briefs?

MP: Thirty-two. However, often I averaged 20, 25 per day.

BN: How did you manage to cope with so many briefs so consistently?

MP: The secret was first of all to be a specialist in the field. You must appreciate that when I started to appear in the Practice Court daily it was prudent for me to examine the whole area of law. This I did not only by reading the relevant works and cases but also by sitting in the Masters' Chambers listening to cases. Then provided I prepared each case thoroughly I found that I had no problem in dealing with large numbers in the Court. I am surprised today by so many practitioners who rely upon the file



Master Patkin

as providing information relating to each matter. I set out the history of each case on a separate sheet of paper with submissions and authorities in support of those submissions. So it was really a thorough preparation of each matter the night or morning before the day's hearings that enabled me to deal with a reasonable number of briefs.

BN: I got the impression that in the past, more than now, the seniority rule was honoured more in the breach than in its observance — particularly when consent matters were called on and young law clerks appeared.

MP: One finds that on the odd occasion practitioners will ignore the seniority rule and it really requires those barristers to exert or rely upon their seniority, but I don't see it as a real problem within the court. Whenever you ask barristers or solicitors as to the order of the next case or who has seniority, you generally find there is no problem.

BN: Yes, I think that has been sorted out now, but in the past there used to be queues of people lining up taking the view that first in first served — particularly with adjournments and consent matters.

MP: Well first of all, adjournments, consent and unopposed matters had an order irrespective of seniority. Then one found you had a rule that you could only deal with two matters at a time. So you could find a barrister with seniority who had say four adjournments — he might do two matters and then he would stop and someone else in court who was unaware of this rule might be a little perplexed. So that might explain why you sometimes felt that seniority was not being exercised when it was probably due to the order of proceedings unrelated to

the seniority because of the nature of the application and also because of the "two brief rule".

BN: Given the degree of your specialisation in County Court "Chambers" there must have been many occasions where there were attempts to brief you for both sides?

MP: Yes, The problem wasn't difficult when a solicitor rang me and I informed him that I was already on the other side. The greater problem was when I was dealing with a matter and my opponent or the judge on reading the file came across a document and said "Mr. Patkin, you appeared for the other side a year ago or two years ago". The worst scenario was when it was ascertained by the judge, or my opponent, or myself on looking through the file that I had appeared on both sides during the last few years of the case's history.

BN: What happened when that was discovered mid-submission?

MP: Generally, no problem arose because the matters were not significant. If a situation did occur when it was embarrassing, then I would disqualify myself from the case.

BN: There must have been many days when your earlier arguments were turned against you later in the day?

MP: Yes. The judge would then indicate he would be interested to hear how I was going to extricate myself from my earlier argument and sometimes counsel would, in fact, indicate that they were relying on that argument.

BN: Were you ever taken to task about the number of briefs you were holding on any one day?

MP: Not unless there was inconvenience caused to the court or other practitioners. On some occasions, a barrister might be inconvenienced if a judge became available but because there was only one court and, because it was rare for other judges to assist, if that circumstance did eventuate, I was never put in an embarrassing position. The multiple briefs only caused problems in a subtle way — sometimes a judge would reduce my costs or make no order as to costs such as when he would ask me how many matters I'd had during that day and I might say I had fifteen. Generally, however, there usually was some equitable basis in the case for the reduction of costs.

BN: Were you often "jammed"?

MP: No There wasn't a problem in jamming. The main cause of barristers being jammed was when they had briefs in both the Supreme and County Court. The potential to be jammed increased once Judge [F.B.] Lewis was appointed and there became two courts to deal with matters. That system did not come into operation until well down the track in my career as a barrister in the Practice Court.

BN: I suppose your "priors" prevent you taking multiple-briefed practitioners to task?

MP: Not really. The question of multiple briefs is a matter for the barrister's discretion. If a barrister accepts too many briefs and there is inconvenience to the Court or to other practitioners then one can make a comment. However, the problem with multiple briefs is not significant today because there aren't very many barristers that come into court with in excess of five matters. So, I don't see the problem. In fact, I encourage multiple briefs because it enables more senior barristers to appear more often in the Practice Court and it enables a number to specialise in the Practice Court and this is to the benefit of the court, the profession and the community.

The problem with multiple briefs is not significant today because there aren't very many barristers that come into court with in excess of five matters. So, I don't see the problem.

BN: Now there are multiple Practice Courts how do you deal with the multiple briefed practitioner who "clogs up the works"?

MP: As I said it is not really a problem now. Where a barrister does have more than one brief then the court ensures, where practicable, that that barrister is referred to one court.

BN: I remember on many occasions, whilst waiting my turn in "Chambers," attempting to calculate the "average daily earnings" of the regular Practice Court practitioner. You must have turned your back on a very successful practice to become Master. Why did you choose to become Master?

MP: Well first of all, it was often said that my practice at the Bar was very lucrative. One has to remember that if there were multiple briefs arising from numerous adjournments then one's fee was reduced. Secondly, the reason why I became Master was essentially to continue my specialisation in the court. Time was passing, I was getting older and I had the decision whether to practise in the Supreme Court or remain in the County Court. For a variety of reasons I eventually decided to concentrate on the County Court — the jurisdiction was enlarged, the matters became more complex and one finds enough complex issues to satisfy one's interest in untangling the law.

BN: What are the major differences between the Practice Court of today and the Chambers of yesterday?

MP: In some ways there is not a great difference. On the other hand, one can say the matters are generally more complex. The biggest difference is that the small debt-collecting jurisdiction has gone to the Magistrates' Court and accordingly a large number of applications for summary judgment no longer exist. The change in the Rules relating to discovery and interrogation has reduced the number of applications seeking orders for those matters. One can conclude by saying that whilst the quantum of work is less, the complexity of the work is to some degree greater.

BN: There was a period before you became Master when you forsook the comfort of the Practice Court. What did you do then?

MP: Initially, I desired to specialise in Industrial Property and the reason that I moved into the Practice Court was that I found that I could continue the flow of paperwork involved in Industrial Property work. Accordingly, when I wasn't in the Practice Court I was dealing with commercial matters relating to Industrial Property and I did some work in probate matters, testators' family maintenance, because such work flowed from my lecturing in Executors and Trustees at the Royal Melbourne Institute of Technology's Law Course. However, I also moved into Building Law via Copyright Law. There was a large increase in copyright matters, in plans and buildings. This, combined with my experience as an engineer, naturally led into Building Law and Arbitration. So that I did quite a bit of work when I wasn't in the Practice Court in those fields and it was through my contact with Building Law that I became involved in the Penhalluriack case.

BN: Turning to the present Practice Court: practitioners, particularly those still waiting to get on, sometimes complain that you are too patient — that you are letting practitioners go on, tediously hashing and rehashing their argument. What do you say to that?

MP: Yes. One can argue that having a specialist in the Tribunal to some degree results in a higher standard and that practitioners' arguments can become detailed and long, but you really have to take each case on its merits. The practitioner waiting in court has to be patient and there may be some situations where the judge or master allows the practitioner to argue too long — sometimes, with hindsight, you might have felt that you could have terminated the arguments, but as a general rule I am of the opinion that the court has to be slow in terminating submissions. The court has to be patient and each case has to be done properly.

BN: Similarly, the junior practitioner, sitting in the back of the court, impatiently waiting his or her turn is often heard to rail at your elucidation of the problems with Order 14A and rule 8.05, especially when they may have heard it previously. I would have thought that you may be wasting your time. After all, those who most need to understand what you are saying are not listening, whilst those who listen would probably have worked out much of it for themselves. It also prevents things moving along, to the everlasting chagrin of those waiting to get on.

MP: Yes, there is no doubt a problem arises when an area of law is complex. I was not only often aware that some practitioners were concerned about repetition of statements as to what is the law, but my own Secretary and sometimes Judges' Associates and Tipstaves would indicate they have heard various statements about problems with the Rules being repeated. However, where the Rules are significant in the administration of justice, then I am of the opinion that each practitioner who is before the court should appreciate the operation of the Rules. Order 14A created specific problems that had to be explained to each practitioner involved in a particular matter before the court and, although some practitioners indicated some concern about statements of laws being made from the Bench, one often detected from other practitioners their approval of various areas of the law being discussed in court.

BN: It could be said that life would be simpler and easier for you if you ignored the problems you have uncovered with Order 14A and rule 8.05. After all, as you said in one of your articles in the last edition of *Bar News*, it is the view of some that, notwithstanding what you have uncovered, nothing has gone wrong so it is pointless to press the issue. So why bother?

MP: In regard to either ignoring the problems, or not searching for the problems, one has to realise that if you are on the playing field every day and there are problems with the rules you can't avoid them. If you are the umpire of a football match, every week, and there are problems involved in the rules, you have to eliminate those problems for the future games of football. Now if a judge came into the court and discovers there are problems, he appreciates that for the rest of the year he won't be in the Practice Court. However, if I am in the court and observe problems (as in another situation where I am continually dealing with applications under the *Case Transfer Act* I come across problems) and because I am going to deal with these applications for possibly another year, or another two years, I cannot avoid the problems tomorrow by ignoring them today. On the contrary, if I attempt to deal with the problems today and eliminate them, then life is a great deal better for everyone tomorrow. So that explains why, even if I wanted to avoid the problems, which is not the case, I couldn't.

BN: Do you believe it is better to be "too quick" or "too slow"?
MP: There is no doubt that if you are quick and you do the job properly, or to put it in more eloquent language, the speedy disposition of cases, done properly, is to be applauded. So, when you ask whether it is better to do the work too quickly or too slowly — if by doing the work too quickly you don't deal with the work properly then it is clearly more desirable to do the work slowly and properly.
BN: Are Practice Court matters generally becoming more or less complex?

When you ask whether it is better to do the work too quickly or too slowly — if by doing the work too quickly you don't deal with the work properly then it is clearly more desirable to do the work slowly and properly.

MP: I suppose you have to say that, as a general rule, they are becoming more complex. However, from my perspective, because I specialise in the jurisdiction, you may not find it so easy to reach that conclusion.
BN: Is it becoming harder for the court to get through its business each day?
MP: Well, that depends on the number of cases that are listed each day. I think, at the moment, the lists — which range from 20 to 50 cases a day — can generally be dealt with during the day. There is no doubt that the days of over 100 matters listed, which was at some stage rather common, could not be dealt with today. Some days, you will have 50 matters and there is no problem; other days you will have 25 and you will find that there are difficulties because you have a number of complex matters.
BN: There have been suggestions, from time to time, that there should be more Practice Courts. Wouldn't that merely mean that the pressure to get through the daily list is lessened and thus more time will be spent on each application?
MP: You are quite right, provided the daily lists were kept between 30 and 50 matters, that if you have three or four persons sitting there may be a tendency to take longer. However, I think that that course is desirable because it is not good to have the court under pressure to deal with the business too quickly.
BN: Perhaps we could look at some particular types of matters. Why do you scrutinise consent matters and unopposed matters so closely?
MP: The statement that I scrutinise matters too closely implies an error of judgment or an opinion that I am being too cautious. Sometimes, I do not look at content matters at all and sometimes I will allow an unopposed matter to be processed without much consideration by the court. It really depends upon the nature of the application; for example, in matters governed by Order 14A, which are subject to the principles of Court Controlled Case Flow Management, it would be wrong for the court to rubber-stamp consent orders. In other types of applications, such as applications to take a matter out of a list, or applications for a speedy trial, again it would be wrong for the court to rubber-stamp a consent order. Finally, when the system of processing orders required the judge or master to sign an order there was the opportunity to reconsider an order made in Court. When that was the procedure, I was surprised at the number of times that I would either reject the consent order, as submitted by the solicitor for signature, or I would amend the order for a variety of problems. Now that orders are authenticated by Registry, I think that the court should be at least informed of the nature of the application and then peruse quickly the terms of the consent order. In regard to unopposed matters, again it depends on the nature of the application. Applications for summary judgment give rise to various approaches to the degree to which the court should consider the application. On the one hand, it may be argued that the court should look at the matter very carefully and check whether the plaintiff has verified the cause of action before giving judgment. On the other hand, it can be argued that if the defendant doesn't appear, and the defendant is represented by solicitors, then the court should adopt a less stringent approach to considering the unopposed application.
BN: Surely if a party chooses to not appear it should not have the benefit of having the court do for it, or say on its behalf, what it does not wish to do or say for itself?
MP: Well that gives rise to various arguments and counter-arguments. The defendant could ascertain a number of obvious reasons why the orders shouldn't be made and assume that the court would not make an order. You can argue that the adversary system justifies the court in assuming, that if the defendant doesn't appear, that the applicant's case is in order. There are a number of applications, that are unopposed, that give rise to some concern; for example, an application for further and better

answers to interrogatories. One can approach those applications by merely making an order if the respondent does not appear to contest the summons. On the other hand, one sometimes looks at the answers to interrogatories and queries counsel for the applicant why a further answer should be ordered, and there is some embarrassment if, on analysis of an answer to an interrogatory, the applicant's counsel agrees that the answer can't be challenged. So there are some situations where I am of the opinion that the court should query, to some degree, the strength of an unopposed application before an order is made.

BN: What changes can we expect in the Practice Court in the near future?

MP: Well that of course is a matter for the court. I would hope there are more masters or judges who will sit in the Practice Court. I hope that the problem of a folded file and uncertainty as to what documents have been filed will be eliminated.

The introduction, a few years ago, of minutes of proposed order has assisted the disposition of cases. I hope to introduce shortly a procedure whereby in opposed matters practitioners have to ensure that the documents related to the application are in a particular folder. I would like orders to be printed, with the use of a computer and printer in court, and I hope within five years that that system will be implemented.

I would like the common practice books, and the common legislation, to be on the Bar Table so practitioners don't have to carry around the heavy practice books and large editions of the Acts. Further, I am concerned about matters that are common in the Practice Court not being known by practitioners or members of the court and that a bulletin or some other means should be introduced to publish the law that is being practised in the Practice Court.

BN: And what about the more distant future?

MP: Well I am often asked what I plan for the future. I hope that if you ask me to be involved in a ten-year interview that I will be still Master of the County Court — hopefully one of a number of Masters — and that I may have written, or be in the process of writing, a manual concerning common matters in the Practice Court that are not presently dealt with in the practice books. That was one of the reasons that I desired to take the position of Master. The other reason was to be a specialist on the Bench.

BN: Does that mean that Master Patkin is going to see out his days in the Practice Court or does he hanker for other challenges?

MP: There is a sufficient challenge in the Practice Court. It is not a matter of being bored. It is a matter of being concerned that there are more than two complicated cases a week.

BN: Thank you, Master.

THE BAR DINNER SPEECH OF MR. JUNIOR SILK

CHAIRMAN, YOUR HONOURS, MEMBERS of the Bar and distinguished guests.

It is a great privilege for me to propose this evening's toast to our honoured guests, but not one for which I volunteered. I drew the short straw. For those of you not familiar with the form of our Chief Justice's letter to the most junior successful applicant for silk, His Honour writes in substance "the good news is, your application is successful, the bad news is, in your case, you are Mr. Junior Silk."

There follows shortly thereafter an intimidating letter from the Bar, in my case, at that time listing ten honoured guests including six appointees to the Bench, and attaching both a copy of Geoff Nettle Q.C.s formidable speech of 1993, and a form of undertaking to be returned by me, to the effect that I would drink only mineral water until after the speech.

The letter also contained a statement that further appointments were in the wind.

Subsequent to that letter, there have indeed been four more appointments, bringing the total of this evening's honoured guests to fourteen.

What was immediately apparent to me was that, above all else, this brief required expedition. I searched for a theme in the hope that it might offer a solution. I looked at the alphabetic approach but it was clearly impractical. There was an "A," but there were four "B"s, a multitude of "M"s, and nothing much in between. I wondered what there were fourteen of, and could think only of ounces. However, It would be quite impossible to compare any of our guests to such light weights.

Further thought revealed that this group of appointees did share something in common — they are all politically incorrect, which may have been prophetic, given recent changes in political leadership.

Not an ethnic or black person amongst them, a fact made worse by the appointment of Mr Justice Kent, a white man, to a jurisdiction, which is not.

Although the female appointees, Her Honour Justice Brown, Her Honour Judge Balmford and Her Honour Judge Curtain, have gender on their side, they are, essentially, "silvertails".

Her Honour Justice Brown was the captain of the prestigious MacRobertson Girls' High School, and read with the superbly polished and urbane Mr. Justice Heerey.

John Digby, Mr. Junior Silk

Her Honour Judge Balmford is the daughter of Dame Ada, and His Honour Sir John Norris. Further shocking facts follow — she is a product of Melbourne Grammar School (the ladies' wing).

The baby silvertail, Her Honour Judge Curtain, received her education at Mandeville Hall, Toorak, loves opera (we are told), is regularly seen at the spring racing carnival at Flemington, and drives a sexy red Mazda MX5 sportscar.

The male appointees, who cannot cling to any political correctness on a gender basis, are far from what is accepted these days as politically correct, or socially well-adjusted. I will not deal with them in order of precedence. That would damage the thrust of what I am putting.

His Honour Mr. Justice Batt is a classics scholar, a man of letters, but his languages are principally dead ones — Greek and Latin — hardly multicultural in the currently accepted sense. He was educated at Melbourne Grammar School, was a resident of Trinity College, and is a member of the Melbourne Club.

His Honour Judge Davey is also the product of Melbourne Grammar School, a University of Melbourne education, and has won blues and first colours in any number of macho, brutal sports,

including weight-lifting, rugby and boxing. He was a prefect in the days when they caned the boys, and His Honour flaunts his elitism by motoring about in a vintage MG.

Neither does His Honour Mr. Justice Hansen fare well under the same scrutiny. Product of major corporate connections, old Melbourne Grammar boy, Melbourne Club, some-time President of the Peninsula Country Golf Club, Savage Club — I could go on. His stately Jaguar sedan, although on a judicial salary unlikely to remain his for long, is a mark of his style.

His Honour Mr. Justice Mandie is *ejusdem generis*. It should be enough, for present purposes, to say that his only sporting interest is the sport of kings, and that he lives in a stately home to which Simon Molesworth has attached his copper caveat.

His Honour Judge Williams may think he is relatively safe having been educated at St. Joseph's Christian Brothers College, Geelong. But these antecedents cannot be accepted at face value. His Honour is a protestant. One wonders what clever strategy His Honour was playing at, even in those early days, so as to appear to have the common touch.

His Honour Judge Kellam is a product of Carey Baptist Grammar School and has a penchant for overseas travel, a legendary appetite, usually satisfied at elegant and hardly frugal restaurants. His Honour is politically callous enough as to drive his convertible Mercedes to court each day, and is a devotee of the plutocratic game of royal tennis.

His Honour the Honourable Austin Asche, the Honourable Peter Murphy, Dinny Barritt, and Simon Molesworth do not count in this analysis. These are not recent appointees, but are honoured guests, in celebration of recent awards.

Highland cross-dressing

HIS HONOUR THE HONOURABLE AUSTIN ASCHE

The first person on this evening's list of honoured guests is His Honour the Honourable Austin Asche Q.C. of this Bar, formerly a Justice of the Family Court (indeed the first Victorian appointee to that Bench in 1976), and also formerly Chief Justice of the Supreme Court of the Northern Territory.

His Honour is presently Administrator in the wild north-west.

One must observe that His Honour has had a pretty fair go at these dinners. He was the subject of Geoff Nettle's speech last year, and also speeches in 1976, 1986 and 1987. Tonight we acknowledge His Honour's Award of Companion in the Order of Australia for service to the law, to tertiary education and to the community, particularly the people of the Northern Territory. We congratulate His Honour for his Award and regret he cannot be with us tonight. If you want to know more about His Honour, I suggest you read the four earlier speeches I have referred to in the *Bar News*.

THE HONOURABLE PETER MURPHY

The next guest is the larger than life, retired, Victorian Supreme Court Justice, the Honourable Peter Murphy. We congratulate him for his well-deserved Award of Member of the Order of Australia for service to the law and the community.

The Honourable Peter Murphy, "Murph" to all those friends to whom I spoke about the honourable one, is fondly remembered as a tenacious, courageous and independent barrister and Supreme Court judge. He served this State for almost twenty years in the latter capacity. He is also a man of diverse interests, and a colourful character.

Murph, the man, has a finger in almost every pie. In common with Asche, he saw service in the air force.

Murph has a passionate love of fauna and flora, and has explored this country from Cape York to the Koorong. His Honour also presided over the Murray/Grey Society, an interest which has absolutely nothing to do with his former judicial brothers of the same names.

Principal amongst His Honour's outdoor activities is fly fishing. He is rigidly in favour of fly fishing as opposed to using a hook and bait, and is profoundly critical of those who put the catching of the fish before the flogging of the water with the taper and fly. Severe scorn and criticism are visited by him on fishermen of the former persuasion. However, it is said that his attitudes to fly fishing, and other things, mellowed in the early mornings — exponentially with the quantity of Hedigan J.'s red wine which he had consumed. These and other bacchanalian activities are conducted under the auspices of the "Tan Tangara Hunt Club and Madrigal Society," founded by Murph, a society which boasts members including the late Woods Lloyd, Hedigan J., Jack Winneke, Arthur Adams, Peter Galbally and many others.

Justice Brown, Justice Mandie, Judge Balmford and Acolytes

An aspect of Murph's personality which is less well known is that of performer, conjurer, and singer. The best developed trick in his repertoire is also one which has been known to benefit his friends. On one occasion, he and the late Woods Lloyd were enjoying a quiet beer at the Birdsville pub, on one of Murph's many outback excursions. Woods, whose eye was often attracted to the eccentric, spied a magnificent Akubra hat of larger than usual dimensions, and was drawn to its wearer and away from his drinking buddy. Woods tried to entice the bemused stockman into parting with his prized possession. Alas, he wouldn't, for love nor money. No brandishment could secure the hat for Woods who, in desperation, said to the redneck "See that bloke over there," pointing to Murph. "What would you say if I could talk him into standing on his head on the bar, drinking a beer, and singing 'Danny Boy' at the same time?" Woods and Murph left the Birdsville pub some considerable while later, the former sporting an Akubra and the latter a wet collar.

THE HONOURABLE MR. JUSTICE BATT

All stories of His Honour's peccadillos and professional experiences are marked by adjectives such as meticulous, learned, careful. It may seem that His Honour's life is devoted to scholarly learning, syntax and punctuation.

Meldrum was once talking to a representative of the "Anstat" organisation about its legislation service. He asked how Anstat could be so sure that their updates were accurate. The representative confidently replied: "Why, we have them checked by Mr Batt Q.C.". Meldrum inquired further, observing that such a service must be very costly — Batt wouldn't come cheap. The Anstat representative corrected Meldrum. "No, no. All we do is send Mr. Batt the first run of the service, a little while before we send the rest out; soon afterwards he rings, and notifies us of all the errors."

His Honour is apparently already known amongst his brothers as the scourge of the Rules Committee.

His Honour's broad learning, care, and intellect will, of course, provide firm foundations for judicial excellence, if he gets the right material. His Honour has not been fortunate so far. Who would have thought that someone with so refined a temperament as His Honour would, in his first judgment, be responsible for a flood of pornography being visited on the citizens of Victoria? That was the result when, in *DPP* v. *Makris*, His Honour decided that certain X-rated videos were not unlawful, because they did not fall within the definition of film in the relevant legislation.

