VICTORIAN BAR NEWS

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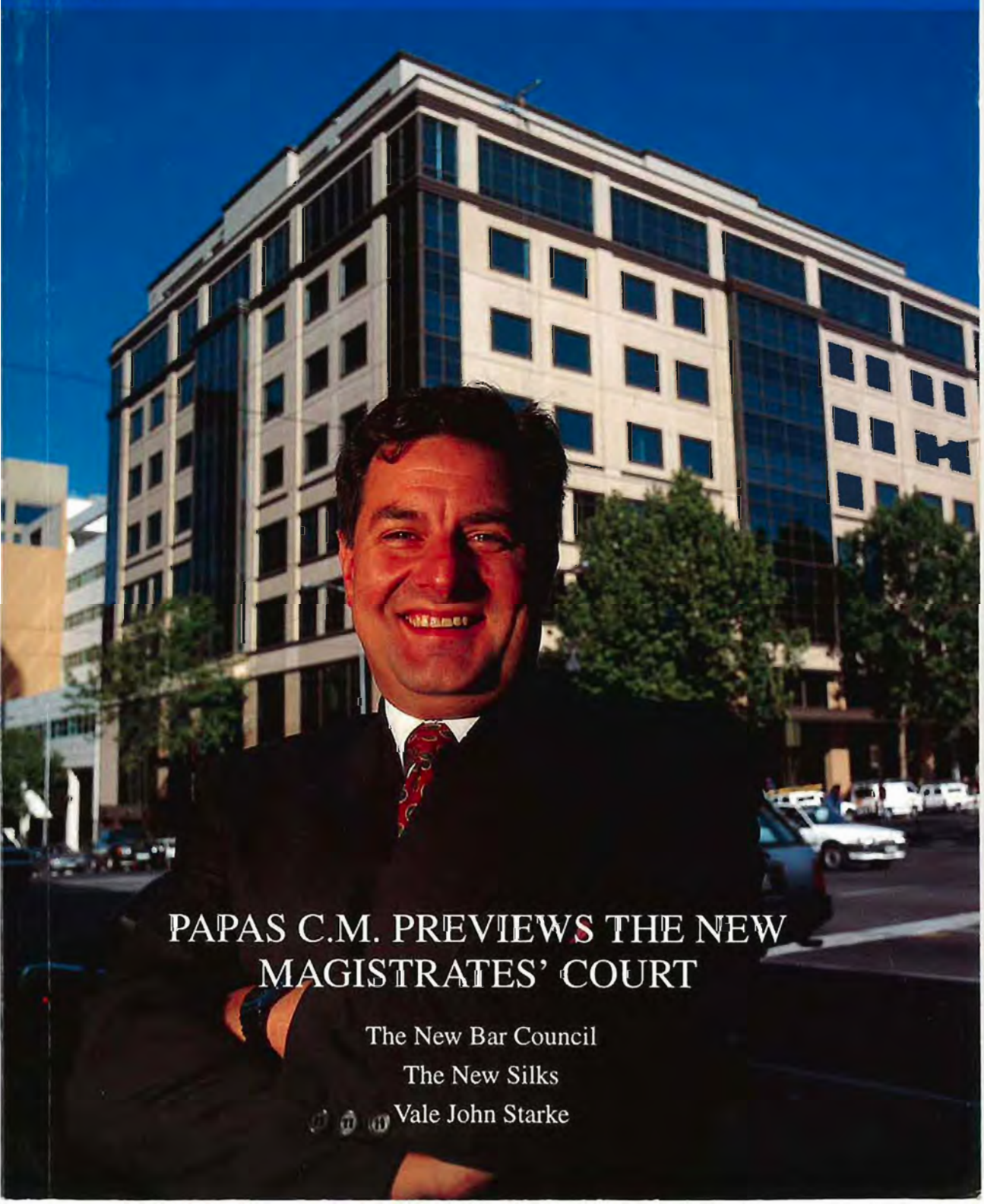

PAPAS C.M. PREVIEWS THE NEW MAGISTRATES' COURT

The New Bar Council

The New Silks

Vale John Starke

VICTORIAN BAR NEWS

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Victorian Bar Council: 1994–1995

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EDITORS' BACKSHEET

A NEW BAR COUNCIL AND THE FUTURE

A new Bar Council has been elected; details are contained in this issue. The coming year promises to be one in which that Council will face many difficult decisions.

The composition of the Bar Council has changed. Susan Crennan Q.C. has ended her reign as an energetic and successful leader of the Bar. Woinarski Q.C., the Junior Vice-Chairman, decided not to stand for election. As a down-to-earth criminal lawyer, his talents will be missed on this year's Bar Council. Robin Brett, who brought much experience to Bar Council meetings, also decided that he had had enough after many years of service. Three members of the junior category failed to make the election transition to the middle category, which was unfortunate as they had added much to Bar Council meetings.

David Habersberger's first Chairman's Cupboard is contained in this issue. We wish him well and trust that the present Bar Council can represent the many varied interests of the Bar in combatting the challenges which will continue to come from both the Government and the media.

WE WERE WRONG

In the Spring issue of *Bar News* a number of major issues were discussed including the future of republicanism in Australia and the future of our flag. We also discussed the biography of Mr. Ronald Sackville of the Federal Court. Justice Sackville (as he now is), wrote to us pointing out some errors. We therefore publish the following:

JUSTICE SACKVILLE APOLOGY

Unfortunately the editors of *Bar News* misread Mr. Sackville's entry in *Who's Who* (see Editors' Backsheet Spring 1994). He was in active practice at the New South Wales Bar from January 1985 until September 1994, in which month he was appointed to the Federal Court.

The editors of *Bar News* apologise for their error and for any upset or embarrassment caused to Justice Sackville (as he now is).

A letter from Justice Sackville is printed below.

"Dear Mr. Habersberger,

I write to you in your capacity as Chairman of the Bar Council, concerning the Editors' Backsheet, page 5 of the Spring 1994 edition of the *Victorian Bar News*.

"I am aware that the publication contains a statement that opinions are not necessarily those of the Bar Council. Nonetheless, I assume that the Bar Council has an interest in ensuring that what is printed is accurate and not defamatory. I also assume it has some responsibility for the publication.

"The material on page 5 accompanying the publication of my letter implies that the letter overstated my period in practice at the New South Wales Bar. Had anyone checked, they would have ascertained that my appointment to the Victorian Accident Compensation Commission from 1985 to 1989 was part-time. I was in active practice at the New South Wales Bar continuously from January 1985 until my appointment to the Federal Court in September 1994. (Of course in consequence of my practice as a barrister I have held other positions such as Assistant Commissioner with the Independent Commission Against Corruption and as an Acting Judge of the Supreme Court of New South Wales.) During the whole of this period I occupied chambers on the fifth floor, Wentworth Chambers.

"I should add for the sake of completeness that I was admitted as a barrister of the Supreme Court of New South Wales in 1973. My work as a barrister was not confined exclusively to the period from January 1985 onwards. See, for example, (1984) 158 C.L.R. 447, at 450.

"In view of the seriousness of the imputation on page 5 I think an appropriate apology is in order.

Yours sincerely,

Ronald Sackville"

The Spring issue also contained a number of welcomes for new judges. We rely to a large degree on the knowledge of people, who agree to write these welcomes on the basis that they know the new judge particularly well. However, it appears from the correspondence below that at least one of our welcomes omitted so much detail as to be clearly inadequate.

The Editors

Victorian Bar News

Dear Sirs,

The Spring Edition contained an article concerning the appointment of His Honour Judge Wodak to the County Court Bench.

Your readers may be interested to learn of further details of His Honour's background and personal history.

His Honour was born on 11 October 1940. His secondary education was at Melbourne High School where he matriculated in 1959 before enrolling in the Law course at the University of Melbourne. He graduated as a Bachelor of Laws on 10 March 1965 and, after completing Articles of Clerkship with John Joseph Curtain of the firm C.A. Curtain & Sons, was admitted to practice on 12 April 1966. His Honour practised as a solicitor for a period of eight years before signing the Roll of Counsel on 5 December 1974.

During his period of nearly 20 years at the Victorian Bar, His Honour developed a very wide practice, particularly in the area of civil litigation. He held a number of retainers on behalf of several major clients. In latter years, His Honour appeared in the majority of the significant complex medical negligence and industrial disease cases which came before the courts.

His Honour had two readers, Danny Masel and Duncan Graham.

For approximately seven years before his appointment, His Honour was Secretary of the Common Law Bar Association in addition to being a Committee Member. In that role, His Honour spent a great deal of time and effort looking after the interests of the Common Law Bar.

Apart from time spent with his wife and two sons, and his active participation in veterans' hockey and scuba diving, His Honour's main interests outside the law in recent years has been as a Member of the Melbourne High School Council. He is presently in his third year as President of the School Council and devotes a substantial amount of time and energy in attending to the affairs of the school.

Yours faithfully,

David Martin

We sincerely apologise to Judge Wodak for our cursory coverage.

WELCOME BACK BONGE

Bernie Bongiorno has resigned as Director of Public Prosecutions for the State of Victoria and is returning to active practice at the Bar. The loss to the State of Victoria, however, is a gain to the Victorian Bar and to readers of *Bar News*. It means that Bernie Bongiorno will be able to resume an active role on the board of *Bar News*, a position he has held for some years.

NEW SILKS

This edition contains the names and profiles of the new Queen's Counsel. The position has been abolished in many States and there has been great discussion as to a widening of the basis for appointment of Queen's Counsel. We trust that in the future, as is the case this year, the appointments will continue to be made from the ranks of those experienced in advocacy and who habitually appear in court as counsel, whether they be solicitors or barristers. If the letters "Q.C." come to be used to honour persons falling outside this category, then it may be that Victoria must turn to the system adopted by New South Wales where members of the Bar who are otherwise qualified to become Queen's Counsel are given the title of "Senior Counsel" instead.

CHILD CARE FACILITIES

An extremely comprehensive survey of the Bar has been carried out in relation to the provision of child care facilities. There has been tentative agreement that such facilities should be provided on a user pays basis for members of the Bar. Indeed there are tentative suggestions that *The Age* newspaper and the Victorian Bar should set up a joint child care centre. This would create an interesting combination of parents. Hopefully it would lead to both barristers and journalists understanding each other a little better.

CHRISTMAS

Christmas has of course become politically incorrect. Creches are banning the singing of Christmas carols. Nativity plays are offensive to minorities. This year looks to be a Tiny Tim affair for the Victorian Bar. The traditional Victorian Bar Christmas Party has now become the end-of-year cocktail party. However at this event we expect a large man in a red suit to come down a specially erected chimney in the Essoign Club to provide presents for all. It may be that after this Christmas the Victorian Bar, and in particular its arrangements for accommodation, will be somewhat different. Hopefully most of us will be somewhat more cheery than this year.

THE FUTURE OF BAR NEWS

Once again the Bar Council has devoted time and effort to an examination of *Bar News* and its future. This appears to happen every couple of years, when some member or members of the Bar express concern, usually directed not so much to the overall cost to the Bar of its quarterly magazine but rather to whether it caters for its readership.

For some time we believe that we are producing a magazine of general interest to the Bar and that there is general agreement with the direction the magazine has taken. Such feedback as we have

had to date suggests the present formula is fairly close to what our readers want. We may be wrong. It really is in the hands of the readership at large. Tell us what, if anything, is wrong with *Bar News*. Also, and preferably, tell us what is right.

THE PASSING OF SIR JOHN STARKE

On 21 November 1994 one of the giants of the Victorian Bar and of the Victorian bench died. So powerful a figure was the late Sir John Starke that the reaction to his death amongst those who knew him is largely one of amazement that his towering persona is no more. To misquote Hopkins, "John Starke, the advocate, is he dead then?"

In this issue we publish what Sir Daryl Dawson said of Sir John some eight years ago in an address to a Criminal Bar Association Dinner held in Sir John Starke's honour and an obituary written by S.E.K. Hulme which was published in *The Australian* on 23 November 1994.

The Editors

CHAIRMAN'S CUPBOARD

I CANNOT COMMENCE MY FIRST CHAIRman's Cupboard other than by thanking the immediate past Chairman, Susan Crennan Q.C., for her magnificent work on behalf of the Bar and congratulating her on a most successful year of office. Whether it was negotiating with Attorneys-General, writing letters to the newspapers, talking to journalists about the Bar, chairing General Meetings, welcoming or farewelling judges or performing the host of other tasks that are the lot of the Chairman, Sue performed admirably. Her tireless contribution to the future of the Bar in these difficult times was outstanding. I am pleased to report that Sue is now President of the Australian Bar Association so that her exceptional leadership of the profession will continue for another year.

David Habersberger

Resignations meant that the newly-elected Bar Council was deprived of the services of two stalwarts — Brind Zichy-Woinarski Q.C. and Robin Brett. Both had been members for some years. Brind's strong leadership will be sadly missed as will Robin's wise counsel. The problems of moving from the junior category into the middle category also meant that Richard Pithouse, Francine McNiff and Penny Treyvaud were not re-elected. Unfortunately their time on the Bar Council was all too short. I wish to thank each of the above for their service to the Bar, and I trust that in due course each of them will return to the Bar Council.

As I assumed the difficult task of following in Sue's footsteps, I was greatly encouraged by the congratulations and best wishes which I received from many members of the Bar. However, some of the messages of support were very gloomy about the future of the Bar. There is no doubt that the Bar is experiencing difficult times. Nevertheless, I am convinced that, subject to one qualification, the Bar will survive and prosper in the years ahead. The qualification is that members of the Bar continue to provide the public of Victoria with the very best advocacy services. It is no accident that, de-

spite a fused profession, the Victorian Bar has existed for over a century as an independent and separate Bar. Rather, it survived because it provided the most efficient means of enabling people to be represented in courts and tribunals and it survived because by and large members of the Bar provided the best advocacy services. There is no reason why this should not continue to be the case. Members of the Bar are specialist advocates. Most of us have had the advantage of undertaking the Readers' Course, so that our training in advocacy is far in excess of that of our competitors. As specialist advocates our experience quickly surpasses that of most of our competitors. We all know that advocacy is not easy. Yet we have the opportunity to continually work at developing our skills and our understanding of what is required to be an effective advocate. Therefore, I see no reason why the Victorian Bar should not continue to be regarded as providing the most efficient means of enabling people to be represented in courts and tribunals and its members to be regarded as by and large the best advocates in the State. Unless we can justifiably make this claim then the future of the Bar will indeed be grim.

On a lighter and more personal note may I say that, having for some years been largely removed from the everyday life at the Bar, it has been very pleasing to find myself back in chambers, mixing on a daily basis with my colleagues both in and out of court. I do not believe that any other profession matches the camaraderie which exists between barristers and as far as I am concerned it is one of the most attractive features of life as a member of the Victorian Bar.

Finally, I invite members of the Bar to raise with me or other members of the Bar Council any matters of concern. We need to know your views on the important issues facing us in the immediate future.

David Habersberger

ATTORNEY-GENERAL'S COLUMN

PROSTITUTION CONTROL BILL

IN ITS LAW AND JUSTICE POLICY released before the last election, the Coalition noted that amendments made by both Houses of Parliament to the previous Government's Prostitution Regulation Bill were not brought into operation by that government. The policy stated that "in legalising brothels without the safeguards Parliament intended, the [Labor] Government has indicated its contempt for a democratic system of government in Victoria".

"The Coalition will proclaim the remaining sections of the *Prostitution Regulation Act* 1986 and will consider whether other changes are necessary in the light of the findings and report of the Queensland Criminal Justice Commission which examined the operation of the Victorian legislation."

In December 1992, I established a working party to review the entire Act, and to indicate which areas of the Act required reform. The present Bill incorporates many, though not all, of the working party's recommendations.

The Bill utilises three areas of control over prostitution:

(i) criminal controls;
(ii) licensing controls;
(iii) planning controls.

CRIMINAL CONTROLS

The Bill retains criminal sanctions against those who are involved in child prostitution. It introduces a new offence of facilitating sexual offences against children. The new offence will be incorporated into the *Crimes Act* 1958, and will apply to

those Victorians who organise tours for paedophiles to travel overseas in order to exploit child prostitutes in other countries.

When the Commonwealth Government introduced its legislation applying to child sex tours, I maintained that it was inappropriate for the Commonwealth to introduce offences relating to persons who organise child sex tours from within Australia. This is a criminal law matter falling squarely within the jurisdiction of the States as provided for under Australia's Constitution. The new offences in this Bill assert Victoria's right to legislate in respect of criminal conduct occurring within its borders. The new offences will operate to reinforce the Commonwealth legislation, which expressly saves any similar State legislation.

The new offences in this Bill assert Victoria's right to legislate in respect of criminal conduct occurring within its borders.

The Bill will amend the *Travel Agents Act* so that licensed travel agents who are convicted of organising child sex tours will have their licences removed.

Other new offences apply to persons who are found without reasonable excuse in an illegal brothel, and to persons who serve alcohol in brothels. Many planning permits for brothels ban alcohol, and this offence formalises the practice, which will assist to protect prostitutes from their greatest danger of physical abuse: drunk clients.

Soliciting offences are retained. The majority of Victorians do not want the noise, disruption and abuse associated with street prostitution on their streets. However, the Government recognises that it is clients and sight-seers who are often the main problem. Penalties applying to street soliciting are higher for clients than for the prostitutes. A new offence applying to those persons who use abusive or insulting words in a public place with the intention of intimidating a prostitute is included in the Bill.

LICENSING CONTROLS

The Bill establishes a Prostitution Control Board which will regulate the prostitution industry in Victoria. The seven-member Board will include persons with expertise in laws relevant to the regulation of prostitution, a police representative, and persons with knowledge of prostitution, health, and community issues. The Board will be responsible for the rigorous licensing procedure for prostitution services, and also for disciplining licensees.

Operators of brothels and escort agencies will be required to obtain a licence. The unproclaimed licensing provisions in the existing Act apply only to brothels. However, escort agencies now comprise most of the prostitution industry in Victoria, and they must be included in the licensing regime.

One or two person owner-operated brothels will be excluded from the requirement to obtain a licence, as long as they are located in non-residential areas required by the planning controls. This is intended to reduce the number of larger brothels, and also offers some autonomy for prostitutes who do not wish to work for another person. The exemption will not apply if such small brothels are associated with any other brothel. This will prevent one person from avoiding the licensing provisions by setting up a number of small brothels.

The licensing provisions require managers of brothels and escort agencies to be approved by the Board. A manager or licensee is required to be on licensed premises at all times.

PLANNING CONTROLS

The planning controls on the location of brothels contained in the existing Act are inadequate. In this Bill, the Government is recognising community demands for strictly defined limitations on the location of brothels.

At present, planning authorities are required only to take into account the proximity of dwellings, churches, hospitals or other community facilities to proposed brothels. There are no fixed restrictions on the proximity of brothels to these kinds of premises. The Bill removes this uncertainty in the law.

The planning controls in the Bill will ensure that brothels are not established within 100 metres of dwellings or within 200 metres of places of worship, hospitals, schools and other places frequented by children for recreational and cultural activities. Clearly defined but slightly less restrictive controls will apply within the central City of Melbourne, as land use in the city is more intense, with less obvious impact on brothels. However, no such business in the city will be established in close proximity to dwellings, places of worship, child care centres or places frequented by children for recreational and cultural activities.

Provisions in the existing Act which allow councils to ban brothels in their municipalities are not repeated. Those provisions were inserted by the Coalition parties who were concerned at the

vague nature of the planning controls in the previous Government's Bill. With the clear planning provisions in the new Bill, the provisions allowing councils to ban brothels are not needed.

PROSCRIBING OF BROTHELS

Provisions in the present Act and in the *Town and Country Planning (Miscellaneous Provisions) Act* 1961 relating to the proscription of illegal brothels will be consolidated in the new legislation. When premises used as a brothel are proscribed by the court, notice is given in newspapers and notices are affixed to the building. A person commits an offence by being on the premises if he or she does not have a reasonable excuse for being there. Police may arrest without warrant any such persons found on the premises.

CLASSIFICATION OF FILMS AND PUBLICATIONS (AMENDMENT) BILL

The primary purpose of the Bill is to provide for the classification of videos.

The decision of the Supreme Court in *DPP* v. *Makris*, earlier this year, found that the Commonwealth's censor had no authority to classify video tapes for Victoria because the previous Government had failed to enter into an agreement with the Commonwealth following the introduction of the *Classification of Films and Publication Act* in 1991. A new agreement between the Governor of Victoria and the Governor-General of the Commonwealth pursuant to s.4 of the *Classification of Films and Publications Act* was executed on 25 October 1994. This agreement enables the Commonwealth censor to classify or refuse classification of video tapes.

In order to validate censorship decisions for the period during which there was no agreement regarding videos, the Bill provides that where a video tape has been classified as "G", "PG", "M", "MA", or "R" under the Australian Capital Territory Classification of Publications Ordinance before the commencement of the new agreement, it will be deemed to have that classification under the Victorian Act. Likewise, the Bill provides that if a video tape has been refused classification or has been classified "X" under the Australian Capital Territory Ordinance, it will be deemed to have been refused classification under the Victorian Act.

IS THERE A CHARMING, WITTY AND FUN male Barrister willing to squire a stunning red-haired 36 year old actress to her ex-husband's 50th birthday party?

She needs to be chuckling merrily on the arm of a personable gentleman who will no doubt possess a real sense of humour, adventure and theatre — [some of the characteristics commonly attributed to the Bar].

Unfortunately it's for tomorrow night — apologies for the late notice — but if you fancy a fun free dinner in the company of an amusing glamorous red-head why not call this number today and leave your name and number — [phone number deleted by editors].

Cheers!

For those who missed it on the Ground Floor Notice Board.

Of course, for more widespread response from a better class of respondents the advertiser would have been well advised to advertise in Bar News.

FAMILY LAW BAR ASSOCIATION

THE MAJOR SOCIAL EVENT OF THE Association in the last three months was the Annual Dinner held on the 1 September 1994 at The Botanical. This event was attended by a record number of members and guests. It has already been the subject of a report in the *Bar News* ("the Family Law Bar Association goes Botanical" — Spring, 1994), complete with photographs of some of the luminaries in attendance. The report further included the tantalising suggestion that even more sensitive photographs could be had upon application to the Editors if accompanied by significant cash inducements.

The Association deems it important to publicly record that a most enjoyable Dinner was had by all, and, whilst some members looked the poorer on the following day, none have looked the poorer since the publication of the aforesaid report.

The formal activities of the Association in recent times have particularly involved ongoing consultation with the Family Court under the auspices of the Judge/Administrator the Honourable Justice Frederico as to the simplification of court procedures, and also responding to worrying proposals from the Legal Aid Commission of Victoria for changes to existing funding arrangements.

Notwithstanding a 3% increase in the Legal Aid scale for family law matters effective from 1 August 1994, the very limited availability of Legal Aid for family law litigants and the remuneration for counsel prescribed by the scale continue to be matters of great concern to the Association.

CHIEF JUSTICE'S CHAMBERS
SUPREME COURT
MELBOURNE, 3000

OPENING OF THE LEGAL YEAR — MONDAY, 30 JANUARY, 1995

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

St Paul's Cathedral
Cnr Swanston & Flinders Streets
Melbourne at 9:30 a.m.

St Patrick's Cathedral
Albert Street
East Melbourne at 9:00 a.m.
(Red Mass)

Temple Beth Israel 76–82 Alma Road St Kilda at 9:30 a.m.

There will be no Greek Service because of the clash in the Greek Orthodox Calendar.

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

Members of the judiciary, Queen's Counsel and the Bar are invited to robe for the procession in the various robing rooms in good time for the start of the procession, and all members of the profession are invited to join the procession. Marshalls will be present at the services to indicate the order of the procession.

BILL OF RIGHTS DEBATE RE-IGNITES

THE DEBATE ON AN AUSTRALIAN BILL OF Rights is set to be revisited. This time the forum will be a broad community-based debate, which hopes to attract the widest participation. The occasion will be the Australian Rights Congress to be held at Darling Harbour, Sydney, 16–18 February 1995, and its convening could not be more timely.

The debate on an Australian Bill of Rights has been an on-again, off-again affair for the last 20 years, beginning with the Whitlam Government proposal that the Federal Parliament enact one. There have been other efforts since to enact a Bill of Rights, but none has succeeded. There are indications, however, that this situation could be close to changing.

There is an increased public awareness of our rights and the importance of some mechanism to ensure those rights. There is an active High Court which in recent decisions has shown a judicial inclination to recognise individual constitutional guarantees. There is also a vigorous republican debate which has led to examination of our Constitution on a national and individual level and weighing up how well our Constitution does serve the aspirations of all Australians.

To set the framework for discussions, the Congress will begin with an outline of the history of earlier proposals for an Australian Bill of Rights and the categories of rights that need to be recognised and protected. The adequacy of existing protections and protection mechanisms will be examined in sessions dealing with the rights of children, women, gay men and lesbians, indigenous people, people with disabilities, people with mental illness and people of non-English-speaking background. Discussion of mechanisms for protecting rights will cover a Bill of Rights or Charter of Rights, declaration of rights and freedoms, piecemeal legislation and judicial infusion of rights.

The Canadian, South African, European and New Zealand positions and experience will be examined. There will be sessions on particular clusters of rights including:

- the rights to social welfare, an adequate standard of living, rest and leisure, education, housing, marriage and family, language, culture and medical care;
- freedom of expression and freedom from censorship;
- the rights to privacy, name and reputation;
- recognition by the law, equality before the law, access to the courts;
- due process and the right to a fair trial, freedom from arbitrary arrest, detention and exile;
- democratic rights of assembly, free movement and association, freedom from discrimination;
- the right to freedom of thought, conscience and religion.

The Congress will also consider the rights of particular groups in Australia:

- women;
- indigenous people;
- children and young people;
- people with disabilities;
- prisoners;
- gay men and lesbians;
- asylum seekers.

Plenary sessions will then look at the roles of the Federal, State and Territory Governments in protecting rights. The final plenary session will consider whether the Congress will issue a final statement or position paper on a Bill of Rights.

Speakers at the Congress will include:

Mr. Brian Burdekin, Federal Human Rights Commissioner

Ms Margaret Mulgan, New Zealand Human Rights Commissioner

Mr. Mick Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner

Justice Murray Wilcox, President, Industrial Relations Court of Australia

Mr. Rodney Croome, Tasmanian Gay and Lesbian Rights Group

Ms Sue Tongue, Deputy President, Australian Law Reform Commission.

The Congress has been postponed until February 1995 to enable the widest possible participation. The conference fee is heavily subsidised and is as low as possible so that no one need be excluded. A special early-bird registration fee for the three-day congress has been set at $225 and student and pensioner rates also apply.

For registration and further information contact John Mulready on (02) 956 8333 or fax (02) 956 5154.

Chris Sidoti
Australian Law Reform Commissioner

CRIMINAL LAW BAR ASSOCIATION

APPARENTLY THE CRIMINAL LAW BAR Association held its annual dinner at the Fortuna Village restaurant on 12 October last. We know that because we have some photographs taken early in the evening. Unfortunately, we have been unable to obtain an eye-witness account. We have enquired of everyone we know who attended the evening. None of them can remember, or will admit to remembering, the evening. For an account of the evening we are left to rely upon the accompanying transcript and photographs. We are also reliably informed that the trophy for best performance of the night will be crossing the Tasman.

IN THE MATRIMONIAL INQUISITION COMMISSION OF VICTORIA

SITTING AT RINGWOOD

IN THE MATTER OF PENMAN

Cor: Mrs Penman and a jury of two
Defendant in person

The Commission: "You stumbled in at 2 a.m. this morning didn't you?"
A Juror: "You woke me up when you trod on the cat."
Another Juror: "I heard you swearing at the cat — you weren't nice to pusskins!"
The Commission: "Well, what do you have to say for yourself?"
The Defendant: "I had warned you that I was going to the Criminal Bar dinner last night and that I could be home late."
The Commission: "That's no excuse for the condition you were in last night or should I say, this morning. On top of that you breathed garlic over me all night, snored and made other wonderous noises."
A Juror: "You still stink of garlic"
Another Juror: "And your eyes are a funny colour too!"
The Commission: "Well what do you say!!"
The Defendant: "It was important for me . . ."
The Commission: "Important!! That you go and have a boozy night with a few cronies!!"
The Defendant: "That's not fair. There were a lot of important people there."
The Commission: "Just because a couple of dissolute Q.C.s get along for a drinking session doesn't make it important."
A Juror: "What's a Q.C.?"

Lovitt's law

Another Juror: "What's a dissoloot?"
The Defendant: "Well, a Q.C. . . ."
The Commission: "Don't change the subject! What was so important about last night?"
The Defendant: "Well, there were some judges . . ."
The Commission: "Yeah, how many?"
The Defendant: "Well, there was Justice Brown of the Family Court . . ."

Crafty Janus eats Chinese

The Commission: "The Family Court! This was a Criminal Law Dinner wasn't it?"
A Juror: "What's a Family Court?"
The Defendant: "She used to be a member of the Association. And there was Mr Justice Vincent of the Supreme Court . . ."
Another Juror: "Whatsa Supreme Court?"
The Defendant: "And Judge Walsh, Judges Hussett and Kelly and their wives and . . ."
The Commission: "Wives!?! Why wasn't I told about it?"
The Defendant: "Errr ... Ahhh ... Well ... Errr ... Well only the guests ... ahh some guests ... had their wives and in any case you wouldn't have enjoyed it all that much."
The Commission: "If you didn't enjoy it why did you get home so late?"
The Defendant: "Oh, it was a very good night but all very 'in house' and all that barrister talk you say you don't like."
The Commission: "Hmph! So there were a few guests . . ."
The Defendant: "No! There were a lot. I didn't tell you about Judge McInerney or Magistrates Crowe, Franich Cashmore and Popovic or the DPP from New South Wales . . ."
Another Juror: "Whatsa Deep Pee? (giggle giggle)"
The Defendant: "A DPP! And 20 or so delegates from the IBA Conference."
The Commission: "IBA! Is that a court I haven't heard about?"
The Defendant: "No! It's the International Bar Association which is having its Biennial Conference in Melbourne at the moment."

Brin brins

Camera catches Cowdrey

It's not Guinness

Con and Kiwi

The Commission: "So you are saying that you had to meet all those people and it took you all night and half the morning and caused you to fill yourself with alcohol and garlic?!"
The Defendant: "Well the food was a Northern Chinese banquet and it was quite spread out."
The Commission: "I suppose we will get the usual story 'the food was ordinary and I would have preferred to be eating at home!' — the 'it hurts me more than you defence'. It won't wash!"
A Juror: "You still reek of garlic!"
The Defendant: "Actually the food was great, superb. Here look at the menu."
The Commission: "I might look at it later. I'll call it Exhibit A at the moment. I can't see how it would take six hours to eat."
The Defendant: "There were some speeches: Colin Lovitt, Brind Woinarski, Nicholas Cowdrey Q.C."
The Commission: "Oh yeah! Tell me what they said."
The Defendant: "Lovitt read out lots of apologies and said he had run 26 dinners . . ."
The Commission: "What! One a fortnight! I wonder what his wife would say?"
The Defendant: "No! Annual dinners! There are a few things about the night I cannot remember all that well."
The Commission: "Ahah! Like what?"
The Defendant: "Some of the speeches. I know Brind's was short and Nicholas Cowdrey's was quite funny and short too."
The Commission: "If they were short that wouldn't have held things up much."
The Defendant: "Oh there was a noodle-making exhibition from the chef. It seemed to be a big deal."
The Commission: "What has that to do with Criminal Law?"
The Defendant: "I don't know, although the way he was throwing the dough around it could have been a form of Chinese bondage. I don't really know."

"There was a noodle-making exhibition from the chef. It seemed to be a big deal." "The way he was throwing the dough around it could have been a form of Chinese bondage. I don't really know."

The Commission: "What about the state you came home in? And where's the car?"
The Defendant: "The car's parked near Chambers. Look, I don't feel too well. Can we talk about this later?"
A Juror: "Gee, you are a funny colour."
Another Juror: "Where are you running to?"
The Commission: "We'll continue this later."
The Commission was adjourned *sine die.*

NEW MAGISTRATES' COURT

ALTHOUGH THE NEW MELBOURNE Magistrates' Court complex will be officially opened on 14 December 1994 the Civil Section moved in on 7 November 1994, WorkCover on 28 November 1994, and the Criminal Section on 5 December 1994. *Bar News* and photographer Andrew Chapman had a preview just before the final scaffolding came down. That is, the Magistrates' Court scaffolding; the County Court's still remains as a counterpoint as it were (*vide*: the cover photograph). On its preview *Bar News* was accompanied by the Chief Magistrate, Mr. Nick Papas.

THE ENTRY FOYER

"Every new court should be built this way: the DPP's looked after, Legal Aid's looked after, Counsel are looked after, there is now enough interview rooms to satisfy the most ardent conferrer . . . there are lots of telephones . . . [although] some counsel are concerned that we haven't got card phones. There are only coin-operated telephones . . . many counsel now have mobile telephones. There are no restrictions on the use on mobile telephones in here. There certainly will be restrictions in court . . . there is a good signal here.

"Network has its own rooms, they will not be taking interview rooms! There is a Police Prosecutors' Room — it is a good large room. The interview rooms are good-sized. Effectively there are two to a court. Plenty of places to talk to your clients. It [also] will be easier to have conferences with clients and walk across.

"There are two floors for crime, and there are two floors for civil. There are 32 courts in the building: 18 criminal courts and the rest will be civil, crimes comp and WorkCover.

"On each floor there will be camera surveil-

The entry foyer

A directions hearing?

A small step for man . . .

lance. There is a security room downstairs which will be able to contact roving security officers whenever a problem occurs. It is an incredible system.

"On the third, fifth and sixth floors there are baby change rooms . . . There is a display with computerised information of the lists, information about the courts, 'if you are not sure what to do go there,' 'legal aid office on this floor'. Because we found that just with lists, of which we will have plenty, they will not be read . . . the younger people, especially, will go straight to a video display. So the advice that we have got, and the system we have employed, is really quite good, with excellent graphics.

"There are three video courts."

COURT 1

"Court I will be the main remand court. It will be the court that most prisoners will see as their first appearance whenever they are arrested. Presumably the Bail Justices will remand them there to the next day. They will have their appearance and bail application in this court. If this court is being used for a significant case where we have got a large number of accused, we will convert Court 2 and we will have Court 1 next door. We will use the two interchangeably . . . In terms of the number of seats — when you look at it I am not sure there is the same number of seats [as in the current Court 1] but it is as big . . . The ceiling has come up well in terms of light . . . the acoustics are fantastic. You can't get-away with *sotto voce* comments at the Bar Table any more . . ."