As a barrister, His Honour has made an indelible mark as a person who requires precision in grammar and expression. Some less than generous commentators suggest that it did not matter so much to His Honour that the statement of claim sailed close to failing to disclose a cause of action, so long as its shortcomings could be clearly understood in perfect, but preferably not contemporary, English.

His Honour's sporting prowess can be succinctly conveyed by informing the present company that, as a schoolboy and fellow student of his brother Ormiston J., Batt was said to be marginally the more athletic of the two.

At school, His Honour was also the editor of the magazine *The Melburnian* and is, according to rumour, to be the editor of a soon-to-be-published magazine produced by the Supreme Court judges, in an attempt to raise morale, and convey a softer profile to the consumer. The magazine is to be called *Farrago Judiciae, Delectare* and under present proposals, the sub-editor to Batt J. will be his brother Ormiston J.

Ashley J. and Coldrey J. will write the sporting pages, Hedigan J. the wine column and possibly an occasional police report. Mandie J. will be responsible for the form guide. The Chief Justice will make freelance contributions from time to time to the motoring section, and His Honour Mr. Justice Nathan has offered to provide the cartoons, and the occasional contribution to Odd Spot.

His Honour Mr. Justice Batt has recently been well depicted in a rhyming couplet by Burnside Q.C.:

Racey Melbourne Grammar chap
Classic scholars' friend
If his judgments ever start
We fear they'll never end

We wish His Honour well.

His Honour's broad learning, care, and intellect will, of course, provide firm foundations for judicial excellence, if he gets the right material. His Honour has not been fortunate so far.

THE HONOURABLE MR. JUSTICE HANSEN

His Honour has enjoyed many successes at the Bar and is a barrister who, from the beginning of his career in the law, was scrupulous in identifying what was in the best interests of his client.

The solicitor who succeeded young Hansen when he left the employ of the firm with which he did his articles confirms that when she checked the files His Honour had prepared, to ascertain their status and locate the timebombs, she noted that in every file in which there was the remotest chance of forthcoming court work, there was a brief already prepared to go to a certain counsel.

His Honour's career at the Bar indeed prospered and he was involved in many notable cases. Research shows that he was one of four counsel: namely, Ormiston, J.D. Phillips, Hansen and Hayne, who appeared for the continuing Presbyterian Church in the famous 1977–78 schools case, involving the church's battle over assets, inter alia, Scotch College and PLC. With His Honour's appointment, all four gentlemen are now on the Supreme Court Bench, drawing one to the conclusion that the almighty is a continuing Presbyterian.

His Honour is a distinguished addition to the bench and we wish His Honour well.

THE HONOURABLE MR. JUSTICE MANDIE

Mr. Justice Mandie is as reserved as he is clever.

As an advocate, His Honour displayed at least three conspicuous traits, something exceeding a commanding competence, a kindly desire to minimise his opponents' pain by bringing to the court's attention, early in the debate, his killer point, and a demeanour, both in court and out, which is best described as unflappable.

However, as a young lawyer, His Honour was not always able to maintain this demeanour. In the only known occasion on which His Honours gave a truly flamboyant display as advocate, he appeared in his first university moot, at the Carlton Court-House, arose to address, and fainted before uttering a word.

His Honour has, as I have mentioned, a sporting reputation of a certain bent. It is well known that His Honour loves punting. What is perhaps less well known is His Honour's success in these areas, and how they reflect His Honour's immense capacity to control any unwanted outbursts of emotion.

Sue Crennan and Gary Crooke

Not so long ago His Honour placed the princely sum of $5.00 on the gee-gee's, judiciously selecting a boxed trifecta for his investment. In turn, each horse came home. In characteristic style, when some 20 minutes later, the course tote confirmed His Honour's collect was $34,500.00, His Honour capped any unseemly display of emotion, by twitching a smile and, in an audible, but not exuberant, voice, said "splendid".

We wish His Honour well — the odds are all in his favour.

THE HONOURABLE JUSTICE SALLY BROWN

Her Honour is something of a forensic superwoman and consummate leader. She has acquitted herself well as Magistrate, Deputy Chief Magistrate, Chief Magistrate of the State of Victoria (and thus head of the largest court system in the State), and was recently appointed to the Bench of the Family Court, an appointment she accepted by exercising the well-known woman's prerogative of changing her mind.

Rowan McIndoe, formerly of our Bar and now a magistrate, wrote these words on Her Honour's appointment to Deputy Chief Magistrate in 1987. They encapsulate Her Honour's attributes: "Sally Brown has inspired an image something like a hybrid of a tiny rare exotic flower and a nuclear-powered washing detergent".

Her Honour's high profile has more than once been the cause of consternation to those who associate with Her Honour. An example relates to a luncheon engagement attended by Her Honour (when Chief Magistrate) and another vertically challenged person, the then Director of Public Prosecutions, Mr. Justice Coldrey.

The chief waiter swept up to Her Honour effusively assuring her that he was honoured that she should patronise his restaurant, at the same time he confiscated Coldrey J.'s wine, with a promise to return it after the meal, noting the premises were fully licensed. Soon after, the proprietor of the establishment descended upon the two dining friends and expressed his exquisite delight on the occasion of Her Honour's presence at the restaurant. The Director of Public Prosecutions sat silent, but impressed. Suitably deflated, the Director of Public Prosecutions returned to his office after the meal, but soon realised that he had left his bottle of wine in its paper bag at the restaurant. Being on a PAYE salary, he immediately returned to retrieve the bottle. In due course, he was handed it by a waiter. It was still in the paper bag. The only difference being that it now bore a message written in biro. It said: "left by the man with Sally Brown".

We wish Her Honour success and satisfaction in her current judicial role.

THE HONOURABLE ACTING CHIEF JUSTICE OF VANUATU, MR. JUSTICE KENT

His Honour was christened Robert Clarke Kent by parents who were possessed of much perspicacity. They knew (provided he was not exposed to kryptonite) that he would one day perform great feats, and indeed he has; ask any recent reader, or their headmistress.

As a barrister, His Honour could evoke passions, not always from the quarter he intended. Mr Justice Brooking once referred (in open court) to

John Ribbands, Tim North, David Denton, Jack Hammond and Jerome Gobbo

His Honour as the second most impertinent barrister he had encountered. At the time Brooking J. was looking directly at Tony Lewis, who stood beside His Honour at the bar table. His Honour could for many years produce that page of the transcript to anyone who asked about the incident.

His Honour's induction into the ways of the judiciary in Vanuatu has not been entirely easy.

Shortly after his arrival to take up his appointment, His Honour was required to attend a training programme at an island distant from the mainland, called Santo. Not being familiar with the ways of Vanuatu generally, let alone the remote islands, His Honour had not inquired as to the victualling arrangements at the island. When he arrived, he found that the general store had closed, and was not due to open for several days. However, by miraculous and happy coincidence, in accordance with tribal custom, 32 chiefs from the neighbouring islands were due to attend upon him that day and, as a token of their esteem, each would provide him with a coonat crab, an edible delicacy. His Honour was much relieved. In due course, the 32 chiefs arrived, but alas, they took one look at His Honour and decided that they would be better off selling the crabs.

The story gets worse. Apparently there were two crabs so undersized they could not be sold. After a lot of smiling and gesturing, His Honour managed to persuade the owners of these crabs to provide them for his sustenance, but, as fate would have it, just as he was about to cook the two meagre coonat crabs, a further catastrophe struck in the form of Cyclone Usher and blew his kitchen away. At this stage, His Honour, who had not eaten for two days, somehow managed to put a call through to the mainland of Vanuatu, imploring the Chief Justice to send an aeroplane to pick him up. The request was refused.

However, from such experiences, His Honour has, in a short time, learned much of the ways and the protocol of Vanuatu.

In Vanuatu, a formal occasion requires attendance in formal dress. For the male, a central part of

such formal dress is the "nambas," an adornment made of a hollowed bulls horn. It is regarded as very bad form for a man not to wear his nambas when invited to a formal function.

Perhaps those of you who know His Honour better can inquire of him after this speech whether he has deemed this function sufficiently formal so as to require the donning of his nambas. (Perhaps Doug Graham and Andrew McIntosh, who are wearing kilts tonight, could compare notes with the Acting Chief Justice.)

We note with awe that in less than six months His Honour has risen to Acting Chief Judge, and wish him well (but at the same time, await his return to the Bar).

Editor and minder

HER HONOUR JUDGE ROSEMARY BALMFORD

Judge Balmford is the big sister of the County Court, and a person who commenced her personal preparation for judicial office as early as 1957, when she adopted the habit of wearing flamboyant hats while presiding over the students she taught as independent lecturer in Conveyancing at the University of Melbourne.

Judge Balmford's authority, as big sister over her 46 brothers, is enhanced by the fact that she has taught many of them, including Judges Fagen, Hart, Hanlon and Davey, as well as many of the boys on the sunnier side of the street.

Ornithology is known to be a burning passion of Her Honour. Unfortunately time has not allowed me to assay Her Honour's works in this area, which include a bird atlas of the Melbourne region and learned publications including *The Beginner's Guide to Australian Birds*, *Learning About Australian Birds*, and a very recent work entitled *As Miserable as an Orphan Bandicoot on a Burnt Ridge*. A work, apparently, dealing with the vicissitudes of judicial life.

Word of these works preceded the court's recent arrival to hear rape trials at Morwell. Somehow the hapless defendants heard that the judge coming down to hear their case had written a book called *The Beginner's Guide to Australian Birds*. The optimism engendered by the prospect of such a broad-minded judicial officer soon evaporated when their counsel told them that the judge's writings concerned birds of the feathered variety, and their spirits further plummeted when they heard that the judge was in fact a woman. No doubt, at that point, each defendant felt "as miserable as an orphan bandicoot on a burnt ridge".

We may conclude that Her Honour is well pleased with her latest hat, although rumour has it she is not entirely satisfied with the rest of the regalia, which was designed to better suit the anatomical needs of the male. We understand that Her Honour's sketches for a redesigned wardrobe for lady judges is in an advanced stage of preparation. Curiously, these sketches, which are presently on display outside Chief Judge Waldron's chambers, in each case depict the female judge with a conspicuously large handbag.

The reason for this has to do with an aspect of Her Honour's own judicial technique. Whereas, to varying effect, her brothers, in appropriate circumstances, fix counsel before them with a gaze which is intended to convey the marginal relevance of what they are saying, Her Honour has perfected the ultimate gesture of judicial disdain, which is to raise her handbag onto the bench, open it, and scrutinise its contents. By way of an informal ruling on relevance, this has far more effect.

We wish Her Honour well.

HIS HONOUR JUDGE KELLAM

With Judge Kellam's appointment, the County Court now has its own Rambo. His Honour attended the Royal Military College at Duntroon in 1965, in an attempt to compensate for the fact that his early school years were spent at Firbank Girls' School Brighton.

Not even a Bar Dinner audience could be exposed to tales of His Honour's exploits at Duntroon. However, His Honour soon tired of military life. The messing facilities, and military-length meal breaks, did not sit well with His Honour's biorhythms. Accordingly, His Honour determined that he would become a first-class barrister, in the old common law mould, and devoted the next epoch of his life to revelry, with a sprinkling of forensic study.

It was not until about 1977, his degree, articles and admission to the Bar behind him, that His Honour found true vocational satisfaction in the restrained company of Curtain Q.C. and Middleton Q.C. at establishments like the Flower Drum — life couldn't get much better! Many have marvelled at how His Honour (and indeed the other two gentle-

The Chief Justice at table

Justice Coldrey and Margaret Rizkalla

men) have been able to enjoy such great professional success, given the time which they devoted to these activities.

Perhaps His Honour's secret is that he, in reality, never took his mind off the job. After one long lunch at the Flower Drum, the trio I have referred to passed a crowded table on their way out. His Honour noticed the solicitor who had been acting for the defendant insurers against one of his badly-injured plaintiffs. His Honour stopped and said, in a voice which should have been softer, "When are you going to tell those bastards from State Insurance to make a decent offer in the case of X?". The solicitor waved his arms at the bastards in question, who happened to be sitting with him, and said to His Honour, "Tell them yourself".

His Honour's first hours as a judge were not plain sailing. When His Honour first took up his appointment, he attended upon the Chief Judge and was given his keys, and the all-important security card to the County Court building. He was told to be most careful about security, and the Chief Judge firmly impressed upon him the importance of vigilance in that regard. Alas, within hours, the keys and the security card were lost (possibly at the Flower Drum). His Honour had to confess all, and was told that the consequence would likely be an expensive change of the entire security system, now that his security card was at large. It is unknown whether such a change was in fact implemented.

But His Honour has been given the Morwell and Ballarat circuits by the Chief Judge, who is apparently enthusiastic to have Judge Kellam on circuit, and away from the main court complex, as much as possible.

We wish His Honour a long and successful career on the Bench.

HER HONOUR JUDGE ELIZABETH CURTAIN

Her Honour is the third woman to be appointed to the County Court bench, and at a tender age of well under 40. Judge Curtain is at present Judge Balmford's only sister, although the potentiality of a gender-perfect Full Court will exist with the forthcoming appointment of Judge Margaret Rizkalla.

It is well recognised that as counsel, and as a presiding member of the Motor Accidents Tribunal, and the Administrative Appeals Tribunal and, from late 1987, as a Prosecutor for the Queen for the State of Victoria, Her Honour exhibited great competence and skill.

Her Honour's commanding ways as advocate were well-known. Example, once, when addressing Judge Nixon on sentence, in a particularly tacky pornography trial involving numerous pornographic video tapes, Judge Nixon queried the title of the video tape under discussion and asked counsel:

"Was it 'Dirty Tricks Part 21, Miss Curtain?"

"No, 'Talk Dirty To Me', Your Honour"

"Ah, Miss Curtain."

Her Honour's personality has many facets — she is a well-known amateur theatrical performer, and famous for her roll of Debbie — the barrel girl in the 1984 Bar Centenary Review. She was the only female member of the Bar in that review. (I have decided not to embellish what I say about Her Honour with more detail of this role; Her Honour has a right of reply this evening.)

Like her brother Judge Kellam, Her Honour's conduct (while wearing the judicial mantle) has not been entirely without hitch. Soon after her appointment, she drove into the County Court car lift — or more correctly, one side of it. In any event, the incident put the lift out of operation, effectively impounding the cars of 18 of her brother judges who use the County Court basement carpark.

To make matters worse, it just so happened that

The younger set

lift maintenance workers were on strike at the time and it was necessary for the court to secure centre road parking for three days. It is understood that Her Honour skulked around the County Court corridors for some time in an attempt to avoid her fellow judges. In due course, however, the Chief Judge summoned her to his chambers. Her Honour explained that she was sorry that she had demolished part of the court and would endeavour not to do it again. The Chief Judge was apparently unconvinced, and has asked the State Government to suspend removal of the protective scaffolding around the court building for the moment.

We wish Her Honour well, and we are certain that her judicial performances will be in no way amateur.

HIS HONOUR JUDGE ROLY WILLIAMS

As I have mentioned, His Honour was educated at St. Joseph's Catholic College, Geelong. What I have not yet told you is that His Honour won the religious education prize in his last year at school. This demonstrated an unusual capacity for abstract thought given that, as revealed earlier, he is a protestant.

His Honour is also a fervent Geelong supporter, and a past member of the VFL Disciplinary Panel. Judge Hanlon of the County Court, who has attended many games with his brother Williams, long ago dubbed him "the Mooroolbool Street Moaner" for his constant excuses for Geelong's performance. The vigour with which His Honour supports Geelong is well known, and it has been said that if he urges on juries in the same way, there will be very few convictions not recorded.

As a junior barrister, His Honour often displayed great initiative. On one occasion, His Honour was trying desperately to settle a case for a client of strong religious views, but whose prospects of success appeared to be negligible. The client was determined not to heed counsel's advice on settlement unless he received some sign or omen from above. The client asked to be left alone to consult Allah. His Honour struck upon a brilliant idea. Appreciating that the partitions dividing the County Court witness rooms were paper-thin, His Honour exhorted his instructing solicitor to occupy the room next to the one in which he left his recalcitrant client. And on a pre-determined signal, the solicitor bellowed "take the money — take the money". As His Honour and his instructing solicitor had anticipated, the foreign gentleman took this to be an utterance from above and immediately furnished the necessary instructions.

We wish His Honour well.

HIS HONOUR JUDGE DAVEY

If Judge Kellam is the Rambo of the County Court bench, then surely Judge Davey is its Arnold Schwarzenegger. His feats of strength and cool of university days are legendary. In ninja-like style, he was known at Trinity College to prop himself above the doorways of fellow students rooms by spanning the corridor at ceiling height. Then, by an orang-utan-like feat, His Honour reached clown and knocked on the door below. The hapless occupant would emerge, look right, look left, see no one

The middle set

except perhaps a few grinning spectators in the distance, and His Honour would drop on his or her unsuspecting head like a big tarantula.

In these same times, His Honour was want to clothe his enormous 50-inch chest, the product of a spartan exercise regime, with a black shirt and silver tie. Showing no restraint, he added to that latin combo dark glasses and, more often than not, a pork pie hat. At lectures in those days he made a striking counterpoint to Neil Forsyth in Harris tweed and black umbrella. For these antics, His Honour was then known as "Fred the Hood".

It's consoling for us to know that if his brother

Kellam's keys and security pass have fallen into the wrong hands, we have our own County Court "Last Action Hero" to foil any sinister plan.

It is a little-known fact that, as part of the lead up to his appointment, His Honour sat, in 1990, for a period of approximately three months as the presiding member of the high-powered tribunal comprising one of Melbourne's most senior solicitors, Frank Shelton, and another senior professional. His Honour radiated judicial persona, and in the best judicial tradition, and as a sign of things to come, refused to share biscuits or the lifts in the tribunal building with litigants or their counsel.

Justice Jenkinson, Boris Kayser, Michael Crennan and Judge Fagan

For the insatiably curious, I feel obliged to reveal that inquiries of His Honour's mother have established that his striking streak of white hair emerged well before his time as a director of the Qintex Corporation.

We wish His Honour well.

SIMON MOLESWORTH

I commenced my researches in relation to this high-profile member of counsel by asking my secretary to check his credentials in *Who's Who in Australia 1994*. She returned shortly afterwards, looking impressed; "he's got more than six inches here," she said.

Indeed, Simon, who is honoured this evening for his Award of Member of the Order of Australia for service to conservation and the environment and to the Victorian branch of the National Trust of Australia, has been enormously energetic. He is distinguished by a list of appointments to various very worthwhile bodies which number thirty in the extract of that publication to which I have referred. We congratulate him on his honour.

My efforts to unearth revealing stories about Simon were met with a singular lack of success. So many were willing to say so little that it gives rise to the gravest suspicion about Simon.

So also does the fact that he is apparently an avid tree lover, and is said to have commenced his rise to prominence as a teenager, seeking to preserve trees. Yet, curiously, Simon lists woodwork as his foremost recreation.

Michael Dowling, John Winneke and Judge Curtain

DENIS BARRITT

Dinny Barritt is a member of this Bar and was, between 1978 to 1991, a Magistrate of the Northern Territory. He has gone down in the annals of history as the judicial officer who presided over the original Azaria Chamberlain inquest. Barritt is honoured this evening for receiving a Medal of the Order of Australia for services to the law and the community.

Probably all that needs to be said about the landmark Chamberlain case is that Dinny Barritt got it right in concluding that the dingo did it.

Dinny, the Magistrate, was well-known to hold the philosophy that the second most important of personal possessions was the motor car, the first being a person's home. On one occasion in the Alice Springs Magistrates' Court, he was endeavouring to impress upon an aboriginal defendant the seriousness of his attempted theft of a motor car. He said to the defendant, "Your attempt to steal this car was a most serious of crimes, and you should realise that the community requires a severe penalty to be handed out for this type of offence because a person's motor car is their most valuable possession, apart from their home".

The aboriginal defendant spoke little English, and the field officer who was called to convey His Worship's views to the defendant did so in these words: "That Judge, him bin say you better not steal nobody's house".

CONCLUSION

The Bar extends its congratulations and best wishes to all of our honoured guests.

John Digby

SEEN AT THE BAR DINNER

Bar News, through its intricate web of Government contacts, was lucky enough to secure a copy of a secret report prepared on the Bar Dinner by the Legal Ombudsman, *pro tem* and the new Head of the Legal Profession Tribunal.

FROM THE OFFICE OF THE LEGAL PROFESSION TRIBUNAL

CONFIDENTIAL

To: The Convenor Non-Lawyers Committee on Lawyers
From: Kevin Redhead, Legal Profession Tribunal
Re: An Illegal gathering entitled Victorian Bar Dinner

On 4 June 1994, in company with Ms Northcote, the Legal Ombudsperson, I attended a gathering called the Victorian Bar Dinner in order to observe and report upon rites of the guild, the Victorian Bar.

You are informed that this so-called Victorian Bar operates as an uncompetitive, restrictive, microeconomic guild. It is now well established that this guild has many secret rules and regulations which are designed solely to protect the self-interest of its members, their friends and their socioeconomic class and which are undeniably anti-competitive, un-Australian and an on-going threat to society as we know it.

The first rite required me to wear what is called "Black Tie''. This most anti-competitive, un-Australian and anti-social garb in undoubtedly a relic of our most shameful Monarchist past. Like those awful wigs and gowns it must be forthwith outlawed.

The second rite required me to imbibe alcohol from a glass – yes a glass! I can tell you that I gagged with each mouthful. If that were not enough, I was forced to pluck the glass from among glasses of un-Australian concoctions such as Gin, Whisky and that horrible contradiction of terms called "Light Beer". It took me many attempts to overcome my gagging sensation to settle my stomach down.

The third rite required me to sit at a table with nine males. You would have thought in these enlightened times the guild would have caught up with the rest of the world and ensured that at each table there were precisely equal numbers of females and males.

The fourth rite was, to put it in the mildest terms that I can think of, THE PITS. I was expected to stand up with all nine other male persons at my table and drink a toast to . . . I can barely write it . . . yes . . . the Queen of England. We have to get rid of this anomalous organisation which refuses to accept that Republicanism is here to stay.

The fifth rite was a welcome from a person with the title of Chairman, yes that

is right ChairMAN. This highly secretive regressive 16th-Century organisation requires its members to defer to a ChairMAN!!!!! They must have suspected that we might be watching them because they made a pathetic attempt to cover up this most accursed shameful practice by having – or should I say allowing – a token female called Susan Crennan Q.C. to act in that role. I made some careful and subtle enquiries about this Susan Crennan. I do not know whether she should be arrested as a danger to our society as we know it or whether she be taken into care. At the very least she requires re-education. I mean she is actually married to a male member of this very same elitist cult. If he thinks he can pretend to be one of us by having a full beard he needs to rethink that. I mean it was neatly trimmed – an obvious giveaway. His patronising of his so-called wife (I never thought I would have to use that term of male possessiveness again) was so obvious and his apparent concern for her welfare on the night was so transparent. As I reported earlier this Susan Crennan person was a mere token. How else could she be characterised: after all, she is white, Anglo-Saxon, married and spoke like she had a private school education. She even wore a dress which seemed to be very expensive. It was obviously designed to pander to the dominant male persons of this highly secretive guild because all of the male persons on my table said how nice the dress was. She would not have a genuine feminist bone in her body. On second thoughts, I believe she is beyond redemption. She must go.

The sixth rite, which they tried to get away with when Ms Northcote and I were outside trying to find the unisex toilet – I have to report that this nasty private school-dominated secret society even chose a venue without unisex toilets – was a celebration of and a toast to all other of their cosy fellow secret societies. We caught them at it and they immediately sat down.

The seventh rite was the permitting of – no! I say encouraging – members to force their consumption of that evil, foul, anti-society, non-conformist nicotine-laden weed on others. Nowhere amidst that pall of ozone-depleting environmentally-dangerous polluting smog could I detect the merest hint of the sweet-smelling, soothing, intellectually-stimulating, environmentally-enhancing product of the marijuana plant. There was no doubt that the heavy hand of Bronwyn Bishop and her friends from the Melbourne and Adelaide Clubs had been allowed to rest upon this vile secret society. I mean it stands to reason doesn't it – she is a lawyer; she is white, Anglo-Saxon; she is anti-feminist; and, she is pro-smoking nicotine.

At last there was a pause. Things seamed to become normal for a moment. We commenced to eat our supper. As much as it pains me to say it, the meal was almost normal. We started with tomato soup just like the ones we used to drink from those paper cups at the rallies before the fuzz used to come and get us. As a sop to this pathetic secret organisation the cook tried to turn it into cream of tomato soup. Obviously his/her heart wasn't in it because the cream was still in a lump and I was able to remove it without damage to the soup. Luckily the green and black bits attached to the cream came out with it. Then we had roast beef, spuds and veggies. The beef looked a bit anaemic to me but it was alright. There wasn't too much of it so I didn't feel guilty about injecting too much cholesterol. I could have had vegetarian. The very large male person next to me ordered vegetarian and got a plate of green peppers in pale tomato sauce. He said he was on a diet but I don't think his heart was in it either. After pushing his veggies around he launched into his afters with great gusto. I had begun to feel sorry for him but then he launched into a Monarchist tirade. He will have to go too. He even seemed to be proud of being what he called a Q.C. Ms Northcote reports separately on Q.C.s. Afters were apple pie and cream. They tried to ruin my enjoyment of the apple pie with their speeches but they failed.

The eighth rite consisted of speeches. In keeping with this terrible closetted

cossetted cabal, some fellow called Q.C. Digby talked of the elite within this elite group. He chose to speak glowingly of fourteen of this group within a group.

Totally out of step with our society and its beliefs he chose to include a mere three female persons in his group – yes three out of fourteen!!!! He referred to most of them as Judges, those relics of a long-gone Monarchist past who insist of wearing un-Australian, anti-competitive anti-social wigs and gowns and expect un-Australian, anti-competitive, antisocial deference. Obviously no one has told him yet that your Committee is soon to replace them with committees made up of equal numbers of male and female persons none of whom will be tainted, fettered, blinded or in any way effected by indoctrination from law schools or in-house, secret, highly restrictive training courses. I did not understand anything of what he said but it must have conformed to the secret rites of this group because they all laughed at the private jokes and they applauded him long and loudly when he finished. Ms Northcote and I wondered if he was really into the perpetuation of his club's ways because he was so obviously greatly relieved when he finished.

The ninth rite consisted of two of the people he talked about getting up and talking about him. I mean how elitist can you get!! There he was obviously deferring to them and there they were self-importantly patronisingly patting him on the head as if to say "job well done". Quite obviously they must have a lot of highly secret symbols, sayings and incantations which he must have got right. I cannot say. As I reported earlier I could not understand him. The first person who replied I also could not understand. Although I thought I understood some of the words the Q.C. used I could not understand anything said by the person called Justasbat. I asked the male persons at my table if Justasbat was uttering special incantations. "No," they said, "it is just a bit of ancient Greek." I thought he may have been the token ethnic person but my worst fears were confirmed when they advised me that he had gone to school at Melbourne Grammar. I don't think the very big person on the diet who sat next to me agreed with my views on that place.

Then there was another token woman. They called her Judge Curtain. Like the other token female person she wore a very expensive dress and said lots of very popular things and made this terrible elite very happy. She must be re-educated. There she was, with the perfect opportunity to correct all these highly politically incorrect male persons and to promote the cause of the sisterhood and not a right word did she utter.

Luckily there was no more. We were allowed to get up and move around. I sought out Ms Northcote and we were able to reassure each other that we had not been dreaming and that all these terrible things had occurred. We made a pact to ensure that nothing like this should ever be allowed to happen. It was an awful unmitigated blight on our fair, egalitarian republic.

Recommendations:

1. That all persons who call themselves Judges, Q.C.s and lawyers be immediately re-educated at a politically correct institution;
2. That the Trade Practices Commission be immediately given full powers and requested to abolish Judges, Q.C.s and Lawyers;
3. That the Committee immediately pass regulations banning all gatherings of a similar nature; the practice of all secret rites by lawyers; and making it a criminal offence to hold oneself out as a Judge, Lawyer and/or Q.C.;
4. That the Committee bring forward its plans to replace all Courts with sub-committees of the Committee;
5. That in the interests of equality no lawyer, no privately-educated person and no white Anglo-Saxon male be allowed to appear before such subcommittees;
6. That Ms Northcote and I be granted six months' sabbatical, commencing immediately to recuperate from this most frightening of ordeals.

CONFIDENTIAL

FOOTNOTE

From: Ms Mary Northcote, Legal Ombudsperson

I have read the report of Mr. Redhead. You will agree that it is a most objective, temperate and careful report. He is a credit to the Centre for Media Studies and a good example for all his fellow graduates to follow. I have no doubt that he will make an excellent, caring, objective Legal Profession Tribunal and that he will apply his renowned dedication to the most pressing objective of eliminating from this wonderful country of ours that highly secretive, anti-competitive, anti-social, un-Australian parasitic group that calls itself the legal profession. The sooner it goes the better. In the meantime, I am certain that he will apply the requisite balance in his task of dealing with public complaints against lawyers. I assure you that I will give him my full support in this most onerous of tasks.

I note that Mr. Redhead has classified his report as "Confidential". I recommend that it be upgraded to "Secret". We do not want the public to know anything about the scourge called the legal profession. They might riot.

We will not be able to rely upon the DPP to prosecute the evil members of this awful secret society. He was always suspect. Mr. Redhead and I each separately and covertly observed him actually imbibing alcoholic beverages, make jokes and enjoy himself. Clearly he was a participant in, and fully conversant with, all of the secret rites! He must not be shown a copy of this report. He must be sacked forthwith.

I have attempted to investigate the phenomenon called "Q.C.". This appears to be another of the many secrets of that vile elite group called the Victorian Bar. To the best of my knowledge, Q.C. is an acronym for "Quite Clever" or even "Queer Customer". Those were the two explanations given to me towards the end of the so-called dinner. My informants at that time seemed to be in very jovial mood. The very large male person who had set next to Mr Redhead and who was less jovial than the other people I spoke to about the subject said, "It is just another term for silk my dear". He seemed to be quite serious. Having applied more research to that matter than was applied by the Trade Practices Commission to its analysis of the anti-competitive nature of the Legal Profession's rules I felt justified in turning to the making of conclusions. Quite obviously, as the application of the label Q.C. is important to the legal profession, it must be bad and it goes without saying that it must be a practice that is anti-social, anti-competitive, un-Australian and designed merely to raise the costs of justice for the average person. The Committee must immediately enact regulations to abolish this iniquitous practice and I so recommend.

You have my assurances that, like Mr. Redhead, I will perform all of my duties as Legal Ombudsperson with objectivity, compassion, understanding and balance.

I have endorsed Mr. Redhead's expense claims appended hereto. He has shown remarkable restraint heeding these most straitened of economic circumstances. My expenses have been calculated with similar forbearance.

Having attended the so-called Victorian Bar Dinner and observed at first hand the above described secret rites – which are only the tip of the iceberg – I am convinced that our efforts to remove this un-Australian, anticompetitive, anti-society blight must be redoubled. I request the Committee to immediately recruit as many politically correct persons as possible to work under my authority to take over and eliminate our expensive, dangerous and unnecessary legal system. The sooner the Committee takes it over the better.

SECRET

OFFICE OF THE CONTROLLER OF ACCOUNTS

I Patrick O'Bean, public service accountant, state that I have audited the expenses relating to the members of the legal department in relation to the Bar Society Council Institute Dinner and I hereby state that I approve all of the following expenses:

Expenses of Mary Northcote

(a) Tina Varicose designer pants suit obtained from Toorak Road, South Yarra $2,000.00
Northcote stated that she had no appropriate clothing to wear to such a formalised function and therefore this expenditure is approved.

(b) Cost of dinner $ 250.00
As she was expected to pay, this is an appropriate expense.

(c) Weekend at the River Walk Hotel.
It could not be expected that Ms Northcote should be required to return to her abode with her live-in person and therefore it was appropriate that she should spend the weekend in an appropriate hotel establishment.
Cost $ 500.00

(d) Limousine hire and driver for the weekend $ 700.00
As alcoholic beverages were imbibed at this function it could not be expected of the Ombudsperson that she should have to drive herself to her abode in Kangaroo Ground.

(e) Child-care expenses $2,000.00
As Ms Northcote was required to have her de facto's children looked after for the weekend this is a properly executed and incurred expense.

(f) 'The Solicitor'. A book on Solicitors. $ 200.00
As the Ombudsperson was required to have some knowledge of Solicitors for this dinner, the incurrence of the expense for this book is acceptable.

Expenses of Kevin Redhead

(a) Cost of dinner $ 300.00
As Mr. Redhead was required to pay this expense for this dinner this is an acceptable cost.

(b) Weekend at Hyatt on Collins Hotel $ 800.00
As Mr. Redhead was required to attend where there was danger to himself it was acceptable that he should not be required to go to his own home in Ascot Vale.

(c) Limousine hire $ 600.00
Mr. Redhead is not a person who should be expected to drive his vehicle to such functions.

(d) Del Monti suit hire $ 60.00
As Mr. Redhead does not and will not ever have such formal and archaic costumes as a tuxedo and dinner suit, this is perfectly acceptable.

(e) Child minding expenses $ 400.00
As Mr. Redhead's niece was inconvenienced by the fact that she could not sit for his children who are now in the custody of his ex-wife, it should be expected that as this was an access weekend these expenses should be incurred.

WOMEN BARRISTERS' ASSOCIATION MEETS

The Women Barristers' Association is not a suffragette movement, nor is it a threat to the masculinity of the male majority at the Bar. It is concerned with promoting equality not reverse discrimination. With the permission of the Women Barristers' Association we print below the text of a speech given to the Women Barristers' Association by the Chief Justice and of a keynote address given to that Association by Justice Sally Brown. Rachelle Lewitan's comments below put those speeches and the Women Barristers' Association in context.

"THE WOMEN BARRISTERS' ASSOCIATION (formed 11 November 1993) provides a forum for issues which concern women at the Victorian Bar. The Association will hold regular meetings and functions to stimulate and encourage debate. We want to raise consciousness, not eyebrows.

Times change. The number of women in the legal profession continues to rise and, at last count, about 50% of law students were female. In his recent address to the Women Barristers' Association, Chief Justice Phillips spoke of Joan Rosanove's difficult path towards becoming the first woman silk in this State. She would have seen the need for an organisation like ours, but in an era in which a long, gold-plated cigarette holder could scandalise her profession, she would have had little expectation of seeing it come into existence.

Today we have such an organisation. With unanimity, the foundation members of our group see as the pre-eminent objective the promotion of equal opportunity for everyone at the Bar. It is in order to promote this that we seek examination of all practices which reduce the opportunities for women to genuinely compete on equal terms. We also wish to ensure that our judicial system accommodates not just female barristers but women generally, either as professionals working within the system or as members of the public who come into contact with the system. Women face obstacles in many professions. However, it is particularly important that those who practise and shape the law uphold its vital principles of fairness and equality.

Justice Sally Brown was our first keynote speaker and a fine role model for us all. In her talk to the Women Barristers' Association in December 1993, she urged us to "operate as if we truly believe that women have entitlements in the legal profession . . . Discrimination in the legal profession must be defined and treated as a problem of the profession rather than a problem of the women who suffer its consequences."

We are venturing into new territory. However, at our second meeting, we were encouraged by the strong support we received from the judiciary. We think that the time is right to promote our cause at the Bar."

Rachelle Lewitan

Three Different Women

(Speech by the Honourable J.H. Philips C.J.)

VIDA GOLDSTEIN

Vida Goldstein, the first woman in the British Empire to stand for election to a national parliament in 1903, was born in 1869 at Portland. You might expect her father, Jacob, to have come from somewhere like Poland, but he was in fact born in Ireland at Cork and had Polish, Jewish and Irish forebears. Both Jacob and Vida's mother Isabella, who had a Scottish background, were very interesting people. Jacob had a general store in Portland and later worked as a draftsman in Melbourne. He devoted all his spare time to charitable work. He urged his daughters, of whom he had four, towards independence of mind and encouraged them to

have the capacity to be financially independent. Unlike her sisters Vida never married. she knew how to say no and kept on saying it for she had, so it is said, many proposals of marriage.

A host of interests crowded the life of Vida's mother Isabella. She was an ardent supporter for women's suffrage, prohibition of alcohol and general social reform. In my researches I found that she had also been involved with a body called the National Anti-sweating League, which worried me a bit until I found out that it had been formed to get rid of the sweat shops where lowly-paid women were exploited.

From the late 1890s Vida, who had taken up most of her mother's interests, became the Australian leader in the cause of women's suffrage. In 1902 she represented Australia at the International Women's Suffrage Conference in America and was elected secretary. In 1903, she made her first bid for election to our Senate, Australian women having been given the vote in Commonwealth elections in the previous year. She polled more than 50,000 votes, but sadly it was not enough. In all, she stood for the Federal Parliament five times, always as an Independent. She usually polled well except during the First World War when her public position as a leading pacifist cost her dearly.

In her campaigns she engendered a lot of hostility from vested interests, which included the press. Her causes were equal rights and pay for men and women; redistribution of wealth; opposition to capitalism; opposition to the White Australia Policy and promotion of women's rights generally. She had some successes including the passage of a *Children's Court Act* which made special provision for youthful offenders. She also, it is said, influenced Mr Justice Higgins in his establishment of the concept of a basic wage in the *Harvester case.*

In 1911 she visited England and addressed many huge meetings on women's issues. Her stand as a pacifist during the First World War included the formation of the women's peace army in 1915 and later, after the war she devoted much time to promoting pacifism and to what she called "an international sisterhood" of women. In her later years she pressed for improved provision of birth control, for disarmament and general opposition to war.

She described herself as "a democrat with a vision of society which would enable the complete equality of women with men and decent standards of living for all". She believed that women had "special talents and needs and were the world's civilisers and therefore had special contributions to make to political and international affairs". She died of cancer at South Yarra in 1949.

JOAN ROSANOVE

Joan Rosanove, the first woman silk in Victoria, was born in Ballarat. Her biographer, rather decorously, does not give her birth date. Her father, Mark Lazarus, was a Ballarat solicitor and Joan was articled to him, taking some subjects at the University of Melbourne. She was admitted to practice in June 1919 and worked in her father's office. She soon appeared at the Ballarat sittings of the County Court before Judge Winneke, the father of my distinguished predecessor but, within a year, had appeared in the Supreme Court at Melbourne in a defamation action where she had the opportunity of cross-examining the then Prime Minister, Billy Hughes. Billy did not fare very well under Joan's cross-examination and indeed his deafness, which was something of a national joke, appeared to progressively increase as the questioning continued. Joan lost the case, but she had learned a great deal and the press and public had started to notice her. Joan married a young doctor, Emmanual Rosanove, in 1920 and they went off to live at Tocumwal. Their first child, a girl, was stillborn, but a daughter, Peggy, who later became Justice Lusink of the Family Court, was born in 1922. After some years Doctor Rosanove moved his practice to Westgarth and in September 1923, Joan signed the Roll of Counsel for this Bar and started off in a tiny room at Saxon House in Little Collins Street. I well know what Saxon House was like in the early 'sixties and apparently it was even more appalling when Joan was there. Work was slow in coming and in 1925 Phillip Jacobs, who was going to England for a year, offered to let Joan have his room in Selborne Chambers to try and improve things. This was not to be. The directors of Selborne Chambers met in solemn conclave and Phil was told that if he let a woman have his room they would cancel his lease. Joan left the Bar and began practising from home as an amalgam. She was to continue to practise as an amalgam for the next 22 years. Dr Rosanove's practice flourished and he took rooms in Collins Street practising as a dermatologist. The family

She had the opportunity of cross-examining the then Prime Minister, Billy Hughes. Billy did not fare very well under Joan's cross-examination and indeed his deafness, which was something of a national joke, appeared to progressively increase as the questioning continued. Joan lost the case.

Alex Richards and Sue Crennan

home changed from Westgarth to Toorak. Joan developed her own very large practice in divorce and re-signed the Bar Roll in 1948. In a chronic shortage of professional accommodation after the war, Joan conducted her conferences and research in the Supreme Court library but before long Ted Ellis offered to share his room in Selborne Chambers with her. I will digress here. Ted Ellis had a brother who was a Commissioner of the Victorian Railways and, perhaps as a consequence, got more than his fair share of the railway's briefs. In one action a man claimed damages for injuries which he said were sustained when he fell off a train toilet while the train was crossing some points. Ted Ellis, for the defendant, pleaded contributory negligence. Asked by the judge for particulars, Ted replied, "sitting too far forward on the seat, Your Honour". At all events, this time the directors of Selborne Chambers held back and Joan was allowed to share the room.

I first met Joan in the early 'sixties when I was privileged to be her more or less regular junior. She usually wore an ermine coat and hats with veils through which she peered with her elegant eyelashes. She had the longest cigarette holder in Melbourne, it was gold-plated and caused great scandal. Sensibly, one of the few tasks she entrusted to me was to light her cigarettes. This I did, very shakily, with the assistance of an equally elaborate Dunhill lighter. She was a very feminine person and set her face against adopting any mannish habits in court. Getting silk had not been easy for her. She had applied to Sir Edmund Herring in 1954. After some circumlocution he refused to recommend her. She asked him to reconsider. Again he refused. In 1965 she applied to Sir Henry Winneke. He recommended her.

Joan was never lost for something to say. When she wanted a visa for America in 1952 she was refused it. The consul told her that she was recorded as having acted for a communist in 1934. Joan flashed the ermine coat at him. "Do I look like a revolutionary?" she said. He signed the visa. On another occasion in the Full Court Sir Edmund Herring said to her, "Thank you Mrs. Rosanove, the court is much wiser from having heard your argument". 'Well," said Joan, "let us say that you are better informed".

MARY GILMORE

The remarkable woman known to us as Mary Gilmore was born Mary Cameron, near Goulburn, in 1865. Her formal education was limited to two years at Wagga Wagga from 1875 to 1877. Devoted attention from her parents, however, enabled her to become a teacher's assistant in country schools in New South Wales from the age of 12. Within a few years her verse was being published in local newspapers. At 16, she gained the highest marks in the State examinations. Teaching posts followed at Silverton and later at Sydney, where she plunged into involvement with radical circles,

soon meeting A. G. Stephens, Henry Lawson and the man who was to exercise profound influence on the direction of her life, the remarkable visionary socialist William (Billy) Lane. Lane was busy organising the "New Australia" settlement in Paraguay, his plan for a model socialist community. Mary was quick to give him her support and was instrumental in obtaining sufficient volunteers and funds. The expedition departed on its own ship, the *Royal Tar*, on 16 July 1893, to take up a huge tract of land that had been provided by the Paraguayan Government. Within a year, however, the community had split in two, with Lane and his personal following setting up a second settlement called "Cosme". It was to "Cosme" that Mary travelled in 1896, responding to Lane's entreaty to set up a school; and it was from "Cosme" that Mary wrote an intriguing letter to Henry Lawson:

La Colonie "Cosme"
Paraguay, South America
via NZ and Montevideo
5 August 1896

Dear Harry,

I've got such a lot to say to you that I write on a postcard in order to say something. I am glad about your book but I haven't seen anything approaching a criticism of it, no one having sent me any papers. As for you, I believe you forgot me — but I know you didn't — only you *might* have sent me a copy of the book. Send me one anyway. How is it going? . . . I'd give a lot to see you here. The place teems with copy, the life makes it. I wish to heaven I could write it up. I could cry when I see how it goes to waste. We are all original, everyone of us, but as life becomes easier it will grow more commonplace and none but a see-er(?) can write of us as we are now.

Communism as we have it is alright, Harry, and we are getting on — slowly, of course, but in a year or two what now is, will have gone, drowned by prosperity. And the country — it is a constant wonder to me, so beautiful, so rich in bird (life) and plants. And the history! — and the stories of the war. If you were only here, Henry. Don't let someone else snap your chances. Come while the field is new — as a visitor I mean, though I'd like you to come for good only I don't think you would. I am satisfied with life anyway and I wish everyone found life as good as I do. Come if you can, dear old friend. You know I wouldn't ask you if I didn't think it worth it — even from your standpoint.

M. J. CAMERON

P.S. I didn't get married.

Somewhat surprisingly, in the light of this letter's contents, Mary married a Victorian shearer, William Gilmore, at the colony in May 1897. Their only child, Billy, was born in August 1898. Within a few years the settlements failed, there were too many intellectuals and not enough farmers and workers, and after great privation her husband succeeded in earning sufficient money for their passage home. They returned to Australia in 1902 and after some years of less than satisfying existence on remote farms, Mary came to Sydney and was appointed editor of "The Women's Page" of the radical newspaper *The Worker*, a position she was to retain for the next twenty years. Her first book of poetry was published in 1910 and other volumes followed in 1918 and 1925. Mary Gilmore's marriage did not last. Her husband departed for Queensland in 1912, and Billy joined him as soon as his schooling was completed.

In the 1920s and '30s there lived in Melbourne a charming man called Alister Clark. He was an expert in breeding roses and, on appropriate occasions, he would pay ladies a great compliment by naming roses after them. Mary Gilmore never received such a beautiful present, but, in 1926, our noble poet John Shaw Neilson wrote for her:

At 16, she gained the highest marks in the State examinations. Teaching posts followed at Silverton and later at Sydney, where she plunged into involvement with radical circles, soon meeting A. G. Stephens, Henry Lawson and the man who was to exercise profound influence on the direction of her life, the remarkable visionary socialist William (Billy) Lane.

THE GENTLE WATER BIRD

In the far days, when every day was long,
Fear was upon me and the fear was strong,
Ere I had learned the recompense of song.

In the dim days I trembled, for I knew
God was above me, always frowning through,
And God was terrible and thunder-blue.

Creeds the discoloured awed my opening mind,
Perils, perplexities — what could I find? —
All the old terror awaiting on mankind.

Even the gentle flowers of white and cream,
The rainbow with its treasury of dream,
Trembled because of God's ungracious scheme.

And in the night the many stars would say
Dark things unaltered in the light of day:
Fear was upon me even in my play.

Judge Kim, Rachelle Lewitan and Anna Kim

There was a lake I loved in gentle rain:
One day there fell a bird, a courtly crane:
Wisely he walked, as one who knows of pain.