BEHIND COURT 1

"Each floor will have a separate custodial corridor and judicial corridor . . . the custodial corridor will be purely for prisoners and prison or police officers. . . [The Adjournment Cell] . . . that is the short-term cell — where you put counsel when they ask for too many adjournments — the permanent cells are downstairs. The prisoner will be brought in downstairs. If you want to see your customer before court very quickly they will be brought in here — you will be on the other side. It is a quick interview arrangement. This is just a short-term very quick

Court 1

The Civil Courts

'back of the court' type of interview which you currently do in the Watchhouse or in those cells you now have in Court 1 . . . you can't pass through any thing or information, I do not think. It is very hard to talk to anybody . . . I doubt that it is very satisfactory but it is more satisfactory from a security point of view. There are a lot of interview rooms downstairs (in the secure area).

"We are struggling to get the right colours in terms of illumination. I think these are very smart court-rooms.

"They are not greatly different from the Criminal Courts — there is no dock, slightly different colouring, no access to the cells. They will not be used for anything other than civil and quasi-crime . . . We have to get so many down stairs so why would we bring crime up here. Civil needs Courts . . . One of the projects I am really keen to get to work on is to tape record all of our courts — I think it is a disgrace people go to goal for a long time and people have substantial civil disputes (without recording). You read a lot of S92 appeals and the current equivalents of orders to review in civil matters and the judges are still working on the old rules in relation to affidavits. It is ridiculous . . . I think it is terrible but I think it would cost us something in the order of $300,000 to $400,000 to deck out all the Courts with machines, wiring, microphones and all those sorts of things. Our staff have been trained so the Registrars have been trained to run the courts with tapes. The cost of tapes themselves are marginal but savings for the State are quite significant if you think about the amount of time wasted with affidavits . . . A lot of magistrates get very frustrated by what they see as quite wrong interpretations of what has gone on before them."

UNDERNEATH THE DOME

"You will see how the design for the dome has different coloured edges . . . it is intended to allow more light in the top and slightly filtered lower

You can always go upstairs!

down. In fact, on a bright day, you almost need sunscreen protection.

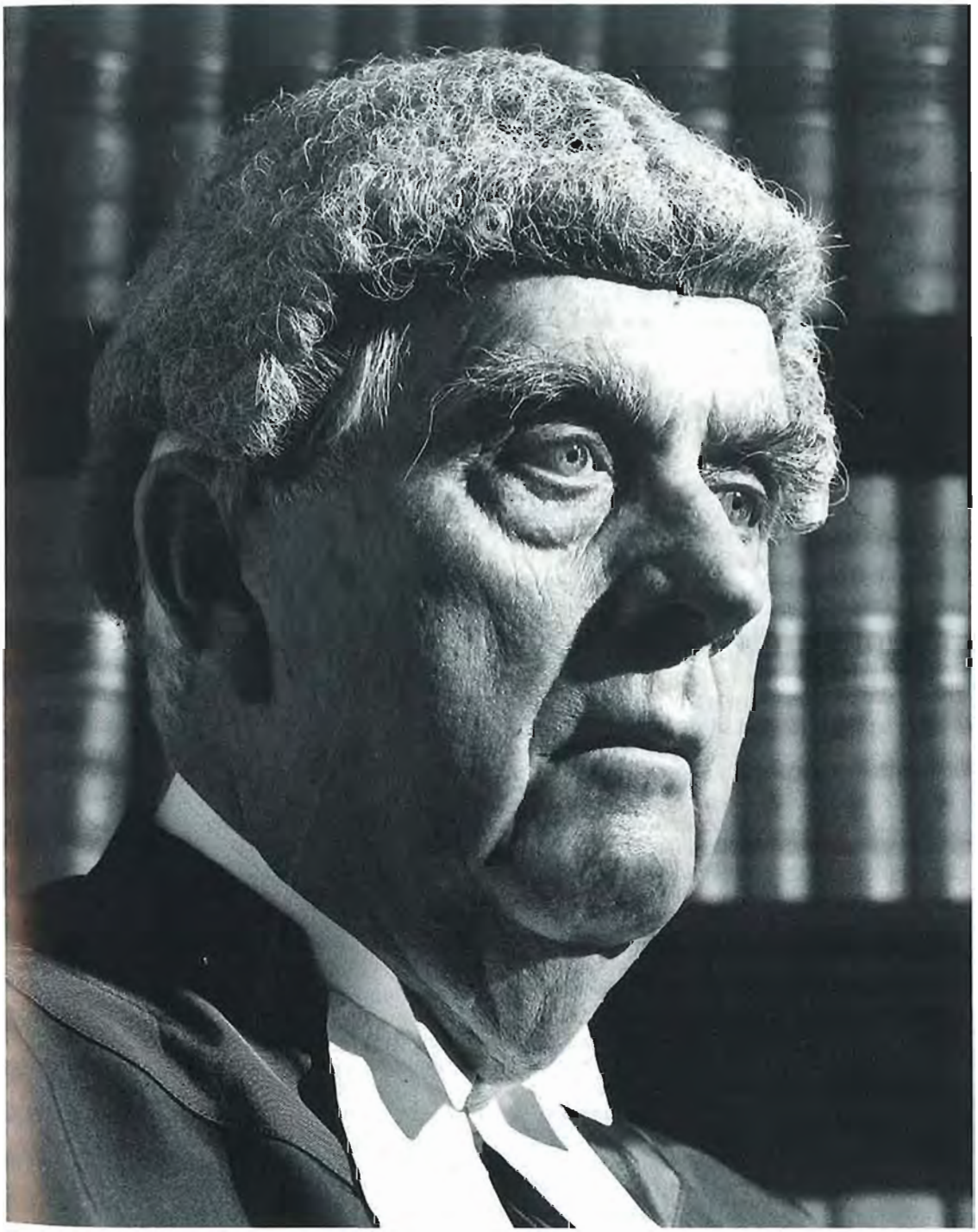
"This is our conference area . . . we have have separate conference rooms or we can have our entire magistracy in one room. There will be 40 magistrates here . . . and 40 sets of chambers.

"In terms of the Library it is going to be more than adequate . . . [there will be a] Librarian and photocopier . . . reading tables. The Library will be available only to magistrates — presumably counsel will be able to pop back over to chambers."

The common room area is where we expect most magistrates to congregate.

"I hope you've noticed that the Supreme Court dome is still higher than us"

VALE — JOHN STARKE



On 22 April 1986 the Criminal Bar Association held a dinner in honour of Sir John Starke. The address at that dinner was given by Sir Daryl Dawson. With his Honour's permission we print that address below.

ADDRESS TO THE CRIMINAL BAR ASSOCIATION DINNER IN HONOUR OF SIR JOHN STARKE, 22 APRIL 1986

In asking me to speak, Mr. President, in honour of Sir John Starke, you have given me a task which I undertake with real pleasure, but it is no easy one because Starke (I cannot keep on calling him Sir John — it has an effete sound about it which entirely belies the man), because Starke has for more than forty years been such a towering figure in the law in this State and those of us who have grown up in his shadow have become so accustomed to his enormous presence and influence that any attempt at evaluation seems a work of supererogation.

Not only that, Mr. President, but it is not possible to approach the subject in any ordinary way because of the quite remarkable blend of the man which defies any conventional treatment. Not least of the difficulties is that to relate directly any story about Starke requires the repetition of what one author has called his "blunt vernacular" which, however colourful and true to nature it may have been at the time, is, at the very least, not the usual stuff of an after-dinner speech at a black-tie affair.

Nevertheless, I want to start by going back to when I was a fresh-faced 22-year-old and Starke was a rising junior some twenty years older. I was an articled clerk and I was given the job of instructing Starke in the Ballarat Court of Petty Sessions where he was briefed to appear on behalf of a local firm in a weights and measures prosecution. He picked me up at the Haymarket Hotel early in the morning and we drove to Ballarat in virtual silence. The most I could get from Starke was a grunt from time to time. When we arrived, we held a conference on the grass outside the court as was the custom then and perhaps still is. Starke turned to one of the prospective witnesses and muttered, "Well, what can you say?" "That all depends." he replied. "Depends on what?" said Starke. "Depends on what you want me to say," said the witness. "P... off," said Starke. "What do you mean?" said the witness, holding up his subpoena, "I've got this." "I said p... off," thundered Starke. We went into court and we lost. On the way home I'd still had no more than a grunt from Starke until we were about half-way there when he turned to me and said, "There's one thing you want to remember laddie, your reputation is worth more than one case". It was my first lesson in the ethics of the Bar and, short and sharp as it was, it is etched upon my memory.

I tell that story because it is of the essence of the man. As a barrister, no one fought harder than did John Starke. He did not pull his punches. He brought his immense talents to every case. Ever adaptable to the circumstances, whatever the tribunal, whoever the judge, he would reason, cajole, bully or charm as the case demanded. But not for anyone, not for any case, did he ever relax the standards of his profession or compromise the principles upon which it is built. It is an independent profession and he is, above all, an independent man. He has always understood in his very bones how much that independence depends upon the strictest observance of an ethical code.

I want to start by going back to when I was a fresh-faced 22-year-old and Starke was a rising junior some twenty years older.

Having told that story, I must say that I do not know why Starke has a tendency to be taciturn in the early morning. I do know that in his earlier career he was not exactly a teetotaller and on circuit was able to defeat the capacities of most other members of the Bar and, if none of them was available, to pit his talents against the usual fraternity of commercial traveller.

Perhaps Starke has taken a little longer than some to work off the bad habits of youth. Those habits were known to everyone except, apparently, his mother, who upon any account seems to have been the saintliest of women. She could not have been entirely unaware of her son's hair-raising reputation, but when two disdainful matrons were discussing the sober virtues of their sons in contrast to the distressing drinking habits of the youth of the day, Lady Starke was able to observe with pride, sweetly and quite innocently, "Well, I am quite sure that John doesn't drink. He's always so thirsty the morning after a party" . . .

It is, of course, as a barrister that I think of John Starke. He was at the height of his career during

my first years at the Bar and he dominated any courtroom in which he appeared. Whilst he did not practise largely in the more elegant jurisdictions, he was as forceful an advocate away from the jury as he was in front of it. His appearances before the High Court were limited — although on the occasion of the *Tait case* more dramatic than any other appearance before that court — but this was more a matter of choice than necessity. Despite the fact that his father had been a member of the High Court Bench for more than thirty years, Starke exhibited bemusement by the jurisdiction, being under the impression that the Bench and the Bar engaged in esoteric word-play and private jokes which were intended to mystify him. "Circuses," he told me, "Circuses are the thing. Just mention circuses and they'll all dissolve into giggles." I've had the time and the occasion to think about that a bit lately and have come to the conclusion, John, that it cannot have been circuses. It must have been lighthouses. But with my present audience, I do not think that I will pursue the matter.

However, I would say that even if Starke does not himself profess to be a profound lawyer, that view is not altogether shared by others and particularly the High Court where, as I have noticed with some private satisfaction, a strongly held view of Mr. Justice Starke is of powerful, persuasive force. *He Kaw Teh* is a recent example. And although it may be thought by some that advocacy requires no deep knowledge of the law, may I say that it is a skill which very much depends upon that instinctive grasp of fundamental principle which has always been one of the great strengths of John Starke as a barrister and a judge. May I add also that, above all, advocacy requires hard work and dedication. And if John Starke has lived life to the full whilst pursuing his chosen profession, most of us are still in bed long after he has risen with a clear head in the early hours of the morning to begin a day's work.

It was before a jury that Starke excelled. At his peak, he had no equal in this country. And this was a time of great jury advocates. In this State there was money to be made in the running down jurisdiction and Starke made his share. But he never confined himself to civil cases and it was in the criminal courts where the stakes were higher but the reward was less that his advocacy reached its greatest heights. And we should remember that those were the days of the death penalty, of which Starke became an implacable opponent. He was always a barrister who keenly felt and understood, without judging, the predicament of his client. Nowadays, for reasons which I will not trouble with, most of the talented jury advocates are to be found in the criminal rather than the civil courts, but at the time when Starke was the leader of them it was not so and his practice of the criminal law lent to it a stature which it otherwise would not have had.

> "There's one thing you want to remember laddie, your reputation is worth more than one case". It was my first lesson in the ethics of the Bar and, short and sharp as it was, it is etched upon my memory.

I suppose that many of you here tonight never knew Starke as a barrister and it is a great tribute to his influence on the Bench that we are celebrating his career on this occasion. But if I could, I would recreate for you the image of this man as a barrister. A barrister whose powerful personality, fierce independence and consummate skill made an advocate of whom this Bar will ever be proud.

I do not think that I would be overstating the matter if I said that Starke has probably found his life as a judge somewhat less exhilarating than his life at the Bar. Moreover, whilst it has not always diminished his irreverence, his bluntness, his irascibility and his quite unusual ability to offend some of the more socially susceptible members of our society, I am sure that it has meant devotion to duty of a different order. And a steely devotion to duty has always been a strong aspect of his personality. Not only duty, which is a cold word, but loyalty to the law. Starke has always been prepared to do what was required of him, even if it may not have been his own choice.

His loyalty is something which those who have read with him or have been his junior for any length of time have come to know. To all outward appearances not a sentimental man, his unexpected warmth and generosity of spirit, of which there were memorable flashes on the Bench, are something which many of us have experienced and come to value — perhaps above all.

During the time Starke was on the Bench, and I was Solicitor-General, I sometimes thought I discerned a sort of torpor descending when the case had failed to capture his imagination as the day wore on. There was one cure for that. I would look behind me, make sure that there was no one that mattered in the court, forget the niceties and provoke an argument. Something like "Trial by jury is often a bad method, you know" would do. His Honour would also dispense with the niceties and it would be a stimulating afternoon.

John Starke's greatness has never been far beneath the surface. I doubt whether he knows that. At the last Bar dinner he was given a standing ovation. He said to me when we sat down, "Do they really mean it, Daryl? I'm so rude to them." They meant it then and they continue to mean it.

Daryl Dawson

The following obituary written by S.E.K. Hulme appeared in *The Australian* on 23 November 1994. It is reprinted here with kind permission of the author.

JOHN ERSKINE STARKE

John Erskine Starke was born on 1 December 1913. His father Hayden Erskine Starke was a Melbourne barrister, and for thirty years from 1920 a commanding figure on the High Court of Australia. Only in the very late years indeed of Sir Hayden's long life did either son or father gain any satisfaction from the connection. Starke's mother Margaret Gavan Duffy came from a family which in a period of sixty years produced a Victorian Premier, a Judge of the Supreme Court of Victoria, and a Chief Justice of the High Court.

Starke's great-grandfather Sir Charles Gavan Duffy was described as "a man of charm, wit, talent and learning, and a devoted friend," but "brusque and peremptory in controversy". Starke was very much a Gavan Duffy. Sir Owen Dixon said of Sir Hayden Starke that "his legal knowledge, his discriminating judgment as to what mattered, his clearness and directness of speech and the strength of his mind and character combined to give him a forensic force as formidable as I have seen". Starke was very much a Starke. The mix was volatile.

Having, so legend relates, become by the age of 8 more than the nuns could handle, Starke thereafter attended the Melbourne Grammar School. In due course he went up to University of Melbourne, residing at Trinity College between periodic rustications. His boisterousness was always combined with humour. On the one occasion he is known to have been locked in the cells overnight, with a group of friends, only Starke poked his shoes through the bars into the corridor so that the police could clean them.

Starke graduated in law in 1937. He served his articles with Messrs. Hedderwick Fookes & Alston, who imposed a condition that on weekdays he not drink alcoholic liquor until 5.30 p.m. At the beginning of 1939 he went to the Bar, where he read with Mr. A. L. Read, later Judge Read of the County Court. Already he was a keen sportsman, and though cricket and football held his interest to the end, it was racing which gave him the greatest thrill. Flemington racecourse was his favourite place, and he was to be a member of the Victoria Racing Club for many years. In later years he was greatly proud that one day when things went wrong at a country meeting, he was permitted to serve as penciller to Mr. Albert Smith, rails bookmaker.

Starke enlisted in the 2nd A.I.F. in October 1939. In later years his low number, VX 580, was a point of vanity in a man who had few vanities. After training in the School of Artillery he was transferred to the 2nd 11th Field Regiment as a lieutenant. In 1941 and early 1942 he served in Africa and then in Syria, against the Vichy-controlled French Foreign Legion. Starke always regarded the Legion as the toughest opponent the A.I.F. fought in the Second World War.

No solicitor or client ever heard Starke say that his junior was other than perfect. His library was available to all who needed to use it. His door was never shut.

In April 1942 he returned to Australia and was promoted Captain. In 1944 he was attached as Liaison Officer to the Australian Naval Bombardment Group, serving on ships in action around New Guinea, the Philippines, and Borneo. For a time he served with the United States Navy in a similar position. In 1945 he was appointed a Temporary Major.

A good tough soldier, not widely seen as a sensitive person, Starke was in fact very soft inside, and the ugliness and waste of war saddened him greatly. What more than anything else kept him going in the bad times, he remarked very many years later, was the memory of the smell of the grass at Flemington.

At the beginning of 1946 Starke returned to his destined work as a barrister. Indeed he had already done a good deal of such work in army courts-martial, where he was a much more effective prisoner's friend than the authorities always approved. At

the Bar his practice lay in the area lawyers call "common law," where the issues are not primarily legal but factual: "Did he do it ?" His great size, his fine appearance, his dominant presence, his ability and wit, his courage and hard work, combined to make him formidable indeed. In his eighteen years as a barrister he became prominent in his area of practice, and then unrivalled. When planes crashed, or bridges fell, or an accused murderer whom five policemen said had confessed claimed he didn't do it, or a jockey's best efforts had been widely misunderstood, retainers flowed to Starke's chambers. In the courts, in the inquiries, at the VRC appeals, he was in all the big Victorian cases. Within Victoria the show did not really start until the big fellow arrived. Within Australia he had no peer.

John Erskine Starke

Inevitably most of the cases that were so important at the time are now forgotten. Some that remain well-known are the defence (with D.M. Campbell Q.C.) of the *Power Without Glory* prosecution of Frank Hardy, the inquiries into the Fokker Friendship that crashed at Mackay and the Viscount that crashed into Botany Bay, the Victoria Market inquiry, the King's Street Bridge inquiry, the Tait Case, and the Max Stuart inquiry.

One small example of his perception and style must suffice. In the Hardy case, John Wren's lawyer was courageous enough to give evidence that in Australia wrestling was not fixed. Cross-examining, Starke began a fair way from wrestling. Gently he had the witness confirm that he had heard of bookmakers holding books on horse-racing, on trotting, on the dogs, on boxing, on foot-running, even on inter-collegiate football at the university. With the jury laughing as they saw it coming, Starke pushed his wig back as he always did near the punchline, and asked the witness whether he had ever known anyone, anywhere in Australia, hold a book on wrestling. Without having called any evidence, the issue was dead.

To young barristers Starke was greatly kind and protective. No solicitor or client ever heard Starke say that his junior was other than perfect. His library was available to all who needed to use it. His door was never shut; never ever. He was constantly called on by those in trouble, or wanting advice on keeping out of it. He might swear at them, and probably would, for his language was always rough. But he would help them too. The Bar loved him, and was very proud of him. He was seen as someone very special.

In 1964, for honourable reasons which seemed to him good, and because he probably did enjoy the elevation of yet one more member of the family, Starke accepted appointment to the Supreme Court of Victoria. He accepted with grace Sir Owen Dixon's offer to send him his father's wig

and gown and white judicial gloves, and one may feel that his doing so marked his final reconciliation with the powerful father with whom he had struggled so long.

Starke recognised and regretted that in going to the bench he was shutting the door on the work he had loved so much: advocacy and the struggle against odds. He served on the court until 1985, and was some years the senior puisne judge. He did not much enjoy it. He did the work diligently, because that was his job. He behaved quietly and well, because a judge ought to. But the fun and happiness which had bubbled up in the barrister was not there, and for most younger barristers he became a somewhat daunting figure. They wondered why those who had known him at the Bar loved him so much and were wont to say "oh, that's only old Starkie".

Though the law gave him no option, he found sentencing Ryan to death deeply distressing. His distress worsened when the Bolte government carried the execution through.

Early in his judicial life he had presided at the trial for murder of Ronald Ryan, and sentenced him to death. Starke had always opposed capital punishment. The mutilation of the human body in particular he found utterly repugnant. In the Tait case, where executive reprieve had been refused, he had made quite extraordinary efforts to preserve Tait's life. He had masterminded the making of applications by other counsel, as well as making the final and successful application himself. Though the law gave him no option, he found sentencing Ryan to death deeply distressing. His distress worsened when the Bolte Government carried the execution through. Ryan's would be the last death sentence carried out in Australia.

In society Starke was turbulently charming; always very much his own man. If he was quick to recognise a pretty face, he was quick to recognise other qualities also. At the races he would accost a group of friends, take them into the bar, buy them a drink, chat for a while, and without warning disappear back into the crowd. Later he would repeat the process with another group. Rarely was anyone, especially the young, allowed to buy him a drink back. If work kept him in Melbourne overnight, early evening would find him in the small bar at the Australian Club, presiding like a latter-day Dr. Johnson while he regaled the young with tales of past and present. Always he spoke with entire disregard of both the law of defamation and all canons of caution.

Sometimes, but only intentionally, he would be astronomically and apocalyptically rude and offensive. Never, let it be said, to the gentle or weak. But one Premier, one Chief Secretary, at least three knights of the realm, many another considerable figure, young policemen who officiously told him what to do, and in all hundreds of people found themselves assailed in a manner it must have taken a long time to forget. Pretentiousness, officiousness, pettiness, meanness, bigotry — and sometimes it must be confessed misunderstanding and error and sheer cantankerousness also — could bring him to white-heat on the instant. Like any other volcano, he simply erupted. One cannot argue with an elemental force. One stood there, devastated just to hear anyone be so rude, and wondering what would happen next. Slowly the world would quiet down.

Starke served lengthy terms as Chairman of the Parole Board, as Chairman of the Council of the State Library of Victoria, and as a Trustee of the Australian War Memorial at Canberra. For his services to the law and elsewhere he was knighted in 1976.

After his wartime return from the Middle East he had married Elizabeth Campbell, always Beth. He used to say proudly — and with some measure of truth — that she was the only person in the world he was scared of. Certainly she was his compass. They were idyllically happy for over fifty years, and she survives him. There were no children.

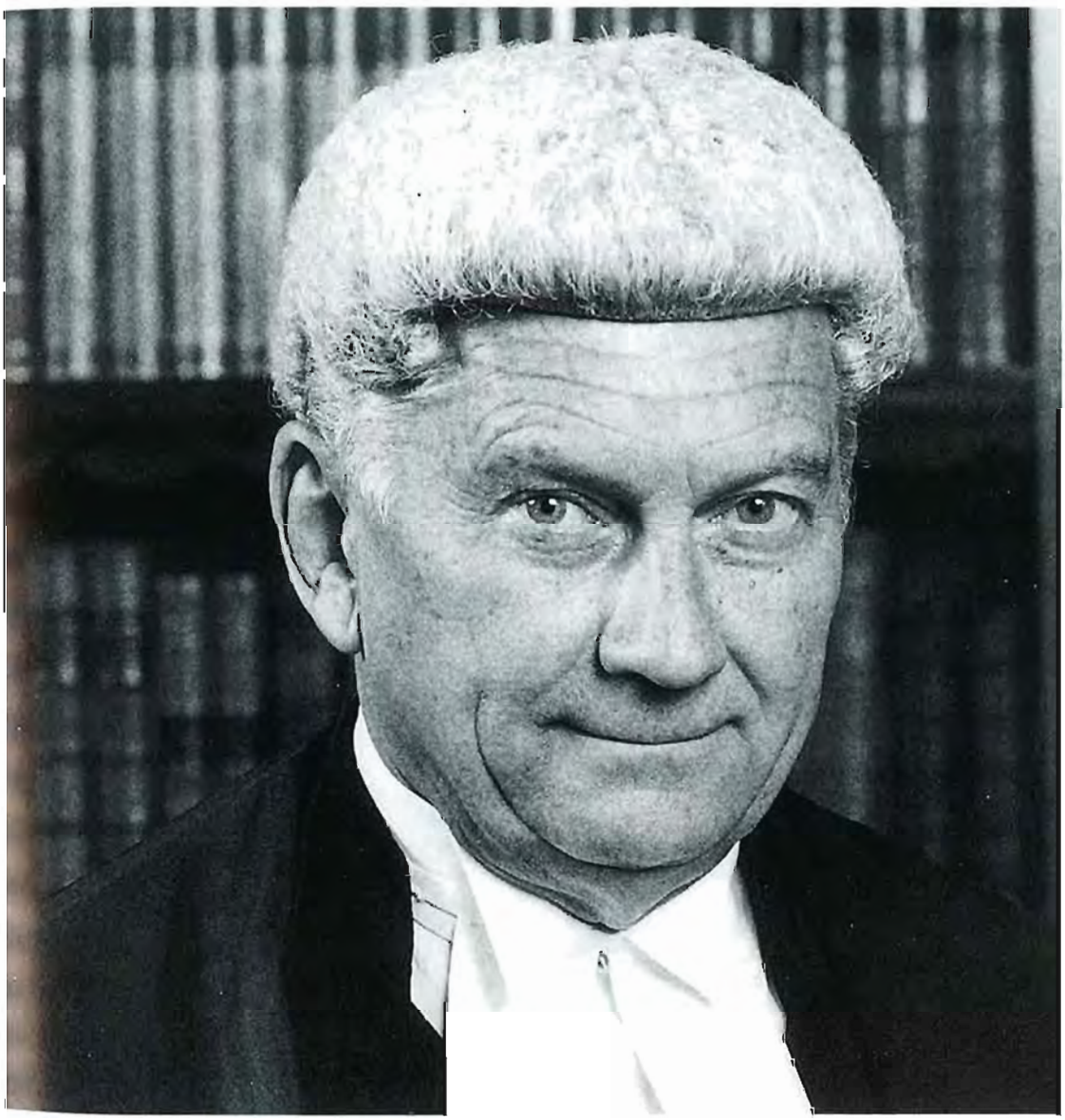
Jack Starke Q.C. will know when he has reached Heaven. There will be a distant sound of hooves, and the grass will smell like it does at Flemington. A young jockey will have been misunderstood. A solicitor will be searching anxiously for Mr. Starke, because this misunderstanding could be pretty serious, and the owner wants the boy to have the best.

S.E.K. Hulme

FAREWELLS

MR. JUSTICE FULLAGAR

THE HONOURABLE RICHARD KELSHAM Fullagar retired from full-time duty as a judge of the Supreme Court on 11 February 1994. He was appointed to that office on 29 January 1975. On his retirement from full-time duty he became a Reserve Judge under s.80A of the *Constitution Act* 1975 but he resigned as a judge on 9 May 1994 when he was appointed chairperson of the Solici-



Justice Fullagar

tors' Board. The qualification for that chair is that the person shall have "retired or resigned" from the office of judge.

Richard Fullagar was born on 14 July 1926. He was the second of five sons of W.K. Fullagar who was to become a celebrated member of the High Court in what many regard as its greatest period. Like his father and all other male members of his family since 1565, Richard Fullagar was given the second name of Kelsham. The name was first acquired when an ancestor named Fullagard married Agnes Kelsham, a daughter of the lord of the manor of Headcorn in Kent. It was a condition of the marriage that male children should bear the name of Kelsham. Richard Fullagar has always had an affectionate regard for the Garden of England.

He attended The Geelong College. He began legal studies at the University of Melbourne in 1944 but they were interrupted when he enlisted in the R.A.N.V.R. on his eighteenth birthday. He was demobilised as a sub-lieutenant in 1946. He graduated as LL.B. in 1948 and as LL.M. in the following year. After serving articles with Mr. E.A. Cook at the firm of Russell, Kennedy & Cook (where the other articled clerk was R.G. DeB. Griffith), he was admitted to practice on 3 October 1949. He signed the Roll of Counsel on 4 November that year, intending to read in the chambers of Mr. H.A. Winneke. When Winneke took silk soon after he commenced, he completed his pupillage with Mr. G.A. Pape. Richard Fullagar's former master retired as a judge of the Supreme Court on 28 January 1975, the day before Fullagar assumed office, but it is more accurate to say that he succeeded Mr. Justice Adam, who retired towards the end of 1974.

George Pape specialised in the law of industrial property and maritime law. Richard Fullagar was to acquire an extensive practice in the former field in the 'sixties and 'seventies but in the first few years at the Bar his work was mainly in equity and real property. His first major patents case was the *Hay Rake case* (*Worrel* v. *Welch Perrin Pty. Ltd.* (1961) 106 C.L.R. 588) in which he appeared successfully for the plaintiff at the trial and upon appeal in the High Court and, alone as a junior, on an application in London for leave to appeal to the Privy Council. Before the Judicial Committee he was opposed by the leading English patents silk of the day and three juniors.

He took silk on 26 May 1964. As leader he appeared in many substantial industrial property and constitutional cases. The latter included the *Concrete Pipes case* (*Strickland* v. *Rocla Concrete Pipes Ltd.* (1971) 124 C.L.R. 468), in which his client won a Pyrrhic victory against the Commonwealth (represented by T.E.F. Hughes Q.C., A.-G., R.J. Ellicott Q.C., S.-G., W.P. Deane Q.C. and A.M. Gleeson), and a number of cases concerning s.92, in particular those relating to transport operations to Tasmania and within that island. In the field of industrial property he appeared in most of the leading cases of the decade, often with his former pupil J.F. Lyons as junior. These included the ampicillin litigation between the English Beecham Group and the American Bristol-Myers Corporation, in which he appeared in Singapore as well as Australia, and the Australian segment of the world-wide synthetic rubber patents litigation instituted by the General Tire & Rubber Co. These cases took him frequently to the United States for consultation. In 1966 he led for the successful plaintiff in *Ansell Rubber Co. Pty. Ltd.* v. *Allied Rubber Industries Pty. Ltd.* [1967] V.R. 37 which laid the foundations for much of the modern law of trade secrets and confidential information. As a judge he contributed to the development of the law in those fields in *Deta Nominees Pty Ltd* v. *Viscount Plastic Products Pty. Ltd.* [1967] V.R. 37 where his judgment contains a systematic examination of the basis of legal protection.

He was vice-chairman of the Victorian Bar Council at the time of his appointment to the Supreme Court.

He sat in all jurisdictions of the Court with many of which he was unfamiliar from practice at the Bar. His first case was a murder trial. He did not enjoy the conduct of criminal trials but developed an interest in criminal law as a member of the Court of Criminal Appeal. With Mr. Justice Murphy he formed the majority of that court in *Reg* v. *Salvo* [1980] V.R. 401 where English authority upon the meaning of the statute codifying the law of theft was rejected. *Salvo's case* has subsequently been followed by the Court of Criminal appeal of New South Wales. His dissenting judgment in *Reg* v. *Lane* [1983] 2 V.R. 449 provided an exegesis of the difficulties that arose from the notorious High Court case of *Viro* v. *The Queen* (1978) 141 C.L.R. 88 which was used in argument when *Viro's case* was put to rest in *Zecevic* v. *Director of Public Prosecutions* (1987) 162 C.L.R. 645. In the companies field he affirmed the authority of the law when he directed the forfeiture of a valuable parcel of shares held by a raiding company for breaches of the notice of substantial shareholder provisions. In his own specialist area he was responsible for a change of direction in the court's approach to the concept of "exceptional case" in applications for the extension of the terms of patents (*Re Imperial Chemical Industries Ltd.'s Petitions* [1983] 1 V.R.1; *Re Vidal's Petition* [1983] 1 V.R. 16; *Re Sanofi's Petition* [1983] V.R. 25).

After the establishment of a de facto Appeal Division within the court, Mr. Justice Fullagar sat almost exclusively in that Division. In the last years of his office, as the second senior puisne

judge he presided over one of the divisions hearing civil appeals. He did so with tact and good humour.

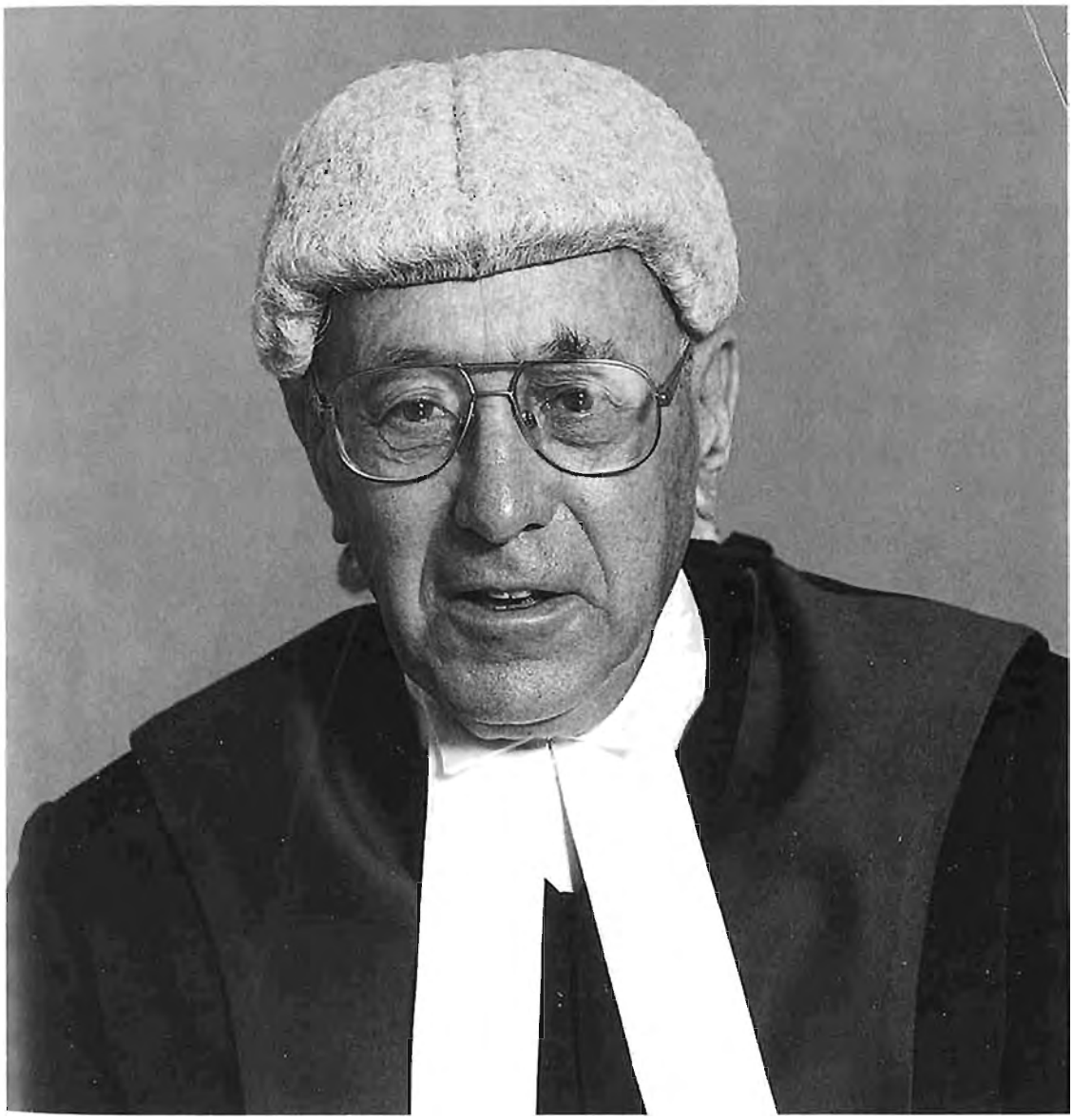
As barrister and judge he was imbued with the ideals and method of Sir Owen Dixon, whom he had known since childhood, and his father. In retirement he has not left the highway for the median strip.

An account of his career would not be complete without mention of his wife June, who has borne patiently and cheerfully the burdens of the wife of a busy barrister and judge. They have a son and two daughters.

JUDGE LAZARUS

ON 19 MAY 1994 AT A GATHERING IN THE County Court a farewell was extended to His Honour Judge Lazarus on his retirement.

His Honour was welcomed on his appointment on 16 August 1976 on which occasion the Chairman of the Victorian Bar Council, Mr. Ken Marks Q.C. addressed His Honour on behalf of the Victorian Bar and his second sentence was "Members



Judge Lazarus

of our Bar, Your Honour, are very pleased to see you on the Bench, particularly are they pleased to see you on the Bench at this time ten o'clock, the appointed time!". After further mentioning His Honour's "degree of form" on this issue Mr. Marks then paid tribute to the great service His Honour had extended to the law having practised for some 27 years as a barrister and served on the Victorian Bar Council for some sixteen years and being, at the time of his appointment, the Chairman of the Victorian Bar Council. The Vice-President of the Law Institute, Mr. Geoff Walsh, on behalf of the solicitors of Victoria, welcomed His Honour to the bench and referred to the co-operation extended by His Honour to the solicitors of Victoria.

In the years between his welcome and farewell His Honour lived up to the high expectations of those who attended his welcome. He said at his welcome that he had loved every minute of his twenty-seven years at the Bar and it was apparent to all those who worked with him that he thoroughly enjoyed his years on the bench. In County Court Chambers his cheerful attitude towards his work and his friendly manner extended to all who worked in chambers. One memorable remark made to a recently appointed Judge who was on his way to court with the assistance of a walking-stick to hear "pleas" and to pass sentences was "Give them a bit of stick judge".

Early in his judicial career His Honour presided over an extremely difficult trial involving a number of accused who were alleged to be members of a motor-cycle group. It seemed to be a particularly onerous trial for a judge with little experience on the bench but His Honour presided over the long and difficult trial in the manner of an experienced and expert judge. Throughout the trial he remained calm and cheerful as usual,

One of his main contributions to the court was his management of the Building Cases list. It was for years a concern of the judges that building cases were unduly expensive to litigate with costs frequently exceeding the amount in dispute. His Honour accepted the difficult role of managing this list and was very successful in limiting the issues and in many cases bringing about settlement of disputes at an early stage.

At his farewell the Solicitor-General, Mr. D. Graham Q.C., the Chairman of the Victorian Bar Council, Mrs S. Crennan Q.C., and the President of the Law Institute of Victoria, Mr. R. Smith, thanked His Honour for the service he had given on the Bench and his attitude towards all those who appeared before him. At his farewell he said that he had pursued a worthy objective of a happy court. There is no doubt that he achieved his objective.

It is hoped that His Honour will enjoy a long and happy period of retirement which he has earned after almost a lifetime of service to the law.

JUDGE JUST

HIS HONOUR JUDGE JUST RETIRED FROM the County Court on Tuesday, 2 August 1994 after completing almost 29 years' service as a Judge of the Court. His Honour was educated at Trinity Grammar School where he attended from the beginning of 1930 and left as a student at the end of 1941. At school he distinguished himself in a number of fields. In the upper school he won prizes in History and English and was sub-editor and later editor of the school magazine *Mitre*. His Honour was a member of the school cadets and played football and tennis for the school. His love and affection for his old school continued throughout his life. For more than 20 years he has served as a member of the Council of Trinity Grammar and has also been President of the Council.

During the Second World War His Honour served in the Royal Australian Air Force in North-Westem Australia in a radar unit. He was qualified as a barrister and solicitor of the Supreme Court having completed the Articled Clerks' course at the University of Melboume and was Articled to his father, H.C. Just of the firm Arthur Phillips & Just.Within days of his admission on I October 1948 he signed the Bar Roll and read with Mr. H. Winneke, later Sir Henry Winneke, Chief Justice and later again Governor of Victoria. His son, John Winneke, now Winneke Q.C., read with His Honour.

At the Bar His Honour built up a wide common law practice. He appeared in many jurisdictions and built up a sound reputation as counsel assisting in a number of royal commissions of inquiry which included the highly publicised inquiry into Scientology.

His Honour was appointed a judge of the County Court and Chairman of General Sections on 10 August 1965, which was shortly following his 41st birthday. During 29 years on the bench His Honour heard almost every kind of case within the jurisdiction of the County Court. From 1965 until 1971 His Honour sat in the general jurisdiction of the County Court and presided over criminal trials as Chairman of General Sessions. In 1971 he went to the Workers Compensation Board where he remained until 1975. On returning to the County Court His Honour then served in the general juris-

Judge Just

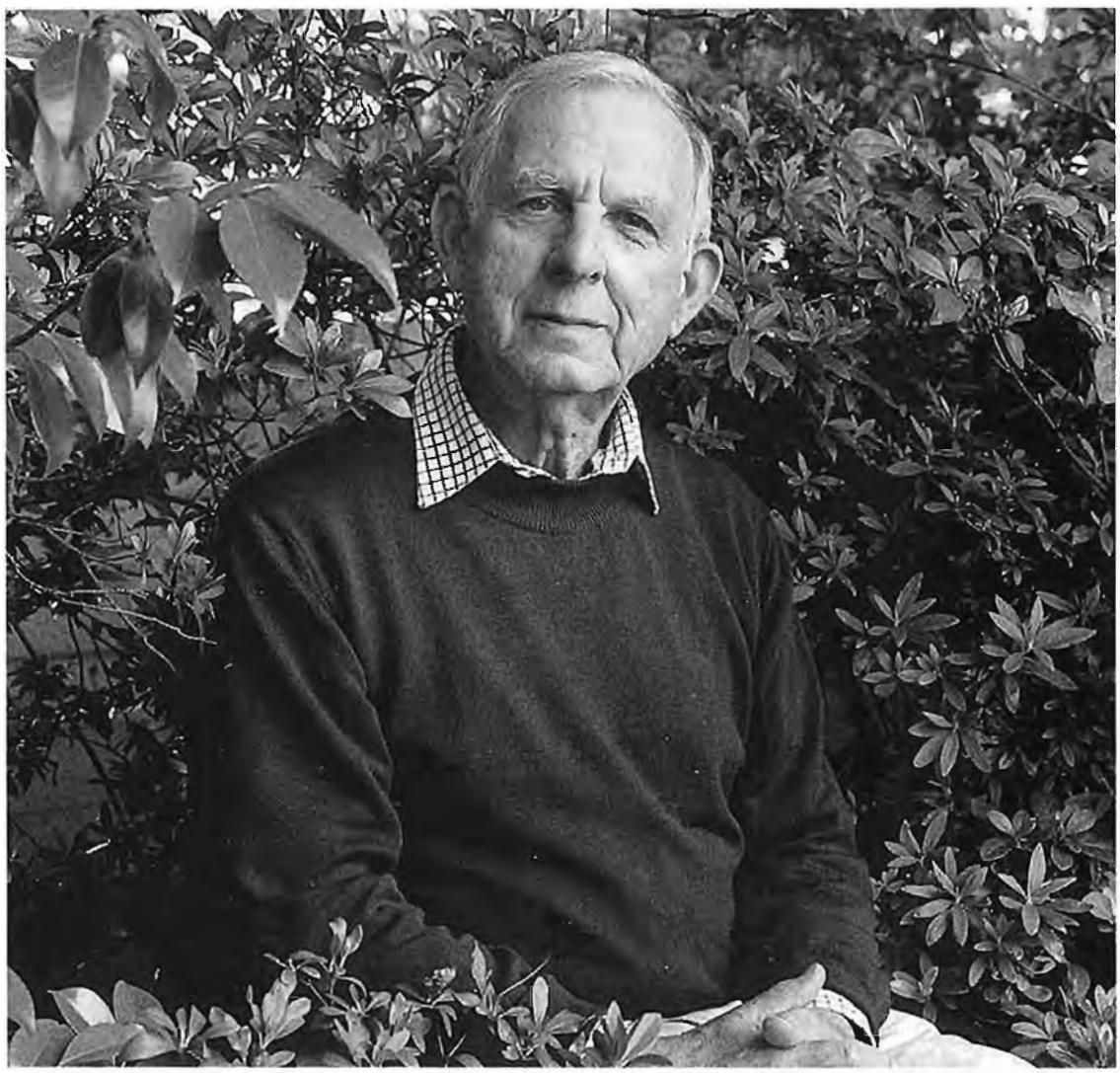
diction of the court for ten years. In 1985 he returned to the Workers Compensation Board and remained there until it was replaced by the Accident Compensation Tribunal. His Honour sat in that jurisdiction until it was abolished and again returned to the County Court where His Honour presided almost exclusively in the WorkCover list. On any view His Honour's service to the court and the people of Victoria has been exceptional. The Bar wishes His Honour a fulfilled and happy retirement.

JUDGE RAVECH

ON 2 JUNE 1994 THE LEGAL PROFESSION and friends gathered to farewell His Honour Judge Ravech on his retirement from the County Court. Martin Charles Ravech was born in London on 6 June 1922. He came to Australia in 1929 and completed his secondary education at Melbourne High School after doing leaving Honours in 1939. In 1940 His Honour enrolled in a Bachelor of Commerce Degree at the University of Melbourne. His Honour's studies were interrupted when on 16 February 1942 he enlisted in the Australian Imperial Forces where he served for the next four years. Initially His Honour was stationed in the Northern Territory. Later His Honour served with great courage in Z-Force, which was an operational unit which served behind Japanese lines.

On 4 February 1946 His Honour was discharged from the Army and re-enrolled at the University of Melbourne. His Honour did not resume his studies in commerce but in the Degree of Bachelor of Laws. He completed that course and graduated on 9 April 1949 having also by that time completed the Articled Clerks' subjects of professional conduct, taxation procedure and accounts. While at university His Honour took an active role in the university dramatic society.

His Honour completed his articles with Mr. Thomas Dixon of Alexander Grant Dixon & King, solicitors. He was admitted as a barrister and solicitor of the Supreme Court on 4 October 1949. He signed the Roll of counsel on 6 April 1951 and read with Mr. Grattan Gunson.

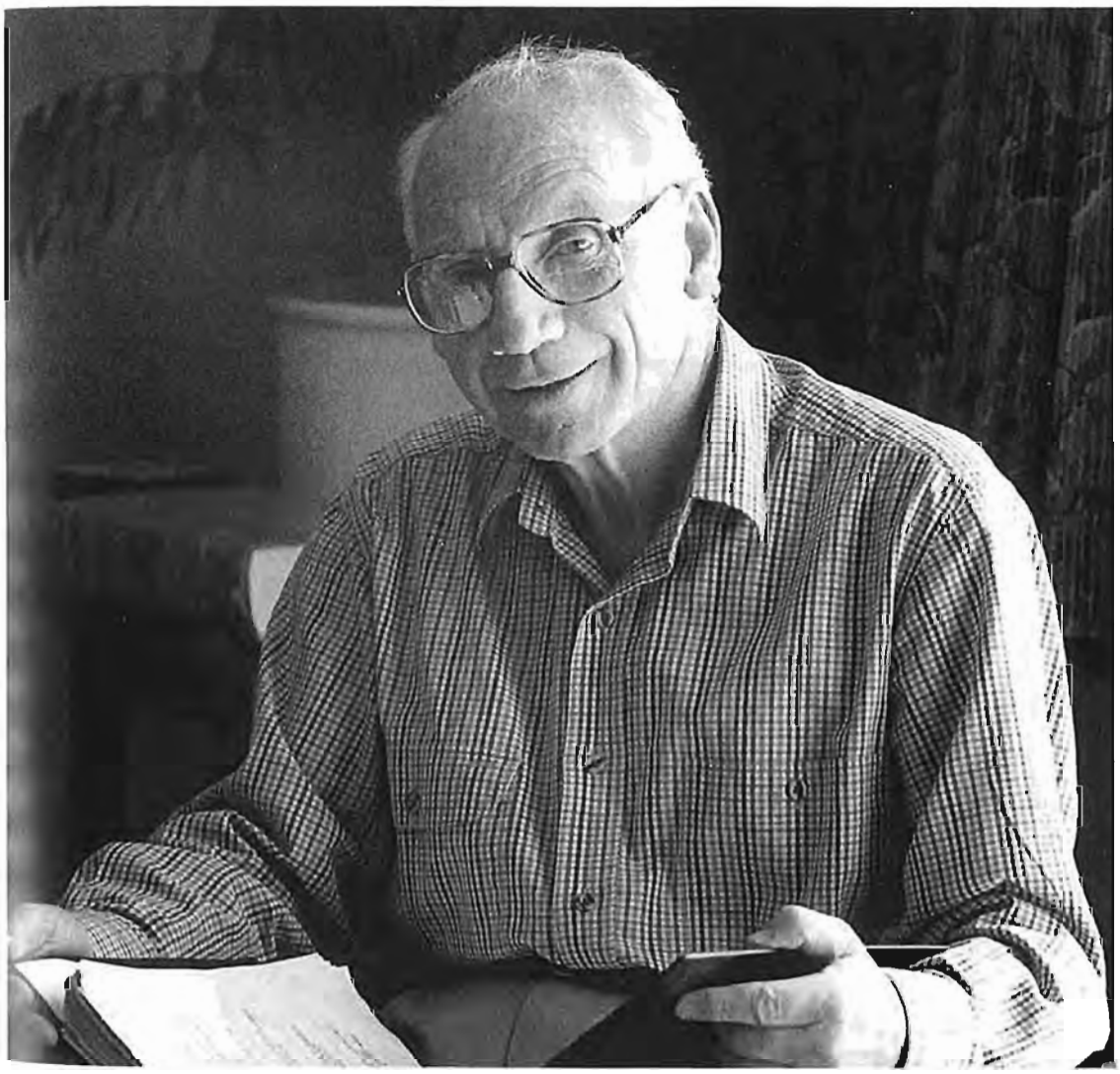


Judge Ravech

At the Bar His Honour built up a practice in personal injury and industrial accidents where his style of advocacy was particularly effective before juries. However, His Honour's practice was not confined to those areas. In 1962 he was junior counsel to an inquiry into the crash of a Vickers Viscount in Botany Bay. Later he appeared with Menhennitt Q.C., as he then was, in the inquiry by the Broadcasting Tribunal as to whether there should be a third commercial television channel. In 1974 His Honour took silk. On 14 October 1975 His Honour was appointed to the County Court. As a judge, His Honour exhibited on the bench the same self-control and affable treatment which characterised his successful practice at the Bar. His Honour retires having completed 18½ years on the Bench. The Bar wishes His Honour a long, happy and busy retirement.

JUDGE HOGG

ON 29 APRIL 1993 STANLEY GEORGE HOGG retired after 17½ years as a judge of the County Court. Upon the occasion of His Honour's appointment as a judge in 1975 *Bar News* observed "His Honour's characteristic quiet courtesy and industry will stand him in good stead in his new office". In welcoming him to the bench the then Chairman of the Bar Council, McGarvie Q.C., (now Governor of Victoria) said: "Your career has been distinguished by good manners, quiet strength, patence,



Judge Hogg

hard work and reliability". As predicted by Mr. McGarvie these qualities were carried into his judicial work in the County Court. His Honour established a reputation as a judge of unfailing courtesy to all who came into court be they counsel, witnesses or jurors. This approach to judicial office (while not universally popular) seems to have a lot to recommend it!

His Honour was born on 3 May 1921. His schooldays were spent at Wesley College. He then studied Law and Commerce at the University of Melbourne. Like many of his contemporaries, he found his studies interrupted by the Second World War. He effectively finished his Commerce degree and then joined the Royal Australian Navy in which he saw service from 1942 to 1946. It is characteristic of His Honour's private nature that details of that war service are not readily available.

After the war he resumed his interrupted studies, graduating LL.B. in 1950 and taking out the degree of LL.M. in 1954.

The year 1950 was an eventful year. In February he married his wife, Judith, in April he took out his LL.B. degree and on 1 August he was admitted to practice.

He signed the Roll of Counsel on 31 January 1951 and took silk in 1970.

During his years as a junior barrister he spent time as an independent lecturer in accounts at the University of Melbourne. There are many of us who remember his lectures, his precision and his politeness — and also his generosity. For most of us, the examination results belied the dread which we felt at sitting for an examination in this strange and peculiar subject.

One of Stan Hogg's three daughters has followed her father's judicial footsteps. She is Master Kings, Listing Master of the Supreme Court whose courtesy, patience, efficiency and gentle humour are consistent with what one suspects she learned at her father's knee

His Honour is a keen and active Rotarian. His charity even extends to the support and membership of the Footscray Football Club! His Honour apparently induced his nephew Matthew Hogg to enlist only to see him later stray from the paths of the righteous into the unholy Battalion headquarters, that of Princes Park!

His Honour has had a fine and distinguished career in the law. He has been described by one of his fellow judges as "incapable of being rude or nasty, to anyone; a model of christian charity with a strong public and social conscience". The Bar farewells His Honour in grateful appreciation and wishes him a long and happy retirement.

THE *ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT* 1976: AN OVERVIEW

Anthony Neal*

GIVEN THE AMOUNT OF RECENT DISCUSsion (and in some quarters confusion) about legislation affecting Aboriginal land rights it seems opportune to present an overview of the lesser known of the two major relevant pieces of legislation, the *Aboriginal Land Rights (Northern Territory) Act* 1976 ("the Act").

The Act is an expression of the Commonwealth's constitutional power to legislate in relation to "races" and "Territories" (see ss.51(xxvi) and ss.122 respectively of the Constitution). The Act expressly provides that the Commonwealth is not liable to compensate the Territory by reason of any land grant (see s.3A(2) of the Act).

As the title suggests the Act only relates to the Northern Territory. Broadly speaking it provides the legislative framework for the creation of "Aboriginal land". It also regulates fairly closely access to and activities on "Aboriginal land".

In 1973 the Australian Government appointed Woodward J. as a Commissioner to inquire into and report upon:

"The appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land, and to satisfy in other ways the reasonable aspirations of the Aborigines to rights in or in relation to land, and, in particular, but without in any way derogating from the generality of the foregoing:

(a) arrangements for vesting title to land in the Northern Territory of Australia now reserved for the use and benefit of the Aboriginal inhabitants of that Territory, including rights in minerals and timber, in an appropriate body or bodies, and for granting rights in or in relation to that land to the Aboriginal groups or communities concerned with that land;

(b) the desirability of establishing suitable procedures for the examination of claims to Aboriginal traditional rights and interests in or in relation to land in areas in the Northern Territory of Australia outside Aboriginal reserves or of establishing alternative ways of meeting effectively the needs for land of Aboriginal groups or communities living outside those reserves;

(d) the changes in legislation required to give effect to the recommendations arising from (a), (b) . . ."

The particular impetus for commissioning Woodward J in these terms came from the decision of Blackburn J in *Milirrpum* v. *Nabalco Pty. Ltd.* (Gove Land Rights case) (1971) 17 F.L.R. 141. In that case Blackburn J. held that the doctrine of communal native title contended for did not form, and had never formed, part of the law of any part of Australia.

METHODS OF CREATING "ABORIGINAL LAND"

The creation of "Aboriginal land" under the Act occurs in two ways. First the Governor General, on the recommendation of the Minister for Aboriginal Affairs, can grant a particular parcel of land to a Land Trust (see especially ss.4 and 10 of the Act). Many former Aboriginal reserves became "Aboriginal land" under the Act in this way. In the shorthand of the Act this is often referred to as "scheduling" the land and it requires no claim process.

Secondly the Governor-General can make a grant to a land trust on the recommendation of the Minister who in turn will be acting upon the report of the Aboriginal Land Commissioner (see in particular ss.11 and 12 of the Act).

The Act has had a dramatic effect on land holding in the Northern Territory. Presently approximately 40% of the total area of the Territory is made up of "Aboriginal land". A total of 149 land claims have been lodged of which approximately 50% have been disposed of. About 58% of that 50% have been successful. Outstanding claims, if successful, would bring another 9% of the total area of the Territory under Aboriginal control.

Whilst land trusts are the statutorily-created vehicle for holding "Aboriginal land" it is to land councils (also a creature of the Act) that much of the management and control of the land is entrusted. Where a grant of land is made to a land trust it is a grant in fee simple. The title so conferred is held by the land trust for the benefit of Aboriginals entitled by Aboriginal tradition to

*The author has been counsel assisting the Aboriginal Land Commissioner since 1993.

the use or occupation of the land concerned, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission . . ."

Most importantly the fee simple, communal title conferred on the land trust, is inalienable. Since the Act recognises the spiritual nature of the relationship of Aborigines to land it would be odd if it then permitted the land to be bought and sold as if it were simply a commodity. However the restrictions on alienation can lead to practical problems (e.g. where a former pastoral lease becomes "Aboriginal land" the new owners are not able to mortgage it in order to obtain working capital.)

THE ROLE OF THE ABORIGINAL LAND COMMISSIONER

The role of the Aboriginal Land Commissioner is central to the scheme of the Act. It is the Commissioner (who must be a judge of the Federal Court or the Supreme Court of the Northern Territory) who hears land claims under the Act.

Not all land in the Northern Territory is capable of being claimed by Aborigines. Only "unalienated Crown Land" and "alienated Crown Land in which all the estates and interests not held by the Crown are held by or behalf of Aboriginals" may be the subject of at claim to the Commissioner. (See ss.50(l)(a)). Hence any land in which non-Aboriginals presently have an estate or interest cannot be the subject of a claim. Once a claim is made to land over which the Commission has jurisdiction it is the Commissioner's function:

"(i) to ascertain whether those Aboriginals or any other Aboriginals are the traditional Aboriginal owners of the land; and

(ii) to report his findings to the Minister and to the Administrator of the Northern Territory, and, where lie finds that there are Aboriginals who are the traditional Aboriginal owners of the land, to make recommendations to the Minister for the granting of the land or any part of the land in accordance with sections 11 and 12 (see section 50(1)(a)(i)(ii) of the Act)."

The expression "traditional Aboriginal owners" is defined by the statute to mean:

". . . a local descent group of Aboriginals who:

(a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and

(b) are entitled by Aboriginal tradition to forage as of right over that land; . . ."

This central definition of the Act does not lend itself to perfunctory application. The issue has arisen whether it is sufficient if the local descent group *collectively* possesses the requisite affiliations or whether each individual within the group must so qualify. The notion of ". . . a local descent group . . ." has itself been subjected to detailed judicial consideration (see *Northern Land Council & Ors* v. *Olney & Anor* 34 F.C.R. 470 at 484).

It will be observed that, for a claim to succeed, there is no necessity that the claimants demonstrate continuous or exclusive possession of the land claimed. Indeed since European settlement it is very frequently the case that the land in question has been used for pastoral purposes which may have involved the complete or partial dispossession of the claimants. The Act recognises the essential spiritual nature of the relationship between people and land in traditional Aboriginal culture. This means that "ownership" can survive physical dispossession and geographical remoteness. This is not to say of course that protracted absence from the land in question may not make it more difficult to establish the necessary "spiritual affiliation" in terms of the statutory definition.

For a claim to succeed, there is no necessity that the claimants demonstrate continuous or exclusive possession of the land claimed.
"Ownership" can survive physical dispossession and geographical remoteness.

THE PROCESS OF ESTABLISHING "TRADITIONAL OWNERSHIP"

To those versed only in some form of adversarial system the process of establishing traditional ownership to land may be of interest. In order to establish whether the claimants are the "traditional owners" of the 'land claimed the Commissioner conducts an administrative inquiry. The Commissioner may, if he chooses, engage consultants of his own to assist him in the inquiry. Usually his consultants are an anthropologist and a lawyer (to act as counsel assisting).

The evidence is usually taken in two stages. First what is referred to as the "traditional evidence" is heard. Notwithstanding that the Aboriginal Land Commissioner is conducting an administrative inquiry the evidence is most often heard in an adversarial format. Lawyers from or engaged by either of the Northern or Central Land

Councils present the case on behalf of the claimants. Where, as sometimes occurs, there are competing groups of claimants they will usually have separate legal representation. The other key participant in the proceedings is usually the Northern Territory Government. Its role varies from that of outright opposition to a claim to one of not contesting traditional evidence and shades in between. A relatively small percentage of claims are settled.

Almost invariably the traditional evidence is heard on the land in question. The claimants are required by direction of the Commissioner to present certain information in support of a claim. This includes, *inter alia*, a report by the anthropologist(s) assisting the claimants, a map identifying sites of spiritual significance to the claimants and a site information register providing a resume of the mythology associated with the site. In the course of a typical hearing most of the sites will be visited and evidence given *in situ*.

Typically it is the older men and women of the claimant group who are the repository of most information and it is they who feature principally as witnesses. The claimants will explain the significance of the sites in terms of their dreamings and will sometimes recite the stories or sing the songs associated with it. Occasionally the evidence takes the form of a performance of the ceremony associated with the site.

Most often the evidence is led in Aboriginal English. The task of simply understanding the novel concepts of Aboriginal mythology, being related in Aboriginal English by shy people whilst sitting in the open air, is not to be underestimated even by those accustomed to the acoustic challenges of some of our court-rooms! Happily the evidence is recorded and, with skilful transcription, is ultimately available in an accurate form.

Given that the traditional evidence substantially consists of relating relevant Aboriginal mythology (which to non-Aboriginals can sound arbitrary and even prosaic) the question is often asked how you test the veracity of the witness. Ultimately of course there is no guarantee of any system exposing untruthful witnesses. As an experienced lawyer/judge, the Commissioner will use the conventional forensic criteria to assess whether or not a witness is telling the truth. However the process is not entirely dependent upon personal impressions. Before the evidence commences the witnesses will have been proofed by their lawyers and anthropologists and the gist of the evidence to be given will have been documented in the claim material. This provides some check against improvisations. It should also be recognised that one claimant group will often be attesting to the presence and significance of a dreaming track which traverses country well beyond the claim area. They will speak about that part of the story/song that they are responsible for. In other claims relating to contiguous areas other claimants will give evidence regarding their part of the story/song. If concoction were to occur it often would become apparent for this reason. Even the most cynical would find it hard to credibly suggest that there has been a giant conspiracy amongst the many different Aboriginal communities in the Northern Territory to ensure that they all "get the story right".

The Commissioner cannot change gender to suit the exigencies of the moment. To date Commissioners have obdurately resisted all suggestions that they should be "neutered" to acquire dual eligibility!

Due to the esoteric nature of some of the evidence it is restricted from general publication. Where "men's or women's business" is being explained the hearing must be segregated along gender lines. This can create practical difficulties. Usually a person of the appropriate gender can be found to represent the interested parties in these closed sessions but the Commissioner cannot change gender to suit the exigencies of the moment. To date Commissioners have obdurately resisted all suggestions that they should be "neutered" to acquire dual eligibility!

Given that Australian Aborigines have an oral tradition much of the traditional evidence takes the form of what witnesses were told by their parents or grandparents or other old men and women. Most of the genealogical evidence and virtually all of the evidence relating to Aboriginal mythology is expressly hearsay.

Fortunately the Commissioner, in conducting his inquiry, is not bound by rules of evidence.

Once the traditional evidence is completed the hearing is usually adjourned to a date upon which it is expected that the transcript of the traditional evidence will be available. Then commences the stage 2 hearing, often referred to as the "detriment evidence".

In fact stage 2 is normally devoted to two things: first cross-examination of the anthropologists who gave the Anthropological Report in support of the claim; and secondly evidence in relation to the detriment which will be suffered if the claim is acceded to.

The Act requires the Commissioner, in making his report, to comment on " . . . the detriment to persons or communities including other Aboriginal groups that might result if the claim were acceded to either in whole or in part" (see ss.50(3)(b) of the Act). Typically those who will claim detriment are neighbouring land-owners, local business people, tour operators, miners and various special interest groups. As entry onto Aboriginal land is generally prohibited by the Act an apprehension of detriment on the part of such people is understandable enough. However, oftentimes they are insufficiently aware that the Commissioner's function is to "comment on . . . detriment". Underlying much detriment evidence is the hope/expectation that the Commissioner will redress the anticipated mischief. In fact the Commissioner lacks the power to arbitrate between the competing interests or to impose solutions of his own.

Title obtained under the Act is secure. "Aboriginal land" cannot be resumed, compulsorily acquired or forfeited under any law of the Northern Territory. With few exceptions entry onto Aboriginal land is prohibited.

The Northern Territory Government usually participates actively in at least the detriment stage of the hearing. It seeks, *inter alia*, to identify public roads within the claim area. These must be excluded from any grant. It also, via the officers of its Conservation Commission, seeks to identify within the claim area flora and fauna which require skilled management for their preservation.

After the stage 2 evidence is complete the hearing is usually adjourned and the representatives of the various interested parties are invited to make final submissions (usually in writing) to the Commissioner. Having received these final submissions the Commissioner then prepares his report to the Minister for Aboriginal Affairs and the Administrator of the Northern Territory.

If the Commissioner finds that there are "traditional owners" of the land claimed he would normally recommend the granting of title to a land trust to hold that land on behalf of the traditional owners.

If unsuccessful there is the possibility of a repeat claim if there are new bases to support the claim and a likelihood that "traditional ownership" will be established.

ACCESS TO AND RIGHTS OVER "ABORIGINAL LAND"

Title obtained under the Act is secure. "Aboriginal land" cannot be resumed, compulsorily acquired or forfeited under any law of the Northern Territory. With few exceptions entry onto Aboriginal land is prohibited. Essentially entry upon and use and occupation of "Aboriginal land" is confined to the "traditional owners" and those other Aborigines entitled by tradition to rights of entry on and use of the land.

Because of the statutory definition of "estate or interest" in Part VII of the Act title under the Act can be given to a land trust notwithstanding the existence of a certain category of rights of a proprietary nature. These rights basically relate to mining activities. Hence, for example, the existence of an exploration licence over land does not prevent it from being the subject of a claim. Equally however, if the claim succeeds, the exploration licence is not extinguished upon the grant of an estate in fee simple to the land trust.

The acquisition of new estates or interests (especially in relation to mining) in land which has become "Aboriginal land" is a politically sensitive issue. It is only the alienation of the fee simple which is, to all intents and purposes, prohibited by the Act.

The creation of new mining rights over Aboriginal land is very closely regulated by the Act. The relevant land council must consent to the granting of new exploration licences over Aboriginal land. The land council (on behalf of the traditional owners) is free to give or withhold its consent as it sees fit. (See ss.40(a) of the Act and *Northern Territory* v. *Northern Land Council* (1992) 81 N.T.R. 1). This is the "veto power" which rankles with some sections of the community.

Royalties received by the Commonwealth/ Northern Territory from mining on Aboriginal land (the fee simple grant to the land trust expressly reserves minerals) are effectively returned to the Aboriginal community.

CONCLUSION

This article has aimed to provide a general introduction to the Act. I trust it will promote a broader understanding of the operation of this significant and in some ways complex piece of legislation. While its ultimate importance relative to the *Native Titles Act* remains to be seen, it can be said with certainty that it has already had a pronounced impact on the complexion of landholding in the Northern Territory and hence on the lives of its traditional inhabitants.

INDIAN LAND RIGHTS IN BRAZIL

Bryan Keon-Cohn

IN MARCH/APRIL 1994, I VISITED BRAZIL with the intention, as a consultant to World Vision, of conducting discussions with a range of people, and pursuing inquiries generally, into the question of Indian land rights in Brazil. The trip was assisted financially, and in its organisation, by World Vision (Melbourne) and various World Vision personnel in Brazil. I wish to record my great appreciation for their support and guidance,[1] and the assistance of colleagues[2] and the Department of Foreign Affairs, Canberra. Above all, I express sincere thanks to the many people who provided information and assistance in Brazil.

I visited in order Sao Paulo, Registro (150 km west of Sao Paulo), Brazilia, Rio de Janeiro, Recife (in the north-east), the Xucuru Indian community (about 250km west of Recife), Manaus (Central Amazonia), and Novo Airo (a town of 6,000 people up the Negro River from Manaus). During these visits, I conducted a number of interviews with personnel working with World Vision; the Presbyterian Church (Manaus), the Summer School of Linguistics (Brazilia); the section of the Catholic Church which advocates Indian rights ("CIMI"); government officers including officials from the responsible Federal Indian Affairs Department ("FUNAI") and the Federal Prosecutor's Office (Brazilia); private legal practitioners; a member of the Human Rights Commission of the Brazilian Bar Association; Indians from the north-east; members of various non-governmental organisations working for Indian rights, especially "CEDI"[3] (Sao Paulo), the "NDI"[4] (Brazilia) and COIAB[5] (Manaus). I kept a detailed diary,[6] recording interviews, activities, observations etc. and collected a valuable range of books, reports, maps, newsletters, campaign posters, pamphlets and the like — most, however, written in Portuguese! I also took numerous photos (some published here), especially of the Xucuru community in North-East Brazil, being the only Indian community I was able to visit.

Brazil is a vast and variable country: I obtained impressions only. However, many of the comments made to me, especially those critical of governments, courts, police, and "big business," were repeated from several sources.

GENERAL BACKGROUND

Brazil: Brazil is a massive country of 8,511,965 sq km and a population of 150,400,000.[7] It was "discovered" by the Portuguese explorer, Pedro Alvares Cabral, in 1500 and continues to manifest Portuguese features. The common language is Portuguese; the laws are a civil code based on the Napoleonic code; the community is 90% Roman Catholic. There are many ethnic communities particularly Portuguese, African negro, Japanese, European (especially German), Chinese and Indian. Of the 150 million people, 120 million (as was said to me) "live below the poverty line".