Gracious he was and lofty as a king:
Silent he was, and yet he seemed to sing.
Always of little children and the Spring.

God? did he know him? It was far he flew . . .
God was not terrible and thunder-blue:
— It was a gentle water bird I knew.

Pity was in him for the weak and strong,
All who have suffered when the days were long,
And he was deep and gentle as a song.

As a calm soldier in a cloak of grey
He did commune with me for many a day
Till the dark fear was lifted far away.

Sober-apparelled, yet he caught the glow:
Always of Heaven would he speak, and low,
And he did tell me where the wishes go.

Kinsfolk of his it was who long before
Came from the mist (and no one knows the shore)
Came with the little children to the door.

Was he less wise than those birds long ago
Who flew from God (He surely willed it so)
Bearing great happiness to all below?

Long have I learned that all his speech was true;
I cannot reason it — how far he flew –
God is not terrible nor thunder-blue.

Sometimes, when watching in the white sunshine,
Someone approaches — I can half define
All the calm beauty of that friend of mine.

Nothing of hatred will about him cling:
Silent — how silent — but his heart will sing
Always of little children and the Spring.

Mary left *The Worker* in 1930, but at 65 years of age most, and many would say the best, of her artistic output was still before her. The same year saw the publication of her most important book of poems, *The Wild Swan*. Four of the next five years produced further volumes of both poetry and prose and, in 1937, proclaimed as the doyenne of Australian letters, she was awarded the honour of Dame of the British Empire. She continued to hold court at her flat at 90 Darlinghurst Road, King's Cross and published yet another book of poetry in her ninetieth year. When she died in December 1962, thousands of Australians mourned her passing and rejoiced in her achievements.

With an audience of this quality, I will not even attempt to relate my pictures of these three women to the objects of the Women Barristers' Association. Except to say this, that throughout life's slings and arrows, these women never once lost faith in themselves and never once lost faith in their vocations.

Rachelle Lewitan speaks and the Chief Justice prays

Keynote Speech, Justice Sally Brown

This speech was not prepared for publication. It draws heavily on published and unpublished articles by a number of Canadian academic writers including Dr. Sheila Martin, Professor Kathleen Mahoney, Professor Mary Jane Mossman and Professor Lynn Smith, to whom I am indebted.

It is not new to suggest it may be hard for judges to be impartial. Lord Scrutton is often quoted as having said ". . . the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish". This comment was made in the context of class bias.

Similarly, judges have written of innate biases towards particular classes of arguments; Lord Mac Millan wrote that "The ordinary human mind is a mass of prepossessions inherited and acquired, often nonetheless dangerous because unrecognized by their possessor . . . every legal mind is apt to have an innate susceptibility to particular classes of arguments".

What may be new is to question judicial use of stereotypical assumptions and untested beliefs, which may result in us tending to judge people on the basis of their group membership rather than their individual characteristics. It is important to question whether the traditional safeguard against judicial error, the appellate process, can deal adequately with manifestations of this sort of bias.

You do not want a history lesson, but it is worthwhile to look at the long, systemic and sometimes systematic exclusion of women from the law and legal profession to better appreciate dynamics and consequences of it in the present. Perhaps lawyers are particularly susceptible to established norms, as the notion that prior acts are precedents is so entrenched in our thinking. For whatever reason, lawyers seem particularly resistant to change, and the response that "this is just the way things are done in the law" is often the response if change is mooted. Customs very easily develop into traditions which are stronger than law, and tend to remain unchallenged long after the reason for them has disappeared.

If you are feeling glum, remember that for many years women were not allowed to be lawyers and couldn't vote. Restrictions on our ability to practice in Victoria were removed in 1903 when an Act to Remove Some Anomalies in the Law Relating to Women was passed. At that time women could not vote; the male Members of Parliament who passed that legislation were elected by men only.

In 1908 the *Adult Suffrage Act* was proclaimed, giving Victorian women the right to vote in State elections, but only the right to vote for men. It was

not until 1923 that women were eligible to seek election to the Victorian Parliament.

When Miss G. (Flos) Greig, the first woman in the Commonwealth of Australia to be admitted to practice, commenced her articles in 1903 she could not vote in State elections, or stand for the Victorian Parliament. The first woman elected to a Parliament in Australia was Edith Cowan in Western Australia in 1921; the first women elected to Federal Parliament were Dorothy Tangney to the Senate and Enid Lyons to the House of Representatives in 1943.

A Canadian Royal Commission on Equality and Employment in the 1980s defined discrimination as an arbitrary barrier which stands between a person's ability and his or her opportunity to demonstrate it. If there are barriers to women's fair and equal participation in the legal profession this constitutes discrimination.

When women first sought admission there were lots of splendid judgments in the U.S., Canada and U.K. which asserted that it was against order, morals and decency for woman to become lawyers. Judges found that they should be excluded on the basis that their proper place was the home; more suitable roles for women were available; that women lacked the capacity for logical reasoning; that they would wreak havoc with juries and disrupt the proper order of society. And what about clothes? And toilets?

I say that although the formal barriers to women's entry into the profession have long been removed many of these stereotypical views still operate as a starting point for how some people think of it. There is still a tendency for men to define women in the law as outsiders, as different and as if acts of generosity are necessary if they are to be included. The language encapsulates this; women were *given* the vote and *allowed* entry into the profession. By whom?

Now barriers to women's careers in the law are usually ascribed to legal practices' inability to accommodate female parents with family responsibilities. If you don't have such responsibilities it is assumed you soon will, to such an extent that one almost needs proof of menopause before the barriers lift.

This is particularly relevant to the Bar. Last Saturday's *Sydney Morning Herald* had an article on John Coombs, the retiring President of both the New South Wales and Australian Bar Associations. The article states:

> Coombs maintains he has been a keen supporter of women at the Bar — although given their numbers (just 115 out of 1756 barristers in Sydney) this is one area where he has not been successful. Coombs suggests that although 50 percent of law students are women, they are not willing to make the personal sacrifice necessary to survive. "The job is so demanding that you have to be very dedicated to it. My ex-wife used to say that the Bar is not just your job it's your mistress too, and it is like that".

It goes on to say that his own family have endured his obsession and that his daughter, now 23, remembers that if she was especially missing him when she was a little girl he used to take her to his chambers for the day and even into court with him.

If Mr. Coombs is quoted accurately and did speak of personal sacrifice, to whose sacrifice is he referring? His own? Or that of his wife and children? If it is his own, and the sacrifice was an inability to spend time with his children, you might ask what is the equivalent sacrifice for a female barrister? Is it not to have children?

Equality before and under the law and equal protection and benefit of the law are central to the debate. If we keep this in mind we can ask what Dr. Sheilah Martin, Dean of Law at the University of Calgary, calls "How Could" questions.

How could a senior partner pander to the perceived prejudices of clients by withholding or withdrawing a file from a woman rather than defend the competence of a female colleague?

How can law firms hire out their own lawyers to draft employment equity policies when they have none themselves?

How could a conference panel on the changing demands faced by lawyers have only male speakers?

In a way it was easier to argue the case when the exclusion of women from the legal profession was categorical, total and formal. Today, aspects of exclusion are systemic, circumstantial and less formal and when blatant forms of discrimination become unacceptable, they often go underground.

The arguments against female lawyers have proven surprisingly durable or have been retooled for modern times. Biologically-based justifications still predominate and our biological capacity to procreate is too often reinterpreted and imposed as a limitation.

We are often told that we shouldn't complain because things are somehow better now. This is true in a limited sense but better is a relative concept. Better relative to what and to whom? Is the scale good, better, best, or is it something more like terrible, bad, less bad, almost good? The tardy removal of a limited number of the more obvious barriers is a very limited form of progress and, as Sheilah Martin asserts, lawyers would certainly counsel a client against accepting such a disadvantageous settlement if they truly believed that client had an entitlement, and this was all that was offered.

Many male lawyers who think that there are al-

ready enough women in the profession and that they have sufficient opportunity, may have internalised the 19th-Century cultural expectation that women are not supposed to be lawyers. If this is your starting point it is easier to claim that we should be thankful for the gains that have already been made and dismiss goals of numeric equality, structural change and full participation as an alarming set of circumstances which simply go too far.

Many male lawyers who think that there are already enough women in the profession and that they have sufficient opportunity, may have internalised the 19th-Century cultural expectation that women are not supposed to be lawyers.

Justice Rosalie Abella of the Ontario Court of Appeal says that equality is evolutionary and that what constitutes adverse discrimination changes with time, with information, with experience and with insight. People say "things are better now". They are. But the statement can be simultaneously self-congratulatory and renunciatory; taking the credit for changes but disclaiming the need for future struggle. Such statements are based on a preference for allowing equality to simply evolve with the passage of time, without further action or turmoil. Sometimes they are proffered as the reason why the profession can take a rest from reform and many of us ourselves may proffer them as a reason why we do not have to confront the reality of inequality, or take risks for other women by speaking out when we know there are real costs for doing so. If the operative belief structure is that generally there is sex equality in the profession, but a few problem areas remain, examples of existing exclusion will be defined and potentially dismissed as isolated exceptions to the general rule of inclusion.

SOME IDEAS TO FOSTER CHANGE

Don't resort to past practice

The only way a discriminatory past can contribute to an egalitarian future is if we learn from and refuse to repeat the lessons of history. We should therefore expect that the changes required to achieve genuine equality in the legal profession will be like nothing we have seen before, troubling as this is to a profession schooled in precedent. We must also be prepared for some suggested solutions not to work or to raise unanticipated problems. There is no simple solution, and those who foresee a one-shot remedy will not only be disappointed but may also unjustly label persistent equality-seekers as chronic complainers.

Operate as if we truly believe that women have entitlements in the legal profession

There is a tendency to characterise the unfairness in the profession as a women's issue rather than as a structural flaw. In attempting to make a case that exclusion continues we do so under the very conditions of sex inequality we seek to change, and this itself means that we are sometimes seen as less credible participants. Discrimination in the legal profession must be defined and treated as a problem of the profession rather than a problem of the women who suffer its consequences.

Attention should be focused on what is said, not how it's said

Too easily questions of voice and tone predominate. No good advocate wants to alienate his or her tribunal, but women who press for change are often labelled strident, shrill, angry or upsetting, adjectives which are never applied to women making the case for the status quo.

It is ironic that whilst the stereotype is that women are emotional, we are often denied the opportunity to express anger, especially on our own behalf.

Change requires individual action, personal responsibility and hard work

All that the passage of time will do is make us old. It is arguable that the participation of women has itself changed the structure of the profession's hierarchies, so that instead of rising to the top with time, the top is redefined to keep us out.

One of the hardest things for men and women to accept is that passive acceptance of a flawed status can contribute to the creation of disadvantage. The faces of gender bias are intensely personal ones. I suggest we must think systemically, but act individually. The law is essentially a self-regulating profession, and there are many people with the power to effect significant change, both by decision-making authority or moral persuasion. Every lawyer should have a personal commitment to equality.

Cardinal Newman, in a famous letter to the Duke of Norfolk, wrote: "I drink to the Pope — but to conscience first". May I follow his lead and say: "I drink to the Law — but to equality first".

The Hon. Justice Sally Brown

ROYAL ROAD TEST

The Greek mathematician, Euclid, was employed as a tutor of mathematics in the royal household. King Ptolemy I complained about the difficulty of the theorems that Euclid expected him to grasp, wondering whether there was not an easier way to approach the subject. Euclid gently reproached him: "Sire, there is no royal road to geometry".

Isaac Asimov's *Treasury of Humor* (1971)

THE SPRING 1993 EDITION OF *BAR NEWS* exhorted readers to undertake post-graduate legal education at the University of Melbourne.

As one who has "been there, done that" I can assure readers that the glory does not justify the pain. I well remember the proud moment I handed my Dad a bound copy of my Master's thesis: perhaps a small thankyou for all the years of cheque-signing that he had endured. He opened it to the title page, studied it briefly (it is a brief title page) and asked, "Does this mean that when you go to court for your clients, you can charge 'em more?"

"No, Dad, it doesn't."

With that he closed the volume and handed it back to me. Although he was a man of few words my Dad could be most eloquent with his gestures.

Given that the game is not worth the candle, is there an easier way? Notwithstanding Euclid, subject to cautionary notes there are several royal roads.

ADOPTING ANOTHER'S TOIL

As Nathaniel Hawthorne's son, Julian, was also a writer, father and son were frequently mistaken for each other. "Oh, Mr Hawthorne, I've just read The Scarlet Letter *[written by the father in 1850], and I think it's a real masterpiece," gushed a lady to whom Julian had just been introduced. "Oh, that," said Julian, shrugging modestly, "that was written when I was only four years old."*

Julian Hawthorne, *Nathaniel Hawthorne and his wife* (1884)

This one is fraught with peril — just ask the ex-partner in a leading Melbourne firm of solicitors who lost his practising certificate after the publication of two articles (one in the *Law Institute Journal*) that bore striking similarities with previously published (by others) articles. During its research into this incident those stickybeaks from the Melbourne *Age* found that there were also striking dissimilarities between the putative author's *curriculum vitae* and the official records.

For a similar offence (also committed in the pages of the *Law Institute Journal*) a member of counsel was fined $3,000 and ordered to pay costs by the Barristers' Disciplinary Tribunal. Why the disparate penalties? As one solicitor was heard to remark, "It's expected of barristers — they've never had an original idea".

However, worse than resignation (see next section), termination or monetary penalties is the prospect of criminal prosecution under sections 81 or 82 of the *Crimes Act*. In the late '80s a tutor and Ph.D. candidate at the University of Melbourne was so prosecuted. Apparently, he happened upon the happy circumstance that he shared an identical name with that of a Melbourne graduate (now a public servant in Canberra) and adopted his namesake's academic record. Consequently he graduated with a Master's degree from Melbourne and gained employment there as a tutor. His game came unstuck when he sought to enrol for a Ph.D. It appears that he was more than a competent tutor and his M.A. had been honestly earned — apart from the irregularity of his not having graduated with the pre-requisite Bachelor's degree.

SHONKY QUALIFICATIONS

In addition to the *Age* research noted above (obviously the newspaper is overstaffed for them to have the resources to compare claimed with actual qualifications) the following are given by way of examples.

In 1993 the Law Institute of Victoria applied to the Supreme Court to have a practitioner's name removed from the Roll of Barristers and Solicitors. While the practitioner did not oppose the application, he maintained that his U.K. legal qualification was kosher. With some glee, *The Age* (again!) noted that the practitioner had lectured at the Victorian Police Academy.

In 1986 Canada abolished the rank of Queen's Counsel — on the basis that it was meaningless as it was conferred as of right upon request to any practitioner of ten years' standing. In fact, some highly-experienced and well-known advocates had refused to seek silk as a point of honour. Some bright entrepreneur hit upon the idea of producing

for sale, at $5 a pop, a Q.C. certificate (standing for "quality chap" or "quality conversationalist" or somesuch in fine print). A university contemporary of this writer, while pursuing post-doctoral research at the CITA in Toronto, lashed out $5 and sent me one of these certificates. The last I saw of it, it had been commandeered by several of the wags who then had chambers on the same floor as mine.

Late last year, the chief of Research and Information Technology at Telecom resigned five weeks into his new job after doubts were raised about the authenticity of his qualifications. He also resigned his part-time position as senior associate at the University of Melbourne's Graduate School of Business citing "other commitments".

Conrad Black's recently published *A Life in Progress* (1993) makes snide references to the doctorate conferred upon his publishing rival, Dr. Tony O'Reilly. According to Black, Dr. O'Reilly is equally contemptuous of his own doctorate.

The Federal Government-encouraged amalgamation of tertiary institutions saw the Warrnambool IAE absorbed by Deakin University. A Warrnambool lecturer of twenty years' standing applied for the post of professor in the newly-enlarged university. After he missed out, he appealed and was successful. This apparently put some noses out of joint and these funny-nosed persons began to delve behind the professor's *cv*. As a consequence the professor retired "for personal reasons" and the two years he had put into his Ph.D. at the University of New England were lost when that body expelled him from his candidature after an investigation into his enrolment in the programme without holding any degrees.

In 1990 a Deputy Registrar of the High Court left without even submitting a resignation after only one week's employment. She had been recruited from the Department of Health where, it seems, she had had a job in advisings. Her new boss had asked her to produce her qualifications and her certificate of honourable discharge from the armed forces. For various, and varying, reasons she failed to produce them. When he insisted (on their production) she came in early the next day, cleaned out her desk and departed. It seems her armed forces experience was with a captain in the regular army. But she never did produce her LL.B. from the Northern Territory which had only commenced its first-year intake that year and whose graduates are only now coming on stream in 1994 and 1995.

FAKING RESEARCH

The English magazine *New Scientist* asked its 70 000 readers in 1978 if they knew of or suspected any cases of "intentional bias" [a euphemism for scientific fraud]. Some 204 [completed] questionnaires were received, one purportedly from a laboratory rat.

The recent downfall of Dr. William McBride of Sydney is well known. A recent scandal at Deakin University saw the retirement of a professor who allegedly substituted his fertile imagination for laboratory experiments relating to the contraceptive pill, the research being funded by the manufacturer. Kohn (*False Prophets: fraud and error in science and medicine*, 1986) and Broad and Wade (*Betrayers of Truth: fraud and deceit in the Halls of Science*, 1982) provide other examples including Mendel, Newton and (perhaps) Claudius Ptolemy while Bell (*Impure Science: fraud, compromise and political influence in scientific research*, 1992) relates the tarnishing of the reputation of the 1975 Nobel laureate Dr. David Baltimore.

Such faked research reminds one of the old saw (here taken from Isaac Asimov's *Treasury of Humor*, 1971):

University President — Why is it that you physicists always require so much expensive equipment? Now the Department of Mathematics requires nothing but money for paper, pencils, and erasers . . . and the Philosophy Department is better still. It doesn't even ask for erasers.

The last word perhaps belongs to Sir Josiah Stamp of the British Inland Revenue Department (1896–1917):

The government are very keen on amassing statistics. They collect them, add them, raise them to the n-th power, take the cube root and prepare wonderful diagrams. But you must never forget that every one of the figures comes in the first instance from the village watchman, who puts down what he damn pleases.

NEPOTISM HELPS

I can't see that it's wrong to give him a little legal experience before he goes out to practise law.

President John F. Kennedy on being criticised for appointing his brother Robert as Attorney-General (1961)

Consider the following entry from the 1988 edition of *Who's Who in Australia* (page 166). The entry is absent from subsequent editions.

CADMAN, Glennis William Silbert, Company Director; son of G S Cadman; *b.* June 6, 1934; *ed.* Surrey Hills State Sch, Box Hill H Sch, Swinburne Tech Coll, Richmond Tech Coll; Dir Cadman/Hill Consultg Servs since 1987, Flat-Mates since 1987, Nova Home Maintenance since 1986, Namdac Cleaning and Property Maintenance P/L (formerly Namdac Cleaning Services) since 1986, Joint Proprietor Namdac Cleaning Servs 1983–86, Works Mgr DPC Cleaning Servs, Dandenong Cleaning Servs 1971-83, Joint Partner Compass Cleaning 1961-71, Motor Mechanic 1954–61; Mgr Kinglake Property Dev since 1987, State Treas Vic AFS Australia 1984–85, Treas Waverley Chapter 1984–86, Memb since 1983, Club Champion Surrey Hills Bowls Club 1981, Pres

1979–80, Memb Cttee 1964–82; *m* (1) 1957, Beverley (dec 1981) 2s 2d (2) Dec 10, 1982, Kerith d J S Harper; *recreations*, bowls, swimming, camping; *club* Waverley RSL; *address* 6 Dorset Street, Glen Waverley Vic 3150.

Mr. Cadman's second wife is one Kerith Cadman. The editor of the 1988 edition is also one Kerith Cadman. Mr. Cadman's entry in the *Australian Who's Who* ceased when Kerith Cadman ceased to be editor of the volume.

The remarkable aspect of this entry is the wholly unremarkable nature of the accomplishments of the biographee — let's face it, back in 1952 I played the part of the hindquarters of a donkey in that year's Christmas Nativity play put on by the Lake Buloke Sunday School. Why has Mr. Cadman been accorded an entry? "Why is it so?" as the late Professor Julius Sumner Miller was wont to ask.

The answer to these questions may lie on the title page of the 1988 edition. Dear readers, please refer back to the entry. Mr. Cadman's second wife is one Kerith Cadman. The editor of the 1988 edition is also one Kerith Cadman. Mr. Cadman's entry in the *Australian Who's Who* ceased when Kerith Cadman ceased to be editor of the volume.

WRITE YOUR OWN TICKET

Thomas Hardy was responsible for the ultimate authorised biography — he wrote it himself, and had it published under another name.

Hamilton, *Keeper of the Flame* (1993)

The following examples may well assist the noted Australian playwright David Williamson who is on record as complaining that his recent works have received excessively harsh criticism — write your own reviews! The number theorist and mathematics historian Eric Temple Bell was also a prolific author of science fiction under the pseudonym John Taine and in 1951 Taine wrote a glowing review of Bell's text *Mathematics, Queen and Servant of Science.* Taine concluded his review by writing "the last flap of the jacket says Bell is perhaps mathematics' greatest interpreter. Knowing the author well, the reviewer agrees."

Perhaps even better was the New York lawyer Arthur Train, who wrote a number of supposedly autobiographical books by the old-fashioned and gentlemanly Ephraim Tutt. Nowhere on these books did Train's name appear and Train's publisher only narrowly averted the inclusion of an entry on Tutt which had been solicited by the American publisher of *Who's Who* and gleefully supplied by Train. In 1943 Train reviewed in the *Yale Law Review* (vol. 52) his own book *Yankee Lawyer: the autobiography of Ephraim Tutt.* The review was laudatory and closed with the reviewer paraphrasing Voltaire's aphorism: if Mr Tutt did not exist, it would be necessary to invent him.

One of the complaints levelled by Williamson and others of the current Australian literary scene is the coterie of writers reviewing each other's work in glowing terms in return for an equally glowing review when the roles are reversed. They do not follow the example of the U.S. Supreme Court Justice Hugo Black who, when invited to write an article about fellow Justice William Douglas in 1958, declined, writing "our views are so nearly the same that it would be almost like self-praise for me to write what I feel about his judicial opinions".

Kohn (*False Prophets: fraud and error in science and medicine*, 1986) suggests that the discredited psychologist, Sir Cyril Burt, in addition to faking his data, wrote favourable reviews of his own work under the pseudonyms Miss Margaret Howard and Miss J Conway.

ADOPTING ANOTHER'S PERSONA

It was, however, in the matter of religious — or irreligious — eccentrics that the credulity of the Christchurch people was most made manifest. The most remarkable of these was a man named Arthur Bentley Worthington. He called himself at first "Dr" Worthington, and let it be understood that he was a Doctor of Laws from an American university. At other times he was "Counsellor" Worthington, a member of the American bar; but he could produce no diploma of proof of these qualifications, and as persistent questions began to be asked about them, he dropped them and allowed them to be forgotten, because he had very soon made them unnecessary. Before he had been many months in Christchurch he had firmly established himself in the hearts of hundreds of people as a Prophet of Righteousness.