Major features of Brazilian society of immediate relevance are law and order problems; general anti-Indian attitudes especially concerning the clash between Indian values and resource development; political corruption, bureaucratic bias and inefficiency; low government priority for Indian problems including a long history of totally inadequate resourcing by Federal and State governments for Indian programmes; and the parlous economy. The country's wealth and political influence appear to be overwhelmingly held by the numerically small industrial, bureaucratic and political elite, termed "the cartel" or "the big boys".[8]

Public Opinion: Public opinion, especially amongst the illiterate lower classes,[9] appears to be heavily influenced by commercial TV. As one informant stated, "100 million people watch the 8 p.m. news". Opinion expressed via this medium — and that of the general population — seems to be that, as to land, the large areas currently claimed by Indians cannot be justified for so few Indian people, especially given widespread and severe rural poverty and homelessness in Brazil. Likewise governments, especially State governments, take the view that economic progress, especially resource development, must prevail over conflicting Indian rights (even rights embedded in the 1988 Constitution) and the preservation and protection of Indian societies and culture. Thus in 1982, at a congress on the occupation of the Amazon, Jorge Teixeira (perhaps related to the bloodthirsty explorer mentioned below), Governor of Roraina State, is reported to have said it was "absurd" that

Indians should occupy 200,000 hectares of land in his State. He felt Indians were an obstacle to progress, and that five hectares a piece would be enough for them.[10]

Indian Policy: Historically: The above situation, depressing as it is, should be seen against a history of government policy and administration over the past five centuries which may be characterised as a mixture of active genocide and abject neglect. Oxfam reports, for example, that:

"Throughout Brazil, the Indians have been fighting for their land, their culture, and their very survival for almost 500 years, since the first Portuguese arrived. Throughout the period of Portuguese rule, between 1500 and 1889, the Indian was seen simply as an animal — to be enslaved as a source of labour, or to be driven from valuable lands. The Indians resisted, and the colonial conquerors began to replace them by slaves imported from Africa. After this, genocide became the most frequent Indian policy of the Portuguese. The bandeirantes, Portuguese adventurers, pressing into the forest in search of gold and silver, massacred them by the thousands. The seventeenth century explorer Pedro Teixeira boasted that after 30 years of expeditions along the Negro and Amazon rivers, he had been responsible for the deaths of two million Indians . . . Integration of the Indians, rather than massacre, has been the dominant theme of government policy during the twentieth century. But the results have often been equally deadly for populations suddenly plunged into the poverty, sickness, and death that accompany contact with the dominant culture."[11]

Policy Today: The Federal Indian Agency, FUNAI, is the major government agency administering Indian affairs throughout Brazil. It has played an increasingly important role in the welfare of Indian communities over recent decades. Historically FUNAI has participated, it appears at times willingly, in the exploitation of Indian lands, and the destruction of Indian culture, rather than work for their protection. During the period of military rule (1964–1988) General Jeronimo Bandeira de Mello, who was president of FUNAI (1970–1971), is reported[12] to have stated that he did not believe that Indians should be allowed to hold back the progress of Brazil, and that his main goal was to integrate the Indians into the modern nation state. In 1991, Oxfam reported that "although subsequent heads of FUNAI were more moderate in their outlook, they did not fundamentally disagree. Many Indians and their supporters are (1991) deeply sceptical about FUNAI's record in protecting Indian rights."[13] Based on my discussions in Brazil, that "deep scepticism" remains, sadly, alive and well in 1994. My impression is that that scepticism is well founded. It must be remembered however, that along with other agencies (e.g. police, health, education) delivering welfare and justice services to the poor generally, a succession of federal governments have grossly underresourced FUNAI and thus Indian communities for many years. These government policies and spending priorities seem unlikely to change in the foreseeable future.

Human Rights Abuse: On 25 September 1992, Brazil signed the American Convention on Human Rights. Despite accepting these standards, Brazilian governments appear to make little attempt to seriously grapple with continuing high levels of violence, kidnappings, assaults and murders in many parts of the country. Allegations of serious corruption in law enforcement abound, e.g. concerning the murders of "street children" in Rio as part of an official "cleansing" operation prior to the holding of the earth summit in June 1992. Again, in 1993, killings of street children occurred in Sao Paulo. Despite public outcry, no persons have been charged or brought to trial. The U.S. Department of State,[14] Amnesty International[15] and Oxfam[16] have also documented widespread rural violence and killings of Indians, squatters and their advisors (including lawyers) in rural areas over the last decade, again with little effective police or judicial control. In 1993, the U.S. Department of State reported:

"Extrajudicial killings continue to be the principal human rights problem in Brazil. Killings of criminal suspects and minors by vigilante groups, often including members of police forces, usually go unpunished. There is also widespread violence against women and the poor, who are predominantly from racial minorities or of mixed race. In rural areas, landowners and their agents frequently resorted to threats and violence, including killings, against activists. A confrontation between invading gold miners and Yanomami Indians, in August 1993, along the Venezuelan-Brazilian border, resulted in the death of 16 Indians — including women and children — from the Haxima village, and the Indian village being burned down. Charges of genocide have been brought against 23 miners. Only 2 were taken into custody; they were released on December 19 1993 when their trial was delayed owing to difficulty in locating witnesses . . . a widespread climate of impunity remains the greatest obstacle to improving human rights in Brazil".[17]

Similarly, informants spoke to me of a "climate of immunity," where it appears to be accepted that the poor (including Indians) have no rights, and that the ruling cartel (said to be made up of government, big business, the bureaucracy and the military) is not accountable to the rule of law.[18] Hired killers ("pistolleiros") continue to pose a real threat to activist Indian leaders,[19] and to communities who occupy traditional lands in conflict with farmers, squatters, miners, loggers, and government officials. Police protection and investigation of crimes involving the poor is unavailable, incompetent, corrupt[19a] or, at best, agonisingly slow. An ex-

From left to right, Everaldo De Souza (World Vision), the author and Bishop Dom Apparecido Jose Dias, Bishop of Registro, former co-ordinator of CIMI, the Catholic Church's Indian Programme, at the Bishop's Presbytery Registro, a town about 100 kilometres south-west of Sao Paulo. Bishop Apparecido continues to be a major activist in support of Indian rights in Brazil.

planation provided to me on several occasions was that police were so poorly paid (and trained) that corruption was endemic and accepted as a survival mechanism. This whole area of breakdown in law and order remains a major continuing problem when advocating Indian rights.

Economy and Distribution of Resources: Deficiencies in Brazil's current treatment of its millions of impoverished citizens, including Indians, must also be seen against the brutal realities of its parlous economy. Such realities provide no excuse for many excesses mentioned here, but they may provide a partial explanation. Brazil suffers 40–50% inflation per month, with an annual rate (1993) of over 2,400%.[20] As stated to me by one informant, 120 million people living below the poverty line are "economic excess" and are "abandoned by their government". There is a constant complaint that the Congress and government agencies (especially FUNAI) responsible for Indian affairs do not deliver moneys to various programmes, even when those moneys are appropriated by the parliament. Thus it was stated to me that in 1994, US$39,320,000 was set aside by Congress for Indian programmes, yet only 5% of that allocation has actually been delivered (US$1,810,000).[21] Similarly, a $A8.4 million World Bank loan recently provided for Indian health programmes has been held up by Brazilian politicians, and simply not spent — apparently due to a "lack of political will to spend the monies" — despite the appalling health needs of many Indian communities.[22] There are similar complaints that a very wealthy small elite (perhaps 5% of the community) governs the country and controls 90% of the resources, while the vast majority of the population receive a very inadequate portion of the nation's resources. The U.S. Department of State Reports:

"Large disparities in income distribution characterise Brazilian society, with the poorest 20% of the population having only 2% of the national income. The richest 20% have 26 times the income of the bottom fifth, and an estimated 32 million Brazilians every day received a less than adequate diet."[23]

As to the more specific question of land-distribution, Oxfam reported, in 1991:

"Brazil is a land of immense contrasts in wealth. In 1984, according to the Movement of Landless People, 4% of the people owned 67% of the cultivable land, while the poorest 71% of people were squashed onto 10.9% of the land. These small farmers fed Brazil. Of the food staples, they provide almost 28% of the rice, over 55% of the maize, over 66% of the beans and almost 78% of the manioc. But over two-thirds of them live below the poverty line, receiving only half the statutory minimum wage or less. Brazil is the world's second largest agricultural exporter, after the United States, yet malnutrition causes almost seven out of every ten deaths among children under 5 years of age."[24]

A lawyer of seven years' experience working in human rights areas received a salary of US$700 per month.

The persons to whom I spoke certainly received very low salaries. A lawyer of seven years' experience working in human rights areas received a salary of US$700 per month; a school teacher received US$5 per hour on daily contract only; waiters, shop assistants and taxi drivers appeared to receive even less. A 1991 report[25] states income per person per annum at US$2,160 (U.K. equivalent US$12,810); the poorest 20% have 2.4% of household income (U.K. equivalent 5.8%); the richest 20% have 62.6% of household income (U.K. equivalent 39.5%). Similarly, in regard to Indian communities, there is little or no government-financed support for them, their organisations or their welfare programmes. Thus Indians I visited at the Xucuru community, west of Recife, receive no unemployment benefits, no old-age pensions, no social welfare payments, no single mother's pensions, or the like. The community, however, it must be said, appeared healthy to me, and appeared to be surviving on gardening and agricultural pur-

suits, which produced food all year round. Certainly I saw no evidence of malnutrition amongst the Xucuru children I met.

INDIAN COMMUNITIES

General: It is estimated that in 1500 there were 5 million Indians in Brazil: in 1991 about 213,000.[26] Most now live in Amazonia, though Indian communities survive in the north-east and the south. My informants suggested that anthropological studies prior to the last 20 years or so have been very defective.[27] Even today, demographic estimates can vary significantly — perhaps another result of government neglect or oppression.

The most comprehensive up-to-date information appeared to be held by CEDI, arising from its land demarcation activities. The Indian population is now said to be increasing, and numbers about 250,000,[28] or about 0.2% of the population. This is approximately the same national percentage as Aboriginals in Australia. Various estimates were given to me, and it is impossible to be accurate. However, according to CEDI, the Brazilian Indian community is comprised of 200 different tribal groups (CIMI 180) speaking about 180 languages (CIMI 150).[29] Of these tribal groups, 84 number less than 200; 45 number 200-500 people; 30 number 500–1,000; 77% number less than 1,000.[30] About 30 groups were said to be as yet uncontacted, living in the Amazon forests.[31]

As mentioned, the dispossession and destruction of Indian communities has been going on for 400–500 years (at least in the heavily-populated coastal regions) and continues today. The Kaioma tribe of the Guaranis Indian nation, for example, originally came from Paraguay and the Matto Grosso regions of Brazil. They have lost and been removed from virtually all of their original lands. Over recent years, a dozen or more each year have suicided due, it is said, to cultural loss, coupled with a strong traditional belief in an after-life, called "land without problems". In February 1994, yet another Kaioma community revealed their intention of mass suicide, due to inability to pursue traditional life-style, e.g. care for graves of their ancestors.[32]

Amazonia: For current purposes, this enormous area is of special significance for a variety of reasons. First, the uncontacted Indian communities mentioned above reside in these forests. People are aware that they are there — they see signs of habitation, although they have not seen the individuals. Best estimates are up to 50,000 people, probably much less. Their existence, and the inexorable penetration of their traditional lands by missionaries, about 220,000 "garimpeiros" (gold miners)[33] since the early 1960s, super highways, various resource developers, plus the burning of the rain forest for land reclamation creates serious ethical problems

Riverside housing and port facilities near the central harbour area at Manaus, Rio Negro, Amazonia.

for government and NGO's alike, and pressing dangers to these indigenous groups. These issues have been much discussed recently[34] and need not be pursued here — save for the "evangelism" issue mentioned below. The above factors however make Amazonia a focal point in the current debate concerning Indian rights in Brazil, especially land rights.

INDIAN ORGANISATIONS

General: So far as I could ascertain, there is no such thing as a Brazil-wide Indian movement. There are however, numerous organisations working at the national, regional, and local levels[35] only some of which I was able to contact. On occasions (e.g. during the constitutional reform processes of 1988) some of these organisations have co-ordinated their efforts and worked effectively at a national inter-connected level. Most of the organisations I contacted were based in, or assisted by, the Catholic or Presbyterian Churches, or were pro-Indian secular NGOs. These organisations were funded not by government, nor by FUNAI, but by their own efforts, local charities, American foundations or European sources. They appeared to me to be generally in their early stages of development. All had wholly inadequate resources to cope with the many demands made of them.

Amazonia: The Amazonian Indian organisations are of particular interest. They are becoming increasingly organised, in an attempt to increase their lobbying power and to better defend their rights. COAIB, for example, whose office is located in Manaus, is a peak co-ordinating indigenous Brazilian body in touch with Indian organisations operating in nine surrounding countries (all of whose borders overlap into the geographical area of the Amazon Basin) plus local Indian groups in Amazonia (Brazil). Indian organisations in these surrounding nine countries have also created their own overlapping peak repre-

sentative body — COICA.[36] COICA meets every two years, organises conferences and lobbies international governmental agencies such as the United Nations, the World Bank and the International Tropical Timber Organisation. Thus the Amazon region appears to be spawning some of the most active Indian organisations in the country, in response, one may suppose, to the massive and destructive invasion of Amazonia by gold-miners, timber-cutters and others, mentioned above.

POLITICAL SYSTEM AND GOVERNMENT

The Federal Republic of Brazil became independent from Portugal in 1822 and a federal republic in 1889. It now comprises 23 States (each of which has a directly elected governor and legislature), three Territories and a Federal District (Brazilia). During the period of military rule (1964–1988) and after much internal unrest and agitation political parties were again allowed to form (from 1980) and Brazilian people began to press for direct elections. In 1985 there was a limited return to democracy, with elections at State and local level. A new relatively liberal President — President Neves — was elected by an electoral college (not popular vote), but his PMDB party retained strong links with the military.

Following the coming into effect of the New Constitution on 6 October 1988, the first fully democratic presidential elections for 26 years were held in 1989. The contest eventually was between the right-wing candidate Fernando Collor de Mello and the left-wing candidate Luis Inacio da Silva ("Lula") — the leader of a new workers' party ("PT"). In a run-off election, held on 17 December 1989, Collor defeated Lula by a little over 5%, and took office as president on 15 March 1990.[37]

In September 1992, following allegations of presidential involvement in official fraud and corruption, the whole cabinet resigned, and President Collor was impeached and tried before the Senate, commencing on 29 December 1992. Minutes after the trial began, Collor resigned. Vice-President Itamar Franco (who had assumed the acting presidency in October) took office to serve out the last two years of Collor's term, at the head of a new multi-party government. In an April 1993 plebiscite, Brazilian voters endorsed the presidential system, and rejected a proposal to adopt a parliamentary form of government. The crisis, however, displayed that a successful constitutional transfer of power could be achieved in Brazil without intervention from the armed forces, suggesting that, despite the tenor of this article, "the rule of law" can prevail in Brazil. For current purposes, the identity of the President (more particularly, his attitude towards Indian rights) is important. As mentioned below, the President retains ultimate powers in regard to the land demarcation process.

National legislative authority now rests with the bicameral national congress. This comprises a Chamber of Deputies of variable size (503 in 1991) directly elected every four years by a system of proportional representation; and a 72-member federal Senate. Senators are elected for eight-year terms with elections at four-year intervals for, alternatively, one-third and two-thirds of the members. Congressional elections are by universal and compulsory adult suffrage, with one-third of the senators elected indirectly. Federal executive power is exercised by the President, who appoints and leads the cabinet. Under the 1988 Constitution the President alone may also enact and continue emergency laws, and has done so[38] — a process replete with difficulties from an Australian lawyer's perspective.

At the State level, each State has a unicameral parliament, plus a third tier of local or municipal government. Unlike Australia, power over indigenous matters is vested solely in the federal government. Like Australia, States tend to be more unsympathetic, or blatantly more antagonistic, to Indian interests than the federal government. The president, two-thirds of the Senate, 503 members of the House of Deputies, 27 State Governors and members of State Parliaments, all faced elections on 3 October 1994. My informants indicated that they did not expect these elections to deliver any radical changes in governments' policies or administrative practices (often malpractices) concerning Indians at Federal or State levels. Likewise the left-wing presidential candidate — "Lula" — was not expected to win. In the event he lost: Fernando Cardoso, who was allied with conservative sectors and backed by the centre-left Social Democracy Party, will take office as President on 1 January 1995. His attitudes to Indian rights are unclear, but tend, contrary to the Constitution, towards integration.

THE CONSTITUTION 1988

Military Rule: 1964–1988: Following a period of military dictatorship (1964–1985) Brazil drafted a new Constitution in 1987–1988, which was finally promulgated on 5 October 1988.[39] The final product is a "lengthy, detailed and convoluted document, containing 245 articles and 70 transitory provisions".[40] It provided for direct presidential elections and confirmed a five year presidential term. It removed many of the restrictions imposed during the period of military rule. Under the former military constitution, for example:

> "Indians were regarded as legal minors, being wards of the Federal Indian agency, FUNAI. FUNAI, in turn, was simply the agency responsible for executing the policy drawn up by the military government. FUNAI drew up an Indian Statute, which became law in 1973. This recognised the Indian's right to remain on their lands and to

own any wealth derived from them. But the loopholes in the Statute were telling: the government was authorised to intervene in Indian lands 'in the interests of national security'; 'in order to carry out public works in the interests of national development', and 'to explore the riches of the sub-soil if they are of outstanding interest for national security and development'".[41]

Indian Rights "Entrenched?": The 1988 Constitution recognises Indians as adult citizens of Brazil with a right to vote. Chapter 8 contains significant new protective provisions supporting Indian rights generally, including rights to possess their traditional land (but not "title" to it), together with its surface resources. See relevant extracts at Appendix A. Thus, for example, before mining may occur within Indian lands, theoretically first the Congress must consent; second, the views of the Indian community must be considered; third, the mineral resources must not be available elsewhere to the mining company. These strong provisions, however, are not translated into force on the ground in local situations. As Oxfam reports:

"between paper and reality there is an enormous gulf. Political will, as well as appropriate laws and resources, is needed to bridge this gulf."[42]

The invasion of the Amazon region by goldminers since the early 1960s is an often quoted example. More recently gold was discovered in Yanomami Indian land (northern Amazonia) in 1987 and 45,000 "garimpeiros" flooded into the region, seeking riches. By 1990 40,000 of these goldminers remained[43] while the Yanomami population had been reduced from 10,500 to 9,000.[44] Today 1,000–1,500 individual goldminers *illegally* (i.e. contrary to clauses of the Constitution) continue to invade Yanomami land to dig for gold with disastrous social effects, apparently with the active support of the local State Governor and police. I was told that a further 1,500 or so Yanomami have died since 1990 due to introduced diseases, shootings, and dispossession generally.[45]

Even after Federal Court proceedings in 1989 resulted in an order to remove the prospectors from Yanomami land, the Governor of Roraina State, with the agreement of the then President Sarney, allowed prospectors to leave voluntarily. The Federal Court accused the government of violating the October 1989 order; the then government backed down and agreed to removal of prospectors from all disputed territory within 90 days, effectively deferring the problem for incoming President Collor. Collor in turn introduced "Operation Yanomami" in 1990, bombed some illegal miners' airstrips, but prospectors simply disappeared and relocated their operations.[46] The position remains unresolved today. Gold-mining continues; local governments and police continue to support miners and their personnel, and to attack Indian communities blockading roads into their lands. Such a situation seriously undermines the basic institutions of Brazilian society, not to mention the rule of law.

Reform Proposals: Part of the 1988 constitutional settlement involved an agreement that after not less than five years, the Constitution could be reviewed or reformed. Why this was considered necessary I do not know. However, as a result, approximately 17,000 suggested amendments to the Constitution have been received, including around 170 concerning chapter 8.[47] Another well-placed informant put the figure at 230, only five or six of which would, if adopted, strengthen Indian rights.[48] Despite the above inabilities to enforce current Indian rights, the vast majority of these proposed amendments to chapter 8 would, if adopted, *diminish* Indian rights already "enshrined". The Congress has the responsibility to vote upon these thousands of proposed amendments. A congressman was deputised to consider the various suggested amendments (in regard to chapter 8) and consolidate them for consideration. However, because thousands of suggested amendments to those parts of the Constitution dealing with priority matters (the economy, government structures) have not yet been resolved, the Congress did not have time to reach the chapter 8 matters prior to the general elections held in October 1994. This scenario is considered a benefit by those informing me: they find themselves engaged in a rearguard action designed to maintain those rights already secured in the Constitution in 1988, being rights now under threat.

The 1988 Constitution recognises Indians as adult citizens of Brazil with a right to vote. Chapter 8 contains significant new protective provisions supporting Indian rights generally, including rights to possess their traditional land (but not "title" to it), together with its surface resources.

THE LEGAL SYSTEM

Ordinary Laws: Part of the problem exemplified by the Yanomami example given above, and a reason underlying the astonishing (to an Australian

lawyer) scenario of State Governments blatantly flouting not only constitutional rights, but also court injunctions, is that constitutional rights have limited legal impact unless they are translated into force via the enactment of "ordinary laws" by Congress. That is to say, pursuant to the Constitution, the rights set out therein are required to be put into force by further enactments of the federal parliament. Thus, writing in 1990, Rosenn states:

". . . a vast amount of implementing legislation must be enacted in order to make Brazil's new Constitution fully effective. According to the (then) Minister for Justice, (the) enactment of some 285 ordinary statutes and 41 complementary laws (is required) in order to effectuate the Constitution's provisions . . . Thus far (i.e. 1990) Congress has failed to comply with most of the directives and deadlines it formulated when wearing its Constituent Assembly hat. The great bulk of the implementing legislation has yet to be enacted . . . In addition, thousands of existing laws have been implicitly revoked or need to be modified to conform with the new Constitution . . . (leaving) many areas in a state of judicial chaos."[49]

Xucuru lands, 250 kilometres west of Recife, north-east Brazil. This land is "identified" as Indian land, but only 2,000 acres of a total claimed of 26,000 have been proclaimed by the President. Twenty-three Indian villages are spread through the area, with a variety of gardens under cultivation. 6,000 Xucuru, 31 farmers and 180 Posseiros (squatters) are in conflict for control of these lands.

This state of "judicial chaos" manifestly still applies to the area of Indian rights.

Further enactments or "ordinary laws" are now being introduced in a variety of areas but again, such laws have not yet been finally enacted in regard to chapter 8. In 1989, a "special ordinary law" concerning Indian rights was introduced into the federal Congress, was passed by the Senate, but was stalled in the House of Deputies.[50] Three new and revised versions of this proposed ordinary law have been devised by FUNAI, CIMI, and the NDI based in Brazilia. A congressman has been deputised to attempt to settle a single proposed ordinary law out of these three drafts. When I left Brazil (mid April 1994) the latest draft had just arrived at the COIAB office in Manaus for consideration. During the last week of June 1994, this ordinary law finally passed the Chamber of Deputies, but still must be passed by the Senate. For further details, see a CIMI *Newsletter*[51] at Appendix B. Until such ordinary laws are brought into effect, it appears difficult to enforce Indian rights built into the Constitution.

The Courts: Under the Constitution, matters concerning Indian rights fall within federal courts' jurisdiction. The federal system of courts includes local courts and appeal courts leading to the Federal Supreme Court sitting in Brazilia. There is a system of State courts, from which appeals lie, in many matters, to the Brazilian Federal Supreme Court.

My informants universally did not have great confidence in the courts, especially State courts at the lower levels. They considered them biased, slow, expensive and susceptible to pressure by the ruling "cartel". Further, court orders in favour of Indians, especially from lower State courts, appeared to enjoy, at times, little power. As indicated above, they were often blatantly disobeyed by defendants (including state agencies and police forces) apparently with impunity. Lawyers I spoke to thus favoured political lobbying first, with the "court" option a last resort. However, by contrast, the NDI office (Brazilia) has pursued, and was continuing to pursue, a number of "test" cases through federal court appeal structures.

Legal Services: The reluctance to consider courts as a viable option in seeking to redress abuses or enforce their rights is compounded by the fact that there is no legal aid scheme to speak of. Nor are there any government-funded, or indeed any "Indian," legal offices of the nature of Aboriginal Legal Services or Land Councils, devoted to asserting Indian rights of the type familiar to Australians. The federal prosecutor's office, however, has (strangely) the constitutional obligation to defend Indians. It does this from time to time, but this aspect of its work is seriously under-resourced. The officer to whom I spoke stated there were 13 prosecutors allocated to Indian matters for the whole of Brazil and that this was quite inadequate.

Similarly, FUNAI has the responsibility to protect Indian rights, but, as mentioned above, it also appears to be seriously under-resourced in the area of Indian Legal Services. FUNAI, I was told, employs 56 lawyers in 46 regional offices.[52] Despite a

statement to me to the contrary by an officer of FUNAI, it appears that that agency has not prosecuted persons who have violated Indian rights for five years.[53] Its lawyers seem mostly concerned to prosecute FUNAI's own employees for various civil or criminal breaches.

CIMI, being the branch of the Catholic Church active in Indian affairs, on occasions has provided funds or personnel to run cases especially to the Federal Supreme Court in Brazilia. However, such legal activity appears to be very occasional.

Most legal services (so far as I could ascertain), apart from CIMI, appeared to be provided by various NGOs, both Indian and non-Indian based. For example, the NDI, a small NGO in Brazilia, employs three young lawyers who are focusing on such high-level litigation. The NDI and other NGOs receive funding from American foundations or European contributions and are in their developmental stages only. Litigation, however, for the reasons mentioned, is not a strong element in the activities of Indian organisations or other NGOs.

THE SYSTEM OF "LAND RIGHTS": LAND DEMARCATION

Following the enactment of the 1988 Constitution, the Federal Government was charged with the responsibility of demarcating 519 indigenous areas within the following five years, i.e. to October 1993.[54] Thus a bureaucratic process designed to deliver rights of use and occupancy of traditional lands (but not "title") to Indian communities was put in place. Under this process, called demarcation, a four-step scheme is pursued. First is identification ("identificar"), when a land area is identified as the "traditional" land of the relevant Indian community.[55] Second is interdiction ("identificada"), when regulations and procedures are introduced to forbid entry to the lands now identified. Third is demarcation ("demarcada"), when the boundaries of the claimed lands are precisely mapped. In border areas this stage has been complicated and much delayed by the demands of the military, who require a 50km buffer zone for defence purposes. The boundaries are also physically marked by, eg. a fence-line in southern regions, or by cutting through the forest (in Amazonia). Finally is proclamation ("regularizada"), when the President and the Minister for Justice sign a decree which completes the legal process and delivers rights to use and occupation of the land (not title) to the Indian community involved.[56] By the October 1993 deadline, this process leading to legal demarcation and issuance of "titles" had been accomplished for only about half of the 519 areas.[57]

The CEDI group in Sao Paulo has been extensively involved in this process, and continues to document and map identified traditional Indian lands throughout Brazil. CEDI has collected detailed information about every area of land claimed as or identified as Indian land in Brazil; compiled maps indicating the various "demarcation" status of each area of land; and holds a great mass of hard copy and computerised information about the whole process, including satellite photos. Thus for example, CEDI holds detailed documentation of Indian lands in the North-East, including the status of Xucuru lands, being a community I visited. CEDI stated to me that as at 1994, throughout Brazil, about 540 areas have to date been identified as "indigenous lands" i.e. lands traditionally occupied by Indian people, within the meaning of the Constitution. 320 of these areas are found within the Amazon basin and some of these are large, comprising a significant proportion of the total Amazon region. In the South, by contrast, indigenous lands can be very small, eg. 40 acres.

Of the 540 areas, about 260 have proceeded through the above bureaucratic process to final "regularizada" since 1988. Thus for example, in November 1991 President Collor signed two decrees creating 72 Indian Reserves consisting of 286,977 sq km of land — 2% of Brazil's land mass. One of these decrees reserved a 176,977 sq km area of rainforest in Northern Amazonia bordering on Venezuela[58] for the Yanomami, then estimated to number 9,000 people.[59] Again around the time of the June 1992 Rio Environment Conference (the "Earth Summit"), the then President Collor proclaimed a number of Indian areas, being the delivery of the final rights to land to the communities involved.

However, since the Earth Summit, although a number of areas have gone through the process and are ready to be proclaimed, President Franco (sworn in on 29 December 1992) and the Minister for Justice refused to proclaim them.[60] Thus, as at early 1994, thirteen areas had been awaiting the signature of the Justice Minister, but he had refused to proceed.[61] When asked directly by Bishop Dom Apereido of Registro (CIMI) why not, the Justice Minister stated that he could not proclaim them due to political pressure. Thus, the government is refusing to pursue its own processes, due, it seems, to pressures from industry and land-owning interests. Indeed there appears to be a real danger that a number of areas which have already been proclaimed will now be degazetted.

Indian organisations are now attempting to hold the line against such regressive tendencies by the current government, pending the forthcoming elections. As indicated above, about half of CEDI's 540 areas are still struggling through various stages of the process. I possess a large map[62] which indicates the areas currently "identified" and involved in the demarcation process, colour-coded to indicate the four above-mentioned land claim stages.

Even when land is delivered at the end of this

The author with members of the Xucuru community, following a meeting held in a forest clearing on the Xucuru lands. Chief Chicaoh is to the author's immediate left. A leading activist in Indian land claims in the north-east of Brazil, his life is threatened, such that he is constantly attended by two armed guards. These men also attended this meeting — with rifles. The Chief spoke forcefully of his struggles and future plans to expand Xucuru lands by direct action, i.e. invasion and occupation. The author explained the "landrights" situation in Australia following the Mabo *decision.*

"claims" process, it appears that local State agencies, mining and forestry companies, and individuals frequently invade Indian land contrary to constitutional rights and local laws, doing great damage to Indian communities and with apparent impunity from breaches of the law. Numerous stories were told to me of such incidents, including violation by police and State authorities of court orders, let alone constitutional rights. It appears that Indian "land owners" also have little or no recourse to law in any effective way, and are a bottom priority of the Brazilian government when pitted against other interests wishing to use their land. My impressions are confirmed by the U.S. Department of State, which reports, for 1993:

"The Constitution gives Indians the exclusive use of the soil, rivers, and lakes located on their lands, while the Federal Government holds the authority to develop mineral resources found under Indian lands, as long as the Indians receive a share of the proceeds. Legal regulations for development have not been enacted, but illegal mining and timber cutting are a constant problem on Indian lands. In one small victory for Indian rights, a federal judge ordered a timber merchant to compensate the Nhambiquara Indians for wood valued at US$40,000 which had been taken from an Indian reserve in the State of Mato Grosso. This sum is dwarfed by the amount of money being taken from economic exploitation of these lands by non-indigenous people."[63]

ASSISTANCE FROM AUSTRALIA?

Lawyers: Many people I met considered that Australian lawyers could assist by e.g. financing projects, pursuing political pressure by writing letters, etc. The Brazilian Bar Association representatives suggested that closer contact with Australian lawyers would be of assistance, in order to support them in their efforts to assert the constitutional and human rights[64] of their citizens. An obvious suggestion is that a conference, perhaps in Rio, between Australian and Brazilian lawyers, might further assist them in these endeavours. Australian lawyers meanwhile might consider:

- raising international and local (Brazilian) awareness of particular issues (e.g. invasions of Yanomami land; constitutional and legal reform);
- engaging in lobbying, generating political pressure regarding particular local issues (e.g. failure to proclaim Indian lands; resource exploitation of demarcated lands, especially when Australian companies are involved);

- liaising with, or providing financial or other assistance to, various NGOs which support Indian rights in Brazil: I hold a lengthy mailing list;
- supporting, financially or otherwise, particular cases, including test cases, involving the protection or assertion of Indian rights, often against industry, land-owning groups, or state governments (e.g. cases run by NDI in the Federal Supreme Court);
- supporting with finance or funding community workers, a particular community or regional group of communities e.g. in education, housing, health, employment, or simply accessing government programmes, services, or benefits, so far as these exist (e.g. the Xucuru community near Recife);
- sponsoring a child through World Vision.

Church, State and Indigenous Survival: One related issue is worth mentioning, since it has direct application to the Aboriginal "reconciliation" process now underway in Australia. Strange things happen in strange places. Some of the church personnel to whom I spoke had, it seemed to me, an overtly evangelistic element to their activities. One even attempted, (at least, so it seemed) to "convert" me. I am happy to report (so far as I am aware) that he failed miserably! Another set out to justify the proposition that the isolated Amazonian Indian communities should be contacted, given a "choice" of faiths, and thereby eased into the modern world. Again, I lectured (about *Mabo*!) to a classroom of students in Brazilia at the Summer Institute of Linguistics. These young people were being trained to embark upon a career of translating the scriptures into various Indian languages, with the objective of converting those communities to the Christian faith. Such proselytising has, of course, been pursued throughout the world since the time of Christ.

It should be said immediately that not all Christian-based groups (including World Vision) are concerned with such activities around the world, or in Brazil. However, those who may be considering supporting church-based organisations which do actively proselytise in a destructive way (some might argue that any proselytising is destructive) should, I think, take a position on this question. Some commentators might see this as, historically and today, a difficult question involving a delicate cost-benefit analysis between the bringing of "civilisation" and much-needed assistance at the secular level, on the one hand and a potentially damaging imperative to proselytise or engage in "mission" as an article of faith on the other. I readily accept that this is a question involving complexities. For example, as mentioned several times above, CIMI (being a branch of the Catholic Church), is today pursing invaluable work in advocating Indian (and human) rights throughout Brazil including at the highest political levels; yet historically, Catholic

Maria de Lourde, a Xucuru elder, 94 years old, from Caipe Village, Xucuru lands.

missionaries since the 16th century have pursued the sort of destructive evangelism in Brazil which I oppose. Again, in the Australian context Father David Passi, one of the successful plaintiffs in the *Mabo case*, has been an ordained Anglican Minister for many years and gave evidence at the trial dressed in clerical robes. Part of his evidence was an impressive account of how he had fused traditional laws and beliefs with his Christian faith. Yet Christianity was introduced into the Torres Straits by the Anglican London Missionary Society in the 1880s, accompanied by an aggressive and violent destruction of indigenous culture, language and beliefs.

Here, there is a risk of appearing simplistic, naive or simply ignorant of Christology (to the last mentioned I plead guilty). But I approach this issue from the perspective of an agnostic lawyer who, for twenty years, has advocated indigenous human rights, including a substantial examination of the impact of colonisation upon indigenous communities throughout the former British Empire. From this perspective I find little difficulty with this question. In today's world, it is unacceptable arrogance to deliberately set out to influence, let alone replace, a system of indigenous beliefs with one's own, whether that indigenous system be considered "inferior", of less utility in the modern world,

or simply different, i.e. "non-Christian". Similarly, I see no justifiable basis to assume, in the first place, that an indigenous (or any "non-Christian") group wants to "choose" between spiritual or moral schemes, or must necessarily benefit from being presented with such a choice, or from such outside influences. I concede that at the "welfare" or human rights level, these positions are contentious, especially when attempting to strike a balance between Western priorities of individual human rights, and indigenous priorities. The latter often focus more upon "community" survival or cultural integrity than the human rights of the individuals who comprise it. Such priorities may lead to serious transgressions of individual rights e.g. the traditional Aboriginal practice of "promised marriage". However these conflicts are to be resolved in any particular situation, they will not be assisted by wholesale evangelising from *a priori* positions. Rather than being provided with a translation of the Bible, or instruction in Christian belief, presentation of health and welfare instruction, and how to access government assistance, would, in my view, be of more use to these communities. If religious-based organisations feel they cannot divorce their much needed and valuable welfare work from the unrequested and potentially damaging spiritual or moral aspects of their pastoral care, then perhaps they should stay away altogether. In this vein, the provision for example, of "optional Sunday observances" as a "minor" addition to otherwise beneficial secular assistance to a community merely creates unnecessary problems for a dependent and indebted clientele. These propositions apply equally in Australia as in Brazil. But I say again: it is a complex question.