Alpers and Baker, *Confident Tomorrows: a biographical self-portrait of O.T.J. Alpers* (1993) 35

It was a decade ago that there were two members of the Victorian Bar sharing the same surname. Early one evening the St Kilda constabulary happened upon the first in a public convenience. Upon being asked to provide his name he adopted the per-

sona of the second. There were those at the Bar, including the second, who thought this was poor form on the part of the first. Needless to say only the second remains a member of the Bar. For once the details were not reported by our friends at *The Age* and it was left to those doughty propagators of the truth from the *Truth* to enlighten its readers.

It so happens that at about that time a member of the Bar spent the mid-year Legal Vacation in old Blighty (remember, this was back in the days when it was possible to make a living at the Bar and even undertake overseas holidays). Upon being invited to an evening soiree our tourist friend was astonished to meet the erstwhile member decked out in the garb of a middle-ranking member of the Anglican clergy. Our tourist friend was implored not to give away the erstwhile member. There should have been no concern. Our tourist friend was speechless from stupefaction and entirely incapable of unmasking the erstwhile member.

It was at that time that this writer proclaimed his satisfaction at being the only representative of the Briefless clan at the Bar and his resolve to formally change his name to Aaron Aardvark should any other person bearing his surname join the Bar.

VANITY PUBLISHING

Henry David Thoreau's A week on the Concord and Merrimack Rivers *did not sell. Eventually his publisher, who needed the space, wrote to ask Thoreau how he should dispose of the remaining copies. Thoreau asked that they be sent to him — 706 copies out of an edition of 1 000. When they arrived and were safely stowed away, Thoreau noted in his journal, "I now have a library of nearly nine hundred volumes, over seven hundred of which I wrote myself."*

Journal (October 27, 1853)

Some members of counsel may have been the lucky recipients of correspondence recently from the International Biographical Centre which boasts a Cambridge (U.K.) postal address and has adopted on its letterhead and seal a representation of King's College Chapel of Cambridge University. The physical location is noted (in very fine print) as Ely, Cambridgeshire, some 16 or 17 kilometres distant from Cambridge. No doubt, on a clear day, with acute eyesight and presumably a highly elevated viewing platform, one can make out the dreaming spires of Cambridge from Ely, Cambridgeshire.

Their initial correspondence of October 1993 invited the addressee to "take [their] place among [the] pages" of the Eleventh edition of the *International Who's Who of Intellectuals* (in preparation).

Of course the publishers limit the inclusion of entries only to "the world's most notable intellectuals" who "are selected because of their particular achievements and contributions to humanity, as well as reputations within artistic, academic and business fields. Invitations are issued ONLY after the most careful consideration by our editors and researchers. You are one of the very few who warrant inclusion into this much coveted title. It is hoped that you will except this honour." It is noted that this spelling of "accept" is not excepted by the *Oxford English Dictionary* which is of course published in a place other than Cambridge.

Of course it goes without saying that inclusion into this much coveted title is dependent upon sufficient gullibility to outlay the purchase price of a copy of the eleventh edition of the *International Who's Who of Intellectuals*:

- US$235 for the Standard Edition (payable in advance);
- US$380 for the Luxury Edition (leather with gold embossing); and
- US$595 for the Royal Edition (limited to 100 copies bound in real leather with gold embossing).

The distinction between real leather (Royal Edition) and leather (Luxury Edition) is not explained in the invitation.

Included in the subscription price is a fancy Certificate of Inclusion — FREE OF CHARGE and hand-inscribed on parchment by IBC's calligrapher "highly suitable for framing and hanging on a wall in home or office".

To allow invitees to see what they get for their money the accompanying brochure includes a Sample Biography of an Intellectual as it appeared in the Tenth Edition. There follows an entry for the Headmistress of the New England Girls' School, Armidale, N.S.W.: Mrs. Anna Leonie Abbott. Given that Mrs. Abbott is a real person and real headmistress of the real NEGS (as reported by one of the writer's underpaid spies on the University of New England campus) it is not proposed to reprint Mrs. Abbott's entry from the tenth edition as it is felt that she has already been sufficiently punished for her vanity in that her entry was published in the tenth edition and is now being used to tout for subscribers to the eleventh. What is not clear is, having made the tenth edition as an intellectual, is Mrs. Abbott included in the eleventh edition as a matter of course or does it require a further subscription to the eleventh edition? Does a failure to subscribe to the eleventh edition mean that the status of intellectual accorded in the tenth edition is lost?

The next lot of correspondence from IBC in December 1993 solicited from the addressee assistance in compiling further IBC publications. In return for providing 250 names and addresses of individuals suitable for inclusion in their future titles,

the Editor, one Jocelyn Timothy, will create the provider as an Honorary Research Associate of the IBC. Of course, to be so elected, the electee must contribute (in addition to the 250 names and addresses) US$175 *to be used solely for biographical research* (emphasis in original). US$770 will see the contributor created as a Research Fellow. Both contributions are acknowledged by another fancy certificate proclaiming "internationally, after a careful study of thousands of portfolios, that John A Gullible has been elected unanimously as a Research Fellow of the IBC in recognition of outstanding services to biographical research".

DO IT YOURSELF (as recommended by Prince Lorenzo)

Oh Lord it's hard to be humble when you're perfect in every way
I can't wait to look in the mirror 'cos I get better lookin' each day
To know me is to love me, I must be a hellava man
Oh Lord it's hard to be humble, but I'm doin' the best I can.

It's hard to be humble (words and music by Mac Davis)

Just in time for last Christmas an advertisement appeared in the *Age* offering "a limited opportunity to acquire an Honorary Doctorate" and depicting, in half-tone, a man in tie, gown and mortar board holding a rolled-up diploma. To be fair to the advertiser, the ad did state that "Honorary qualifications are NOT an academic passport . . . ."

Having sent off the completed coupon I received a letter from Alex Kharitonov, Deputy of International Parliament for Safety and Peace, Honorary Doctorates Department congratulating me on meeting the basic criteria illustrating the leadership achievements of a select group of Internationally influential people (Heck! all I did was complete the coupon and despatch it with a 45 cent stamp - being too embarrassed to send it off through my clerk's office).

For a fee starting from US$5,000 (payable to Transglobal Immig. Agency) I can have the pick of:

1. The Order of the Temlars (Medal)
2. General Knighthood (Medal for Life)
3. The Order of San Circiaco
4. The Order of the Circulo de las Caballeros Universales
5. The Beethoven Medal
6. The (personalized) Albert Einstein Medal
7. Wilson International Des Intellectuels (including buttons for my coats)
8. Institute des Affaires Internationals Diploma d'Honerus
9. Academia Argentina de Diplomacia Honor Diploma, and (sorry ladies, but this one is only for gentlemen):
10. Captain of the Traditional Legion de L'rigle de Mer

If I am prepared to lay out US$7,000 I am competent for one of the following Honorary Doctorates:

11. Doctorate Bodkin Bible Institute
12. Doctorate Christian Congregation
13. Doctorate Universal Church
14. London Institute for Applied Research
15. International University, Bombay, India
16. University Sancti Spiritus, California

US$8,000 will be acknowledged by one of the following Honorary Professorships:

17. Australian Institute for Co-ordinated Research
18. High School of the Rupac (Alliance Universalle de la Paix) Paris
19. Institute European de Documentation, Brussels
20. Institute des Hautes Etudes Economiques et Sociales, Brussels
21. Institute d'Enseignement Technique Superieur, Brussels
22. Academie des Sciences Humaines Universelles, Paris

However, real patrons wishing to benefit mankind will receive one of the following knighthoods (in return for US$10,000):

23. Baron of the Order of the Bohemian Crown
24. Knight of the Lofoensic Ursinius Order, Germany
25. Knight of the Order of the HTE Holy Grail
26. Knight of the Italian Order of San Ciriaco
27. Knight of the Spanish Order Circulo Nobilario de las Caballeros Universales
28. Knight of the Holy Cross of Jerusalem
29. General Knighthood (Merit for life)
30. Knight of the Order of the Templars

Accompanying the letter of congratulations there is a two-page application form and four further pages depicting the various medals and certificates available.

The applicant is required to state Professional and Parliamentary activities, Social and Military offices, academic degrees and "State, Governmental and Knightly Awards." Given that Edward III instituted the Most Noble Order of the Garter in 1348 and it being rumoured that the Prince of Wales intends instituting a similar Order of the Tampon upon accession to the British Throne, there should be no surprise at being requested to provide details of any knightly awards the applicant may have received.

Less than a month passes and a breathless missive from the CEO ARO IRSP (Peter Lion) seemingly offering a discount of US$1,000 on the above-quoted prices if the recipient forwards the full amount within five days.

Another two weeks passes and Mr. Lion, now the CEO of IPSP, sends the following (which is not

the result of the notorious *Bar News* proof-reading):

DEAR SIR,

WE ARE VERY PLEASED TO HAVE SUCH A DISTINGHISHED APPLICANT LIKE YOURSELF AND, THEREFOR BASED ON INFORMATION AVAILABLE TO US, DECISION HAS BEEN MADE BY OUR CHAIRMAN TO GRANT A HONORARY DEGREE OR OTHER AWARD TO YOU.

PLEASE,DON'T HESITATE TO SEND TO US YOURS COMPLETED APPLICATION FORM TOGETHER WITH 2 PHOTOS AND A BANK CHEQUE.

YOUR AWARD(DEGREE,CERTIFICATE), IN ADDITION TO ALL USUAL SEALS AND SIGNATURES, WIIL **BEAR A SEAL FROM THE RELAVANT DEPARTMENT OF THE DUCTH GOVERMENT AND THE REGISTRATION NUMBER** AND WE DO HEREBY FOR FORMALLY STATE AND **IRREVOCABLY CONFIRM AND GUA**RANTEE WITH FULL LEGAL RESPONSIBILITY,ACTING UNDER PENALTY OF PERJURY,SUBJECT OF RECEIPT FROM AN APPLICATION FORM AND FUNDS,THAT WITHIN 5 WEEKS THEREAFTER ALL THE DEGREES(AWARDS,HONORS) WILL BE DELIVERED TO YOU BY CERTIFIED MAIL.

SHOULD YOU HAVE ANY FURTHER QUESTIONS,PLEASE DO NOT HESITATE TO CONTACT US.

YOURS FAITHFULLY,
IPSP
PETER LION
CEO

THE PROLIFERATING PROFESSORS

[Lord Rutherford, Cavendish Professor, Cambridge and Nobel laureate in Chemistry, 1908] was actively hostile to the commercialization of scientific research, telling his Russian protege Peter Kapitza, for example, when Kapitza was offered consulting work in industry, "You cannot serve God and Mammon at the same time".

Davies, *The Martin Committee and the Binary Policy of Higher Education in Australia* (1989) 44

Today, not counting emeritus ("retired with great honour") there are more professors in Australia than there are professorial chairs in institutions of higher learning. This is fine while the music is in full swing but when it stops there will be a mad scramble for too few seats.

Why is this so? Why doesn't Professor Fels of the Trade Practices Commission prosecute chairless professors for breaches of the *Trade Practices Act*? Why doesn't the DPP prosecute them for theft of university chairs?

It's like this — a real professor occupying a real seat of learning at a real university calls a press conference. After serving God for many years the professor is fed up with his recently-graduated students, snot-nosed pimply-faced boys all of them, paying more in income tax than he receives in gross salary. He has called the press conference to announce that he is forsaking God for Mammon and has joined a mega-firm of solicitors as a senior partner.

This is all very well, but the professor wishes to retain the cachet of the title "Professor" and he can't take it with him - the university wishes to seat his successor in the chair. Thanks to John Dawkins's term as the Federal Minister for Education there is a whole slew of new universities that only a few years ago gloried in the name, style and title as the Koo-wee-rup College of Domestic Economy or somesuch. It is a marriage made in heaven. The new university desires the respectability of association with a respected academic and the new senior partner retains his title even if he is only a "visiting" professor.

Today, not counting emeritus ("retired with great honour") there are more professors in Australia than there are professorial chairs in institutions of higher learning.

This is not for us to carp at — the rot set in years ago when the first Chairman of the National Crime Authority insisted on retaining the privileges of judicial office, forcing the then Government to offer a Federal Court position to induce the first Chairman to relinquish his place on the N.S.W. Supreme Court bench. So much for judicial independence. Those of us who bemoan the crumbling concept of such independence were strangely silent only so few years ago.

Brien Briefless
Master of Jurisimprudence
The Benjamin Boothby Professor of Constitutional Law
Yalla y poora Mechanics' Institute and Lending Library

A BIT ABOUT WORDS

"'When I use a word,' Humpty Dumpty said in a rather scornful tone, it means just what I choose it to mean, — neither more nor less'." (*Through the Looking Glass*, chapter 6).

That notion works not only for Humpty Dumpty but for all of mankind. Most words begin life with a meaning which is clear, well-defined and demonstrable. Some are eventually mis-read, misunderstood or misprinted and take on a new life, and a meaning which bears no relation to their origins. Two distinct branches of this phenomenon can be identified.

The first is *mumpsimus*. *Mumpsimus* refers to a word which has been distorted by some accident and has adopted either a new form or a new meaning (or both). *Helpmeet* is one example. It is the product of a wrong hyphen in Genesis ii.18, in which God decides to "make an help meet for him" (Adam). *Meet*, in the context, means "suitable". In some translations, it is written "an help answering to him". An inadvertent 17th century hyphen produced *help-meet*, and a new word was assumed and invested with meaning. An accident of typesetting, it is etymological nonsense, but it endures.

Also from the Bible comes *scapegoat*. It is a genuine word, but its meaning has never accorded with the sense in which it was coined. It is exclusively used in its spurious sense. In Leviticus xvi.8 Aaron offers the Lord two goats. He casts lots on them, one for the Lord and the other for a scapegoat (i.e. a goat to escape, to be freed). The Lord's goat is killed (verse 15) and the scapegoat is released into the wilderness (verse 10). So, originally it was the scapegoat which survived; now it is otherwise.

Psychological moment is an example of a related process. We adopted it (mistakenly) to mean a decisive instant, a critical time. We then eroded it until the received meaning is now "the nick of time". All quite mistaken. In 1871, during the Franco-Prussian war, the Prussian forces were poised to bombard Paris. The *Kreuz* newspaper referred to the proposed bombardment, and to "das psychologische Moment" of that bombardment.

German grammar recognises three genders. "Der Moment" (masculine) means "moment" or "second". "Das Moment" (neuter) means "momentum". So, *das psychologische Moment* means "psychological momentum" — the likely effect the bombardment would have on French morale.

Appropriately enough, we get the expression via the French "moment psychologique". Understandably, the French use it as meaning "the moment in which the mind is in actual expectation of something that is to happen". So it must have been in 1871. By this accidental path we got an expression which does not mean what it should, but serves a useful purpose nonetheless.

Tweed comes from a misprint. The cloth was called *tweel* (Scottish dialect for *twill*). In 1831, a Scottish cloth merchant's catalogue misprinted it as *tweed*. By chance, the principal cloth-weaving area of Scotland is in the region of the River Tweed. By association of ideas, the misprint stuck. Humpty Dumpty would have been proud.

Syllabus is another product of a misprint. In Cicero's letters to Atticus, he refers to *sittubas*, which is the accusative plural form of *sittuba*, a title slip or label which identifies the contents of a manuscript. In a 1470 edition of Cicero, it was misprinted as *syllabus*. Although it is a Greek plural, it looks like a Latin singular; so it is now used in the singular and given a Latin plural: *syllabi*. This has the double disadvantage of being both ugly and misconceived. It is too late to insist that *syllabus* is not singular; but *syllabuses* is to be preferred for the plural.

Although it is irrelevant to the theme of this article, plurals of imported words bring out the best and worst in English speakers. *Octopus* is often heard in the plural as *octopi* — this, presumably, as a display of classical erudition. But *octopus* is not Latin, it is Greek ("eight foot"). The Greek plural is *octopodes*, as in *antipodes* ("other feet," meaning the opposite side). Since we have adopted the word so completely, we should give it an English plural: *octopuses*.

* * * * * * * *

The second branch of the phenomenon is the ghost word. These rare creatures haunt dictionaries for a time; occasionally they escape into the real world; they differ from mumpsimus only in this, that they are created by lexicographers, and when they are exposed they generally fade away.

Dord was, for a time, defined in Webster (1934) as meaning "density in physics or chemistry". It was entirely wrong: a typesetter had misread "D or d, density in physics or chemistry". It is seen no more.

Howl was for a time picked up in dictionaries as a Scottish spelling of *hovel*. That was almost right, but not quite. The dialect word is *howf* or *howff* — defined by the second edition *OED* as "a place of resort, a haunt, a resort". (Curious that it should be a haunt: it gave rise to a ghost word, and is also the name of the burial ground at Dundee). *Howf* was thus understood as a place where people lived; it appeared to be related to *hovel*; the English lexicographers have a tradition of disdain for the Scots; and a typesetter got it wrong. So *howl* roamed the dictionaries for a time as a crude dwelling house.

Samuel Johnson enlivened his many triumphs with some spectacular blunders. (Asked once why he had defined *pastern* as the "knee" of a horse, he replied "ignorance, madam, pure ignorance". And for his attitude to the Scots, see his definition of "oats"). He is the father of a ghost word: *foupe*. His *Dictionary* describes it as follows:

> to FOUPE v.a. To drive with a sudden impetuosity. A word out of use.
> 'We pronounce, by the concession of strangers, as smoothly and moderately as any of the northern nations, who *foupe* their words out of the throat with fat and full spirits' Camden.

Well, he was partly right — it was certainly out of use; it had never been in use. The word as printed in Camden was *soupe* (with the archaic long form of "s," the mistake was easily made). It is a dialect word with a meaning akin to *swoop*. Dr Todd's edition of Johnson (1818) spotted the error and left it there, but pointed it out. The *OED* second edition also records it. (It does not record *Dord,* but that was an American mistake.) It identifies it as an error for *soupe*. Being thus exposed as a ghost, but recorded anyway, makes *foupe* a shadow of a ghost: unique so far as I know.

Most ghost words are ephemeral; but during its brief existence in Johnson's London, *foupe* was exported to Barbados. Presumably it went there as part of sailors' cant. However that may be, it came into use in Barbados, meaning the rollicking copulation of animals (not humans). It is the sort of word politely castigated by dictionaries as (vulg.) or (not in polite use). It is seen in the ad hoc social comments of graffiti artists and other nostalgic philologists, 200 years after its chimerical parent faded away in England. If Barbadians compile a dictionary of their language, *foupe* will presumably materialise there, and will join *syllabus* as a ghost legitimised at last.

Julian Burnside

OBJECTIVITY AND THE EXPERT WITNESS

[Henry Herzog is a consulting engineer with whom many members of the Bar will be familiar. He is a regular attender at court in the role of an expert witness. In the paper set out below he provides a view from the other side of the fence.]

COURTS OFTEN ASK EXPERTS TO PROVIDE opinions as to what was the probable cause of an event so that the courts can reach decisions. However, there are occasions when the probable cause cannot be determined.

The discussion of one particular outcome as being more probable than another can have objective connotations when, in fact, it may be quite subjective. Conclusions containing probability terms are reached either because probability theory was used, or because there was a lack of the information necessary to reach an objective conclusion. In the former case, the circumstances and conditions under which the conclusion was reached need to be such that the application of probability theory was appropriate. In the latter case, it is essential to ascertain both why an objective conclusion could not be reached, and what subjective reasoning the expert used. For predictions of outcomes to be objective, the appropriate laws of nature must be applied in the appropriate ways.

I intend to present a brief and simple description of what I mean by the laws of nature and how probability theory should be used in forensic science.

THE LAWS OF NATURE

The expression "the laws of nature" is used to describe generalisations as to how physical things behave. These "laws" are often expressed in the form of mathematical models which equate certain properties of a system to other properties of that system. The laws of nature can, if the initial condition or state is known, be used to predict outcomes of future events to within certain degrees of accuracy.

The laws of nature of which I speak are causal laws and they can be used to predict how the properties of a system change when that system is subjected to particular changes. They can, for example, predict the increase in temperature required to boil a particular liquid, or the increase in force required to blend or break a piece of steel.

Physical laws of nature, such as Newton's laws of motion, relate various properties of a system to other properties of that system.These properties are variables and if certain variables are unknown, then, depending on the relationship, the outcome cannot be determined. Similarly, one cannot determine the value of a particular angle inside a triangle

without knowing other dimensions required to satisfy the rules of geometry.

Since these laws of nature are causal, by definition they describe the world as being deterministic. In fact, up until the emergence of quantum theory, in the 1920s, the world was viewed by scientists as being completely deterministic. By "deterministic" I mean that if you know the state of a system, for example, the position and motion of a particle, that is, where the particle is and what it is doing, at any particular time (the initial state), you can then determine, by applying the appropriate laws, its state at a later time.

However, the laws of nature are not absolute, and have time and time again been shown to be approximations. Einstein's theory of relativity showed Newton's laws to be approximations; and when quantum theory was developing to describe the behaviour of much smaller particles, such as atoms, electrons and the like, it was discovered that the state of those particles could not even be measured, and causal laws were useless.

The laws of nature are approximations. But, when used in their proper context, they work extremely well and can provide meaningful and objective results.

PROBABILITY THEORY AND THE LAW

In the large classical world where one can measure the required properties of particles and systems, one should not have to express opinions in probability terms. If one does then those opinions must be qualified. It is only when outcomes have certain calculable probabilities of occurring, such as in the throwing of dice, that probability terms can be used in an objective way.

Probability theory is used to determine the likelihood of a particular event occurring when certain information about that event and the system in which that event occurs is known. One example is determining the probability of a number coming up in the throwing of a dice. The probability of a six coming up in the throwing of a dice is 1 in 6 — in fact, the probability of any particular number coming up in any one throw is 1 in 6 —. That is because the dice is finely balanced and all the numbers have an equal chance of coming up. If the dice is thrown a dozen times, the probability of any particular number coming up does not change and that is because each throw is independent of any other throw. However, the probability of six coming up both times in two throws of the dice is much less, namely 1 in 36. Here we have a different situation in which we connect the two events, and for every number of throws the probability of having one number, or any other selected number, come up each time is the number of possible outcomes of the thrown dice to the power of the number of throws; that is, 6 to the power of 2 is 36.

To express opinions in probability terms the conditions of the system must follow the rules of probability theory. If the dice is not balanced the above theory no longer applies, and one number will have a propensity to come up every time the dice is thrown.

As stated, probability terms can only be objective when there are certain calculable outcomes. A malfunction in a mechanical system will occur for a reason and not by some freak of nature. Nor are there any probabilities associated with it malfunctioning. If there was nothing wrong with the system then there would not have been a malfunction.

Let us consider such an example. Passenger elevators are required to be designed and built so that the lift doors at any floor will not open unless there is a lift car at that floor If a situation arises where the lift doors open without a lift being present then clearly something has gone wrong. If no evidence has been found to identify the exact cause of the malfunction, no objective opinion can be expressed as to the probable cause.

To have a lift system in operation involves different parties in the design, manufacture, installation and maintenance of the system. There will also be other parties who designed, manufactured and supplied the components selected for the manufacture of the lift system. Unless the cause of the malfunction is identified, no one party can be held more responsible than any other party. Let us say that during the soldering in of an electrical component an insulated electrical wire of another component was accidentally heated. (There are electrical installation materials which produce hydrochloric acid when heated to a particular temperature.) The hydrochloric acid produced in the unnoticed incident causes the wire to corrode and, as a result, a fault develops which ultimately causes the malfunction. Unless the precise cause is identified, no objective opinion as to the cause can be given.

In another case the prosecution's expert presented findings from microscopic examinations which identified cuts in electrical wires taken from a letter bomb as being made by a pair of wire-cutters found at the defendant's home. That expert aligned the wires from the letter bomb and wires cut by that pair of wire cutters in a particular orientation so that most of the features of the two cut surfaces looked the same. However, when those wires were viewed from different angles they looked quite different. Also because particular features of the cuts on the wires from the letter bomb could be reproduced by another instrument, namely a paring knife, which were different to the cuts produced by the defendant's wire-cutters (wire cuts produced with the subject wire-cutters were similar to the features on cuts of other wires also found at the defendant's home), it was concluded that there was no connection between the cuts in the wires contained

in the letter bomb and the defendant's wire-cutters. In this case there was no need to express findings in probability terms. All the required information to form a definite and objective conclusion was available. However, the prosecution's expert limited himself to selected information and, therefore, could not draw such a conclusion.

CONCLUSION

The laws of nature have been discovered as a consequence of man's need to understand his world. These laws are a concise collection of facts and descriptions from which outcomes, to certain degrees of accuracy, can be determined. However, on occasions no reliable outcomes, not even probable ones, can be determined; and sometimes conclusions cannot be more definite than predictions of the outcome of the throwing of a perfectly-balanced dice.

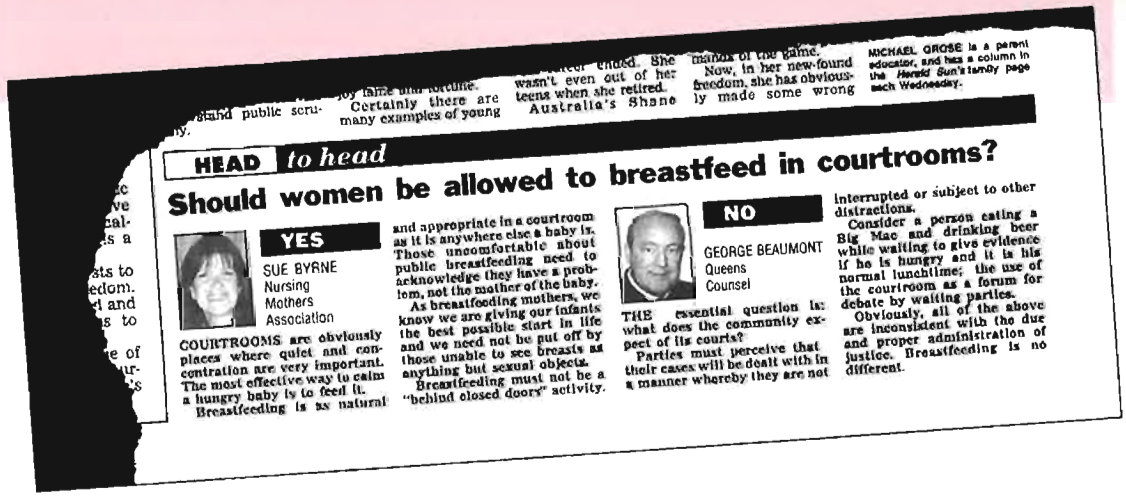
Neils Bohr, who in 1913 developed the first quantum picture of the atom, once said that a person should not express himself more clearly than he can think. Applying this principle to experts, they should not, when using subjective input in their evidence, express themselves in terms which appear to make their conclusions absolute.

Evidence which is expressed in probability terms needs to be fully explained so that the court knows whether the conclusions are based on the correct use of probability theory, or whether there was limited information used, and this prevented the expert from reaching an objective conclusion.

If the legal profession has a better understanding of the laws of nature and probability theory it could only benefit practitioners and the courts in giving their clients better advice and the courts assistance in resolving disputes.

Henry Herzog

WHAT DID GEORGE SAY?



wasn't even out of her teens when she retired. Australia's Shane

Now, in her new-found freedom, she has obviously made some wrong

MICHAEL GROSE is a parent educator, and has a column in the *Herald Sun*'s family page each Wednesday.

Certainly there are many examples of young

HEAD *to head*

Should women be allowed to breastfeed in courtrooms?

YES

SUE BYRNE
Nursing Mothers Association

COURTROOMS are obviously places where quiet and concentration are very important. The most effective way to calm a hungry baby is to feed it. Breastfeeding is as natural and appropriate in a courtroom as it is anywhere else a baby is. Those uncomfortable about public breastfeeding need to acknowledge they have a problem, not the mother of the baby.

As breastfeeding mothers, we know we are giving our infants the best possible start in life and we need not be put off by those unable to see breasts as anything but sexual objects.

Breastfeeding must not be a "behind closed doors" activity.

NO

GEORGE BEAUMONT
Queens Counsel

THE essential question is: what does the community expect of its courts?

Parties must perceive that their cases will be dealt with in a manner whereby they are not interrupted or subject to other distractions.

Consider a person eating a Big Mac and drinking beer while waiting to give evidence if he is hungry and it is his normal lunchtime; the use of the courtroom as a forum for debate by waiting parties.

Obviously, all of the above are inconsistent with the due and proper administration of justice. Breastfeeding is no different.

Q. SHOULD SILKS BE ALLOWED TO BEAT THEIR BREASTS IN COURTROOMS?

A. "YES."

1. The essential question is: What does the client expect of its Silk? Clients perceive that their cases will be dealt with by their Silk in a manner whereby the opposing side is frequently interrupted and subjected to as many irritating distractions as the Judge will allow.
2. Where possible, the Silk should eat a big Mac and drink plenty of beer while waiting to cross-examine opposing witnesses. If the Silk is hungry and it is his normal lunch time then he should go and eat at his favourite restaurant. The court-room is ordinarily used by Silks as a forum for debate and to annoy the opposing parties.
3. Obviously all of the above is inconsistent with the due and proper administration of justice but breast-beating by Silks should be considered something different: it is a hallowed tradition of the Victorian Bar.

George Beaumont,
Queen's Counsel

NO NEED TO GREET THE JUDGE

THE LATE SIR EUGENE GORMAN WAS known as "Pat" at the Bar. He was awarded the Military Cross in World War I and was a Brigadier in charge of the Comforts Fund and later the Repatriation of Prisoners of War in World War II. He did not return to the Bar after 1945 having vowed that he would not practise after he turned 50. Between the wars he became a legendary figure as an advocate sporting, as he did, a remarkable command of the language and a brilliant capacity to draw on his prodigious reading. He was a Silk in the '30s at the same time as Wilbur Ham and R.G. Menzies.

There are many stories about Pat Gorman, most of which he told himself. One of them, which he was prone to repeat, was the way he persuaded reluctant clients to settle.

After Pat led an exodus of barristers from Selbourne to Equity Chambers he set himself up in the largest of the new rooms. He lined his walls not only with law reports but photos of his racehorses. He claimed that in his whole legal career he had only one case that was a "certainty" but that he won only after many anxious moments. When a client said that he would not settle, Gorman would take him by the arm, stand him in front of each horse photo and recount the history of its purchase. "This one cost me so and so. Bought him after a long case. Client wouldn't settle." After a carefully orchestrated circuit and the last sentence many times repeated a trembling chastened client was swiftly "reasonable".

The costs and uncertainties of litigation are well enough understood by intelligent lawyers. Not all of them have had large rooms lined with photos of racehorses who were fruits of litigation. The techniques of persuasion of litigants about the risk of litigation and of their confronting reality have been limited. In recent times, given a lead from the United States, we have hit upon the technique of a mediator conducting a conference between the parties themselves. In most cases the technique works. But it is being talked about more widely than it is understood and indeed that it is used.

If mediation is to be used in important cases it is up to the lawyers to explain what it means and its value. The readers of the *Bar News* all know what mediation is and how it may benefit clients. But there are obstacles to it being put into practice,

Ken Marks and Bar mediators

Of course, everyone has settled plenty of cases without a mediator. But there are plenty more that would settle early with cost benefits to the litigants if they were helped by the newly-acclaimed process. This would benefit not only the litigants but also the image of the legal profession.

Many cases settle in the ordinary course of events merely by negotiation. Mediation is different from negotiation although eventually negotiation takes place at a mediation.

Mediation is appropriate where the parties are too far apart, where their relationship is too strained and where innovative solutions might break an impasse.

Mediation can hardly be said to be new. But the dimension of current interest in its utility probably is new.

The resurgence is manifest in media coverage, the number and frequency of training courses, seminars and other "talk" shops The interest in these forms is not matched by the number of mediations. There are more mediators than mediations.

There is all manner of reasons why this is so. The adversary system is not only deeply entrenched in our culture but it is deeply entrenched in our attitude to dispute. Some lawyers see a conflict of interest between suggesting mediation to their clients and advising them to go on with the case. It may be thought, although I do not think that it is necessarily so, that there is more profit to the lawyer in the case going on. It is not necessarily so because there can never be an adverse fall-out from achieving a

good result for the client at a minimum cost. Quick turnover of cases is also a benefit

There is an even greater inhibition about suggesting mediation to a client who may take the suggestion as an expression of no confidence in his or her case or who may think that it will signal a weakness to the opposing side or a willingness to compromise.

It may be conceded that making the first approach towards mediation poses a difficulty. But it is not insuperable. The difficulty is more apparent than real because a proposal to mediate is not a proposal to capitulate. It does no more than offer to talk in the presence of a third person and of the opposing parties. Participation by the parties in a confidential meeting can more often than not produce the kind of understanding of relative strengths and weaknesses which leads to settlement. In addition, a well-trained mediator will assist the parties to concentrate on the problem rather than on their feelings towards each other. Nevertheless these obstacles to agree to mediate are real and substantial. They may be overcome in more than one way:

- the offer to mediate can, if it is feared that it shall be taken as a weakness, be accompanied by a clear statement of position;
- the offer may well be accompanied by an explanation that the commercial realities should be explored notwithstanding the strength of legal rights;
- early finality to the dispute and reduction of legal costs should be emphasised as the reason for agreement to mediation rather than the reason being a weaker case.

The profession can help to facilitate the use of mediation:

- by making it an express ethical rule that lawyers explain to the clients the advantages of and available services of mediation once it becomes clear that they are in dispute;
- by seeking amendment of the *Legal Profession Practice Act* to impose such an ethical duty on members of the profession;
- by supporting and facilitating the inclusion of mediation clauses in commercial contracts, for example, as is presently proposed by the Law Institute for standard commercial leases;
- by using the summons for directions procedure (preferably at an early stage) for a court direction that the dispute between the parties be referred to a mediator. An order from the court clearly eliminates any fear that going to mediation is a confession of weakness;
- by supporting legislation along the lines of that in the United States which requires the courts to order attendance at mediation conferences in appropriate cases.

The Hon. Ken H. Marks Q.C.

A FAIRY TALE (CONTINUED)

GATHER AROUND ME MY DEARS WHILST I tell you more of the VicBees. Since we were last together the VicBees have been very busy little Bees indeed. Lots of Bees have asked them lots of questions and lots and lots of momentous decisions — at least for the VicBees — have been made.

For a start, VicBees have decided that they must begin to think about whether provision should be made in the hives for little Bees. Therefore, the senior VicBees decided that experts should be brought in to ask lots of questions, analyse the answers and make recommendations. The experts were brought in and lots of questions were asked and lots more answers were given. VicBees are awaiting, with bated breaths, the outcome of the analyses of their answers. The analyses should be interesting because it appears that the questions were more relevant to all sorts of Bees other than VicBees.

For many years, VicBees had their own bit of hive where they could sip nectar and consume large amounts of honey without the distraction of the presence of non-VicBees. Unfortunately, it seems that VicBees consumed far more honey and nectar than they paid for and so their little niche was temporarily closed down whilst more questions were asked and more answers were given. The jury is still out on the analysis of those answers as well.

In the meantime, all sorts of other Bees have offered VicBees access to their eating areas. The GreenBees were the first to make an offer and the CarBees followed shortly thereafter. It is unlikely that VicBees who couldn't afford to support their own niche can afford that of others.

As if not to be outdone by this outpouring of self-analysis FedGovBees and VicGovBees have indulged in their own form of navel-gazing and asked all sorts of people to provide all sorts of answers to a very limited range of questions. Those

amongst us who are cynical may be forgiven for thinking that the question-answerers each have been asked to provide an essay, of not less than 2,000,000 words, on why VicBees must not be allowed to continue as they successfully have for many years past.

Not satisfied with ensuring that the activities carried out by VicBees would be undertaken in a more restricted, less competitive environment, the GovBees have turned from matters of substance to the apparently more important and more immediate matters of form. The activities carried out by VicBees would be more efficiently and more efficaciously done, these question-answerers say, if VicBees were not allowed to wear their uniforms and if they were exposed to the glare of live television coverage whilst they went about their activities. Why? Oh, it's all in the name of "freedom of competition".

What is freedom of competition? I do not really know. I do know that if you ask a dozen Econobees you will get two dozen incomprehensible, wordy definitions. Furthermore, if you ask a dozen GovEconoBees three of them will put you on hold whilst you listen to canned music, four will be at tea, two will be on sick leave, four will be on annual leave, three will be away on a course, five will "come back to you later on that," two will want to know why you need to know, one will tell you it is classified and the other three will give you contradictory responses which appear not to address the question you have asked. Yes! I do know that adds up to two dozen GovEconoBees but half of them are "acting" as EconoBees on "higher duties". That means that they are not really trained as EconoBees but they are paid lots of money to pretend that they know what they are talking about.

Whilst all this navel-pondering went ahead the senior VicBees felt they too must be seen to have made decisions. Accordingly, they decided VicBees were to be allowed to be allocated fields in which to forage by the owners of those fields directly rather than through SolBees — but then only in certain qualified situations. They also decided that VicBees could be flexible about the amount of honey they could harvest — provided they met certain qualifications.

Most significantly, they decided individual VicBees could tell anyone they liked how good they were provided they did not overdo it too much or over-exaggerate their skills. VicBees have been doing that for years but now they could be less subtle about it.

Much to the chagrin of those who don't like VicBees — and the list of categories of such grows each month — they chose to retain their ClerkerBees and to require VicBees to retain a cell in one of the many and varied VicBee hives.

In the midst of all this orgy of decision-making it was decided not to make any decisions about the ever more desolate piece of land VicBees bought many years previously for such a high price. Perhaps they thought that if enough decades were to pass the value of the land could catch up to the price paid for it. Even better, maybe, with the passage of sufficient time the land's value could even catch up not only to the honey originally spent on it but also to the honey spent borrowing the honey used to purchase it. In the meantime, the fences around it continue to fall like dominoes and the flora flourishes.

It seems that all is not entirely lost. It appears that whilst VicBees gave away their lovely pink hive for a song, so that it could be rented back to them at a fantastic premium, they had inadvertently retained ownership of the land upon which it was erected. It wasn't easy to sell the hive without the hole in the ground into which it was permanently affixed but manage it they did.

It now appears that, apart from asking VicBees for lots of honey to use their own hive, there isn't much the owners of the hive can do without the hole in the ground to go with it. VicBees are now flapping their wings with glee at the possibility of making an unexpected windfall gain out of their inadvertent ownership of the land under the pink hive. It is a pity the same doesn't apply to land unburdened by a hive — pink or otherwise!

I have previously told you about the mass of rusty old pipes seemingly holding up the hive next to the pink one. With a great fanfare VicGovBees announced their intention to expend a vast amount of honey to remove them and replace them with something that would be truly wonderful to behold. Although the pipes had achieved a degree of permanency and a status worthy of heritage listing the VicGovBees' announcement caused not a ripple of concern to ConservaBees or even TouraBees who make a vast fortune bringing busloads of visitors past the pipes each day.

But worry not my dears; although immediately after the VicGovBees' proud announcement a mass of mess and smoko huts sprang up on top of the hive with the pipes with the same speed as the pipes originally appeared, nothing at all has happened in the many weeks since that event. Perhaps nothing will be allowed to be done until the elements have caused the huts to match the colour and texture of the pipes!

Talking of the elements; it has got dark, cold, wet and windy outside. It is probably time we called it a night. Sleep well my dears and we will continue the tale of the VicBees next time.

(To be continued)

COURTS IN A REPRESENTATIVE DEMOCRACY

National Conference, Canberra, 11–13 November 1994

THE EXISTENCE OF AN UNDERLYING tension between the legislative, executive and judicial arms of government is well known to most observers of the political scene. It is not necessarily a bad thing. In the balance of powers under which Australia's democracy operates, an arm's-length relationship particularly between parliaments and the courts can operate as an inhibition on abuse of power. It is, however, of critical importance that there be an adequate understanding by these institutions and by the public of their respective roles and functions. Recent history has seen debates about the role of courts in the review and construction of legislation, the interaction between judicial decision-making and the democratic process and the sensitivity of courts to community and other standards. Questions of the way in which appointments are made to the courts, the accountability of judges and the notion that the courts should be able to publicly explain their functions have all been agitated.

On 11–13 November 1994 in Canberra, there is to be a significant National Conference held under the title "Courts in a Representative Democracy" at which many of the issues arising between legislatures and the courts will be addressed. Those attending the conference will be drawn from the ranks of judges, legislators, academics, legal practitioners and public servants. The conference is being jointly convened by the Australian Institute of Judicial Administration, the Constitutional Centenary Foundation and the Law Council of Australia. The organising committee comprises Justice Robert French, representing the Australian Institute of Judicial Administration, Professor Paul Finn, representing the Constitutional Centenary Foundation, and Gary Crooke Q.C., representing the Law Council of Australia. The committee has been fortunate in securing the participation of speakers, commentators and chairpersons who are of national prominence in their respective fields. The programme in which they participate is a particularly exciting and interesting one for those who are concerned about the respective roles of the judiciary and the legislature.

The keynote address on "Separation of Powers" will be delivered on the evening of Friday, 11 November by the Chief Justice of South Australia, Justice King, who, prior to his appointment as a judge in 1975, served in the South Australian Parliament and held a number of ministerial portfolios, including that of Attorney-General. The first session on Saturday, 12 November, will be concerned with the law-making process. The speakers are Hilary Penfold, Commonwealth Parliamentary Counsel, Kim Beazley M.H.R., the Minister for Finance and Leader of the House of Representatives, and Professor Dennis Pearce, Professor of Law at the Australian National University. They will consider the legislative drafting process, the parliamentary law-making process and problems of quality control in law-making. Commentators for that session are Rowena Armstrong Q.C., Chief Parliamentary Counsel for Victoria, the Hon. John Hatton M.L.A., an Independent Member of the New South Wales Parliament, and Professor Colin Hughes of the Politics Department of the University of Queensland. The Chairman for the session will be the Hon. Justice Trevor Olsson of the Supreme Court of South Australia, Deputy Chairman of the Australian Institute of Judicial Administration. The second session on "Courts and the Community", will be chaired by Stuart Fowler, who will then have assumed office as President of the Law Council of Australia. A paper on the "Courts, Legal and Community Standards" will be given by the Hon. Justice Sally Brown of the Family Court of Australia, formerly Chief Magistrate for the State of Victoria. The commentator will be Dr. Carmen Lawrence M.H.R., Federal Minister for Health.

The third session, "Courts in a Democracy," will involve two papers, one presented by the Hon. Justice Michael Black, Chief Justice of the Federal Court of Australia, and the other by Professor Leslie Zines, formerly Professor of Constitutional Law at the Australian National University. The commentator on Chief Justice Black's paper, which is entitled "The Courts and the Individual," will be the Hon. Fred Chaney, a former Federal Minister

and Member of both the Senate and House of Representatives. John Doyle Q.C., Solicitor-General for the State of South Australia, will comment on Professor Zines' paper which is entitled "Courts Unmaking the Laws". That session will be chaired by Alan Rose, the Secretary of the Attorney-General's Department. There will be a formal dinner on the Saturday night.

The conference promises to be an exciting and important occasion. The registration fee is $450 for members of any of the participating organisations and $500 for non-members.

The fourth session on the Sunday morning will deal with the "Appointment and Accountability of Judges". The speakers will be the Hon. Michael Lavarch M.H.R., Commonwealth Attorney-General, and the Hon. Murray Gleeson, Chief Justice of New South Wales, respectively. Their commentators will be the Hon. David Malcolm, Chief Justice of Western Australia, and the Hon. Duncan Kerr, Federal Minister for Justice. The Chairman of that session will be Professor Michael Crommelin from the Faculty of Law at the University of Melbourne.

The fifth and final session which will conclude at 1.30p.m. on the Sunday, is entitled "A Voice for the Courts". Daryl Williams Q.C., Shadow Attorney-General, will address the topic "Who Speaks for the Courts?". His commentator will be David Solomon, well-known journalist and a former Chairman of the Electoral and Administrative Review Commission established in Queensland following the Fitzgerald Royal Commission. The last paper of the conference, "Supping with the Devil," will be given by His Excellency, the Hon. R. McGarvie, Governor of Victoria, a former Judge of the Supreme Court of that State. His Excellency will discuss the extent to which judges and legislators should communicate directly about the operation of existing or proposed laws and the need for law reform in areas which have come to the notice of the courts. The question whether judges should communicate with parliamentary committees on other elements of the law-making process will also be considered. Justice C.W. Pincus of the Court of Appeal of Queensland and the Litigation Reform Commission of that State, will be the commentator. That final session will be chaired by Professor Cheryl Saunders, who is the Deputy Chair of the Constitutional Centenary Foundation.

The conference promises to be an exciting and important occasion. The registration fee is $450 for members of any of the participating organisations and $500 for non-members. This figure covers an informal dinner on the Friday night, lunch on Saturday and the formal dinner on Saturday evening as well as morning and afternoon teas. The conference will be held at the Hyatt Hotel in Canberra. The hotel is offering a special conference rate of $160 per night. Qantas is the official conference carrier and has offered a discount rate of 45% off economy airfares for those travelling to the conference.

Registration forms and brochures will be distributed through the July edition of the *Australian Lawyer*. However, anybody wishing to register earlier than that, can do so by writing to:
Christene Jackson, Conference Organiser
Law Council of Australia,
19 Torrens Street, Braddon A.C.T. 2601.
Ms Jackson's telephone number is (06) 247 3788 and her fax number is (06) 248 0631.

COMPETITION

DWYER v. *VILLA MARIA SOCIETY FOR THE BLIND*
County Court of Victoria MC 933313
25 March 1994.
Before Master Patkin.
S.A. Glacken for the Plaintiff
J.D. Hammond for the Defendant

Application for answers to interrogatories — Day 5.
Hammond: (Taking the Master to the Pleadings) "I should start at the beginning which is, as was said in the "Sound of Music" a very good place to start.
Master: I think it was said at the Mad Hatter's Tea party in "Alice in Wonderland," Mr Hammond.
Glacken: I think the Master is right.
Hammond: I don't think it was, but if it was said in that it was also said in the "Sound of Music" in the song "Do Re Me" (sings) "Let's start at the very beginning . . . . . ."

Was the Master right? Who said what in Alice in Wonderland?