I do not seek to ignore the practice and theory of liberation theology,[65] nor to forget improved living conditions, political empowerment, and the *realpolitik* arising in part from church involvement amongst the powerless and the poverty-stricken of today's third world — which includes Brazil. My overall impression, however, is that throughout the former European colonies of Africa, Australia, the Pacific and the Americas, the concept of "mission" with its aggressive evangelistic brand of Christianity as practised by some branches of the Christian church in the past, and still today, has provided few long-term benefits, and caused untold and unjustifiable devastation amongst indigenous communities. As an agnostic, of course, I see few countervailing benefits. If this — or even some of the above — is accepted by Australian Christians as applicable to the historical (or current-day) evangelism practiced in this country, then significant questions are raised, and must be answered, if Australian Christian churches are to play any valid role in the process of reconciliation leading to the year 2000.

Similarly, I am yet to be convinced of any need to make contact with uncontacted Indian communities in Amazonia (or Australia)[66] other than for reasons which service the colonising powers. These "powers" include even today not only governments but Christian-based organisations and some branches of the Church itself. A multicultural society such as is found in Australia and Brazil should, by definition, value diversity, and should foster the continuance of minority cultures. Protection of such groups from the dramatic changes inevitably caused by contact, let alone from the ravages of eg. goldminers illegally entering, does not require the sort of "contact and conversion" intended by some church groups I spoke to in Brazil. Rather, if contact is to occur at all, its objective should solely be containment of the potentially destructive impacts of the modern world (disease, dispossession, destruction of habitat) and not the intellectual curiosity, evangelising obsessions, or resource greed of the 20th century. As was recognised (by some) during the recent *Mabo* debate, there are times in the life of a nation when cultural interests should prevail over economic interests - assuming for current purposes that such conflict must arise.

These noble sentiments are easy to say. Based on my experience in Brazil, it will not be easy to achieve any significant turnaround in the foreseeable future in the destruction of Indian communities that has been perpetrated essentially by the State, but also by the Church in the name of the State, or by the Church in its own name, over the past 500 years. If this unhappy assessment is correct, this simply means that those concerned to protect and advance human rights, and who enjoy the benefits of the first world, have an urgent, and important task to pursue in Brazil. And the uncomfortable truth is that the same task faces us in Australia today.

APPENDIX A

1988 CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL[6]

81420095 Sao Paulo 0 ESTADO DE SAO PAULO (Special Supplement) in Portuguese 5 Oct 88 pp.1–23

PREAMBLE

We, the representatives of the Brazilian people, convened in National Constituent Assembly to institute a democratic state that is intended to ensure the exercise of individual and social rights, liberty, security, well-being, development equality and justice as supreme values in a fraternal and plural-

CCH UPDATE

As part of the extra curricular entertainment at the recent IBA conference in Melbourne, the ABC staged a World Series Debate on the topic "Have Lawyers Lost Their Appeal?". The incoming President of IBA, Professor Ross Harper of Glasgow (pictured), was brave enough to participate and, resplendent in the kilt, he made a great showing and a great speech ... during which he mentioned that the IBA has over 16,500 members plus 164 bar associations and law societies which represent 2.5 million lawyers ... "and if you laid two and a half million lawyers end to end they still wouldn't come to a conclusion."

■ ■ ■

Sir Ninian Stephen, in his address opening the IBA conference, began by noting the opprobrium in which the profession is sometimes held within the community ... "but nonetheless," he quipped "they still want their children to become lawyers."

■ ■ ■

CCH, as a sponsor of the IBA Conference, had an exhibitor's stall in the World Congress Centre and interestingly one of the most popular publications on display was our new ***Vietnam Business Law Guide***, perhaps not unexpectedly. Consider how an advance report to that service begins:

"Vietnam offers a market of 71 million consumers, a large pool of cheap labour, major oil and coal resources, and a prime location at the crossroads and seaways of the world's most dynamic economic region. The Vietnamese government continues to reaffirm its commitment to market-oriented economic reforms and to welcome foreign investors."

■ ■ ■

That report goes on to refer to some of the problems which face foreign investors in Vietnam. It notes for example the inadequate infrastructure, a lack of clarity and frequent changes in the country's laws and administrative procedures, and a stifling bureaucracy.

And the inadequacy of a commercial and legal infrastructure was commented upon by the keynote speaker at the opening plenary session, former PM, R J L Hawke, who was critical of those practitioners who complain of the lack of a comprehensive legal system in a country like Vietnam without accepting the fact that it has taken us in the West several centuries to reach our sophisticated situation. "It's unreasonable to expect developing countries to have reached that stage of sophistication in just a few years," was the point he made.

■ ■ ■

One interesting visitor from a developing country to the CCH stall offered to write for us a commentary on the laws of his country. When asked the size of the home market: "How many lawyers are there in your country?", he replied: "You're looking at him".

■ ■ ■

In an article in the Winter issue of the NSW Bar News, S L Walmsley, under the heading "Let's Stamp out the Gavel", takes strong objection to the way the gavel is frequently shown in the Australian media to illustrate stories about our courts. He also instances the serious flaw in the film "In the Name of the Father" where an English High Court Judge is seen "pounding away with a gavel like an excited auctioneer".

Seeking to suggest a more appropriate symbol (throwing in the line "Those hurtful purveyors of lawyer jokes may well suggest the $100 note"), he nominates the scales of justice which "constitute the one symbol which is common to British, American and Australian Courts" ... and to confirm the point and bring us neatly back to the beginning of this column, note that the IBA logo is:

■ ■ ■

A hurried review of the covers of our current books in print reveals that there's not a gavel to be seen ... although we might confess to a transgression or two in this regard on some occasions over the past 26 years.

■ ■ ■

Closer to home there's the announcement from CCH that we will be launching our ***Electronic Australian Tax Library*** next year ... so that you'll be able to get the more than 30,000 pages of tax knowledge — ie Australia's most in-depth, comprehensive income tax commentary — on CD-ROM.

Actually the one disk will include all 11 volumes of our ***Australian Federal Tax Reporter*** integrated with the full text of the legislation and the rulings.

The official launch will be at a series of seminars to which all subscribers of our ***Federal Tax Reporter*** will be personally invited ... and even if you're not one of that group we'd be delighted to have you on our guest list. Just dial 008 801 438 and tell us you'd like to be included.

■ ■ ■

On the other hand, there's our brand new one-volume loose-leaf ***Lawyers Tax Companion*** which uniquely[1] looks at tax law from the practising lawyer's perspective.

It's no doubt relatively true to note that many lawyers tend to view tax only slightly more favourably than a dose of the plague; but there are also today many who are aware of the fact that most of their work on behalf of clients has tax implications.

Be it handling a family law dispute, prosecuting a damages claim, drafting a will, advising a company, etc, the tax ramifications are ever-present. Take as an example[2] the need to keep in mind the significance of tax when a contract for the sale of land is terminated. Note what happened in a recently decided case.[3]

The purchasers of the taxpayers' principal residence defaulted and the deposit was forfeited to the vendor taxpayers. Subsequently, the vendor taxpayers agreed to sell the residence for an amount equal to the original purchase price less the amount of the forfeited deposit. It was held that the forfeited deposit was a capital gain which arose in the income year in which the deposit was forfeited.

Clearly (advised our editors), in such a case, the amount of the discount in the purchase price in the second contract should have taken into account the potential CGT liability on the forfeited deposit.

■ ■ ■

And finally, for Yuletide, a lawyer's prayer. US Senator Sam Ervin used to tell the story of the young lawyer who turned up at a revival meeting and was asked to deliver a prayer. Unprepared, he gave a prayer straight from his lawyer's heart: "Stir up much strife amongst the people, Lord, lest thy servant perish."

■ ■ ■

1. A word not carelessly used on this page!
2. This example is taken from the November Advance Report.
3. Decided by the AAT, 94 ATC *Case* 32/94.

If you're interested in seeing any of the publications noted on this page — contact CCH Australia Limited ACN 000 630 197, Sydney (Head Office) 857 1555,

ist society that is without prejudices, is founded on social harmony, and is committed on the domestic and international scene to the peaceful resolution of disputes, hereby promulgate, under the protection of God, the following Constitution of the Federative Republic of Brazil.

TITLE 1 — THE FUNDAMENTAL PRINCIPLES

Article 1.

The Federative Republic of Brazil, formed by the indissoluble union of the States and Municipalities and the Federal District, is constituted as a democratic state of law upon the following premises:

i. Sovereignty;
ii. Citizenship;
iii. The dignity of the human person;
iv. The social values of labor and of free enterprise;
v. Political pluralism.

Sole Paragraph. All power emanates from the people, who exercise it either through elected representatives or directly, pursuant to this Constitution.

ARTICLE 2.

The three branches of power of the Union, independent and harmonious among themselves, are the Legislative, the Executive, and the Judiciary.

ARTICLE 3.

The following constitute the fundamental purposes of the Federative Republic of Brazil:

i. To build a free just and unified society;
ii. To ensure national development;
iii. To eradicate poverty and powerlessness and diminish social and regional inequalities;
iv. To promote the welfare of all, without regard to origin, race, sex, color, age or any other forms of discrimination.

ARTICLE 4.

The Federative Republic of Brazil is governed in its international relations by the following principles;

i. National independence;
ii. The preeminence of human rights;
iii The self-determination of peoples;
iv. Nonintervention;
v. Equality among nations;
vi. The defense of peace;
vii. The peaceful resolution of conflicts;
viii. Repudiation of terrorism and racism;
ix. Co-operation among peoples for the advancement of humanity;
x. The granting of political asylum.

Sole Paragraph. The Federative Republic of Brazil shall seek the economic, political, social and cultural integration of the peoples of Latin America with a view to the formation of a Latin American community of nations.

TITLE 11 — FUNDAMENTAL RIGHTS AND GUARANTEES

Chapter I — Individual and Collective Rights and Duties

ARTICLE 5.

All are equal before the law, without distinction of any sort. Both Brazilians and aliens resident in Brazil are guaranteed the inviolability of the right to life, liberty, equality, security, and property, under the following terms:

i. Men and women are equal in rights and obligations under this Constitution;
ii. No one shall be obligated to do or to refrain from doing anything, except by virtue of the law;
iii. No one shall be subjected to torture, nor to inhuman or degrading treatment;
iv. Thoughts may be freely expressed, but anonymity is forbidden.

. . .

TITLE VIII: THE SOCIAL ORDER:

Chapter VIII — The Indians

ARTICLE 231

Indian social structure, customs, languages, beliefs, and traditions are recognized, as well as their native rights to the lands that they traditionally occupy, it being the province of the Union to establish the boundaries thereof and to protect all the [Indian] assets and see that same are respected.

Paragraph 1. Lands traditionally occupied by the Indians are deemed to be those inhabited permanently by Indians, those used for their productive activities, those essential to the preservation of the environmental resources necessary to their welfare, and those necessary to their physical and cultural reproduction according to their uses, customs, and traditions.

Paragraph 2. Lands traditionally occupied by the Indians are intended for their permanent possession: they have exclusive usufruct rights to the riches of the soil, the rivers, and the lakes existing thereon.

Paragraph 3. The utilization of water resources, including potential sources of energy, and the prospecting for and mining of the mineral riches on Indian lands may only be carried out with authorization from the National Congress, after hearing the views of the affected communities;

said communities are assured a share in the proceeds from the mining, pursuant to law.

Paragraph 4. The lands that are the subject of this article are nontransferrable, may not be made available for any purpose, and the rights to them are imprescriptible.

Paragraph 5. The removal of Indian groups from their lands is prohibited, except *ad referendum* by the National Congress in case of disaster or epidemic that places their population at risk, or in the interest of the nation's sovereignty following a decision of the National Congress; in any event, their immediate return after cessation of the risk is guaranteed.

Paragraph 6. Acts having as their object the occupation, dominion, and possession of the lands to which this article refers, or the exploitation of the natural riches of the soil, the rivers, and the lakes existing thereon, are null, void, and extinct except as regards an important public interest of the Union as may be provided in complementary law; nullity and extinction do not generate any right to indemnification or to suits against the Union except, *pursuant to law* regarding the improvements derived from the good faith occupation thereof.

Paragraph 7. The provisions of Article 174, Paragraph 3 and 4, do not apply to Indian lands.

ARTICLE 232.

The Indians, their communities and organizations have standing to sue to defend their rights and interests, and the Office of Government Attorney shall intervene in all the procedural acts.....

APPENDIX B
ORDINARY LAW ON INDIAN AFFAIRS

CIMI Bulletin 119
Bill would End State Guardianship of Brazil's Indians.

After a year without making progress the bill proposing a new Statute for the Indigenous Peoples was approved this week in the Chamber of Deputes. The bill, sponsored by Deputy Luciano Pizzato, would end the state's role as guardian of Indians. However, Indians would still not be recognised as peoples, but merely as indigenous societies.

The end of guardianship would have an effect, for example, on the administration if indigenous property, which would now be carried out by the Indians themselves. Indians would also be able to enter into contracts without requiring the government indigenous agency as an intermediary.

On intellectual property rights, the bill guarantees indigenous communities the right to keep secret knowledge about the environment, animal and vegetable species, seeds, drugs and biological and genetic processes. The use of this knowledge without authorisation would be a crime.

One of the most controversial proposals concerns the rule that would oblige the federal government to compensate Indians for any harm they suffer in any transaction if the government did not take the necessary measures to prevent the harm.

Another controversial measure provides for the participation of Indians in the teams that initiate the process of demarcation which secures protected status for indigenous land. Since state governments are generally opposed to the protection of indigenous territories, demarcation at present is often difficult, despite the criteria laid down by the federal Constitution. There will also be a right to use the courts to force the federal government to take measures to secure demarcation.

As regards mining on indigenous land, the deputy wants all prospecting applications made by mining companies before 1988, when the Constitution was promulgated, to be accepted. There are applications affecting almost all indigenous areas in Brazil.

The new statute still has to be passed by the Senate. Because of the elections in October, it is unlikely that the vote will take place this year.

Brasilia, 30 June 1994
CIMI — Indianist Missionary Council

REFERENCES

1. Especially Greg Thompson, Executive Associate, Education and Advocacy, World Vision Australia (Melbourne); Serguem da Silva, Director of Programmes, Brazil; and above all Eduardo Nunes and Paulo de Moraes, Sao Paulo, without whose enthusiastic assistance my inquiries simply would not have occurred.
2. Especially Professor Garth Nettheim and Tony Simpson.
3. Centro Ecumenico De Documentacao E Informacao — an impressive office involved in constitutional reform, drafting new laws, political lobbying, with its main focus in documenting traditional land areas and advocating land claims through the bureaucratic process.
4. Nucleo De Direitos Indigenas: a small legal office — the closest analogy to an aboriginal legal service or land council. It employs three young lawyers and pursues claims concerning Indian land issues, constitutional rights etc. to the superior courts.
5. Coordenacao Organizacoes Indigenas de Amazonia Brazilia — an umbrella Indian organisation which co-ordinates and liaises with numerous local and national Indian organisations. Involved in drafting of new "ordinary laws" concerning Indian rights now before the Federal Congress.
6. See various *Diary* references herein. These refer to notes of various interviews. Legal materials in English are very hard to find. Similarly, no daily newspaper of any substance is published in English.
7. 1991 World Bank estimate.

8. *Diary*, p.40. See further discussion within.
9. In 1991, adult literacy was stated as 24% (female) 22% (male) (U.K. equivalent: less than 5%). *Brazil: A Mask Called Progress* (Oxfam, 1991) p.113.
10. *Id*, p.19.
11. *Ibid.*
12. *Id*, pp.29–30.
13. *Ibid.*
14. See *Report on Human Rights Practices for 1993: Brazil* (U.S. Department of State) 17 pp. held by author.
15. See, among numerous publications: *Brazil: Authorised Violence in Rural Areas* (1988); *Brazil Briefing* (Sept. 1988); *We are the Land: Indigenous Peoples' Struggle for Human Rights* (1992); *Brazil: Killings of Members of the Truka and Atikum Indigenous Communities in Pernambuco State* (August 1991).
16. See *Oxfam Report*, *op. cit.*, pp.19–30; 32–58.
17. U.S. Department of State, at *Report*, *op. cit.*, pp.1–2, 11.
18. *Diary*, p.41.
19. Including Chief Chicoah of the Xucuru, who is constantly attended by two guards armed with rifles — including at our community meeting held within Xucuru lands. He told me he never travels by public transport, due to death threats.

19a. Eight senior officers resigned over bribery allegations, and 16,000 troops took over security in the lead-up to elections on 16 November last: *The Age*, 16 November 1994, p.11.

20. *U.S. Department of State Report*, *op. cit.*, p.1.
21. *Diary*, p.42.
22. *The Age*, 9 April 1994. *The Age* reports Yanomami as "reduced to a diet of bread and water through lack of funds; malaria, tuberculosis and other diseases spreading unchecked; (and) . . . one Indian community of 115 members having 23 cases of malaria (with) two people dead (as a result)".
23. *U.S. Department of State Report*, *op. cit.*, p.1.
24. *See Oxfam Report*, *op. cit.*, p.3.
25. *Id.*, p.113.
26. *Id.*, p.19.
27. For a useful description of cultural blocks, at 1967, see J.H. Hopper (ed.), *Indians of Brazil in the Twentieth Century* (Institute of Cross-Cultural Research, Washington, 1967).
28. *U.S. Department of State Report*, *op. cit.*, p.11.
29. *Diary*, p.55. The U.S. Department of State Report, *op. cit.*, p.11, alleges "170 different languages".
30. *Diary*, p.25, per Mr. Carlos Ricardo, Director, CEDI.
31. *Diary*, p.55, per CIMI.
32. *Diary*, p.46.
33. See "Brazil: Mercury Pollution in the Tapajos Valley," *International Work Group for Indigenous Affairs Newsletter* ((1992), No. 2 Copenhagen) pp.18–20, at 19.
34. See, e.g., various Amnesty International Reports, mentioned at fn. 15 above; *Oxfam Report*, *supra.*
35. For example at the national level, the Union of Indian Nations (UNI); at the local level (amongst many) the Organisation of the Indian Peoples of the River Envira (OPIRE), with a small headquarters at Feijo, in Western Acre. The River Envira runs down from the Peruvian border. Both UNI and OPIRE are supported by Oxfam. See *Oxfam Report*, *op. cit.*, pp.20–24.
36. Co-Ordinating Body for the Indigenous Organisations of the Amazon Basin. It unites the national Amazon Basin Indian organisations of Colombia, Ecuador, Peru, Bolivia, Brazil, French Guyana, Surinam, Guyana and Venezuela.
37. *Oxfam Report*, *op. cit.*, p.112.
38. For example two years ago, to freeze all bank deposits over US$1,500 for several months without notice or compensation as an endeavour to cope with galloping inflation despite a "just terms" provision in Brazil's Constitution.
39. For an English version, see Blaustein & Flanz (eds.), *Constitutions of the Countries of the World* (entry under Federative Republic of Brazil (Oceana, N.Y., 1990). For an excellent commentary (in English) see K.S. Rosenn, "Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society" (1990) 38 *American Journal of Comparative Law* 773–802. The 1988 Constitution was Brazil's eighth since 1824.
40. *Id.*, p.777.
41. *Oxfam Report*, *op. cit.*, pp.27-28.
42. *Id.*, p.27.
43. *Id.*, p.24.
44. *Encyclopaedia Brittanica*, *Year Book* 1992, p.94.
45. *Diary*, p.25.
46. *Diary* pp. 24–25; *Oxfam Report*, *op. cit.*, p.26.
47. *Diary*, p.23.
48. *Diary*, p.42.
49. Rosenn, *op cit.*, pp.778–9.
50. *Diary*, p.24.
51. Being my only (and invaluable) up-to-date regular source of information in English.
52. *Diary*, p.56, being an interview at Head Office, Brazilia with the "Co-Ordinator of Public Relations".
53. *Diary*, pp.56, 64.
54. *U.S. Department of State Report*, *op. cit.*, p.11.
55. A committee comprised of the major interest groups for a given area is appointed. It decides what areas qualify as "traditional" lands under the Constitution. This, in effect, replaces any claims process before a tribunal or court.
56. *Diary*, p.26.
57. *U.S. Department of State Report*, *op. cit.*, p.11.
58. Traditional Indian boundaries, of course, do not correlate with current political boundaries: Yanomami traditional lands extend into remote regions of Southern Venezuela. As to how Indians fare in the nine countries which border Brazil and share the Amazon basin — watch this space!
59. See *Encyclopaedia Brittanica*, *Year Book* 1992, p.94.
60. *Diary*, p.27.
61. *Diary*, pp.42–3.
62. Provided at an interview at FUNAI, Brazilia.
63. *U.S. Department of State Report*, *op. cit.*, p.11.
64. The Constitution in fact contains an elaborate "Bill of Rights": see Title II "Fundamental Rights and Guarantees"; Ch. I "Individual and Collective Rights and Duties"; Article 5 which states: "All are equal before the law, without distinction or any sort. Both Brazilians and aliens resident in Brazil are guaranteed the inviolability of the right to life, liberty, equality, security, and property, under the following terms . . ." then follow 78 paragraphs, including at para. XXII: "the right of property is guaranteed".
65. See, e.g., A.J. Grittins, *Gifts and Strangers: Meeting the Challenge of Inculturation* (Paulist Press, N.Y., 1989): P. Pope Levison and J.R. Levison, *Jesus in Global Contexts* (Westminster/John Knox, 1992).
66. A group of Pintubi were first contacted in Central Australia in 1988.
67. See *Blaustein & Flanz*, *op. cit.*, at note 39.

NEW SILKS — 1994

Appointment of Queen's Counsel

Left to right: M.R.B. Watt, R.A. Lewitan, D.M.B. Derham, R.S.Osborn, and M.R. Titshall
Absent: T.D. Wood and J.G. Santamaria

ON TUESDAY, 29 NOVEMBER 1994 THE Governor-in-Council appointed as Her Majesty's Counsel seven barristers from the Victorian Bar. The appointments are in order of seniority:
Tim Deneys Wood — Building Law
Joseph Gerard Santamaria — Commercial Law
Robert Stanley Osborn — Town Planning
Rachelle Ann Lewitan — Commercial Law
David Mark Brudenell Derham — Commercial Law
Malcolm Robert Titshall — Common Law
Michael Raymond Brook Watt — Family Law
The Bar congratulates these members of counsel on their appointment.

Also appointed were two practising advocate — solicitors, Gary Thomas Bigmore and David Grace. The Bar congratulates them on their appointment.

Full Name:	**Tim Deneys Wood**
Date of Admission:	2 April 1970
Date of Signing Bar Roll:	8 August 1974
Readers:	Duncan Allen, Lou Vatousios, Chryssa Anagnostou
Areas of Practice:	Building Law
Reason for Applying:	N/A
Reaction to Appointment:	N/A

Full Name:	**Joseph Gerard Santamaria**
Date of Admission:	1973
Date of Signing Bar Roll:	1978
Readers:	Mrs. J. Dodds-Streeton, Franz Holzer, David Colman, Peter Collinson, Martin Scott, Joseph Belbruno, Ian Martindale
Areas of Practice:	Commercial Law
Reason for Applying:	N/A
Reaction to Appointment:	Joseph Santamaria was in New York and unavailable to be interviewed but asked his best wishes be sent to everybody

Full Name:	**Robert Stanley Osborn**
Date of Admission:	1974
Date of Signing Bar Roll:	1975
Readers:	Hennessy, Smale, Dix, T. Cohen, Townshend
Areas of Practice:	Town Planning, Environmental Law, Local Government
Reason for Applying:	To give my practice a different flavour
Reaction to Appointment:	Very happy

Full Name:	**Rachelle Ann Lewitan**
Date of Admission:	1 April 1974
Date of Signing Bar Roll:	21 September 1977
Readers:	I had children instead
Areas of Practice:	Commercial Law
Reason for Applying:	I applied because it is something I have always hoped for; now that I have got there I can't quite believe it. I look forward to new challenges and perhaps new directions
Reaction to Appointment:	Apprehensive and delighted

Full Name:	**David Mark Brudenell Derham**
Date of Admission:	1 April 1972
Date of Signing Bar Roll:	1 March 1980
Readers:	Tony Bean, Mark Carrazzo, Iain Jones, Nick Jones, Stephen Moloney, Chris Caleo
Areas of Practice:	Commercial Law
Reason for Applying:	Need help
Reaction to Appointment:	Amazed

Full Name:	**Malcolm Robert Titshall**
Date of Admission:	3 March 1975
Date of Signing Bar Roll:	8 December 1975
Readers:	Mark Gibson, Geoff Martin, Clarke Granger, Ragini Rajadorai
Areas of Practice:	Common Law, Insurance Law, Criminal Law
Reason for Applying:	To make Jack Fajgenbaum happy about me parking in the Silks' car park
Reaction to Appointment:	Oh I don't know! . . . don't you dare put that in!

Full Name:	**Michael Raymond Brook Watt**
Date of Admission:	1 April 1976
Date of Signing Bar Roll:	14 September 1976
Readers:	Diana Bryant
Areas of Practice:	Family Law
Reason for Applying:	To be able to concentrate on appellate and other demanding work
Reaction to Appointment:	Great delight

IS FINGERPRINT EVIDENCE CONCLUSIVE?

Ron Clark

ON TUESDAY, 25 OCTOBER 1994, AT THE County Court at Melbourne, before His Honour Judge Williams, a jury returned a verdict of not guilty in the case of a man charged with burglary where the prosecution case was based on evidence of a piece of glass allegedly found at the scene with a fingerprint thereon.

The accused man's defence was that there was a link between the alleged fingerprint and the fact that he had issued writs claiming damages against three members of the police force arising out of another matter.

The prosecution case was that an inner-suburban home was burgled and that the offender or offenders had gained entry via a rear wood-and-glass door that had been bashed in. When two young constables answered the owner's call they said there was a fingerprint impression on a piece of glass jutting from a piece of doorframe. This object was taken to a local Criminal Investigation Branch office where a detective applied special powder to the impression which resulted in the impression becoming clearer. The Fingerprints Bureau of the Victoria Police Force was called and on the following morning a member of the Bureau attended the CIB office where he took two photographs of the developed print and then "lifted" the impression. This was a process where a piece of sellotape was placed over the print on the piece of glass. The adhesive tape was then peeled off the glass with the powder adhering to the sticky tape. Another piece of tape was then used to seal the first strip of tape and then both were secured to a piece of black photographic paper with a third piece of adhesive tape.

Evidence was given that the two photographs and the lifted fingerprint were taken to the Fingerprints Bureau where the impressions were fed into a computer and a search made of available data. The court was told that the fingerprints of over 500,000 persons are recorded at this Bureau. Within a fortnight a match had been made, that is, the fingerprint being found to be the same as one on record. The owner of the print was identified and the investigating detective at the local CIB notified.

The court was told that fingerprints were compared and matched by way of characteristics and that the standard for Australian courts was to have twelve points of similarity. With the one in this case there were twenty-four characteristics that were identified.

A fingerprint expert was called by the prosecutor and the court was told:

"A fingerprint in layman's terms is a chance contact impression in that with everything that is physically touched there is also an exchange of material onto that surface but whether it can be developed or not is another

Original

Taken from police records

Reproduction of prints using rubber stamps

matter . . . Basically the surfaces of your hands and your feet contain friction ridged skin which is skin that contains lots of little ridges, different patterns, and they are all equally valuable for identification. Every finger has a pattern on the finger. Also that applies to the toes. If you looked at your toes, every toe has a pattern similar — not necessarily the same, but similar to what you would have on your fingers. As well, what we call the plantar surface, which is your foot, has friction ridged skin, from the tip to the heel. And that is basically what we would refer to as friction ridged skin. The patterns themselves on the fingers are actually broken down into four different types."

The court was told that these four types are the arches, loop, whorls and composites. These terms describe the types of patterns that are formed on the fingers.

The expert said, "The ridges are the raised portions of the finger," that the prominent parts of the pattern are called ridges and they are the parts that stick out. Along those ridges are small mounds which are the sweat pores, If the finger was pressed onto ink and then pressed onto paper the black lines are the ridges and along them would be small white dots. They are the sweat pores.

He gave evidence that ". . . the outer area of skin is called the epidermis, the inner part of the skin is the dermis, that is, the second layer of skin — the sweat pores come through the dermis into the epidermis and exude sweat at various times. When you are warm, when people generally sweat, with fear, with nerves, of course, it causes the sweat pores to exude sweat, which runs along the actual ridges . . . Within the pattern itself we term these as characteristics . . . We search for characteristics of coincidence and relative position . . . Fingerprints can be detected generally on a good smooth surface . . . nice clear glass . . . a good smooth wooden surface provided it wasn't too textured — also paper. We are very successful with paper with fingerprints."

The court was told that when an impression is suspected of being made on a smooth surface a white powder is gently brushed onto the impression to make it more visible. The powder is basically French chalk mixed with titanium dioxide. This is then termed a developed print and the undeveloped print is called a latent print.

With respect to the two photographs and the lifted impression of the fingerprints the expert said, "The actual photograph shows a very good quality fingerprint in that there are considerable — the sweat pores are very, very clear, very, very pronounced in the actual photograph as are in the lift. I would say it's a very good photograph. It's better than your average one."

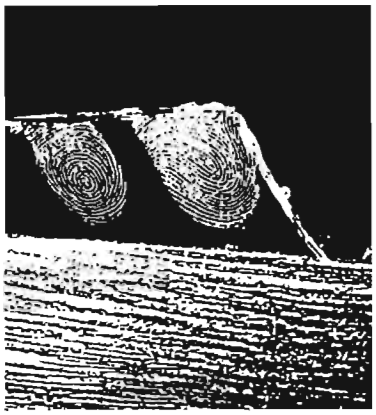
The expert was asked about tampering, forging, altering or interfering with fingerprint evidence and he told the court, ". . . you must have access to that person's fingerprints". The expert said there were three methods of forging fingerprints: ". . . There can be a transferred fingerprint which is transferred from the actual exhibit or from another means and placed on an exhibit by the means of, say, a piece of sticky tape. There is stamped prints, by the making of a stamp or mould to transfer a fingerprint. And there is the moulded fingerprints."

MOULDED FINGERPRINTS

The expert said, "A mould-ed fingerprint would necessitate placing the suspect's hand into a latex mould . . . a reproduction of the fingers. A latex mould like that, for all intents and purposes, is usually exceptionally good in that they possess all the sweat pores and every detail that you can find off a fingerprint and would, in my opinion, be very very difficult to, to actually say that it wasn't a forgery." The court was told that in order to use this method it was essential to have the owner of the fingerprint co-operate so that a mould of his finger can be obtained.

TRANSFERRED LIFTS

The court was told that there were two methods of transferring fingerprints, one with the use of powder and the other simply by lifting a fingerprint in its latent form and placing it somewhere else. The expert said that by either method the transferred print "is extremely faint, extremely faint to the point where in most cases you would never identify it". The expert said that a problem with this method is that an adhesive medium deposited on the secondary surface in an unnatural sequence and telltale residue of the adhesive are obvious and therefore easily detectable as a lift.



Demonstration of forgery method

STAMPED FINGERPRINTS

The court was told that it is a simple matter to take an inked fingerprint impression on a plain sheet of paper to a commercial stamp maker and have a rubber stamp is made. Evidence was given that a stamp made by the use of light-sensitive paper making a negative and then "a piece of rubber is placed under the actual negative and it is exposed to ultraviolet light, and then it is a procedure, whatever remains, and the other areas are washed away with a solution so it leaves the area that has been highlighted prominent as in the fingerprint, and the other area, produced area, not exposed to the ultraviolet light produced".

The expert then said, "The main thing with the stamped impression compared to human impression is the extremely poor quality. Very, very blurred, very faint, no ridge detail, no sweat pores consistent with a rubber stamp."

EXPERT'S CONCLUSIONS

The expert referred to the exhibit allegedly taken from the burglary and said, "They have not been done with a rubber stamp. In my opinion they have too good a quality to have been done with a rubber stamp." The expert then told the court that the exhibit could not have been made with either a stamp or by transferring prints with sticky tape.

The expert said, "That, as far as I'm concerned, the quality of the fingerprint, it's in a natural position consistent with a grip. The fingerprint itself contains numerous sweat pores, the sweat pores are nice and clear; they're not faded. They're a nicely shaped fingerprint. It's got natural markings consistent with somebody moving the finger. I consider nothing other than it is a genuine fingerprint."

CROSS-EXAMINATION OF THE EXPERT

Various methods of forgery were suggested to the expert but he maintained his position that in his opinion it would have been impossible to forge the fingerprint which was the exhibit in the trial.

The expert admitted that the procedures in place at the material times would have allowed any member of the police force to have access to sets of fingerprints that were kept at the police criminal records section. It was further conceded by him that the then system was that only one set was kept at the Fingerprints Bureau and the other sets were sent to the records section.

When asked about latex moulds and sweat pores being visible the expert replied, "Possibly because you have actually the hand and that's still, if it's in the mould, is still exuding sweat. The sweat pores wouldn't be blocked up. The sweat pores would still have sweat within the pore."

THE DEFENCE CASE

The accused gave evidence of an alibi and called a number of persons in support of this. He further testified as to previous dealings with other police and how he had instituted civil proceedings seeking damages against them and that when giving evidence in the other case his house had been searched by police using a warrant and that it was his opinion that this was an attempt to dissuade him from continuing this action.

THE EXPERT WITNESS CALLED BY THE DEFENCE

A witness was called on behalf of the accused and he was qualified as a fingerprint expert. He had examined the photographs and lifted fingerprint which were exhibits in this case and formed the opinion that he had no reason to believe that they were anything but naturally formed. He was then asked if forged fingerprints were capable of being detected and he replied, "In the majority of cases, yes, but not necessarily so". When asked about latex moulds and the necessity to have the person's finger to make the mould he replied, "Not necessarily, I'm not up with all the tricks and things that they can do these days, but I wouldn't be surprised, but there would be some difficulty, but I would expect in today's climate they would be able to do that."

The expert then discussed the possibility of lifted and transferred fingerprints and reference was made to Vienna Foil, a substance made from gelatine by which it is possible to transfer fingerprints without it leaving any residue such as with adhesive tape.

This witness said that he first became aware of fingerprint forgery using latex moulds thirty years ago.

During cross-examination he was asked if was impossible to forge the fingerprint evidence that had been tendered and he replied, "I am not aware what has gone on in the industry and therefore I wouldn't be so dogmatic as to say, 'No, it's impossible'."

VICTIM IMPACT STATEMENTS

Anne Thacker

THE VICTORIAN GOVERNMENT, AFTER considering a range of reforms to further the cause of victims of crime in the sentencing of criminal offenders, decided to give priority to the introduction of victim impact statements. On 31 May 1994 the *Sentencing (Victim Impact Statement) Act* was proclaimed.

The purpose of victim impact statements is to regulate the presentation of information of the effects of a crime on a victim to the sentencing court following conviction of the offender.

Providing such information to the sentencing Court is not a new procedure. For example, in *R.* v. *Webb* [1971] V.R. 147 the court dealt with a rapist and heard evidence from the victim about the effect of the resultant pregnancy upon her and her husband. In that case a clear statement was made:

"It is always open to a judge to have regard to the fact that no evil effect resulted from the crime to a victim. That is a common occurrence and a fact properly taken into account. But, conversely, a learned judge is entitled, in our view, to have regard to any detrimental, prejudicial or deleterious effect that may have been produced on the victim by the commission of the offence." [1]

What then does the further regulation of this procedure mean? To answer this question and understand what is necessary to ensure continued fairness in the sentencing of criminal offenders — fairness to the offender, the victim and the community — it is necessary to first look at where and how the victim impact statement fits into the sentencing procedure.

One of the distinctive characteristics of the *Sentencing Act* 1991 is that the intentions of the legislature and the principles governing sentencing in Victoria are codified.[2] "The only purposes for which sentences may be imposed" are set out in section 5(1). These purposes, in brief, are: to punish the offender; to deter the offender or other persons from committing offences of the same type; to facilitate rehabilitation of the offender; to denounce the type of conduct in which the offender engaged; and/or, to protect the community from the offender.

The sentencing court, in pursuing these stated purposes, must have regard to the maximum penalty prescribed, current sentencing practices, the nature and gravity of the offence, the offender's culpability and degree of responsibility for the offence, if and when the offender pleaded guilty, previous character of the offender and the presence of any aggravating or mitigating factor concerning the offender and any other relevant circumstance.[3] As can be readily appreciated all of these considerations focus attention on the offender and the offender's behaviour.

The *Sentencing (Victim Impact Statement) Act* 1994 adds a new dimension to the sentencing procedure by requiring the court to have regard, specifically, to:

"The personal circumstances of any victim of the offence; and

Any injury, loss or damage resulting directly from the offence."[4]

While these factors are now presented to the court in the form of a victim impact statement[5] it does not necessarily cause any change in the information provided to the court. See for example, how the court dealt with the injuries to the victims in the *Kay Nesbitt case* [6] and *R.* v. *Tahche* (the revenge rape case).[7] Nothing in the victim impact statement procedure would change what occurred in these cases should they be heard under the amended legislation.

However, as might not be so readily appreciated, the inclusion of factors relating to the victim necessarily establishes competition between attention to the offender and his behaviour on the one hand and the consequences of his behaviour on the other. Dangers raised by giving priority to the consequences of a crime were commented upon by the Supreme Court very recently in *R.* v. *William Penn* where evidence of the sorrow and misery of the victim's family was provided to the sentencing court (and before the changes referred to were proclaimed):

"It cannot be... that a sentencing judge should be required to impose a harsher penalty upon an offender who causes the death of a person who is widely loved than upon one who causes the death of an unloved victim". [8]

The criminal justice system was devised to deal with offenders in a context broader than that which

has regard only to the interests of the victim and of the offender. The function of the criminal justice system is to ensure that the interest of the whole community as affected by the crime is met.[9] Standards of conduct expected and demanded by the community are tested and reasserted each time a court sentences an offender Vengeance is not a proper sentencing principle.[10] The ancient commandment to revenge has been rejected for a just desserts principle of sentencing which focuses attention on the culpability of the offender and the seriousness of the criminal act.

The Attorney-General has said, and there would be few who disagree with her, that the community has a responsibility to respond to the needs of victims of crime.[11] There was much public debate about the wisdom of providing that response via use of a victim impact statement.[12] The criminal justice system is challenged to maintain a proper balance of the broad purposes of the criminal justice system with better inclusion of the needs of victims. In other words, focus of attention should remain squarely on the offender with no warping of the sentencing process into a quest for retribution.

There is another concern: the wellbeing of victims. There is potential for the use of the victim impact statement procedure to actually effect further damage to the victim.

Historically, women and children have been most of the victims of sexual crimes. This factor itself substantially raised the debate about inequity in the system. The criticism is precisely that the system does not recognise or acknowledge the full extent of the damage caused to this section of the population by violent men (the vast majority of offenders of sexual crimes).[13] No benefit will flow to these victims by adding to their burden yet another opportunity for them to be victimised.

Each time the system deals with the victim's complaint the victim may now be required to perform again as a victim: first, at the police station when the initial statement of complaint is taken and the police investigate the cogency of the complaint; secondly, at the committal hearing where the magistrate may hear cross-examination of the victim's evidence to decide whether or not there is sufficient evidence on which to order the accused to stand his trial; thirdly, at the trial when the victim will again take the witness stand to give her evidence and be cross-examined on it by the accused's counsel; and fourthly, at the sentencing stage of proceedings after the accused has been found guilty.

Unlike most of the victims of crimes against property, women and children as victims have been treated as unreliable and subject to particularly harsh cross-examination. The victim impact statement procedure will further the opportunity to challenge the stated experience of victims rather than provide a forum for them to be believed and receive support for the damage that they have suffered. Crimes of violence against women and children are the most under-reported crime in the community. This reluctance to use the criminal justice system in the first place is because they have no faith that they will be believed or treated sensitively. The victim impact statement procedure will do little, if anything, to alter this perception.

The victim impact statement procedure will further the opportunity to challenge the stated experience of victims rather than provide a forum for them to be believed and receive support for the damage that they have suffered.

It is at the point of sentencing the offender that a victim commences to be a survivor. She (or he) is given support for her ability to survive. The victim impact statement procedure necessarily delays that process and she will again be subject to accusations as to her behaviour, her motive, her credibility, her weaknesses. These problems have the capacity to be exacerbated further where the victim prepares the statement herself as is envisaged.[14]

There are other procedural problems. Giving an active role to victims raises the question of the financial cost to the victim. For example, who pays the costs incurred to corroborate assertions by production of medical evidence is not addressed in the legislation. No victim is compelled to provide a victim impact statement. The question of what occurs where a victim does not wish to provide one is not addressed. There is no mention of protection of a victim from adverse inferences if no victim impact statement is produced. The Victorian Sentencing Committee, after analysing various matters particularly procedural difficulties, ultimately rec-

ommended that victim impact statements not be adopted in Victoria.[15]

In the majority of cases where prosecution is followed by a guilty plea the victim complaint has not been lack of opportunity to be more intimately involved in the court process. However, information (or lack of it) has been consistently identified as the principal item of frustration and negative experience of victims.[16]

It has often been the case that victims (and other witnesses) are not provided information about charges laid against the offender, bail status of the offender, date of hearing of the criminal proceedings, the plea entered by the accused, or the sentence imposed. Victims complain they are not informed of the offender's release from imprisonment date. These issues have been raised by various community groups including Victims of Crime Assistance League[17] and the Victorian Sentencing Committee.[18] The Victorian Legal and Constitutional Committee has pointed out that there is no formal recognition of the matters mentioned above.[19] The Attorney-General herself acknowledges the importance of information to the victim and has stated this "will be a vital next step (after introduction of victim impact statements) in the process of recognising the victim's place in the criminal justice system".[20]

At the Crimes Compensation Tribunal victims are given an opportunity to be involved in a public process that recognises their full status as both a victim and a survivor.[21] At present the Crimes Compensation Tribunal is a restricted forum in its capacity to accommodate applicants both as to access to its jurisdiction and response to what applicants have to say about the effect of the crime on them. Further action is necessary to develop the Crimes Compensation Tribunal jurisdiction.

In the meantime, it will be necessary for judges and magistrates to give depth to the law on criminal sentencing to ensure a proper balance of the competing interests now before them. For this they will need a high level of informed understanding of how and why the legislation was passed and the ways in which the Act might operate.[22]

The success of the victim impact statement procedure as a reform measure will ultimately depend on the ability of the courts to maintain an attitude of fairness in the face of competing interests.

FOOTNOTES:

1. At p.150. Winnecke C.J. delivered the judgment of the full court of the Victorian Supreme Court (Winnecke C.J., Pape and Lush JJ.).
2. See discussion of the *Sentencing Act 1991* by Ian Freckelton and Anne Thacker, "The New Sentencing Package: Part III" (1991) 65 *L.I.J.* p.1032.
3. Section 5(2)(n)–(g) *Sentencing Act* 1991.
4. Section 5 *Sentencing (Victim Impact Statement) Act* 1994 inserts into the *Sentencing Act* 1991 at s.5(2) additional paragraphs at (da) and (db).
5. Division 1A *Sentencing (Victim Impact Statement) Act* 1994 provides victim may make a victim impact statement/contents of the statement/distribution of written statement procedure/examination of victim procedure/ other witness procedure.
6. *R.* v. *Mallinder* (1986) 23 A. Crim. R. 179, especially at p.80 per Murray J. who considered first the consequences of the criminal act and then the prospects of rehabilitation and other aspects of the offender. At p.183 O'Bryan details all of the injuries suffered by Kay Nesbitt.
7. (1992) 62 A. Crim. R. 75. During the course of the plea, the court had tendered to it by consent, a document entitled "An Impact of the Crime Statement" in relation to the victim. Significantly, the statement was prepared by a psychologist after consultation with the victim. The court said (at p.79): "The provision of material of this kind to a sentencing judge in appropriate cases is, we think, to be encouraged".
8. *R.* v. *William Penn,* unreported judgment of the Full Court of the Supreme Court of Victoria (Crockett, Southwell and Vincent JJ.) delivered 9 May 94.
9. Victorian Sentencing Committee Report 1988, Sentencing, Vol.2, pp.542–3.
10. The *Victorian Sentencing Manual* at paragraph 21.104: "In the decided cases the word ('retribution') is frequently used to describe that which the *Sentencing Act* 1991 now calls ('just punishment'). In this context retribution can be taken to mean a sense of recompense for, or requital according to the merits or deserts for evil done as opposed to outright vengeance (Shorter Oxford Dic ; Macquarie Dictionary.; Williscroft [1975] V.R. 292; Valentine and Garvie (1980) 2 A. Crim. R. 170 at 299."
11. During the second reading on Sentencing (Victim Impact Statement) Bill, *Hansard,* 31 March 1994 at p.12.
12. See for example letters to *The Age* including VCCL letter dated 1 April 1994, 19 April 94 and 29 April 1994. Victim Impact Statements — A Problematic Remedy, a position paper prepared by the Project for Action Against Sexual Assault, June 1993.
13. This is now well documented. See for example, Dr. J. Scutt, *Women and the Law* (Law Book Company, 1990), p.460; R. Graycar and J. Morgan, *The Hidden Gender of Law* (Federation Press, 1990), pp.277–78 providing statistics on violence in the home by men against women.
14. The Attorney-General, "The Attorney-General's Column," *Victorian Bar News,* Autumn 1994 at p.11. See again endnote 7. No mention is made in *R.* v. *Tahche* of who paid for the psychologist's report.
15. *Sentencing, op. cit.,* Vol.2, p.545.
16. *Id.,* Vol.2, Ch. 13.2 at p.526.
17. Submission from Victims of Crime Assistance League Incorporated, *Sentencing,* Victorian Sentencing Committee Vol.3, pp.L2–L3.
18. See endnote 16.
19. "Report upon Support Services for Victims of Crime," Victorian Parliament, November 1967.
20. "The Attorney-General's Column," *Victorian Bar News, op. cit.,* at p.11.
21. Set up by the *Criminal Injuries Compensation Act.*
22. See further, Sir Anthony Mason, "The Role of the Courts at the Turn of the Century," 5th Annual Oration in Judicial Administration, Melbourne, 5 December 1993, *JJA* Feb. 1994, Vol.3. No.3, p.158 at 162–3; and Sir Anthony Mason, "Courts Must Apply Just, Sound Rules," *Lawyer,* May 1994, Vol.29, No.4, p.14.

VICTORIAN BAR COUNCIL: 1994–1995

Standing left to right:
Cathryn McMillan, David Beach, Susan Morgan, Paul Elliott, Ross Ray, Julian Burnside Q.C., Elizabeth Hollingworth, Michael Colbran, Con Kilias, Andrew McIntosh, Gary Moloney (Assistant Honorary Secretary), Darrel Dealehr (Honorary Secretary), Jeanette Richards, Jack Rush Q.C., Ross Macaw Q.C., Joseph Tsalanidis.

Seated left to right:
Fiona McLeod, David Curtain Q.C. (Treasurer), John Middleton Q.C. (Senior Vice-Chairman), David Habersburger Q.C. (Chairman), Graeme Uren Q.C. (Junior Vice-Chairman), Neil Young Q.C., Robert Redlich Q.C.

THE RIGHT TO SILENCE

Gerard Nash

THERE HAVE BEEN RECENT SUGGESTIONS that the right of an accused to refrain from giving evidence in his own defence should be abolished; that, if an accused does not give evidence, the jury should be told that they may, depending on the circumstances, draw from that failure an inference which supports the prosecution case.

At the present time s.399(3) of the *Crimes Act* 1958 prohibits comment on the failure of an accused person to give evidence, It does not, however, prevent the jury from taking that failure to give evidence into account in arriving at its verdict.

If the trial judge were permitted to comment on the failure of the accused to give evidence on his or her own behalf and were free to invite the jury, whether directly or by implication, to draw an inference from that failure, it might result in the conviction of many accused who are now acquitted. Some of those accused would be guilty of the offence charged, but the probability is that others would be innocent.

Unfortunately, there are some people who, even when giving evidence of the truth, do so in a manner not calculated to inspire confidence. Some witnesses become confused under cross-examination. Some witnesses, including persons accused of offences, lie when they are confused. An accused whose manner is evasive, whose answers are confused or who lies under cross-examination is not necessarily guilty of the offence with which he or she is charged.

It is true that the requirement that the accused go into the witness box (or suffer adverse comment) may lead more readily to the conviction of a guilty accused. Implementation of a proposal that juries may properly be invited to draw inferences from the failure of the accused to give evidence will almost certainly involve an increase in the conviction rate. Many of those who make up that increase will be guilty. Inevitably, some will be innocent. It is difficult to estimate what the proportions will be.

Implementation of such a proposal involves a total rejection of the fundamental principle that a man or a woman is innocent until proved guilty. That principle is fundamental to the administration of the criminal law as we know it; and it is one of the basic protections available to the individual against the police power of the State.

There is a danger that rights which the common law has regarded as fundamental, and which are essential if the rights of the individual are not to be made subservient to what the executive may from time to time regard as the "common good," may be jettisoned in some *ad hoc* attempt to increase the conviction rate.

Implementation of a proposal that juries may properly be invited to draw inferences from the failure of the accused to give evidence will almost certainly involve an increase in the conviction rate.

Over a decade ago I had the opportunity, as a representative of the International Commission of Jurists, to visit Uruguay, then governed by a military junta.

Shortly after my return I wrote the following:

"The Uruguayan system of criminal law is based on the medieval Spanish practices. The criminal law itself is contained in a code which is based on the Italian criminal code, but the procedures are, it would seem, those which the Spaniards left behind in South America.

So far as I was able to ascertain in both criminal and civil matters evidence is taken on deposition and the tribunal actually determining the case sees neither the witnesses nor the parties. In criminal matters jurisdiction is exercised both by civil courts and military courts. Whether a person is tried by a military court or a civil court depends upon whether he has committed an offence against the penal code or against the military penal code. Offences such as subversion are offences against the military penal code. In either case, however, the procedure is almost identical.

A person arrested either by the police or by the military is required to be brought before an examining magistrate within ten days of his arrest, The examining magistrate will authorise the continued detention of the accused if there is what one military defence counsel described to me as "half a case" against the accused. The examining magistrate will then, as is the practice in many countries, supervise the collection of further evidence and will examine witnesses produced on behalf of the prosecution. He may also, I believe (although I am not absolutely certain of this), examine the accused, whose counsel is entitled to be present during such examination.

If after the evidence has been collected and put before the examining magistrate he decides that there is a *prima facie* case against the accused, he will forward the written depositions containing the evidence given before him to the superior court which in turn will pass the depositions to the prosecutor. The prosecutor will, on the basis of the material in the depositions, decide what offence(s) should be charged.

After the change is formulated the prosecution can lead further evidence and all prosecution witnesses may be cross-examined by the defence. The defence may also lead evidence which is subject to cross-examination by the prosecutor, This evidence and this cross-examination is not heard by the trial judge, but occurs before a clerk of the superior court who records the evidence and the answers given in response to questions in cross-examination. As I understand the situation the precise evidence or the precise answers are not necessarily recorded, but only the substance of the answers.

When the hearing of this evidence is complete the prosecution has three months to submit a written brief to the trial court and the defence has a period of three months after that to submit its written brief. The "trial" judge then determines the issue of guilt or innocence and the penalty to be imposed on the basis of the written depositions and the written submissions, He does not hear any oral argument from counsel, nor does he see the accused or any of the witnesses. The whole matter is determined by "the record". I was told of one case where the trial judge (in a civil court, not a military court) was asked to see the accused before deciding what penalty to impose, He refused on the ground that "it would be impossible to relate my impression of the accused to the record".

The "trial" judge then determines the issue of guilt or innocence and the penalty to be imposed on the basis of the written depositions and the written submissions,

Substantially the only difference between prosecutions conducted in the military courts and prosecutions conducted in the civil courts are to be found in the personnel. In the military courts the arresting officer, the examining magistrate, the prosecutor and the judge are all military officers. The accused has a choice of having civilian or military defence counsel and in most cases chooses to have military defence counsel. There is one other difference. If a sentence of more than three years is imposed by a military court at first instance, there is an automatic appeal to a superior military court consisting of five military officers. This appeal is conducted in public and the accused does on the hearing of the appeal come face to face with his judges. I was unable to ascertain whether any additional evidence is called at this stage or whether there is merely argument as to sentence based on the material before the judge at first instance.

In practice there are extremely few acquittals. Once the examining magistrate decides that there is a *prima facie* case there is, except in most exceptional cases, almost inevitably a conviction. Statistics I was given drew a distinction not between convictions and acquittals, but between those who were arrested and released either before the expiration of the ten days or on coming before the examining magistrate and those who were "processed". The delays in decision-making are, by the standards we accept, somewhat frightening. I know of one case where the conviction took place some eight years after the arrest and some five years after the examining magistrate had found that there was a *prima facie* case.

When I queried the possible injustice caused by delays, one senior government officer pointed out that the written procedure did have its defects, but then, he said, so does the oral system of argument adopted for example in Australia, England and the United States. "It is possible for a good advocate to persuade a jury in your country to acquit a guilty man."

"It is possible for a good advocate to persuade a jury in your country to acquit a guilty man."

It is possible in our system of justice for a guilty man to be acquitted. It is possible for a man guilty of the most atrocious crime to be defended by competent and able lawyers. Our system does, perhaps, lean too far in favour of protecting the rights of the accused. It is not desirable that guilty men should go free; but if the alternative is that some innocent men should not go free or that the decision as to guilt or innocence should in fact be made, as it appears to be done in Uruguay, before the accused has had any real opportunity of presenting a case, then the acquittal of guilty men appears to be the preferable alternative.

Our system is a human system. It depends upon the impressions which individuals make on others. It has no precise predictability, but all in all it does provide justice; and when there are departures from that general pattern, when for some reason an injustice is perpetrated by the system, it is usually manifest. Individuals may err, but the system has been proven by time. There is good reason why the murderer or rapist should be defended and well defended.

Many of the conventions and practices which the common law has developed may seem inefficient and in today's computerised world perhaps too subject to human error. Certainly from the point of view of ensuring that anti-social behaviour is prevented, that no people who may be a danger to society are left unnecessarily at large, the Uruguayan system has advantages over ours. I doubt if many of us would be prepared to pay the price which such a system demands."

Time has passed since I wrote that statement and our society has moved into what can only be described as a "more puritanical" mode. The "new puritanism," or as it is more commonly called "political correctness," dominates our society at every level. There is considerable pressure to conform to some arbitrary social norm, and non-conformity of a kind which would once have been considered a breach of good manners may soon become a criminal offence. Only in sexual matters (and then only in certain areas of behaviour) is there a "liberalism" and an encouragement of non-conformity,

There is also an increasing emphasis on "law and order" and on the "need to protect society".

There has, perhaps with the growth of our cities, the widening gap between the "haves" and the "have nots," the denial of individual responsibility implicit in the form in which the hand-out philosophy of recent governments has been manifested, been a boom in crime — particularly violent crime.

The answer put forward is that we need more convictions, "Let us change the system to make the task of the accused more difficult. Trials are too long and too expensive, Do the accused really need all the rights which have in the past been extended to them? Why should an accused be able to plead the general issue? The task of the prosecution would be easier if it had to prove only specific matters raised by way of 'pleadings'. Let us, therefore, punish an accused by way of costs or an increase in sentence if he or she fails to admit facts which at the end of the trial the trial judge considers it was unreasonable to put in issue."

The answer does not lie in more convictions but in the prevention or reduction of crime. Perhaps we should look to more fundamental questions. We need to encourage "self-responsibility" by emphasising the rights *and responsibilities* of the individual in our schools and through our bureaucratic and social service procedures. We need policemen who are better paid, better educated and better disciplined. We need policemen who are respected not resented. They should not be given powers (or allowed to exercise powers) which interfere with the liberties of the individual to such an extent or in such a way that the police power of the State is seen as a threat to rather than as a protection of the individual. If we accept the suggestions set out in the preceeding paragraph then, in our brave new world, once police or other prosecution witnesses tell a story from which an inference of guilt may reasonably be drawn, the failure of the accused to give evidence will result in a conviction. This will certainly lead to an increase in convictions — of the guilty and of the innocent.

If the right to silence is abrogated or qualified the presumption of innocence — once a proud boast of our legal system — will become "a presumption of guilt once the prosecution has spoken".

THE TRIALS AND TRIBULATIONS OF KLAUS McTAVISH O'PENMAN

THE FOLLOWING IS A TRANSCRIPT OF A telephone conversation between a counsellor and his client. It appears to have fallen off the back of a telephone company motor vehicle.

CP: "It is very unfair. It is very, very, very unfair. The whole thing is unfair. Nobody has been fair to me."
C: "When did it all start?"
CP: "It all started at work . . . no it really started much earlier but I was told to say it started at work . . ."
C: "Who told you to say it started at work?"
CP: "Err . . . my lawyer . . . or it could have been my doctor."
C: "Your lawyer or your doctor and they told you to lie?"
CP: It wasn't really a lie, well not a big lie . . . Anyway it was to the WorkCare people so it didn't matter."
C: "What did they tell you to lie about?"
CP: "It's my back. My back she is very bad and no one believes me. She is so bad I can't do anything. It hurts me really bad and everyone laughs at me and doesn't believe me. It is so bad I can't even see my friends or do anything."
C: "When did it start?"
CP: "It start at work when I send down to . . . it really start much earlier but I have to say she start at work. It is really very bad, it hurt all the time, the doctor do nothing, the pills no good, and no one believe me. It . . ."
C: "You hurt your back?"
CP: "You don't believe me either. She really hurt very bad. I can't do nothing. My life is ruined. I want to kill myself."
C: "I do believe you. When did you hurt your back?"
CP: "I tell you at work. You no believe me?"
C: "I do. But I thought you said you hurt it earlier?"
CP: "See, you call me liar. No one believe me. I kill myself."
C: "Wait! Wait!! I *do* believe you. I know you have hurt your back very badly. I would like to know how it happened."
CP: "I tired of telling people about it. They no believe me. It really hurts real bad. I cannot do anything. My friends no talk to me any more. Everybody laugh at me."
C: "I really would like to know what happened I am not laughing at you. I know it hurts you very much. Please tell me how it happened."
CP: "But I tell the doctors and they no believe me. They twist my words around. They lie. They no like me. They make fun of me. I kill myself."
C: "I will believe you. What doctors do not believe you?"
CP: "All the doctors. WorkCare send me lots of doctors. They poke me, they make me do things that hurt me a lot and they tell me I must do those things. I see doctors for my back and doctors for my legs and other doctors for my back and more for my legs and some doctors I don't know what for and then they send me to doctors who look at my brain. They say I am mad. Everybody say I am mad. They say I make up the pain. I don't. She hurt really bad. I no able to do anything. I no longer man. Everybody laugh at me. This she is a bad country. I kill myself."
C: "What about your own doctors? You have your own doctors?"
CP: "I have doctors. They no good. They gang up on me too. They help other side. They laugh at me. They no help me. They say I should be get better. I say that she get worse. My back she really hurt me. I no able to bend over. I not do anything. No one believe me. They all say I liar. I kill myself."
C: "When did you hurt your back?"
CP: "See you no believe me either. I tell you at work".
C: "Tell me how you hurt your back at work?"
CP: "I bend over and she go snap and I hurt really much and I can do nothing. I can no stand up straight any more."
C: "What were you doing?"
CP: "I work in car factory. I really good. They make me work hard."
C: "What exactly were you doing when you hurt your back?"
CP: "See you no believe me either. I say I was very good car maker. I hurt back. It very sore. Fac-

tory doctor he no understand. He tell me go home and rest for a day and then come back and see him. He laugh at me. He no like me."
C: "Did you hurt yourself when you were bending down to put something on a car?"
CP: "I no remember. She hurt so much. I in great pain. Doctor he laugh at me. I still in great pain. No one believe me. I kill myself."
C: "You do not remember . . ."
CP: "I do remember You no believe me."
C: "I do believe you. How did it happen?"
CP: "My doctor say it must be the work I do. It really be bad work. My boss must be bad to me."
C: "So it was while you were working making cars?"
CP: "Yes I was car worker . . ."
C: "So whilst you assemble . . ."
CP: "It happen when I work I tell you . . ."
C: "Yes whilst you are assembling cars?"

> It not really bad before work. It a good back. My boss he make it bad. He hurt me. He no believe me. He laugh at me. I kill myself.

CP: "It happen when I bend down to put my boots on. But they tell me to say it happen when I work."
C: "Your lawyer or your doctor."
CP: "Maybe, I not remember. My back so sore I nothing remember. You believe me?"
C: "I do. And that was the first time your back sore."
CP: "They tell me say it not bad before work. I say that. They tell me I am liar. I not lie. Everyone else she lie. My back really badly hurt. I can do nothing. I have no more friends."
C: "So you have hurt it before you hurt it at work."
CP: "It not really bad before work. It a good back. My boss he make it bad. He hurt me. He no believe me. He laugh at me. I kill myself."
C: "So you have never hurt it before?"
CP: "See you no believe me. You call me liar. You not think my back really very sore."
C: "I believe your back is badly hurt."
CP: "I twist it when in army back home. But it not bad. I only in hospital two weeks. They no do operation."
C: "And it was OK after that?"
CP: "Well I hurt it in car accident."
C: "So you made a claim for the car accident?"
CP: "I no claim. My lawyer he say I no claim because it my fault. He say I must be drunk cos I hit wall of club with car when I leave. He no believe me my back she really sore. I get new lawyer."
C: "So you saw another lawyer?"
CP: "Yes. He from home country. He say everybody no believe me because I not Australian. He say everybody racist and doctors worst of all. He tell me not say anything about back before work as it not important. He say I should say back hurt when I work. I do that. Doctors lie about my back. Doctors hate me."
C: "When do the doctors lie about your back?"
CP: "They write to Court and tell Court terrible things about me. They say I make it up. They say it in my head. They say my back no hurt. I know it hurt. I hurt very badly. I no able to do anything. I not even able to pick up baby. I no can mow lawn. My wife . . . err my wife . . ."
C: "Your wife?"
CP: "Yes I have wife. We no can . . . err . . . we don't . . . my wife . . . I am not man no more. My wife she . . ."
C: "I understand. Your wife good to you."
CP: "My wife she have sore neck. Doctors no believe her either. Doctors say it in her head. But she get money."

C: "You do not get paid?"
CP: "WorkCare pay me some money each week but not big money for all hurt and pain and sore back and not able to work and for all I suffer."
C: "You did make a claim."
CP: "Lawyer he make claim for me. He say I get big money. He say I no go to Court. He say I no have to pay him. He tell me I must make big claim. I make big claim. She no good."
C: "What happened?"
CP: "I get no money I go to Court. They laugh at me. I get no money. Lawyer want big money from me. He say I must pay him. I no have money. It is his fault. He no good. I kill myself."
C: "So you go to Court for your back?"
CP: "I go to Court and they laugh at me. They call me liar. They no understand I have sore back and it hurt so much."
C: "Who laughed at you?"
CP: "The other lawyer. He wear wig and funny clothes but he not funny. He gang up with judge and doctors against me. He tells lies to judge about me. Doctors they tell more lies. They no believe me. They say it all in my brain. They wrong. It not in my brain. I hurt real bad. I want to cry. They not believe me. They not believe me cos I not Australian They are racist. My lawyer tell me they racist"
C: "So it doesn't go well?"
CP: "First of all the other lawyer he ask me lots of questions. My lawyer lets him. The judge lets him. I say not his business. He asks me about my sex life. I tell him no business for him. He say I must answer. I get very upset. I start to cry. I think he laugh at me. Judge not tell him to stop. I say I have no sex because my back hurt very much and I don't do it. I say I not feel like a man. He say but we have baby after my big accident. I say my back very sore. He say but you have baby since accident. I no understand. He ask again. I say it accident. He laughs."
C: "Oh dear . . ."
CP: "Then he want ask about our garden. I say it used to be best in street before my back hurt. I say I no able to do even mow the lawn. He ask if I am sure. I say I am sure. I say my back really sore and ask if he not believe me. He ask me questions which I have to answer but he not answer me. He go on and on."
C: "And?"
CP: "He show judge and jury film. It not fair. They very unfair. They spy on me. My lawyer he no object. He do nothing."
C: "What was the film of?"
CP: "It not a good film. They say it of me. I say it not of me. They say it shows me making big rockery. I say I no make rockery since hurt back. I say it not me. I say it not look like me and if it were me it must be before I hurt back and I say they lie about me. They have man come and say he made film and it was me and it was made after I hurt back."
C: "What happened?"
CP: "They ask me more questions and then it lunch. My lawyer he shout at me. He must be on their side. He not believe me I think. He shout more at me and say I must not go on. I say my lawyer promise me big money. I deserve big money and I ask if I get big money. He go away and come back and say I might get my costs but not big money. I say I am promised big money and I should get big money so we go on. He shout at me more and more. My lawyer from my country he not there then. He wouldn't allow lawyer in Court to shout at me."
C: "Is that the end?"
CP: "No. The other lawyer then ask me about whether I make other claims. I say no. He say I do. I say he liar. He says I liar. He shows judge this document with lots of writing which he says I make claim for back injury in car accident. I say I no understand. He show it to me. I say I never seen it. I say I no read well. My lawyer he says nothing. He not help me. I ask him what should I say. Judge says he no help me. I say he not help me right from start. Everybody laughs I not see any funny. My back starts hurt real bad I ask for tablets and water. Judge says let's finish for day."
C: "And it goes on?"
CP: "Yes. My lawyer shout even more at me and say I must take small money or get nothing. He say because of film and writing. I say they lies. He shouts more and says I must do as he says."
C: "And did you?"
CP: "My lawyer come. He says barrister right. I must not go on. I say but he make big promise. He says that everyone against me and it is not fair but I must do as barrister says . . .I not happy."
C: "Mmmm."
CP: "So they make me sign this document. I no understand it. I no get big money. My back really sore and it hurt real bad. They laugh at me. I kill myself."
C: "What did you get?"
CP: "I got very sore back. Lawyer say I get $5,000 but he need that for his extra fees. I say but you not ask for money unless I get big money. You promise me. He say I get money and he has people like doctors to pay."
C: "Oh dear . . ."
CP: "It not fair. It very unfair. My wife she get money for sore back. All my friends and cousins they get big money. I get no money. I have very sore back. No on believe me. They say I mad. Australia not good country. I come to Australia cos I told it is good country where everyone get lots of money from the Government. I no get money. It not fair."
At that point it appears that either the tape ends or the line becomes disconnected.

EQUALITY IN EDUCATION

THERE WAS A TIME WHEN THERE WERE few universities and it was assumed that those who attained university entrance had a reasonable degree of intelligence.

For those who completed their secondary schooling but were not of an "academic" bent, tertiary institutions known as "Technical Colleges" or "Institutes of Technology" provided post-secondary education. With the development of a more egalitarian approach to outcomes, it became an article of educational faith that every student who enrolled in grade I had the necessary intelligence to complete successfully year 12 of his schooling (or sixth form as it was once known).

The powers-that-were recognised that there was a role for two types of tertiary institution. But in the interests of equalising images it was thought inappropriate to continue using such terms as "Technical Colleges" or "Institutes of Technology". They increased the number of universities slightly and at the same time, for those of a "more practical bent," they created a great number of Colleges of Advanced Education.

By some metamorphosis (and following the egalitarian principle) those Colleges of Advanced Education have now become universities. The new article of educational faith is: everyone who enrols in grade I has the necessary capacity and aptitude to obtain a "university" degree.

Our law schools have now gone further. They say that *at least* 30 per cent of those who graduate from our law schools should have Honours Degrees. At the Monash Law, Faculty Board meeting held on 20 July 1994, the Board approved a recommendation that quotas be fixed for the grades above pass in all subjects having an enrolment in excess of 100.

The Executive Committee of the Faculty in its report set out the criteria for grading candidates as follows:

"NN Fail (less than 40%): This means that a supplementary examination has not been granted. The candidate has made no effort to address the issues raised by the examination, or has responded to those which have been idenfified in a grossly inadequate fashion.

N Fail (40–49%): The Examiner does not oppose the student being granted a supplementary examination. The candidate has not addressed sufficient issues raised by the examination and has failed to make sufficient attempt to deal with those which have been identified.

P Pass (50–64%): The candidate has identified the principal issues, but does not explore them in detail and leaves difficulties unexamined. In the upper Pass range, the candidate may have attempted an examination of the relevant law, but has not supplied sufficient reasoning and authority to justify his or her conclusions.

C Credit (65–74%): The candidate demonstrates a reasoned explanation for the conclusions reached and the citation of authority indicates better familiarity with the relevant cases and legislation.

D Distinction (75–84%): All or almost all significant legal issues have been raised by the candidate and reasoned conclusions presented. The candidate's responses show evidence of wider reading and a deeper understanding of the complexity of the law, legislation and underlying policy.

HD High Distinction (85–100%): An excellent response which offers close to complete coverage of the significant issues with no major errors of law. The candidate demonstrates high level skills in case and legislative analysis, understanding of underlying policy, capacity to draw analogies with related areas of law and clarity of exposition."

Immediately after setting out those criteria the report recommended that:

"In relation to subjects with an enrolment in excess of 100, the following quotas should nominally apply in respect of the distribution of grades above Pass:

	Min	Max
High Distinction	2%	5%
Distinction	8%	15%
Credit	20%	30%
Total	30%	50%"

One is forced to ask whether the criteria and the quotas can, as a matter of logic, co-exist?

Gerard Nash

ASSASSINATIONS AND GUN CONTROL

Graham Fricke

assassin, n . . . fr. Arab. *hashishi*, 'drinkers of hashish', q.v., sect of fanatics in Palestine in the 13th cent., whose chief object was to stab Crusaders; fr. 15th cent. *assassin* became equiv to murderer. A secret, treacherous murderer.