A bottle of Essoign Claret for the neatest correct entry.

LUNCH

THE R.A.C.V. CLUB

TO UNDERSTAND THE ESSENCE OF middle class Melbourne, go to the R.A.C.V. Club and the Melbourne Cricket Ground — that is, the Ladies' section of the Members thereof. If anyone wants to know the real Melbourne, these are two of the establishments that testify as to how the place ticks. Or it should be, how it used to tick. The problem is that things have changed.

The Royal Automobile Club of Victoria is essential Melbourne middle class. I have a very high regard for this club. My late parents were members and attended regularly. I have had very many memorable meals in the club dining room. It was like a ship, an old P & O liner. Everything was all linen and starched cloth. The waiters had been there for years and everybody knew them, they had short white jackets on and brass buttons. It was never a snobby club. I had my wedding reception in what is now the dining room. It is a place I have fond memories as being the first smorgasbord I ever attended as a young child. I have been a member for 22 years.

Things have changed. Melbourne has changed, Australia has changed. The people that represent the Melbourne Cricket Club and the R.A.C.V. represent what is Australia. This does not fit in with any microeconomic or multi-cultural reform. Therefore the R.A.C.V. has itself undergone some changes.

The Club realises that it needs to recruit members. Indeed it now realises that barristers, a dying breed though they may be, should be the type of persons that join this club. This is a laudable ideal. Being so close to Chambers it is an ideal place for barristers to be able to meet people and to discuss things without worrying about those in power.

The club has now undergone a great reorganisation. The buffet on the top floor has been renovated and the food streamlined. The club wisely has retained a formal dining room. This is where I had lunch. There is also the Club Restaurant and Bar which is more informal.

The Dining Room used to be called the Duke of Edinburgh Room. Of course in modern day Australia it is a crime to name a room after the name of a member of the British aristocracy.

The dining room has retained the linen and the feeling of a ship. The club Restaurant is now being renovated and has more basic foods such as sausages and steak and kidney pie. As long as these dishes are presented in a straightforward manner they will always attract people.

The luncheon menu in the dining room is aiming higher than just club food. The present chef appears to be managing to make that difference. The menu is wide. It starts with a salad of spicy chicken fillets and grapefruit segments marinated in Noilly Prat and ranges through salad of smoked rainbow trout, natural oysters, vegetable ravioli, duck liver and yabbie tails in an oyster sauce with abalone mushrooms, beef consomme and soup of the day. I had the warm oysters in a Washabi hollandaise sauce and julienne of smoked salmon. This was the best thing of the lunch. It is a clever idea to have strips of smoked salmon under a hollandaise sauce with the oysters. The added ingredient of the smoked salmon together with the sauce and the oysters made an extremely good entree.

The main courses are again esoteric. Rack of lamb placed in eggplant puree and sweet potato crisps; oxtail and forest mushroom pie finished with Victorian shiraz, vegetable lasagna, pumpkin layers with mixed vegetables, sauteed chicken breast topped with a sweet chilli ginger and lemongrass sauce served with egg noodles, beef tenderloin cooked to one's liking, fish of the day, which was salmon. I decided to have the prawns cajun-style with a risotto of fresh and sun-dried tomatoes. My companions had fish of the day which looked to be an excellent salmon. I don't believe the prawns worked very well. To begin with they were not all that large. The cajun-style did not come through. I expected them to be somewhat in a blackened pepper state, they were not. The rissoto was acceptable. With main courses the club serves simple steamed vegetables. These were carrots and other assorted vegies, together with piped and overglazed potatos. The vegetables were only ac-

R.A.C.V. Fine Dining Room

ceptable and I believe that the chef needs to look at this aspect of the menu.

I am not a sweet person. However on this occasion I did dip into the pineapple strudel with coconut ice cream. This was very well done. Those with sweet tooths obviously would enjoy themselves. On the menu there is a compote of rhubarb served with Grand Marnier sabayon, white coffee mousse with Bailey's liquor-flavoured vanilla bean sauce and strawberries, frozen raspberry cake and cheeses. My larger friends would really go for the ice cream.

Two courses inclusive of a complimentary glass of Victorian wine, coffee or tea are $25 per person. Three courses including complimentary glass of wine and coffee or tea are $28 per person. This is extremely good value. The service is excellent, the ambience is refined. The club must keep up this standard. It has its other venues to provide the sausages and steak-type food. What must be decided in this restaurant is whether to concentrate on the rather exotic dishes that are on the menu or to simplify things a little. The first and last courses were excellent, the main course was just acceptable. Since the Essoign Club is now in abeyance, this is a perfect place for barristers and a cut above the Celtic Club, which has attracted many of our brethren.

There is imagination in this cooking. What is needed is refinement and improvement with the vegetables and main courses. Perhaps this is just a fine-tuning process. What can be said is that the R.A.C.V. and Melbourne's middle class are alive and kicking. The forces of mediocrity which now rule our country will not prevail. The club must remember that it is a club and keep those essential features. It is not some half-baked Sydney-type poker machine place. If the Club continues on this course and the food remains the same it is a place which I will attend regularly and I recommend to all. It is one of those shrinking havens where barristers can talk to people without fear. Let us hope the R.A.C.V. and the people it represents continue to thrive. If not Australia is in peril.

Paul D. Elliott

R.A.C.V. Club Dining Room $25–$28
Open: Lunch — Monday–Friday
Dinner — Tuesday–Saturday
Wines very reasonably priced.
Club Restaurant —
cheaper than the main restaurant
ranging from $10 to $16.
Wines ranging between $10 to $22.
Sandwiches etc. available in the lounge.
Buffet on the top floor.

CRIMINAL BAR DINNER

CHIEF PROSECUTOR LECTURES CRIMINAL BAR

THE TWENTY-FIFTH DINNER OF THE Criminal Bar Association was attended by seventy-seven members and guests at the Jewel of India Restaurant in Chapel Street, Prahran on Wednesday, 30 March 1994. Chairman for the evening, Bill Morgan-Payler, welcomed guests including Mr. Justice Hampel, Mr. Justice Coldrey, Judge Kelly, Judge Fagan, Judge Hassett, Judge Barnett, Chief Magistrate Nick Papas, James Morrissey Q.C., Betty King Q.C. and Colin Lovitt Q.C. Long-standing member John McArdle was welcomed to his first dinner and mention was made that Brind Zichy-Woinarski Q.C. was helping out the Australian Opera. Bill indicated that CBA members were in two groups: seminar attenders and dinner attenders.

Bill Morgan-Payler then introduced the guest speaker, Jim Morrissey Q.C., the retiring Senior Prosecutor for the Queen. Bill related anecdotes of Jim's skill as an advocate and of how he learned a dialect in the old Four Courts Hotel and gave an example of when a witness made a salient point in the prosecution's favour Jim would look at the jury and call out to the witness, "What was that? I didn't quite hear it."

James Morrissey thanked the chairman and added that it was a rare pleasure for him to speak after a defence counsel's address. Jim pointed out that after nearly forty years as an advocate it was time to call it quits. Jim mentioned a number of distinguished lawyers whose career started when Jim was first called to the Bar. He recalled the prophetic words of a client in one of his early cases. He was briefed by Frank Galbally to appear at the Carlton Court of Petty Sessions on behalf of a woman charged with loitering for the purposes of prostitution. Mr. Galbally introduced his client to Jim and the client's reaction to Jim's apparent inexperience was assuaged by Frank indicating, "Mr Morrissey is a leading expert in the area of loitering for prostitution, he'll look after you". Subsequently the case was heard and despite a plea of not guilty and a rigorous contest the woman was convicted as charged. Her parting words to Jim were "You, you bastard! You'll make a bloody good prosecutor one day."

Jim entertained all with stories about Pat Gorman, "Red" Nolan, "Black Jack" Cullity, Rob Monihan, "Wingie" Maloney and the cherubic-faced Phil Dunn. These were amongst the best trial lawyers he had observed. He then included Frank Galbally, "Woodsie" Lloyd, Jack Lazarus, John FitzGerald and Frank Vincent as outstanding lawyers. He was pleased to note that the Victorian Bar is now much better than it was because of its now enormous depth of talent. He said today's barristers have greater preparedness, greater thoroughness and greater consideration of tactics than did their predecessors. He was critical of the length of jury trials and expressed his opinion that juries cannot cope with lengthy complex cases. He made special mention of Mark Weinberg Q.C. as a brilliant lawyer and one who watches men fight and then argues about what happened.

The audience were told that the best nickname at the Bar was Bill "Organ-Failure" and that Bill lost that nickname and is now known as Bill "By-the-Way" Morgan-Payler. Jim told how he was opposed to Bill in a trial relating to the shooting of two policemen in Walsh Street, South Yarra, and that Geoff Flatman was also appearing with others and Mr. Justice Vincent was presiding. A female witness had allegedly changed her evidence, which had a telling effect on the outcome of the trial. After her husband had testified Bill resumed his seat and then called out, By the way, you're not calling your sick wife are you?"

Among the prosecutors that Jim had worked with who left a lasting impression were Paul Coghlan, Gavin Silbert, Caroline Douglas and Nick Papas and there was a reference to a murder trial and "Gaelic and Garlic".

In Jim's early days he was in Equity Chambers and also there was Brian Bourke. He told how they recently attended a wedding as father-of-the-groom and father-of-the-bride respectively. He said that because of Bourkie's reputation for having more that one brief a day at courts far apart every effort was made by all involved to ensure Bourkie's punctual attendance at the wedding.

In conclusion Jim said he had only one main regret — that he had not been a regular attender at Criminal Bar Dinners.

At the close of the formal part of the evening members and guests mingled. Pat Tehan was seen chatting with Bill Stuart. Carol Keating was charming too as she related her recent experiences with a mobile telephone while appearing in the County Court. Peter Billings had a new supply of jokes which he shared. The table of junior barristers remained seated while accommodating their quota of liquid refreshments. Notably missing was the plate-breaking of the last CBA dinner, together with the singing of Liz Gaynor and the Greek dancing of Con Killias and Mr. Justice Hampel. The *Bar News*, for a change, instead of sending a photographer, arranged the attendance of a cartoonist; this will not happen again.

CLIVE PENMAN: ON THE MOVE

LATE LAST YEAR OVER A CUP OF FOUR Courts coffee a solicitor friend of mine — that is, a solicitor I socialise with, receive promises of briefs from but am never briefed by — asked me how one could tell when an estate agent was lying. I didn't know. He responded to my ignorance with "When you see his lips move". At the time I thought it was very funny — almost apocryphal. Some time later I had cause to remember that conversation.

Early *this* year I finally tired of the never ending train journey from and to Upper Ferntree Gully — when indeed the trains were running — and my wife tired of driving the twins to and from the nearest school (some kilometres away) and collecting me from the station after the buses ceased running. So we decided to move "in closer".

The first step was to get in the estate agents. We asked all three of the local firms to come in, have a look around and advise us. They did that and all three suggested "$130,000 is a certainty but above that . . . but don't quote me." We thought that was a little light-on. I hadn't met any of the agents. My wife disliked and distrusted one of them less than the other two so I rang him to arrange to get together. His receptionist said he was on the telephone and he would ring back straight away **(Lie No. 1).** He didn't.

I tried again two hours later. He answered the telephone. I asked if he had got my message. He said that he had just got back from a busy day out **(Lie No. 2)**. When I advised him of what his receptionist told me he responded "Oh, she shouldn't have said that". We agreed we had started off on a bad note. We made arrangements to meet the next evening.

A little while later he rang my wife and said "Oh, I did try to ring you but the number I was given had two figures transposed" **(Lie No. 3)**.

The agent was late for the meeting. He then proceeded to tell us how brilliant his agency was and what a great job he would do. We discussed our respective experiences with agents — with me remembering how an agent client of mine had been given 17 concurrent life disqualifications by the Estate Agents' Board because, *inter alia*, of an inability to understand what a conflict of interests was, and he sought to reassure me that all local agents were highly professional and would never mislead anyone **(Lie No. 4)**.

We proceeded to discuss the "marketing" of our property. He handed me a schedule which added up to $1,500. I told him I would not pay that sum. He responded with, "Well we cannot do business then" **(Lie No. 5)**. I apologised for wasting his time and gave him back all his material. He stayed another hour and a half.

He repeatedly asked me how much I was prepared to spend on the marketing of our property and I repeatedly suggested he go away, discuss it with his principals, prepare a revised schedule and give me a more realistic figure. He was revolted by the suggestion that he could bear some proportion of the advertising costs. He informed me that the costs could not be pared back **(Lie No. 6)** and that they got no discounts for bulk and repeat ads from *The Age* **(Lie No. 7)**.

Two days later a revised schedule appeared on my clerk's fax. The cost had decreased to $1,000 with a 10% discount on the agent's commission. I rang him back and agreed to those figures and other aspects of the agent's authority were discussed.

Another day later and the Exclusive Agency Authority arrived **(Lie No. 8)** — it had no discount of commission, specified $1,500 for advertising, included a few undiscussed special conditions and omitted those that had been agreed. The wife and I altered the authority back to what had been agreed, signed it, returned it and waited for a copy with the agent's signature on it.

The board went up but still no authority. I suggested to the agent that the cart was well ahead of the horse. He told me that our copy of the authority with the alterations initialled by him "was in the mail" **(Lie No. 9)**. A few days later when speaking to my wife she "innocently" asked if it was true that he would not get any commission without a properly-completed authority. It was hand-delivered the next day with a letter telling us all that had been done already.

Our agents had allegedly:

a. erected a Board "with light" **(Lie No. 10)**;
b. placed display photographs in the windows of each of their offices **(Lie No. 11)**;
c. placed ads with *The Melbourne Weekly* **(Lie No. 12)**;
d. approached *The Age* to specially feature our home **(Lie No. 13)**.

The next step was to meet with the agent one

evening to "discuss progress of the campaign" **(Lie No. 14)**. In fact, the purpose of the meeting was to enable the agent to commence to "crunch" us on the reserve. $100,000 is "what the market is telling me this house is worth" **(Lie No. 15)**. No he had not quoted that figure to any potential purchasers at the first open for inspection **(Lie No. 16)**. We had a stooge go through to be told he valued it at "$100,000 tops".

Much to his chagrin we chose not to discuss reserves that early in the piece but rather to ascertain where in the windows were the display ads as we had seen none the day before. "Oh that was a mistake — word processor problems **(Lie No. 17)** — it was hand-typed) and the photos will go up tomorrow" **(Lie No. 18)**.

The campaign progressed on for two more weeks. There were four more "open for inspections" and a score of inspections at other times notwithstanding the initial assurances that out of hours inspections would be "extremely rare" **(Lie No. 19)**. There were two more meetings. At the first the market told him the property was worth just over $100,000 "maybe" and at the second "perhaps $105,000 but the reserve must be $100,000 or you will not get a sale" **(Lies Nos. 20** and **21** respectively).

A few days before the auction we had another meeting to discuss the auction itself. Again he had denied quoting to potential purchasers a figure of $100,000 **(Lie No. 22)**. When we told him that we had heard third-hand that one of his colleagues had done just that, without a blink of his eyes he stated "Oh that must have been early in the campaign — everyone knows we quote low to drag in the punters". The potential purchasers were always discussed in mildly derogatory tones.

"Anyway, you must give the auctioneer a reserve **(Lie No. 23)** so he can plan when to put the house 'up for sale'." We suggested that could wait until the auctioneer paused the auction and came in to see us. "Oh no, it must be 'up for sale' before that" **(Lie No. 24)**. "What does 'up for sale' mean?" we asked. "That means that it is going to sell." "In other words, that it is past the reserve," we prompted. "Not really," he suggested. We then asked what it meant when the auctioneer said "The property is now in the market". We were advised that that was different. When we pressed him as to the differences he gave up and suggested we ask the auctioneer.

The auctioneer arrived the eve of the auction; told us how great he was; how superbly the campaign had gone; how everything that had been promised to us had been done **(Lie No. 25)**; how it was all set for a brilliant auction; and that it was not necessary to give him our reserve until midway through the auction. "But we were told we had to decide on that long before now," we said. "[The agent] is wrong. We don't do that any more. He was specifically instructed not to press you on the reserve."

Next morning it dawned bright and clear. The leaves were raked up; the kids' junk thrown under beds; scones were baked to create an ambience along with the fresh coffee brewed just before the scheduled auction time. "Look, we need the reserve now," said the agent an hour earlier **(Lie No. 26)** "and the market is still telling me '$95,000 to $100,000 tops'."

As we had previously hinted but now pointedly said "The house will not be sold for a cent less than $150,000. We don't need to sell." He blanched; he gulped; his lips moved soundlessly; he started to quiver. The auctioneer then approached us and said again how well things had gone; what a great crowd; and what tremendous agents they were. [I haven't recounted the number of times we were advised that "firm offers had been made . . . and rejected" for progressively $80,000; $85,000 and $93,750 **(Lies Nos. 27–29** if you like)].

The auctioneer suggested we could whisper to him our reserve and "I won't even tell [the agent]" **(Lie No. 30)**. We said that if the auction still had legs on it and looked as if it could go well past $150,000 he "could put it on the market at $145,000".

The auction started with a bang, slowed up, motored through the $130,000s and to our surprise was "put on the market" at $140,000. It then gathered a little speed to $150,000 and suddenly slowed down as bids of $200 increments were accepted and each was eked successively out of the two remaining bidders. It went to $152,400 and we were overjoyed. The agent was obviously relieved but with the fanciest of footwork said "See, I told you that we would get you well over $150,000" **(Monstrous Lie No. 31)**.

We then sought to have him return the keys to our solicitor to be handed over at settlement and to send us a "souvenir display photograph".

We were variously informed by him, orally and occasionally in writing:

- "I have returned all the keys to your solicitor" **(Lie No. 32)**.
- "It is standard procedure for us to hand them to the purchasers on settlement" **(Lie No. 33)**.
- "We never lose keys" **(Lie No. 34)**.
- "We would never hand over keys giving possession to purchasers where something has gone amiss at settlement" **(Lie No. 35)**.
- "We will send you the photograph" **(Lie No. 36)**.
- "We *have* sent you the photograph" **(Lie No. 37)**.
- "I will bring around the photograph tomorrow in person" **(Lie No. 38)**.
- "We have misplaced the photographs in the office" **(Lie No. 39)**.

Two days before settlement the agent brought

the purchasers around for a final inspection. When they asked him about the keys and was informed by me that their solicitor would get them at settlement he said, quite brazenly, we thought, "Oh, don't worry, we have some sets back at the office, just pick them up the day after tomorrow".

When taxed on this a few days after settlement he said that he had never told us that he was returning all keys (even though that was in his letter to our solicitor accompanying the keys) **(Lie No. 40)**. In the same conversation he reluctantly admitted that the display photographs had never existed and he couldn't explain why we had been billed and paid for same **(Lie No. 41)**. Perhaps the explanation may lay in his other admission that he had popped around to our place the day after sale to "see how the purchasers were going and to give them a little present from me". Methinks the intention was to keep the photographs to use if they conned the purchasers into using them as agents sometime into the future!

The lies never ended there. We are now in a new home in Ringwood. Ringwood agents are also not averse to being economical with the facts.

As for my solicitor friend — whilst he may not be accurate on his ability to brief me — on agents his views can be summed up as "many a true word said in jest. . ."

Clive Penman

VERBATIM

County Court of Victoria

10 May 1994
Coram: Judge Duggan

Grant cross-examining witness who is a rails bookmaker.
Grant: If I go easy on you will you give me a shade of odds tomorrow?
Witness: Yes I can accommodate you.
Grant: In that case I have no questions.

Supreme Court of Victoria

9 May 1994
MacCardy v. *DPP*
Coram: Eames J.
P. Billings for Appellant
D. Just for Respondent

Eames J.: I should probably alarm you both by warning you that I am probably one of the few people currently living in Victoria on the bench who is a complete virgin so far as the 05 legislation is concerned. I have not had to worry about the Victorian .05 legislation for 20 years so you had better keep that in mind when taking me through.
Billings: I will try, Your Honour. My learned friend and I will treat you very gently.
Eames J.: Yes. Right.
Billings: Perhaps just before I leave ground 5, sir, we would submit that having found that matter of fact, the learned magistrate was bound to dismiss the charge on the basis of D-A-L-Z-O-T-T-O's case.

District Court of W.A.

14 January 1994
R. v. *Metrovic*
Coram: Judge Hammond
P. Hogan for the accused

Hammond D.C.J.: Please sit down for the moment. Mr. Hogan, do you represent this lady?
Hogan, Mr.: Yes, sir, I do. This is a matter being handled by my learned friend Ms Amsden.
Hammond D.C.J.: It's an unlawful wounding.
Hogan, Mr.: Yes.
Hammond D.C.J.: He was wounded.
Hogan, Mr.: He was, so they say from the papers.
Hammond D.C.J.: Are you telling me it's a trial?
Hogan, Mr.: Most certainly sir, yes.
Hammond D.C.J.: Yes.
Hogan, Mr.: I have had a chance to read the papers myself over the weekend, yes.
Hammond D.C.J.: I often wonder whether, you know, Mr. Hogan I'm reading the same papers that counsel read. I sometimes get to the conclusion there must be two separate files somewhere.

In the matter of Homfray Carpets (Australia) Pty. Ltd., 13 April 1994
Coram: O'Bryan J.

Counsel was in the course of reading a lengthy passage from [1969] 2 Q.B., and was on page 310 where the text referred to an essay entitled "The Contractual or Non-Contractual Nature of Collective Agreements in Great Britain and in Eire".
Haylen Q.C. *(reading hastily)*: ". . . Collective Agreements in Great Britain etcetera . . ."
His Honour: And Eire.
Haylen Q.C.: Yes.
His Honour: That's not etcetera.
Haylen Q.C.: Yes, I shouldn't have made that mistake, Your Honour.

Supreme Court Practice Court

9 February 1993
Staats v. *Commonwealth of Australia*
Coram: Tadgell J.
Plaintiff in person
Walters for the Commonwealth

The Commonwealth had sought to have the plaintiff's claim struck out as an abuse of process.
His Honour *(to the plaintiff)*: "Just when do you say that this cause of action arose?"
Plaintiff: "In 1978."
His Honour: "That's a very long time ago."
Plaintiff: "Yes, Your Honour, and I'm prepared to waive the Statute of Limitations."

Supreme Court of Victoria

25 March 1994
Middendorps Electric Co. Pty. Ltd. v. *Law Institute of Victoria and Deputy Commissioner of Taxation*
Coram: Nathan J.

Mr. De Zilwa: The actual number of pages of documents, I can't tell that to Your Honour, I don't know.
His Honour: Is it 20,000 pages? Is it 200,000 pages? You must know.
Mr. De Zilwa: It would have to be less than 20,000, Your Honour.
His Honour: Give me some idea. You're not helping me at all. I don't know what sort of problem I'm dealing with. I ask you a simple question of how many pages are involved, and you say you don't know.
Mr. Beaumont: Your Honour, if I might assist?
His Honour: Thank you.
Mr. Beaumont: I think, Your Honour, that the estimates vary between three and 10,000 pages.
His Honour: Three to 10, it would be terrific coming in on a margin on a horse by three or 10 feet.
Mr. Beaumont: Let's call it five.
His Honour: Well, 5,000 pages, well that's sort of one American family novel or . . .
Mr. Beaumont: Only if it's *Roots*.