WHILST THE ETYMOLOGY OF THE WORD assassin may be ancient, the phenomenon persists in a modern form. Today's perpetrators do not usually imbibe hashish before indulging in their attacks, and the victims are commonly politicians rather than Crusaders. Nevertheless, American citizens can expect a presidential attack every decade or two.

Until recently, however, the phenomenon was almost unknown in Australia. The first political killing in this country occurred in 1921, when a New South Wales Labor parliamentarian, Percy Brookfield, was shot at Riverton. But that could hardly be regarded as a political assassination. Brookfield was shot when he attempted to disarm a Russian who had wounded two other people.

No Australian Prime Minister has ever been assassinated. An attempt was made in 1966 to assassinate the then Leader of the Opposition, Arthur Calwell. Peter Kocan, a nineteen-year-old poet and factory hand, had attended an anti-conscription rally at the Sydney suburb of Mosman. When Calwell left the rally, Kocan fired a bullet through the window of the car in which Calwell was seated. The Labor leader was not seriously injured, although fragments of glass penetrated his face.

Seen against this historical backdrop, the killing of the New South Wales Labor backbencher John Newman constitutes a disturbing precedent.

Perhaps we should not be surprised at the difference between the Australian and American experience to date. America is a much more violent society. The per capita incidence of homicide there is several times that in Australia. Guns are much more readily available in that country.

Guns were, however, a relatively recent phenomenon in April 1865 when the actor John Wilkes Booth shot President Lincoln at Ford's Theatre in the nation's capital. The American nation, although it had already experienced an attempted presidential assassination (in 1835, when two pistols directed at Andrew Jackson both misfired), was stunned. The American people could not have appreciated that, with the proliferation of guns during the succeeding century, presidential assassinations would become commonplace.

Less than sixteen years later, President Garfield became the second victim of the phenomenon. Garfield was elected to the top office in 1880. Within months, he was shot dead.

Twenty years intervened before President McKinley was killed by the anarchist Leon Czolgosz. The pattern was becoming a familiar one. McKinley was replaced by his Vice President, Theodore Roosevelt, who was himself to be shot in an unsuccessful assassination attempt during an election campaign a decade later. And his cousin, Franklin Delano Roosevelt, was in turn shot at in 1933 in another attempt that resulted in the death of Mayor Cermak of Chicago.

The next President, Harry S. Truman, was fond

U.S. Supreme Court

of saying "The buck stops here". He accepted ultimate political responsibility, but escaped the ultimate presidential fate when two disgruntled Puerto Ricans set out to kill him at Blair House. Their attempt failed, but in the process a secret service agent and one of the Peurto Ricans were killed. Thirteen years elapsed before the celebrated slaying of President Kennedy by Lee Harvey Oswald at Dallas.

John Fitzgerald Kennedy's brother, Robert, was travelling in the course of a presidential campaign five years later when he too was fatally shot by Sirhan Sirhan.

The next assassination attempt was bizarre. In 1974, Samuel Buck, who had developed an obsessive animosity towards President Nixon, devised a scheme which he hoped would result in Nixon's death. He planned to hijack an aeroplane, force the pilots to fly over the White House, then shoot the pilots so that the plane would crash into the presidential dwelling. He bungled the attempt, but in the process killed two pilots and himself.

The man who succeeded Nixon, Gerald Ford, was not an object of widespread hatred, as was the man whom he pardoned, but he distinguished himself in 1975 by being shot at twice by two would-be assassins — both women — on two separate occasions within three weeks of each other. A further attempt on the life of the next Republican president, Ronald Reagan, occurred in 1981, when John Hinckley caused serious but not fatal injuries to the President.

What conclusions can be drawn from this sorry catalogue of the republican equivalent of regicide? Is it an argument for strict gun control? Surprisingly, Americans are loathe to draw this conclusion.

The National Rifle Association is a strong lobby group, which is fond of the aphorism."Guns don't kill; people do". Its members sometimes add that a knife is equally lethal. They urge that the right to bear arms is protected under the United States'

Ford's Theatre

Constitution. The group's opponents respond by emphasising the opening words of the Second Amendment:

"A well regulated Militia being necessary to the security of a free State,

the right of the people to keep and bear arms shall not be infringed".

One American author, James W. Clarke, has undertaken a detailed study of sixteen political assassins, fourteen of whom killed or attempted to kill Presidents. After observing that fourteen of the sixteen used handguns (Lee Harvey Oswald, of course, used a rifle), he concludes that "Of all the measures that could be taken to decrease the probability of future assassinations, the most significant would be the confiscation of privately-owned handguns".

In the Australian context the debate has a certain poignancy. The fatuous nature of the N.R.A. aphorism that guns do not kill is demonstrated by the Newman assassination. For John Newman was a fifth Dan black-belt karate champion, who once told his students that his karate skills could protect him against a knife attack, but they would never save him from a speeding bullet.

LAUNCH OF THE VICTORIAN BAR DIRECTORY

The *Victorian Bar Directory* was launched by the Chief Justice on Wednesday, 9 November 1994. The *Directory* is designed to assist solicitors to make an appropriate choice of counsel. It does enable them to know who does what — if not necessarily with which and to whom. In launching the *Directory*, the Chief Justice said:

IT SHOULD BE SAID AT THE BEGINNING OF this launch that there are, of course, "directories" and "directories". I must stress that the *Victorian Bar Directory* is not the sort of directory that was held by the House of Lords in *Shaw* v. *The Director of Public Prosecutions* [1961] 2 W.L.R. 897 to be part of a conspiracy to corrupt public morals. Although it must be conceded that both the *Victorian Bar Directory* and the directory in *Shaw* v. *Director of Public Prosecutions* contain a wide and most interesting variety of services on offer.

In October 1959, when I became a member of the Bar of Victoria, there were approximately 70 members. Although there were one or two small outposts, the Bar was essentially based on Selborne Chambers. The rent for the room where I commenced reading with Vic Belson was two pounds a month, including firewood.

I was personally introduced to most of my new colleagues that I did not already know. All of those to whom I was introduced were men. I was told, in rather hushed tones, however, that there was "a woman up on the second floor". Her name was Joan Rosanove. After a few days I actually saw her swish past wearing a veiled hat and an ermine coat and smoking a cigarette in an enormously long holder, but I was too shy to speak to her.

My capital outlay for my new profession was to the order of twenty pounds. Eight for a wig and twelve for a coat and gown. I had a suit which was a hand-me-down of my elder brother. But fate lent a hand when I won second prize in my clerk's Melbourne Cup sweep. I proceeded to buy a new suit with stovepipe trousers and an uncomfortable waist coat under which I wore braces. These braces, and indeed all braces of that era, were prominently marked "Police and Firemen" apparently to suggest some inner strength which would ensure that wearers would never be "let down," if that is the right expression, however energetic their activities.

The Chief Justice, Bill Martin (editor of the Directory*), and the Chairman at the launch.*

A lot of the barristers did not shave in those days before coming to work. There was an enormous barbers' shop in Chancery Lane with a long row of chairs and many counsel were shaved with cut-throat razors, Figaro-style, between nine and nine-thirty of a morning.

Only Joan Rosanove walked from Chambers to the Law Courts wearing her wig and gown and this caused great scandal. For the rest of us, there was also a robing room at the Supreme Court which then included all the County Court rooms. It was on the south-west corner where the jury rooms and the Prothonotary's Office are now situated. Each of us had a superb cedar locker; as a job lot they would now fetch a fortune at Sotheby's.

In retrospect, my 25 years as a member of the Victorian Bar passed with very great rapidity. I realise now that the work was incredibly hard — but I would have rejected out of hand any suggestion to that effect at the time. The fact was, I simply knew no other lifestyle. While members of the Bar did newsworthy things, the Bar itself was never in the news. But, by the early 1980s, the Bar of Victoria had come under attack from some sections of the media and some interest groups. It was said the Bar was an ultra-conservative and elitist institution. There was nothing original in this for the same had been said in preceding years of the Bar in England, the Bar of France, the Bar of Canada and even, as I found out earlier this year over morning tea with the Chief Justice of New Mexico, the Bar of New Mexico. I think the best evidence that the Victorian Bar is neither ultra-conservative nor elitist lies in the treatment handed out to those with hyphenated names who join it. Thus, the late Mr Hollis-Bee found himself addressed simply as "Mr Hyphen". That well-known advocate, Mr Hugh-Jones, was dubbed "Mr Huge-Ones" which I understand to be a reference to his ears, and the Crown Prosecutor, Mr Morgan-Payler, found himself christened "Mr Organ-Failure".

The *Victorian Bar Directory* reflects the profound changes that have taken place in the Victorian Bar during the time I have been involved in the practice of the law. Now, there are 1,233 practising barristers of whom 193 are women. It also reflects the Bar's capacity to react to current community expectations evidenced by such matters as the recent decision as to co-advocacy.

The *Victorian Bar Directory* is a record of a remarkable institution. The *Directory* contains no less than 24 areas of legal practice ranging from common law to land acquisition and compensation. The barristers listed in the *Directory* include counsel fluent in Italian, Polish, Greek, Tamil, Malay, Indonesian, Hebrew, French, Maltese, Arabic, German, Japanese, Dutch, Swedish, Hungarian, Afrikaans, Danish, Spanish, Chinese (including Cantonese, Hokkien and Mandarin) and Russian.

The Chairman appears unworried by the presence of "The Investigators".

Counsel in the *Directory* are admitted to practice not only in every Australian State and Territory, but in New Zealand, Vanuatu, Ireland, Papua New Guinea, Solomon Islands, Tonga, New York State, South Africa and New Mexico. The degrees they hold include Doctor of Philosophy, Bachelor and Master of Laws, Bachelor and Master of Arts, Bachelor of Economics, Bachelor and Master of Science, Bachelor of Commerce, Master of International Law and the Diplomas of Criminology, Chemistry and Social Studies. There are chartered accountants, arbitrators, mediators and even a master mariner.

There are now, too, I would believe, substantially different, and indeed novel, accommodation arrangements for some members of the Bar. Recently, walking in Bourke Street, I fell into step with a young barrister. Making conversation, I asked, "where are your chambers?" Before he could answer his portable phone rang. He said to the caller, "I'll ring you back." A few paces further and the same thing happened. In all innocence, I repeated my question, 'where are your chambers?" "Well, Judge," he said, "to be honest, we're walking along them."

Before proceeding to the actual launch it is proper that I point out that launches can involve, at least for audiences, an element of risk. Alexander the Great, launching a new city in Asia Minor that he had named after his favourite horse, exultingly hurled a javelin into the air. Unfortunately, it impaled the Ambassador from Ethiopia. King George III launching a refurbished Queen's House at Greenwich, inadvertently pulled the wrong lever, releasing a flood of Thames mud and sewage onto the assembled dignitaries.

And so, with an appropriate denial of liability, I declare the *Victorian Bar Directory* launched.

RULES RELATING TO USE OF PORTABLE TELECOMMUNICATIONS DEVICES

Draft Rules of Conduct

Chapter 16AA — Portable Telecommunications Devices

16AA.1 PORTABLE TELECOMMUNICATIONS DEVICES

Subject to these Rules a barrister shall be permitted to operate a Portable Telecommunications Device ("PTD").

16AA.2 CARRIAGE OF PTDS

(a) Barristers in possession of a PTD shall at all times carry it in an ostentateous manner;
(b) Barristers in possession of a PTD shall take it into Court with them at all times;
(c) PTDs taken into Court shall be placed upon the Bar Table before anything else is placed thereupon;
(d) PTDs shall be placed upon the Bar Table in such a manner as to ensure that they shall be sighted by the Presiding Judicial Officer, the Barrister's instructor and all other members of Counsel appearing in that proceeding;
(e) Barristers in possession of a PTD shall take it into all toilets visited by the Barrister;
(f) Barristers in possession of a PTD shall take it into all cafes, bistros, restaurants and other eating places visited by the Barrister.

16AA.3 USE OF PTDS

(a) At all times, Barristers using PTDs must speak into them with a loud, clear voice ensuring that they are clearly heard not only by the other party using the PTD but also all persons in the vicinity of the Barrister using the PTD;
(b) Should a Barrister be required as above to take a PTD into the toilet the Barrister shall ensure that the PTD is used;
(c) PTDs used in toilets shall be used from cubicles therein in such a manner as to ensure the Barrister is heard by that Barrister's opponent and that the Barrister is overheard communicating matters confidential to the Barrister's client;
(d) Should a Barrister take a PTD into an establishment where food is sold and/or consumed the Barrister shall comply with the next subrule hereof.

16AA.4 THE USE OF PTDS IN PLACES WHERE FOOD IS SOLD AND/OR CONSUMED

(a) The PTD must be left switched on at all times;
(b) At least three calls must be made from the PTD whilstever the Barrister is in the establishment subject to sub-sub rule (c);

Barristers in possession of a PTD shall at all times carry it in an ostentateous manner.

(c) Should a Barrister receive more than three calls whilst upon or within the establishment the Barrister may reduce the number of calls pursuant to sub-subrule (b) by the number of calls received in excess of three;
(d) All calls made and taken should be made and taken so that the occupants of at least three other tables or 12 people (whichever is the lesser) shall hear every word and be aware of the nature of the Barrister's practice;
(e) All calls made and taken should be made and taken so as to maximise the disruption to the other persons present at the establishment with the Barrister;
(f) Should there be more than one Barrister present at the establishment not more than one Barrister shall use a PTD at a time;
(g) Should there be more than one Barrister present at the establishment each Barrister should only communicate with other Barristers by medium of the PTD.

16AA.5 THE USE OF PTDS IN COURT

(a) Barristers carrying PTDs into Court pursuant to rule 16AA.2 shall ensure that they ring at least once during proceedings;
(b) No PTD shall be used in the precincts of a Court unless it is used to disparage, in that person's hearing, at least two of the following:
  (i) the Barrister's instructor;
  (ii) the Presiding Judicial Officer;
  (iii) the client;
  (iv) the Barrister's opponent;
  (v) a Member of the Ethics Committee;
  (vi) a Member of the Victoria Police.

16AA.6 THE USE OF PTDS IN MOTOR VEHICLES

(a) A Barrister shall not use a PTD in a motor vehicle unless that Barrister is driving that motor vehicle and that motor vehicle is in motion throughout the entire use of the PTD;
(b) A Barrister shall not use a PTD in a motor vehicle if it has "hands free" operation;
(c) Should a Barrister be requested to discuss the use of PTD in a moving motor vehicle by a member of the Victoria Police the Barrister should commence any explanation with the words "I am a Barrister . . ." placing maximum emphasis on the word "I";
(d) No PTD shall be used in a motor vehicle in motion for any purpose other than arranging the carriage of a PTD into an establishment where food is sold and/or consumed.

16AA.7 PROHIBITED USES OF PTDS

(a) To inform one's Clerk where one is;
(b) To inform any member of one's family where one is;
(c) To communicate with emergency services;
(d) To advise one's instructor of the outcome of any proceeding conducted that day or the three working days prior;
(e) To call one's TAB account,

16AA.8 USE OF PTDS OWNED BY OTHER PERSONS

Barristers are permitted to use PTDs owned by other persons (PTDOPs) provided that:
(a) Each of the foregoing Rules is complied with;
(b) No conversation on a PTDOP is less than 8 minutes;
(c) No less than three conversations are initiated from the PTDOP on each occasion it is used;
(d) No remuneration is offered or paid for the use of PTDOPs;
(e) PTDOPs are to be preferred to the Barrister's own PTD, telephone or Clerk's telephone or a public telephone for the purposes of interstate or international telephonic communication;
(f) The Barrister ensures that the battery of the PTDOP is exhausted upon completion of such Barrister's use.

16AA.9 USE OF A PTD IN PLACES NOT OTHERWISE COVERED

A Barrister should use every endeavour to use their PTD in places other than those dealt with in the foregoing rules provided that:
(a) Such places shall not include the Barrister's own Chambers or residence unless there are at least five other persons in close proximity to the Barrister whilstever the PTD is in use;
(b) No PTD is to be used in private;
(c) Each and every conversation commences with the loud proclamation that "I am a Barrister";
(d) Maximum disruption, discomfort and disturbance is afforded to other persons in the vicinity throughout the entirety of the use of the PTD;
(e) Under no circumstance is the PTD to be loaned to any other person except for another Barrister and then only after the borrower has been informed in loud tones that "Do you really need to use it? I am expecting a most important call," and the Barrister has ascertained that the borrower will not use the PTD for the benefit of the borrower's client, instructor or practice.

16AA.10 DISCONNECTION OF PTD

No Barrister shall switch off a PTD unless:
(a) There is no other person present; and
(b) It is a Public Holiday; and
(c) It is between midnight and 6a.m.; and
(d) The Barrister proposes to be asleep for the whole period that the PTD is to be switched off.

16AA.11 USE OF MUTE DEVICES

Under no circumstances, and at no time, shall a Barrister use, operate, have the benefit of or allow any other person to use, operate or have the benefit of any switch, device or facility for the diminishment or muting of PTD ringing tones or the carriage of speech from that PTD to any other telecommunications device.

16AA.12 EXCHANGING OF PTDS

Should there be more than three Barristers present each with a PTD it shall be permissible for each of the Barristers then present to place their PTD in a central pool so that the PTDs can be taken out at random and used, not otherwise than in accordance with these Rules.

SUPERANNUATION INDUSTRY (SUPERVISION) ACT 1994

Investment Strategies under SIS

Vincent Ruta

SOME MEMBERS OF THE BAR MAY BE operating their own superannuation funds, making investment decisions in relation to their retirement nest or taking wise counsel from investment advisors or their accountant.

They should be aware of the new prudential requirements dealing with investments under the *Superannuation Industry (Supervision) Act.* 1993 ("SIS") which came into effect on 1 July 1994.

SIS was necessary to fix a fatal flaw under the provisions of the *Occupational Superannuation Standards Act* which did not penalise trustees for breaching that Act.

Instead, breaches were castigated by imposing a penalty rate of tax for non-complying and recalcitrant superannuation funds, financially affecting only the members by reducing the ultimate benefits to be received.

The philosophical approach of SIS is that members' rights are paramount and must at all time be protected; trustees are now castigated for non-compliance. The approach is akin to the Corporations Law philosophy which places a greater burden on the directors of companies to ensure that the affairs of the company are carried out in accordance with the law.

It is for this reason that fund trustees should look at their responsibilities under SIS, particularly as it affects investments, as SIS has placed the responsibility squarely on fund trustees to implement an investment strategy.

This memorandum looks at the provisions relating to investment strategies within the ambit of the new Act and the Regulations and in the light of the Insurance and Superannuation Commission Circular "Investment Strategies and Beneficiaries Investment Choice" recently released.

1. *Section 52* of the Act in effect codifies some of the most important fiduciary duties of trustees in formal covenants. These covenants are to be included or taken to be included in the governing rules of a fund.

   The covenants exist alongside trustee duties under common law.

   Two of the covenants need special attention: s.52(2)(c) requires trustees to ensure that their actions are always in the best interests of the beneficiaries.

   It is to be noted that the term "beneficiaries" as defined includes "any person that has a beneficial interest in a fund and it includes in relation to a fund, a member of the fund".

   Section 52(2) (f) deals with investment strategies and requires trustees to (x) formulate and (y) give effect to an investment strategy that has regard to the whole circumstances of the fund including but not limited to the following:

   (i) the risk involved in making, holding and realising, and the likely return from, the fund's investments having regard to its objectives and its expected cash flow requirements;

   (ii) the composition of the fund's investments as a whole . . .;

   (iii) the liquidity of the investments *vis-a-vis* cash flow requirements;

   (iv) ability of the fund to meet its liabilities;

2. In summary fund trustees are responsible for:
   - determining an investment strategy;
   - selecting investments for inclusion in each strategy;
   - periodically informing members of investment strategies and objectives; and
   - ensuring that investment strategies meet the objectives of the beneficiaries.

3. **Meaning of Investment Strategy**

   (i) A strategy is a plan for the investment of assets by a fund with a view to accumulating members' benefits;

   (ii) a strategy will rarely be concerned with individual investments, rather an investment strategy should be concerned with asset classes. That is, it should concern itself with what portion of the fund is to be invested in equities, property, fixed interest deposits and within each category therein the class or type of investment that should be made;

   (iii) diversification between asset classes compared with the size of the fund should also be considered.

4. Generally a fund trustee should be concerned with the fund as a whole; however the composition of the membership of the fund and its objectives should be taken into consideration

and members are required to have their views heard.

5. Although fund trustees can seek advice from any source their powers and discretion should not be fettered. The legislation does not allow members to direct trustees to make particular investments.
6. Trustees are not obliged to give beneficiaries investment choice, although they can subject to the qualifications contained in s.52(4) and reg. 4.02.
7. Fund trustees must continually monitor an investment strategy to assess whether in the circumstances it remains appropriate.

   It is the writer's contention that an assessment depending on the size of the fund should be carried out at least every six months if not quarterly. Failure to do so would be negligence on the part of the trustees.
8. As part of formulating an investment strategy trustees may consider investments in collective investments such as unit trusts:
   - provided that they have taken into account the consideration set out in s.52(2)(f); and
   - provided that the strategy of that collective investment meets strategy of the fund, the trustee may invest in a single collective investment such a unit trust.
9. Investment only in one asset will need to be justified on the basis that it is in accordance with an investment strategy properly formulated in accordance with s.52(2)(f).

   Accordingly fund trustees (and their respective advisors) will need to think very clearly and obtain proper legal advice to determine as to whether a single investment decision is properly formulated.
10. Excluded funds i.e. those with less than five members, are still required to draw up and implement an investment strategy — reg. 4.09 is not an operating standard and although the Insurance Superannuation Commissioner is precluded from penalising fund trustees for not complying, members of these funds can sue the fund trustee for losses or damages from the lack or deficient investment strategy; in turn fund trustees could seek indemnification from their respective advisors for negligent advice.

In conclusion, members of the Bar who have in the past administered their own funds or are thinking of doing so in the future should ensure that any investment they intend undertaking accords with investment strategy under SIS.

THE PAPERLESS OFFICE

IN ADDITION TO WORRIES ABOUT O & M, Fonti was starting to have to deal with extra work generated by the other major tenant, [leading law firm] Cravath, Swaine and Moore. Because they had come in much later than O & M, they had less scope for making changes in the building to suit their own needs, since the design was completed and construction of their floors well advanced. But that didn't prevent them from wanting to make some important changes which, at some inconvenience, [owner-developer] Zeckendorf and HRH had to accommodate. Every tenant has needs peculiar to itself. As a law firm, Cravath used a vast amount of paper, which they would need to store in a fully mechanised filing system ten or twelve feet high. The combined weight of their filing system and the paper it would eventually contain was so great that Cravath's architects had decided they wanted to make a major modification to the building to keep the filing floor and its contents from putting an unnecessary strain on the floors below it. To Fonti the proposed changes threatened to play havoc with the rest of the work going on at the time, and the design seemed to provide more strengthening than was necessary:

Essentially Cravath is making substantial changes to the mechanical systems and to the structure, which, fortunately or unfortunately — depending on which side of the coin you look at [No, Fonti is not a lawyer! *Eds.*] — they're doing themselves. The columns have enough "overdesign" capacity to be able to sustain these additional loadings, but the concrete floor, which is only five and a half inches thick at its maximum, and the beams are not designed for any of that at all. So they are doubling up on beams, they are adding cover plates on the bottom, and they're changing connections. All this will increase the capacity of the floor loading from fifty pounds a square foot to two hundred pounds a square foot. You could build a garage up there — you could park buses and trucks on that floor. By the time they finish it, it will cost them a million [additional] dollars.

Sabbagh, *Skyscraper. The Making of a Building* (1989) 361–362

Brian Brainless

CHILD CARE FEASIBILITY STUDY — FINAL REPORT

THE CHILD CARE FEASIBILITY STUDY IS at hand. Here are a few select quotations from some of our respondents indicating the diversity of views:

"As we are getting older the pressures have reduced. However, we recall the outright stress created by the need for us to race about so that one of us was free to attend work. My spouse, who bore the brunt of it, worked many weekends and late shifts. We commend you for what you are doing here."

"I am totally against this whole idea."

"I consider it essential for child care (especially for preschoolers) and occasional day care facilities to be made available close to chambers so that single parents in particular (of which I was one for 4 years when my children were aged between 5 and 9 and 3 and 7) are not significantly disadvantaged in the conduct of their practices."

"Children are like drugs. Those who need them should be sympathised with and accommodated but their proclivities to procreation should not be allowed to unduly interfere with others. People wishing to have children catered for should band together and organise a creche."

"Trying to meet these diverse needs, particularly the need for feasibility and affordability, would be very difficult. Good luck."

How did the study come about? The Victorian Bar Council requested assistance from the federally-funded Work and Child Care Advisory Service in conducting a child care needs assessment in December 1993. In order to obtain the views of the Bar, a needs survey was distributed to all barristers, their employees and other staff in March 1994. We had a splendid response. Just under 4 out of 10 of those surveyed responded to the questionaire. By August, it was possible to hold a group meeting to discuss the survey.

For those interested in the statistical details a full report dated September 1994 was tabled at the Bar Council and can be obtained for perusal. A few of the salient findings are listed below.

- 142 respondents had 203 children under school age.
- 142 respondents had 218 children aged 4-12 years and at school.
- 37% of respondents (217 respondents) plan to increase their families in the future.
- 27 respondents were currently pregnant.
- 59 respondents with 82 children under school age would consider using a child care centre/family day care centre at or near work.
- 41 respondents with 61 children aged between 4-12 years and at school would consider using a holiday/vacation programme at or near work.
- 50% of respondents with children under school age would use a parents' room with changing and feeding facilities in chambers.

Of a number of recommendations made by the Child Care Advisory Service, one is of overwhelming importance. The Work and Child Care Advisory Service recommended that the Victorian Bar Council consider establishing a child care centre as a joint venture arrangement with other organisations within the central business district.

Not everyone will agree with the thrust of the recommendation. Those of us who have raised children have generally responded favourably and those without the joys and tribulations of rearing their young have not.

For my own part, I would say simply this — no one needs to be overly concerned if a discrete child care facility is established by the Victorian Bar as a joint venture with other entities in the central business district on a "user pays" basis. Such a centre will provide reliable and competent care for children so that their working parents can have peace of mind and enjoy the inestimable benefit of being close to their children in the heart of the city. In the 1990s it is time that the Bar takes this liberating step.

Rachelle Lewitan
Chairperson,
Child Care Facilities Committee

MORE HELPFUL ADVICE

Brian Briefless

A PLAGUE OF LAWYERS

There are more lawyers just in Washington DC, than in all of Japan.

Brallier, *Lawyers and Other Reptiles* (1992) 46.

They've got about as many lawyers as we have sumo wrestlers.

Lee Iacocca on the lack of litigation among Japanese businesses

It's been widely quoted that the U.S. has 70% of the world's lawyers. Though the figure is almost certainly overblown, legal scholars admit that the ratio of lawyers per capita remains far higher in the U.S. than in other countries. The primary reason America has the lion's share of the world's lawyers, according to the American Bar Association, is that other countries have too few.

Hobbie, *World's Wackiest Lawsuits* (1992)

INTRODUCTION

I don't have the exact figures, but I am told that the current growth rate in the legal profession is, in relative terms, far greater than the growth in population. Lawyers are being hatched like chickens, and it is only a matter of time before the entire country is overrun. Everywhere will become like those parts of Los Angeles where lawyers outnumber people.

Mayle, *Expensive Habits* (1992) 38–39

. . . according to a recent Harper's Index, [the US] produces fifty law school graduates for every engineering graduate (as against Japan's ten-to-one ratio of engineers to lawyers, a figure that explains, among other things, the rank, unchecked corruption of Japanese politicians).

Ross, "The Private Parts of Justice" in Morrison (ed.), *Race-ing Justice, En-gendering Politics: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality* (1993) 40 at 49

FAMILY LAW

DIVORCE — a process that our lawyer friend describes as working out who gets custody of the money.

Mayle, *Expensive Habits* (1992) 19

BLACK CHANGES FROM WHITE TO BLACK

. . . Justice Hugo Black, a [Ku Klux] Klansman in his early life, of whom it was said, "In his youth he wore white robes and terrified black people, and in his maturity he wore black robes and terrified whites".

Thelwell, "False, Fleeting, Perjured Clarence: Yale's Brightest and Blackest go to Washington" in Morrison (ed.), *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas and the Construction of Social Reality* (1993) 86 at 125

Three days after the broadcast he [H.L. Black] donned the robes of associate justice — "he need not buy but merely dye his robes" was a favorite contemporary cocktail quip.

Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (3rd ed., 1992) 215

Time wrote that "Hugo won't have to buy a robe, he can dye his white one black".

Ball and Cooper, *Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution* (1992) 28

EARLY TO RISE

Ferenc Molnar, the Hungarian playwright and coffeehouse wit in the early part of the century, rarely got out of bed before the afternoon. To his great distress, he was once summoned as a witness, which involved getting to court by nine o'clock. As soon as he left his house, blinking in Budapest's early light, he noticed vast numbers of people hurrying along the street. "Good heavens," Molnar exclaimed with genuine astonishment, "are they all witnesses, too?"

MAKING YOUR MARK

On January 3, 1932, after the Justices had heard oral arguments, Justice [Oliver Wendell] Holmes casually announced, "I won't be here tomorrow," and he submitted his resignation later that day. On that day coincidentally, Earl Warren, then a California district attorney [and later Chief Justice of the United States], had argued his first case before the Court. Warren used to say that his friends accused him of driving Holmes from the bench. They used to tease him — "one look at you and he said, 'I quit'."

Schwartz, *A History of the Supreme Court* (1993) 228

DISSENT

[Harlan] was certainly one of the great dissenters in Supreme Court history; his frequent challenges to the majority led his colleagues, as he once wrote to Chief Justice Waite, to suggest that he suffered from "dis-sent-ery".

Schwartz, *A History of the Supreme Court* (1993) 163

THE NEW WORLD

Justice Jackson's striking claim — "struggles over power that in Europe call out regiments of troops, in America call out battalions of lawyers".

Jackson, *The Struggle for Judicial Supremacy* (1941) xi

PLAIN ENGLISH

Another misadventure occurred when Brennan was defending a young man accused of automobile manslaughter. Uncharacteristically, Brennan hadn't adequately prepared because he thought the case would be a snap. As he later admitted, "I didn't talk beforehand, as I should have, to a retired policeman who testified as a character witness". When he got to trial, Brennan asked the officer three separate times about his client's reputation for "veracity". Three times came the same reply: "He's a good automobile driver". The witness didn't want to admit that he didn't know the meaning of the word "veracity". But Brennan wasn't sharp enough on his feet to figure that out.

Brennan's face had turned red with irritation at the third repetitive response when the judge interrupted. "Is this boy in the habit of telling the truth?" the judge snapped impatiently.

"Oh, yes. your honor," the retired cop said. "I've never known him to tell a lie."

Said the judge, "That's what Mr Brennan was asking, but he's a Harvard graduate and doesn't speak English".

Eisler, *A Justice for All: William J Brennan Jr, and the Decisions that Transformed America* (1993) 36

Angus was out at the law school, speaking at a continuing legal education program, when he made an observation that I wish had been mine:

"The biggest single difficulty you face as persuasive speakers," he said, "is something we all share — the burden of a legal education. Whether your law school meant to or not, it taught you to sound like a lawyer."

McElhaney, "The Real Message," 79 *ABA Journal* 74 (December 1993)

ENJOYING YOUR BOSS'S SUPPORT

[Assistant Attorney-General Nicholas Katzenbach] resourcefully commanded civilian forces during the Ole Miss crisis [the enrolment of James Meredith at the University of Mississippi] . . . Ole Miss was a harrowing experience better forgotten. Yet Katzenbach would never forget a quick exchange with Robert Kennedy [the Attorney-General] before boarding the plane for Oxford [Mississippi]. Only the passage of time made it amusing.

"Hey, Nick," Kennedy called out.

"Yeah?" Katzenbach replied.

"Don't worry . . . if you get shot," Bobby laughed, "cause the President needs a moral issue."

Clark, *The Schoolhouse Door; Segregation's Last Stand at the University of Alabama* (1993) 217

UTOPIA

William Howard Taft, the only man who was both President and Chief Justice, once said that the Supreme Court was his notion of what heaven must be like. This led Justice Frankfurter to say that "he had a very different notion of heaven than any I know anything about".

Schwartz, *A History of the Supreme Court* (1993) 203

LOYALTY TO THE BOSS

To such an extent was this [Sanford following the lead of the C.J.] carried that Sanford died on the same day as Taft.

Schwartz, *A History of the Supreme Court* (1993) 214

NECESSITY KNOWS NO LAW

When C.J. Vinson supported Justice Tom Clark's appointment, Washington wags said it was because he wanted someone on his Court who knew less law than he did.

Rodell, *Nine Men*

BRIEF EXPERIENCED COUNSEL

Sir Frank Lockwood, a well-known British barrister in the late nineteenth century, usually undertook to defend cases where he could honestly assume the prisoner's innocence. After one such

case, when he had gained an acquittal for his client by pleading an alibi, he met the judge, who congratulated him.

"Well, Lockwood, that was a very good alibi."

"Yes, my Lord. I had three suggested to me, and I think I selected the best one."

HERE COMES JUDGE SANDRA DAY O'CONNOR

As rumours of a female appointment gained ground, the Justices joked, first to Justice Rehnquist and then to the new junior Justice, Stevens, that when a woman came to the Court, he should be a gentleman and continue to answer the door.

Schwartz, *A History of the Supreme Court* (1993) 214

The retired cop said. "I've never known him to tell a lie." Said the judge, "That's what Mr Brennan was asking, but he's a Harvard graduate and doesn't speak English".

JUDICIAL FELICITY

Stewart was prompted to tell Frankfurter "that he held forth for exactly fifty minutes, the length of a law school class period at Harvard".

Murphy, *The Brandeis/Frankfurter Connection* (1992) 300

. . . , recalled Brennan, Douglas "would rise from his seat, approach the C.J. and say 'When Felix finishes, Chief, I'll be back', and leave the conference".

Murphy, *The Brandeis/Frankfurter Connection* (1992) 300

RESPECT FOR THE BENCH

It was in Maine, where judges are appointed and within the memory of living men followed the English fashion of head-dress, that a lawyer said after losing a case, "I know how his wig stays on his head; it's nailed on".

Mayer, *The Lawyers* (1967)

KNOW YOUR JURY

"Tom" O'Mara recognised this art in a sheep-stealing case at a country town. Four prisoners were jointly indicted, and their right of challenge was used to its full extent for the purpose of getting the desired jurors in the box. The policy so far succeeded that Tom was able to begin his address for the defence by saying, "Well, gentlemen, it will not be necessary for me to address you at any length, because I am sure that you all know a great deal more about sheep-stealing than I do".

Blacket, *May it Please Your Honour* (1927) 13

CROSS-EXAMINATION

James T. Brady, a prominent American lawyer of the nineteenth century, was of Irish origin. He was once examining an unwilling witness who persistently called him Mr. O'Brady. At length, the attorney's good nature became ruffled, and he said to the witness somewhat brusquely:

"You need not call me Mr. O'Brady. I've mended my name since I came here and dropped the O."