County Court of Victoria

At Morwell
Coram: Neesham J
J. Saunders prosecuting
N. Crafti defending

In the course of a *voir dire* his Honour excluded a record of interview in which a Senior Detective Head was the corroborator. Saunders was re-casting his list of witnesses:
Saunders *(from one end of the Bar table to the other)*: Do you still want Head?
Crafti: Would you care to re-phrase the question?

20 August 1993
Coram: Supreme Court of Victoria

Cross-examination of Expert Witness:
Secondly, he found her level of verbal fluency was about average, that's her capacity to communicate, is that right? . . . Well, I don't know.
Does that not have a particular meaning in the profession?
. . . Well, it has several meanings, regrettably. What are the meanings? . . . Well, verbal fluency can simply refer to, as you suggested, the manner in which a person speaks, their ability to select appropriate words and to engage in a socially appropriate conversation. Verbal fluency can also relate to specific tests which assess a person's word-finding ability, assess their ability to follow a pro's passage.

Supreme Court of Western Australia

Before Walsh J.
R. v. *Pinkstone*
J. Scholz for the Crown
T. Percy for Pinkstone
J. Mazza for Lazaro

[Walsh J. had interrupted counsel's final address in which he had made reference to prisoners being brought up from the "bowels of the Court by armed police officers".]
Walsh J.: . . . and as for them being brought up from the bowels of the court, I suppose that's a matter of opinion. Some of our judges are on that level . . .

Victorian Court of Criminal Appeal

27 May 1994
Church v. *The Queen*
P. Priest of Counsel appeared for the appellant Church.

County Court of Victoria

Coram: Judge Meagher
R. v. *Juric*
Mr. A. Tinney prosecuting.
Mr. P. Casey for the accused.
(an exchange on a *voir dire*)

His Honour: But do you concede that he does fit into the category?
Mr. Casey: I think that one would have to concede . . .
Mr. Tinney: If that is conceded in front of the jury . . .
His Honour: We do not need Mr Lee, do we?
Mr. Tinney: If it was conceded on behalf of his client by Mr. Casey that the accused looks like the assailant the Crown would be very happy with that.
His Honour: Looks 60 per cent like the . . .
Mr Tinney: That would be fine, Your Honour. The Crown would be very happy with that, that's why the Crown seeks to lead the evidence.
His Honour: I guess you would not want to make that admission, Mr. Casey . . .
Mr. Casey: Yes, I would, given that the 60 per cent, that is the 40 per cent that does not look like him is his face.

Aboriginal Land Commission

24 May 1994
Coram: Gray J. sitting as Aboriginal Land Commissioner, Alice Springs
Mr. A.C. Neal, Counsel assisting the Commissioner
Witness: Dr. John Morton, anthropologist.
Mr. Neal: Are you able to assist with knowledge of the methodology of Carl Strehlow collecting the information in part relied upon in various reports?
Dr. Morton: Well the story goes that Carl Strehlow relied exclusively on sitting down and talking to - particularly to a small number of informants — about four — for the majority of his information. Because of his missionary position, he regarded himself as unable to attend a lot of things that Aranda people did, including ceremonies and stuff like that, so that all of the stuff that he recorded was people describing those to him. But I do understand that he relied heavily on a number — I think four particular informants.

. . . .

Mr. Neal: Would his pastoral position mean that he would have difficulties with acknowledging illegitimate children in a genealogy?
Dr. Morton: I do not think so, because there is something written by Ted Strehlow that suggests that he often had ideas about who people's fathers were that contradicted their own.
Mr. Neal: I see.
Dr. Morton: Well, sometimes, I should say.

DOES THE CAP FIT?

In a recent appeal counsel referred the Full Court to the AMA's Guide to the Evaluation of Permanent Impairment which categorises a 5% to 15% impairment of the whole person described as follows:

> There is reduced daytime alertness due to sleepiness or sleep episodes, or disturbed nocturnal sleep affecting complex integrated cerebral functions, but ability remains to carry out most activities of daily living.

Bar News is unable to advise its readers as to the judicial reaction to that description.

COODE ISLAND FIRE INQUEST

Day 11, 10 May 1994
(Bell cross-examining Professor Douglas Napier, Emeritus Professor of Industrial Hazard Control, University of Toronto)

Bell: But you are not saying the cause was that, are you?
Prof Napier: I'm saying that I think that the cause of the highest probability is that. I am — let me tell you, I came at this from one of your phrases, I think — *causa proxima et non remota spectatur.*
Bell: Your Latin is much gooder, er much better than mine.
Her Worship: I hope his English is too.

CRICKET

Bar 1st XI v. Mallesons Stephen Jaques

THE BAR'S ELDERLY FIRST ELEVEN FACED a youthful Mallesons team on a warm, perfect Sunday in late March at Wesley. This was the fifth annual match of the series and the score was 2-all.

Mallesons began cunningly by putting on a splendid lunch, with champagne, fine reds and whites and plenty of beer, *before* the game; judging, presumably, that the Bar's hapless stand-in captain would be unable to restrain his charges.

The rules were dispensed by Mallesons together with the lunch. It was 35 overs a side, batsmen could not be out first ball and had to retire at 35, and each bowler was limited to five overs. (These rules seemed to us a mercy.)

Eventually, Mallesons won the toss and batted. The wicket was slow but true and the outfield was a green carpet. Inspired by the weather, the conditions, the surroundings or perhaps the lunch, the Bar's bowlers managed to bundle out Mallesons for 83 in a mere 25 overs, even after we allowed one of their best to bat twice!

Andrew Donald, Tony Cavanough, Ross Middleton and Steve Mathews took two wickets each, Joe Forrest bowled tightly and well without luck and Gary Cobbledick removed three batsmen and startled several more. (Gary is a South African solicitor last seen playing alongside Jonty Rhodes and was snuck into the Bar's team by an arrangement between Chris Connor and Mallesons which is now sorely regretted by the latter.) Mordy Bromberg kept wicket superbly for the Bar and Jeff Gleeson took a "blinder" off the captain's bowling and thereby ensured himself a high spot in the batting order.

The Bar's openers David Neal and Dennis Gibson withstood the onslaught of Mallesons' fast men and set a firm foundation for the innings. The game was sewn up by a fine partnership between Gary Cobbledick (36 retired) and Justice David Ashley (22 not out). The Bar went on to 4/127 and a fine victory. The shocked Mallesons captain called his players into a postmatch huddle for a "de-briefing". Ross Middleton offered an immediate spot at his reader's desk to Gary Cobbledick.

Thanks to Mallesons, Wesley and Chris Connor for organising a great day.

Tony Cavanough

Bar 2nd XI v. Mallesons Stephen Jaques

THE "BACK TURF," WESLEY COLLEGE WAS the scene for the annual challenge between the Bar Second XI and a team from Mallesons Stephen Jaques. After a number of late changes, the Bar's team was strengthened by the inclusion of regular players Connor and Shatin Q.C. (after their humiliating outright defeat the previous day).

Mallesons won the toss and, against all the rules of one-day cricket, sent the Bar in. After a steady but slow start the opening partnership was broken in the twelfth over with the score on 32 when Rob Williams was bowled for 7. Chris Connor (7), Peter Couzens (15) and Phil Trigar (9) were all dismissed in the search for quick runs. Young Q.C. joined John Baring, who had opened the innings, and the runs began to flow. Young straight-drove one ball out of the ground and right across the street. Baring retired after a sound 37 and Habersberger Q.C. joined Young Q.C. Vicious boundaries were mixed with short singles. Habersberger put to good use his 35-year-old home ground knowledge and hit a six over square leg — the shortest boundary. After Habersberger was bowled for 28 and Young retired for a brilliant 36, early retirements by Alan Hands (15) and Con Kilias (4) enabled Ernie Burrows (8) and Shatin Q.C. (2) to be not out at the finish.

A total of 182 off 35 overs was respectable but not insurmountable bearing in mind the thrashing handed out by Mallesons' batsmen the previous year.

If there were slight fears that 182 runs might not be enough, these fears were rampant after the first ball of Mallesons' innings from Kilias was hooked for 6 and 11 runs came off the over. Worse was to follow, after five balls of the opening over from Connor the score stood at 0/29. This included a second 6 which shattered the front passenger window of a parked car in the street outside the ground. (See *Bolton* v. *Stone* [1951] A.C. 850). However, Connor rose to the occasion and the opener smote once too often and was caught by Trigar for 25. (It was such an important breakthrough that I won't mention Phil's subsequent dropped catch.)

Thereafter, the bowlers were always on top and if it had not been for the social game rule — "every-one has to score" — Connor may well have been on his way to a hat-trick. Nevertheless,

Connor's figures of 0/18 from five balls were converted into a match-winning 3/23 from four overs. The other main strike bowlers all performed well — Kilias 1/37 from five overs, Couzens 1/21 from four overs and Williams a miserly 1/10 from five overs. Skilful handling of the remaining bowlers enabled Young, Burrows, Hands and Shatin all to take a wicket, most in their one and only over. The fielding generally supported the bowlers and in particular three sharp catches were taken by Williams at first slip, Kilias at short midwicket and Young at short leg, thus enabling him to pip Connor for man of the match. In the result Mallesons were all out for 113, after only 23 overs, much to the disgust of the Bar's captain who had yet to bowl himself. A well-deserved victory to the Bar by 69 runs. Our thanks to Brendan Quinn of Mallesons for so ably organising the fixtures.

LAWYER'S BOOKSHELF

Boundaries and Easements

Colin Sara
Sweet & Maxwell (distributed by Law Book Co. Ltd.), 1994
pp vii–lix, 3–588
Price: $258.00 (hard cover)

THE ENGLISH PUBLISHERS SWEET & Maxwell, through their Australian distributors The Law Book Company Limited, recently released Colin Sara's beautifully-presented and clearly-written text on the laws of boundary disputes and easement claims.

The author has intended this work to be the comprehensive guide for English practitioners in their conduct of cases involving boundary disputes, adverse possession, rectification of conveyances and registers, easements, profits *á prendre* and the like. For the Australian lawyer, much assistance should be derived from the author's clear and detailed explanation of the common law and the relevant practical advice provided in the book.

Boundaries and Easements is divided into four main sections. The first part covers the laws relating to boundaries. Included in this section is an examination of conveyances, both registered and unregistered, the crucial role that extrinsic evidence such as deeds, maps, surveys and photographs can play in boundary disputes, the remedy of rectification, the claim of proprietary estoppel and adverse possession. Particular boundary problems arising out of highways, party walls, waterways, mines, pipes and drainage are also highlighted.

The next part of the text is devoted to the examination of the law of easements. Among the topics discussed in its 14 chapters are the creation of easements by express or implied grant, easements created by English statute of prescription, termination, equitable easements, as well as particular types of easements, for example, the right of light, rights of support and water rights.

The third part of *Boundaries and Easements* is only relevant to the Australian practitioner in its identification of the remedies available to the parties involved in boundary or easement disputes. Declarations, injunctions and damages are focused on in this section.

Finally Colin Sara has provided the reader with 55 pages of precedents. Some of them, in particular the pleadings, should prove useful to the Australian lawyer who is seeking to draft a statement of claim, a defence or a counterclaim in this area of the law.

Anna Ziaras

Civil Remedies Volume Two, Remedies in Particular Contexts

M. J. Tilbury
Butterworths, 1993
pp v–lxv, 1–425.

THIS IS THE SECOND INSTALMENT OF Michael Tilbury's two-volume study of the civil remedies available to plaintiffs under Australia's federal, State and Territory laws.

This volume comes three years after the publication of the first volume, *Civil Remedies: Principles of Civil Remedies,* which critically examined the general principles of civil remedial law. *Volume Two, Remedies in Particular Contexts* goes one further by applying these general principles to specific causes of action, namely those which arise out of injury to persons and property, defamation, false

imprisonment, malicious prosecution, death, breach of contract and injury to economic interests.

The first chapter of this second volume (which is actually referred to as chapter 9) focuses on statutory and common law compensation available to plaintiffs for personal injuries or for losses consequent on injuries suffered by third parties. Federal, State and Territory legislation concerning work-related injuries, transport accidents and sporting injuries is described in some detail.

The chapter on compensation for death (chapter 10) covers claims by dependants and by the estate of a deceased person, and details the manner in which loss to dependants is assessed by Australia's courts.

Injury to property is examined in the context of injury by damage, destruction, misappropriation, occupation, use, or by interference with comfort and enjoyment. Principles of restitution, normal and consequential loss, non-economic loss and aggravated damages are discussed.

The section on breach of contract (chapter 13) focuses on the principles of damages, restitution and coercion, and includes a detailed discussion of the landmark High Court decision in *Commonwealth of Australia* v. *Amann Aviation Pty. Ltd.*

Finally, compensation for the actions of deceit, negligent misrepresentation, or under the *Trade Practices Act* are examined in the chapter on injury to economic interests (chapter 14).

Michael Tilbury's work is clear and well presented, and his critical comments on various areas of the law of civil remedies are very instructive. Unfortunately, because the author has chosen to highlight a large number of causes of action and their resulting remedies, Tilbury's examination is not always as detailed as a practitioner might wish, especially in the rapidly-expanding field of injury to economic interest.

Anna Ziaras

Trade Practices Act 1974 (1994 ed.)

L.P. Layton and R. Steinwall
Butterworths, 1994
pp v–xxii, 1–428.
Price: $24.95 (soft cover)

This volume is one of a series of Annotated Acts published by Butterworths each year. It reproduces in full the Trade *Practices Act* 1974 (C'th.) and its forms and Regulations. Accompanying the Act are fairly detailed annotations and explanations, as well as references to equivalent State legislation. The Act is current to 31 December 1993, and as such does not include the amendments effected by the *Industrial Relations Reform Act* 1993, which had yet to be proclaimed when this work was published in February 1994.

Layton and Steinwall's work is about half the size of Russell Miller's rival publication *Annotated Trade Practices Act*, which has been published annually by the Law Book Company Limited since 1979. As such, it lacks much of the detail of Miller's popular annotated work. Nevertheless, the much cheaper price of the Butterworths publication (its retail price is about $20 less than the Law Book company's publication) is sure to make it appealing to many, in particular the student market.

Anna Ziaras

Bankruptcy Act and Rules

LBC Legal Editors
The Law Book Company Limited, 1994
pp. 820
Price: $49.00 (soft cover)

Lewis' Australian Bankruptcy Law (10th ed.)

Dennis Rose
The Law Book Company Limited, 1994
pp v—xlvii,1–350
Price: $65.00 (hard cover); $45.00 (soft cover)

The Law Book Company Limited has recently released two very affordable and important works on the law of bankruptcy in Australia.

Bankruptcy Act and Rules is a new publication — a one-volume legislative reference to the *Bankruptcy Act* 1966 and to its Rules and forms. It is current to 1 January 1994 and includes an 81-page index and a table of statutory amendments. Although it is aimed at the student market, this edition is appealing to those of us who find the cost of loose-leaf services prohibitive.

Lewis' Australian Bankruptcy Law is an established text on the principles governing bankruptcy law. First published in 1928, it has survived two authors and 66 years of legislative change and amendments. Dennis Rose, who has written this work since the enactment of the *Bankruptcy Act* 1966, has again provided practitioners and students with a well-set-out and easy-to-follow textbook. It is clearly written and to the point, with constant references to legislative provisions, numerous headings and sub-headings, and detailed tables and indexes.

I recommend both works for their user-friendly formats and non-prohibitive retail prices.

Anna Ziaras

BARRISTERS' OPINIONS LESS THAN 92% RELIABLE

The Age of 18 May 1994 carried a report of the parting shots of the former Victorian Ombudsman, Mr. Norman Geschke, on the occasion of his retirement:

Lawyers . . . used "balances of probability, fantasies, (and) oddball dictionary meanings" to justify some indefensible situations. "My view (is) that a barrister's opinion does not have the scientific basis or the reliability of a Melbourne weather report . . .".

We note that the 1992–93 Annual Report of the Victorian Regional Office of the Bureau of Meteorology discloses that on average 92% of the Bureau's 5.00 p.m. forecasts are subsequently verified as "good forecasts" or "fair forecasts" according to the Bureau's "reasonable person" test.

Anthony Cavanough

Geschke attacks community services

By MICHAEL MAGAZANIK

The recently retired ombudsman, Mr Norman Geschke, has attacked the Department of Health and Community Services, accusing it of intransigence, "heavy-handed and insensitive dealings" and of allowing "injustices to be continued without check or conscience".

In his final report to Parliament, Mr Geschke said the department had an "expressed policy" to ignore legislation and the powers of the ombudsman.

"When compared to police, there is little accountability for social workers' actions," Mr Geschke wrote. "They can remove children without a warrant and can take other action which can totally disrupt families on evidence which is untested."

In some cases, social workers had abused their powers and made "uninvestigated" allegations of sexual abuse against relatives of the supposed victims and, in one instance, a department employee, he said. Such "heavy-handed and insensitive dealings" could have a devastating effect on families.

The department has refused to accept Mr Geschke's ruling in one case that it compensate a former employee accused of raping several intellectually handicapped women in his care.

A magistrate has dismissed criminal charges against the man and Mr Geschke has found the allegations were fabricated by another employee who helped the handicapped women communicate through a largely discredited technique called facilitated communication.

In another case, the department has refused to compensate two families whose mentally disabled daughters, according to Mr Geschke, were wrongly taken from them.

"Families have incurred substantial legal costs in getting their children back after unsubstantiated, improperly investigated allegations have been made," Mr Geschke wrote.

Last night, Mr Geschke said the department was dealing in "emotional, difficult and sensitive areas and they usually get it right".

"But when they don't . . . they refuse to accept that they were wrong and they defend the indefensible. Their policy is to refuse to pay compensation for legal fees unless ordered to do so by a court or tribunal. This completely contravenes the thrust of the Ombudsman Act."

"Where demonstrable errors have been made it is not sufficient to just offer an apology," Mr Geschke wrote.

A spokesman for the department last night rejected Mr Geschke's allegations as "factually wrong". The spokesman said the department was entitled to reject the ombudsman's recommendations. "The department operates within a tightly defined legal network. We have an unusually accountable system," he said. He said some of Mr Geschke's comments in the report were facetious.

Mr Geschke, who retired on 28 February, said that in 13 years as ombudsman no minister had "sought to unfairly influence my decision".

Lawyers, however, used "balances of probability, fantasies, (and) oddball dictionary meanings" to justify some indefensible situations. "My view (is) that a barrister's opinion does not have the scientific basis or the reliability of a Melbourne weather report. . ."

Mr Geschke called for a general review of the Ombudsman Act and a parliamentary committee to whom the ombudsman could relate. He said Parliament, not the bureaucracy, should select ombudsmen.

Parasite vaccine may

We accept that a forecast scoring C or better is a pass, because it would be regarded as useful for most purposes. But a forecast scoring D or E would be regarded as not useful for most purposes so we define it as a "major error". All major errors are investigated and a report is written which sets out the reasons for the error and suggests what steps could be taken to improve the forecast in a future similar situation.

An example of a very good forecast :

Forecast :	Fine. A cold night. Mild and sunny tomorrow with northerly wind freshening. Min 6, max 21
Actual Weather :	Sunny with a light to moderate northerly wind. Min 5 max 20.

An example of a fair forecast :

Forecast:	Showers developing with local hail and thunder. Fresh to strong north to northwest winds easing later in the day. Min 8 max 16.
Actual Weather:	A mostly cloudy day with a little light patchy rain in the late afternoon and evening. Moderate to fresh north to northwest wind eased later in the day. Min 9 max 15.

An example of a very poor forecast :

Forecast :	Cool to mild, and partly cloudy, with one or two showers clearing tomorrow .Moderate southerly wind easing. Afternoon seabreezes. Min 13 max 23
Actual Weather:	An overcast day with continuous rain. Light to moderate southwest to northwest wind. Min 12 max 14.

FORECAST VERIFICATION

Every organization needs to have some idea of how well it is performing - whether it is doing its job well or badly. Factories have quality control officers who constantly monitor the manufactured articles, the end products of the factory. Some of the Bureau of Meteorology's end products are the forecasts and warnings. We are concerned with the quality of observations and the accuracy of weather forecasts.

A = VERY GOOD :	Forecast was correct in all elements and therefore very useful.
B = GOOD :	Forecast was substantially correct but may not have been completely specific or accurate in terms of some elements such as cloudiness, wind speed, wind direction. Nevertheless it would generally be recognized as a useful forecast.
C = FAIR :	Forecast was not correct in all elements but the error was not of major importance so that the forecast would still be regarded as useful for most purposes.
D = POOR :	Forecast was incorrect in one or two elements but was still of some benefit to users.
E = VERY POOR :	Forecast was incorrect in most elements and would have been misleading for most applications.

CONFERENCE UPDATE

The Australian Institute of Criminology will hold the following conferences:

20–22 July 1994: Access to Justice — Sydney.

21–26 August 1994: Eighth International Symposium on Victimology — Adelaide.

Late September 1994: Safety in Public Places — Gold Coast.

18–21 October 1994: Sentencing — Brisbane.

22–25 November 1994: Family Violence — Canberra. Contact Conference Unit, Australian Institute of Criminology (06) 274 0223.

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.

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.

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.

20–24 August 1994: Annual meeting of Canadian Bar Association — Toronto. Contact Canadian Bar Association, fax (613) 237 0185.

20–24 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.

31 August–2 September 1994: Seventh Conference on International Business Law — Singapore. Contact Ms Lochine Hsu, Faculty of Law, National University of Singapore, fax 779 0979.

7–9 October 1994: North Queensland Law Association Annual Conference — Townsville. Contact Heather Watson (07) 772 2177.

8–11 October 1994: Fourth LawAsia Labour Conference — Beijing. Contact Judge D.D. Finnigan, Labour Court, P.O. Box 50411, Auckland N.Z.

9–14 October 1994: International Bar Association 25th Biennial Conference — Melbourne. Contact Lorna McLeod, International Bar Association, London, fax 44(0) 71 409 0456.

11 October 1994: Fifth International Criminal Law Congress — Sydney. Contact Ms Rosita Johnson, Law Council of Australia (06) 247 3788.

16–19 October 1994: Thirteenth Aviation Law Association of Australia and New Zealand Conference — Hamilton Island. Contact KK Conference Management Services (03) 428 3155.

17–22 October 1994: Sixth National Family Law Conference — Adelaide. Contact Ms Ann Ewer, Stafford Conference Management, tel. (08) 364 3987, fax (08) 332 8810.

23–27 October 1994: Seventh LawAsia Energy Law Conference — Manila. Contact Mrs. May B.Y. Oh, fax Singapore (65) 224 4637.

29 October–2 November 1994: 38th Congress of the International Association of Lawyers — Marrakesh. Contact UIA (02) 232 1450.

4–6 December 1994: Second LawAsia Comparative Constitutional Law Seminar — Katmandu. Contact Professor Cheryl Saunders, Centre for Comparative Constitutional Studies (03) 344 6206.

8–10 December 1994: Biennial Conference of the LawAsia Comparative Constitutional Law Standing Committee, Katmandu. Contact Conference Secretariat, Centre for Comparative Constitutional Studies, 157 Barry Street, Carlton, Victoria 3053, tel (03) 344 5152.