"Have ye now? 'Pon my sowl it's a pity ye didn't mend yer manners at the same time."

BE FRANK WITH YOUR OPPONENT

A barrister entered one of the Four Courts with his wig placed on his head in a very affected and whimsical manner, which soon attracted attention, and caused much laughter. Seeing Curran, among others, smiling, he, in the most dignified manner, turned upon him, and requested to know whether he saw anything in his wig that moved his laughter.

"No, my dear Sir, nothing," replied Curran, "nothing but your head."

NEW-FANGLED TECHNOLOGY

Monday, 22 November 1965

Had lunch with Eleanor Bumgardner [a secretary at the U.S. Supreme Court]. When I think of "Lady" Bumgardner I remember the priceless faux pax she made when she substituted for me when I was Hugo's secretary. Hugo dictated on the machine — something about "a case which we summarily dismissed." Lady typed it "which we so merrily dismissed".

from the diary of Elizabeth Black
Mr Justice and Mrs Black; the Memoirs of Hugo L. Black and Elizabeth Black (1986) 127

RELATIONS WITH THE CONSTABULARY

One night late — it might be early in the morning — I was in Piccadilly, and attracted by a gathering of people, I came upon a policeman struggling with a powerful drunken woman. She had either fallen down, or been thrown down, and he had fallen on her. There were expressions of indignation being uttered by the persons around, and a row seemed imminent. "Why do you not spring your rattle? You will hurt the woman." He jumped

up, and seizing me by the collar, said, "I take you into custody for obstructing me in the execution of my duty!" I remained perfectly passive, and in the meantime another constable had come up, and had seized the woman, whom he was handling very roughly. At this moment, Sir Alexander Cockburn, the Attorney-General, who was returning from the House of Commons, appeared upon the scene, and seeing a woman, as he thought, ill-used, remonstrated in indignant language with the officer, upon which the constable who had hold of me stretched out his other arm, and said, "I arrest you also". "Arrest me!" exclaimed the astonished Attorney-General, "what for?" "Oh," said my captor, "for many things. You are well known to the police."

Attributed to Ballantine in Willock, *Legal Facetiae* (1887) 58

[The legendary Houston lawyer Richard "Racehorse"] Haynes's own life-style befits his flamboyant reputation — a lavish house in Houston's exclusive River Oaks section, a forty-foot yacht, a Cessna, a $40 000 Porsche Turbo Carrera, a replica of the classic Excalibur motorcar, and enough motorcycles to kill himself eight times over. There wasn't anything in Racehorse Haynes's life that wasn't a challenge, or the fruits of a challenge. He was a skydiver and a motorcycle racer and a champion of the hopeless cause. When he'd had a drop too much Scotch, he'd been known to race his motorcycle through motel lobbies. A man whose ego seemed to be on a permanent collision course with his courage, Haynes was absolutely convinced that with enough time and money he could win any lawsuit anywhere . . . He once talked his way out of a drunk driving ticket by performing a back flip off the bumper of his Porsche.

Cartwright, *Blood will Tell: the Murder Trials of T. Cullen Davis* (1979) 115

POLITICS CAN BE FUN

During the course of his career, [Thurman Arnold] won a seat in the state legislature, where he delighted his colleagues by once nominating himself for Speaker, filibustering for three days on his own behalf, and then dramatically announcing that he would not accept the nomination.

Murphy, *Fortas: the Rise and Ruin of a Supreme Court Justice* (1988) 75

SWORN TO UPHOLD THE CONSTITUTION (INCLUDING THE EIGHTEENTH AMENDMENT)

Felix Frankfurter was having lunch with Oliver Wendell Holmes on the occasion of the recently retired justice's ninety-second birthday.

Frankfurter joked with Holmes about, in those Prohibition days, the two of them having had sauterne and champagne for lunch. Frankfurter recalled that Holmes looked at him with simulated sternness and said: "Young fellow, I don't want you to misunderstand things. I do not deal with bootleggers but I am open to corruption."

Baker, *Brandeis and Frankfurter: A Dual Biography* (1984) 281

REDHEADS HAVE MORE FUN

Besides defences under the *Poor Prisoners' Defence Act*, Birkett had more than his fair share of "dock briefs". By long-established custom, a prisoner who has been charged and is in the dock may pick out any barrister who happens to be in court and robed at the time to defend him, and by the etiquette of the Bar the barrister must accept the brief for the fee of £1 3s 6d, which sum must be paid in cash upon the spot. The feature of Birkett which prompted a prisoner to point to him was the colour of his hair, which appeared conspicuously from under his wig. "I'll 'ave the bloke with the red 'air," the man in the dock would say more often than not when Birkett was in court. Thus the feature, which Birkett always felt to be a hindrance at school, turned out to his advantage. "When I was a lad," he once admitted, "I worried and was absolutely ashamed because of the colour of my hair . . . Well, I have found that it has added to my success, for work has come my way because I have red hair."

Hyde, *Norman Birkett: The Life of Lord Birkett of Ulverston* (1964) 72

AND YOU THOUGHT MELBOURNE WAS SNOOTY ABOUT MONASH

The U.S. Senate was considering President Truman's nomination of William Hastie (LL.B. magna cum laude Harvard 1930, JSD Harvard 1933) for the post as Governor of the Virgin Islands. The narrator, Louis Lautier, wondered which senators would challenge the nomination: certainly not Eastland. Senator James O. Eastland of Mississippi had "attended" three Southern universities and had "studied" law somewhere, sometime, somehow. By Harvard standards, he is virtually an illiterate.

Ware, *William Hastie, Grace under Pressure* (1984) 193

The real tradition of the [Solicitor General's] office was a clubby sense of self-importance — what one ex-assistant called a "collective smugness". Some of the SG's aides from Columbia, Harvard, and other elite law schools looked down their noses at political officials like Bradford Reynolds, Charles Cooper, and Carolyn Kuhl, as if where the three studied law (Vanderbilt, Alabama, and Duke) were enough to explain why they failed to defer to the wisdom of the office's career lawyers. "They don't know any better because they didn't go to the

right schools," one of the SG's lawyers explained seriously.

Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (1987) 229-230

As the Court's master manipulator, Frankfurter did not intend to leave Brennan's voting record to mere chance. His approach was cynical and calculating. In the past, with weak Truman appointees such as Minton, Clark, and Burton, flattery had been a totally successful maneuver. He would flood the justices with notes of false praise and encouragement. If that failed, Frankfurter would resort to brow-beating and intimidation. His efforts to influence fellow justices through their clerks was legend, especially when those top law school graduates were Harvard men. Any Harvard graduate, regardless in whose chambers he worked, was considered by Frankfurter to be his own. They were invited to dine and lunch with him. They let him know what the other justices were thinking. Frankfurter let them know what their bosses should be thinking. The justice from Harvard was so brilliant and confident that he was quickly able to dominate anyone of weaker intellect. Conversely, anyone not from Harvard was considered by Frankfurter to be not worth talking to.

Eisler, *A Justice for All: William J. Brennan Jr and the Decisions that Transformed America* (1993) 100-101

DUTY

[Robert] Bork was not eager to take the job [as a justice on the District of Columbia Court of Appeals]. He could scarcely afford the cut in salary. Further, the heavy load in administrative law at the DC Circuit didn't much appeal to him. As he said two years into the judgeship to reporters, "You remember those last lines in *The Heart of Darkness*, 'The horror, the horror'? I kid friends that my last words will be 'The trivia, the trivia'."

But if there was the stick, there was also the carrot. Bork was sent a clear signal: If he wanted to join the Supreme Court, he would have to go on the appeals court. He took the job and went into debt.

Bronner, *Battle for Justice: How the Bork Nomination Shook America* (1989) 88

TIMIDITY

One nervous old barrister named Lamb, who usually prefaced his pleadings with an apology, said to Erskine one day that he felt more timid as he grew older. "No wonder," replied Erskine, "the older the lamb the more sheepish he grows."

INSPIRING YOUNGER PRACTITIONERS

[Justice William] Douglas said he first met [Richard] Nixon when Nixon was a law student at Duke University: "I had gone there to give a lecture to the law school. I talked about predatory practices in finance . . . Some years later Nixon told me that I had been an inspiration to him, that my lecture had affected his life. I did not ask in what way, for the uneasy thought crossed my mind that predatory practices had inspired him."

Glennon, "Separation of Powers and the Conduct of Foreign Relations" in Wasby (ed.), *He Shall not Pass this Way Again: The Legacy of Justice William O. Douglas* (1990) 261 at 269

GOOFING OFF

[Justice Thurgood] Marshall moved in a painful waddle. He gasped for breath after walking a few steps. His eyesight has deteriorated, too. He could only read greatly enlarged type, but Marshall joked about his sad condition and persevered, determined to "serve out my term," as he put it. His clerks joked, too, that they had been given the best opportunity in the building to goof off on the job without being detected because "we can hear the boss's wheezing from fifty feet away".

Savage, *Turning Right: the Making of The Rehnquist Supreme Court* (1992) 345

AMUSE THE CHIEF

[William] Rehnquist also enjoyed playing practical jokes. Unlike his colleagues, Rehnquist never spoke ill of [Warren] Burger, but he had been well aware of the chief justice's concern for the dignity of his office. On April Fool's Day in 1985, he asked Burger for a ride to work. As the long black limousine passed in front of the Court, they noted a street photographer holding a life-sized photo of Burger, with a sign that read: "Have your picture taken with the chief justice, $1". Burger was plainly irritated. He might have been even more so had he known that the photographer had been sent there by Associate Justice William Rehnquist.

Savage, *Turning Right: The Making of the Rehnquist Supreme Court* (1992) 16

SUCH INSOUCIANCE

[Bob Bork] was remembered fondly by his colleagues from those years [as U.S. Solicitor General] for beginning his days sitting on a couch in his office, smoking, drinking coffee, and filling in a crossword puzzle while briefs and legal papers were piled up all around him. Such insouciance had its drawbacks. The *Los Angeles Times* reported that Chief Justice Warren Burger once complained to Bork about his frequent lateness in filing briefs.

Bronner, *Battle for Justice: How the Bork Nomination Shook America* (1989) 83

FRAMING AN EFFECTIVE ARGUMENT

The distinctive qualities that Robinson admired in Hastie were evident. Among them was "the skill in dialectic" that another distinguished jurist con-

siders "a useful tool" of appellate lawyers. Those who possess it often display their special sparkle in response to questions from the bench. This jurist remembers United States Attorney George Z. Medalie's reaction to his suggestion that Medalie include a point in his opening argument. "No," said Medalie. "The point is so vital that they are bound to ask it. It will be more effective if I give our position in answer to a question."

Ware, *William Hastie: Grace under Pressure* (1984) 189

TORTOGENS AND LITOGENS

Unfortunate indeed is the man who works for a company covered by insurance, for even his slightest injury may result in cancer.

Crane, "The relationship of a single act of trauma to subsequent malignancy," in *Trauma and Disease* (eds. Moritz and Helbery, 1959) 147

It is not an experience that anyone in the pharmaceutical industry cares to repeat. "We wouldn't bring Bendectin back," a Merrell spokesman declared, "even if we won every lawsuit." No other U.S. pharmaceutical company is ever going to expose itself to such legal risks either, so private research in pregnancy-related drugs has virtually stopped. "If you're suffering from morning sickness," runs one bitter joke in the industry, "go see your lawyer."

Huber, *Galileo's Revenge: Junk Science in the Courtroom* (1991) 128

FAMILY LAW

The only time some fellows are ever seen with their wives is after they've been indicted.

Kin Hubbard

LITIGATION IS FUN

I have now turned fifty and am going through menopause and I enjoy a little litigation. It's costly, perhaps, but salutary, and considerably less expensive than keeping racehorses or getting married.

Gore Vidal

READ YOUR BRIEF

It is told of Mr Justice Hawkins that a heavily marked brief in a compensation case was once delivered to his chambers, and that after six weeks had elapsed, and the hearing of the case was approaching, his clerk wrote to the solicitor suggesting that a cheque for the fee was not only feasible, but was in accordance with the usual practice of the profession. To this the solicitor replied: "If Mr Hawkins had taken the trouble to open the brief he would have found the cheque inside".

Fountain, *The Wit of the Wig* (1968) 21

CANDOR BEFORE THE COURT

The Solicitor General [William Mitchell] was out for a stroll in Washington, and he met Justice Holmes on the street. "Mr Solicitor General," the Justice said, "I admire your candor before our Court." As Mitchell drew himself up proudly, Holmes quickly added, "I have always thought that candor is the best form of deception".

Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (1987) 147

PERQUISITES OF OFFICE

On retiring from the N.Z. Supreme Court in 1921, Mr Justice Edwards created his final temporal controversies by announcing that he had resumed practice as a barrister and by retaining *in invitos* a Justice Department typewriter. After a correspondence marked by his usual vigour the Department internally acknowledged defeat, writing off the machine as "irrecoverable".

Portrait of a Profession: The Centennial Book of the N.Z. Law Society (ed. R. Cooke, 1969) 83

RESPECT YOUR OPPONENT

During argument in Provincial Court, Crown Attorney Ken Rae Q.C., of Owen Sound, Ontario, took a verbal swipe at his opponent:

"Your Honour, my friend's ignorance of the law surprises me".

"Surely you can rephrase that," said the judge.

"All right," Rae replied. "My friend's ignorance of the law doesn't surprise me."

McDonald, *Court Jesters* (1985) 83

KNOWING WHICH SIDE YOUR BREAD IS BUTTERED

Steven Kumble's unique attitude towards the practice of law can be summed up by another of his favourite sayings: "Praise the adversary. He is the catalyst by which you bill your client. Damn the client. He is your true enemy."

Eisler, *Shark Tank: Greed, Politics, and the Collapse of Finley Kumble, One of America's Largest Law Firms* (1990) 32

CHOOSING YOUR TABLE COMPANIONS

One day I'm sitting with Tom when Roy [Cohn] pops his head in the room and says, "Tom, do you want to go to lunch with so-and-so?", a well-known person associated, I guess, with the criminal elements. Tom said, "No, Roy, I'm busy . . ." When he left, Tom looked at me and said, "I don't want to go to lunch with 'em. These guys are always getting shot in restaurants."

von Hoffman, *Citizen Cohn* (1988) 251–2

CONSERVATION LAWS: TIME

[In the not too distant past, murder was a capital offence.]

. . . , after the Seddon trial, Marshall Hall turned to me and remarked wearily: "I don't think I'll ever take on another murder case. The strain is too great. It takes too much out of one."

A similar remark was made by Norman Birkett after the conclusion of the Hearn trial, when, flinging his wig on to the table he remarked to his junior, Mr Dingle Foot, "These sort of cases take years off a man's life". To which his junior replied sagely: "Maybe — but they add years to his client's".

Bowker, *Behind the Bar* (1947) 238

IF YOU DON'T KNOW THE ANSWER, DON'T ASK THE QUESTION

In an April 1992 deposition in a civil case, [convicted Wall Street inside trader Ivan] Boesky refused to say where he lived or reveal his net worth. But when asked by an opposing lawyer if he had a chauffeur for his car, he paused and then said, "No. Do you want the job?"

Stewart, *Den of Thieves* (1992) 532

"But, madam," said Sir John Coleridge [in cross-examination] to Mrs. Starr, "was not that rather an unnecessary fuss to make about a few strawberries?"

"Sir John," replied the witness, "you may remember that on one occasion a good deal of fuss was made about an apple."

Mathew, *For Lawyers and Others* (1938) 167-8

This is an old Supreme Court story: Justice Holmes, once during oral arguments, curious about the legal maneuverings that had brought a case before the bench, asked a nervous lawyer, "How did you get here?" Replied the flustered lawyer: "By the Santa Fe Railroad".

Felix Frankfurter told a similar story of his first day on the bench, 30 January 1939. The case being argued involved a direct appeal from an action by a federal district court. "I was puzzled to know why the case was here," Frankfurter recalled — that is, what jurisdiction the Supreme Court had over a case which had not gone through the Court of Appeals route. He leaned over to ask Justice Black, sitting next to him, but Black could not offer any help. Frankfurter suggested that Black ask the lawyer, arguing before them, about jurisdiction. "For one reason or another he was not willing to do so," said Frankfurter. "I then struggled with my soul to consider the great problem of when a new justice could ask a question from the bench . . . I summoned my daring." The question Frankfurter asked was "Why are you here?" The lawyer's answer was "Because the Court assigned me as counsel in this case". From that moment on, Frankfurter framed his questions more carefully.

Baker, *Brandeis and Frankfurter: A Dual Biography* (1984) 377

APPROACH YOUR CASE REFRESHED

. . . He was in Leeds for an important case, lunching with his clients and their lawyers, and at the end of the meal, which had naturally been accompanied by wine, ordered port. When a glass was brought, F.E. looked at it contemptuously and said he meant a bottle, not a glass, and proceeded to demolish a bottle; after which he returned to court and demolished the opposition.

Campbell, *F.E. Smith, First Earl of Birkenhead* (1983) 712

EARNING HIS 5%

In 1976 a senior clerk described his tasks: "a barristers' clerk does everything for his governor, even sewing on his fly-buttons, because the typist couldn't do it, as there was no time to take his trousers off".

Flood, *Barristers' Clerks — The Law's Middlemen* (1983) 11

PASS OUT YOUR CARD WITH CAUTION

A story about Justice Sir William Grantham of the King's Bench Division was that, after protesting vainly to a man who was smoking in a non-smoking carriage, he sought to impress the offender by handing him his card, with a threat to have the man arrested at the next station. But the man left the compartment quickly when the train stopped, and took a seat in another compartment. Justice Grantham sent the guard to get the man's name and address so that he could be prosecuted. When the guard returned he said, "I wouldn't have him arrested, Sir. I asked his name and he gave me his card. You see, he is Mr. Justice Grantham, Sir."

from the *Green Bag* magazine

WHICH WAY IS UP?

The idea of invalidating "the monkey law" seemed to tickle him [Fortas]. Dean Louis Pollak of Yale Law School called on Fortas during that time and found the justice working on the case. The justice's portrait, which his former partners had commissioned as a gift for the law school, sat in a corner. Fortas was dubious about the painting, which was impressionistic He told Pollak that while he worked on *Epperson* [v. *Arkansas*, 393 US 97 (1968)] he looked at the painting occasionally and tried to decide whether it indicated mankind "ascended from or descended from apes".

Kalman, *Abe Fortas: A Biography* (1990) 275

SAGE CLIENT

Russell Sage's lawyer was delighted by the case his client had brought to him. "It's an ironclad

case," he exclaimed with confidence. "We can't possibly lose!"

"Then we won't sue," said Sage. "That was my opponent's side of the case I gave you."

STATUTORY INTERPRETATION

I intended to lie as low as possible, but within the hour an opportunity occurred that I could not resist. The next step in the disciplinary process was to overawe me with the *Official Secrets Act*. I was shown the laboratory copy of the Act and asked to sign a certificate to the effect that I had read the *Official Secrets Act* (1911) and understood it. I could not resist adding a postscript to my signature: "The 1920 Act is also worth reading."

Jones, *Most Secret War* (1978)

LAW AND TECHNOLOGY

A nation's values and problems are mirrored in the ways in which it uses its ablest people. In Japan, a country only half our size, 30 percent more engineers graduate each year than in all the United States. But Japan boasts a total of less than 15,000 lawyers, while American universities graduate 35,000 every year. It would be hard to claim that these differences have no practical consequences. As the Japanese put it, "Engineers make the pie grow larger; lawyers only decide how to carve it up".

Bok, *Annual Report to the Board of Overseers, Harvard University* (1983)

Lawyers should tread humbly outside their own strictly legal business. As they are often reminded, their experience is limited mainly to dissecting the mistakes of others with the advantage of hindsight, and no legal argument has ever put one brick on top of another.

Abrahamson, *Engineering Law and the ICE Contracts* (3rd ed., 1975)

LITIGATION IS FUN

To allow claimants such as the plaintiff to continue to pursue claims that have been fully remedied during the administrative process would frustrate the congressional policy favouring administrative resolution of complaints for no discernible reason. Continued pursuit of such claims consumes judicial and other resources, resulting in a deadweight social loss except for giving satisfaction to litigants who prefer court proceedings to administrative relief. However, litigation is not a sport in which the hunter may release a trapped quarry for the thrill of further chase.

per Winter J., *Wrenn* v. *Dept of Veterans' Affairs*, 59 Law Week 2348 (Court of Appeals, 2nd Circuit, 16 November 1990)

People who have never sued anyone or been sued have missed a narcissistic pleasure that is not quite like any other.

Malcolm, *The Journalist and the Murderer* (1990) 148

Litigation takes the place of sex at middle age.

Gore Vidal

COUNSEL'S DREAM

The ideal client is the very wealthy man in very great trouble.

Sterling, "Lawyers and the Laws of Economics," *ABA Journal* (April 1960)

Justice Fortas reminisced: " . . . there are few things in a lawyer's life more rewarding than a substantial corporation whose officers are threatened with criminal prosecution. Here we have an ideal combination — a long purse, moral indignation, a protracted trial and a reasonable amount of fear."

Shogan, *A Question of Judgment* (1972) 120

IGNORANCE OF THE LAW

The fact is that there is not and never has been a presumption that everyone knows the law. There is a rule that ignorance of the law does not excuse, a maxim of very different scope and application.

per Lord Atkin, *Evans* v. *Bartlam* [1937] A.C. 473

Ignorance of the law excuses no man; not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to refute him.

Selden, *Table Talk* (1689)

Everybody is presumed to know the law except His Majesty's judges who have a Court of Appeal set over them to put them right.

Maule J.

A FAIRY TALE (CONTINUED)

NOW GATHER AROUND ME MY DEARS whilst I tell you more of the sad tale of the VicBees. Last time I told you that the VicBees were going to have an election to decide which among them were going to spend the next year being criticised by the remaining VicBees whenever they made a decision — a very rare event indeed — and whenever they didn't make a decision — a less rare event. Well it seemed that there were a lot of masochistic VicBees because lots and lots of them put up their feeler as if to say, "here I am, vote for me, I will bring back the halcyon days of years past". So the VicBees trooped off to the polling stations in their droves — well would you believe about every fifth one of them? — and, in the keeping of VicBees, essentially voted for a retention of the status quo. Whenever the decision-nonmaking VicBees first met there would have been few among them that were new. But that is the way it should be: why should there be changes to long-standing institutions?

Now you may think that those many VicBees who were not chosen by their fellow VicBees for such high honour as decision maker/non-maker would be greatly disappointed and that there would be much wailing and moaning and gnashing of feelers. If you did so think you were wrong. All of those VicBees who were unsuccessful — in a good imitation of stoicism — were heard frequently to say that they were actually quite pleased not to have been successful at the election, that really their practices (whatever *they* may be) were so frantic that they may not have had time to devote to decision making/nonmaking and if the "truth"(!) be known they really did not want to be elected but stood because so many of their dear colleagues had told them that they should.

Do not grieve too much for the injured feelings of those sad but unsuccessful VicBees for there is still the thrill of another chase ahead for many of them. The older, wiser, more experienced VicBees will join many others in a quest that none of them will avowedly be participants in, that-none of them "really wanted" to join in and that few of them "really wanted" to succeed in. In each and every case, the unsuccessful seeker of greater glory will have only joined the hunt because so many others told them that they should and that it was their turn this year. So many will find out that, in fact, it was not their turn this year. Perhaps, too, this year the apparently pleased losers will have an additional reason to appear pleased and that will be that the Holy Grail has become somewhat tarnished, if not turned to lead. It may well be that the once exclusive preserve of VicBees — the Mt Everest once only attempted by VicBees — will become surmounted by others as well and maybe even including the Sherpas of recent times past! "Who," the unsuccessful seekers after the right to wear silkier rainment will say "really wants something quite so common, the currency of which has become so debased?" The sentiments of those who successfully sought after such rights and honours will be different. They will be humble, grateful and surprised, or so they will say. Life will not change significantly for them, or so they will hope.

One does wonder why there is such interest in the right to wear different work clothes whilst a gathering they do go that so many VicBees seek such rights that the successful are outnumbered by the unsuccessful by a margin of perhaps ten to one. After all more and more VicJays and OzJays are moving away from the older traditions of soecified work uniforms and concommitant uniformity to less informality and greater diversity. "Why is this so?" in the words of one who was so prominent so many years ago. In a time when the SchoolBees are trying so hard to eliminate everything that militates against differences in outcome in our education system and SocWorkBees and their fellow travellers are trying so hard to open the professions to those who want to be in them rather than those who have trained long and hard (and have incidentally acquired the necessary skills along the way) it seems strange that there are groups around which are pressing for diversity in the cause of progress and modernity.

Given the excitement about and arising out of elections and quests it probably is not entirely surprising that things are apparently quiet on the question of the future directions of VicBees' hives — or so it would appear. Perhaps the elections and the annual question were merely well-timed diversions? Perhaps not! It may well be that those VicBees who want change in the way that the hives are forceably divided among them are merely biding their time awaiting further pronouncements, reports, recommendations from the Oracle. Who or what is the Oracle, I hear one or two of you ask. It is not quite metaphysical; it is not really a single entity; it really isn't a deity although it occasionally clothes itself with the wisdom of one who has the

ear of a deity; it is not really any of these but yet is a bit of all of these. It is probably best described as the collective "wisdom," as it were, of all of those in the community at large who go by the name of, or proudly call themselves, Microeconomists. Yes it is a big word for those whose successes are so small. Like those who like to call themselves Psychologists they have managed to turn an artform into a science albeit without the unnecessary and burdensome apparatus of true scientific methodology. But then again who needs scientific rigour when one is merely expressing self-evident truths?

Anyway, the various VicBee hives continue effectively unchanged although the level of activity within them seems strangely muted. There is far less movement in and out of the hives as in times past; there is less happy conversation within the hives as in times gone by and, there are fewer gatherings of VicBees outside of the hives to discuss the many successes of VicBees as there once were. Yes, VicBees are indeed a sad, depressed, unloved and unwanted lot. Were it not for the existence of Surgeon and DoctorBees, VicBee alone would be the pariahs of their society.

To return for a moment to the VicBee hives: I should tell you of one change that has apparently led to greater activity. Around the many hives, and perhaps most of all in the pink hive, there has been a growing number drones of a new type. All of these drones are male, young, clean-cut, intense, adorned in muted black or dark grey and white and are constantly moving in and out and around the hives pushing great loads in metallic trolleys. Were it not for the fact that they appear not to stop and speak to others apart from each other, one could be excused for thinking that their self-appointed role was to purvey tracts of a religious kind. But they do not and their ever-growing pervasiveness is a mystery indeed. Perhaps a mystery for next time.

Time has moved on. Time for sleep my dears. Perhaps more next time.

(To be continued, perhaps)

COMPETITION

IN THE SPRING ISSUE OF *BAR NEWS* WE published a piece in which a very, very bad day in the life of Penman or one of his compatriots was described. At the end of the day "you" (Penman) trudge to your car in the rain to discovery that "you have left your lights on and your battery is as flat as the tyre you changed a long, long, long, ten hours earlier". Readers were asked to complete the day in appropriate vein. The winning entry submitted by A.D.M. Hewitt of Wentworth Chambers, Sydney reads as follows:

You call the R.A.C.V., to find out that you have allowed your membership to lapse. The service will be available upon payment to the patrol officer of a special rejoining fee, but owing to the inclement conditions there will be a long delay.

After a long delay a serviceman arrives and the car is started, and the tyre is filled with a warning that it and the battery need replacing.

You head home through thick traffic, every street around you seemingly blocked by broken-down or accident-damaged vehicles. You hurl abuse at one driver, then realise he is vaguely familiar. He seems to recognise you.

You arrive home to find the house empty. In the oven are the charred remains of a meal. There is a note from your wife, indicating that the children are with neighbours and that she is out to dinner with an old friend Simon Smooth, who is unexpectedly in town. The nominated old friend is someone whose company you believed your wife had ceased to enjoy since marriage to you had demonstrated the immaturity of her earlier taste in men. The note ends: "Don't wait up".

A flashing light on the answering machine invites a replay of your messages. Your stomach turns at the first message. "I tried your chambers but you seemed to have left early. The other side have put that Jones matter in for hearing tomorrow. I told them it would not be a problem for you as you told me you read that brief only last weekend." When you told him you had read the brief, you meant you had read the brief observations. The two brief volumes you had saved for a rainy day.

The next message could not be worse, you think. It is. Today's solicitor had phoned to inform of the clients' unhappiness about their case. They have in mind complaint to a Professional Disciplinary Tribunal.

It is at this point that you recall the identity of the motorist you had abused on your way home. It is Judge Smith, before whom tomorrow's matter is listed.

A BIT ABOUT WORDS

WITHOUT A MOMENT'S REFLECTION WE refer to a *school* of fish, a *flight* of stairs, a *host* of angels or a *pod* of whales. The italicised words are nouns of assemblage or nouns of company. They are sometimes called collective nouns or nouns of multitude. However, I think those expressions are better reserved for such words as *majority, group and herd*, which all have implicit in them a sense of number or multitude.

There are not many nouns of assemblage in general use. Those which are in use sound so natural to the ear that we rarely pause to reflect how idiom settles naturally into the consciousness. The strangeness, and sometimes the poetry, of some nouns of assemblage is only seen clearly when we encounter some of the rarer examples of the species.

In 1486 the *Book of St Albans* was published. There is a certain amount of mystery surrounding it. It is thought to be the work of Dame Juliana Barnes. She is thought to be the daughter of Sir James Berners: spelling was very unstable until Johnson's time, so their surnames are quite possibly variants of the same name. The *Book of St Albans* was *A Treatyse Perteynynge to Hawkynge, Huntynge and Coote Armiris.* It contained a great deal of practical information about those subjects, including reference to the correct nouns of assemblage for the creatures and persons likely to be within range of those for whom the book was intended. It was republished in 1496 by Wyncken de Worde with an additional section on *Fysshynge.*

The *OED2* has 856 quotes attributed to the *Book of St Albans*. Clearly a book to be accorded some respect. Chief among the purposes for which it is quoted in the *OED2* is its collection of nouns of assemblage. It includes those which are in common use: *colony* of ants, *flock* of sheep, *litter* of pups, *herd* of cattle, *school* of fish. It also has some which catch at the corners of memory: *skein* of geese (when in flight: on the ground, a *gaggle* of geese), *brood* of hens, *clutch* of eggs, *string* of ponies, *plague* of locusts, *bevy* of beauties (no longer politically correct), *band* of men (ditto).

The real splendour of the *Book of St Albans* lies in its collection of nouns of assemblage which are no more heard. Some were used as recently as 1906, in *Sir Nigel* by Sir Arthur Conan Doyle. Their passing is probably due to the fact that not many people nowadays do very much hawkynge or huntynge, although fysshynge is still popular. Still, if most know *herd* of elephants, why forget *skulk* of foxes? If we naturally speak of a *pride* of lions, why do we not recall a *hover* of trout?

Although political correctness may dissuade us from talking of a *bevy* of beauties (since compliments are demeaning and condescending, as are insults), it was Dame Juliana who recorded in 1486 the usage *bevy* of maidens. It must be added that she gave *bevy* as the word for a group of roes, quails or larks. (For those who baulk at the *s* on quails, *OED2* gives quotes from Coverdale (1535), Cornwallis (1601) and Otway (1684) supporting the usage).

Less contentious, and more evocative, are a *charm* of finches, a *drift* of hogs, an *exaltation* of larks and a *bouquet* of pheasants. This last is an example of how specific some of these terms could be. It refers specifically to a group of pheasants as they break cover in front of the beaters. It derives from the french *bouquet* (little wood), which in turn comes from Italian *bosco* (wood) *boschetto* (little wood). Our word *bush* is cognate with *bosco.* The original meaning of *bouquet* is the sense still retained in *a bouquet of flowers.* By extension, it refers to the perfume of the flowers, and by further extension to the "nose" of a wine. So originally a bouquet of pheasants naturally evoked the sight of pheasants rising from the bushes ready to be shot at.

Birds must have been very important to the English gentry of the 15th century. They had nouns of assemblage for many different types: a *murder* of crows, a *rafter* of turkeys, a *fall* of woodcocks, a *murmuration* of starlings, a *dule* of doves, a *cast* of hawks, a *deceit* of lapwings, an *ostentation* of peacocks, an *unkindness* of ravens, a *host* of sparrows, a *congregation* of plovers, a *mustering* of storks, a *flight* of swallows, a *watch* of nightingales, a *parliament* of owls. How much more drab is our language now, as we refer to virtually any group of birds as a flock or a flight.

More surprising yet is the fact that the *Book of*

St Albans records nouns of assemblage for a range of animals which would not form part of the ordinary landscape of even the wealthy nobility of 15th century England. So, it includes a *pod* of seals, a *gam* of whales, a *sloth* of bears, a *gang* of elk, a *crash* of rhinoceroses, a *barren* of mules, a *shrewdness* of apes, and a *route* of wolves.

Nor is the *Book of St Albans* confined to *byrdis and beystis.* It records the approved nouns of assemblage for all manner of humankind. Many of the terms are self-explanatory; others give an oblique insight into the way various occupations were seen: a *school* of clerks, a *sentence* of judges, an *eloquence* of lawyers, a *subtlety* of sergeants (at law), a *prudence* of vicars, an *obeisance* of servants. For opacity it is hard to pass the following: a *cutting* of cobblers, a *bleach* of sutors (another word for cobblers), a *misbelieving* of painters, a *worship* of writers.

Colourful ideas sparkle in all of these. Perhaps some of them can be rescued from oblivion. Others must be left under the dust of centuries. But Dame Juliana was apparently not one of the Sisters: she records a *superfluity* of nuns, a *herd* of harlots, a *gaggle* of women, and a *scolding* of seamstresses.

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Just as we mistreat some words by ignoring and forgetting them, so we mistreat others by misusing them. With some, the effect of continuous misuse is a permanent change of meaning. With others, it is a prolonged period of irritated confusion. In the end, popular misuse generally prevails. Of the many words in the state of ambiguous confusion, there are three which are very often misused even by people who otherwise use the language with care and skill: *fulsome, ilk,* and *eke.*

Fulsome has only one current meaning: "offensive to normal tastes or sensibilities, disgusting, repulsive or odious; in relation to flattery, grossly excessive or nauseatingly fawning". Its obsolete meanings are closer to the meaning suggested by its form: *abundant or copious* (1583); *growing abundantly, rank* (1633). By 1678, it was used in the sense of *overgrown or corpulent*; simultaneously it took on the sense of *sickening to the taste, nauseating* (1601–1743). It is now most often seen in the expression *fulsome praise.* So used, it is no compliment.

Ilk is generally used as a noun: "We don't want people of his ilk in this club" i.e. of his sort. In fact it is a pronoun and means *same.* Two factors have led to its being almost universally misused: first, it can be used absolutely ("more of that ilk" = "more of the same"). Secondly, it is commonly seen in the titles of Scottish and Irish gentry *(Cameron of that ilk).* Since most Australians have little cause to be interested in the niceties of Celtic titles, and since the grammatical form suggests something like *Cameron of that clan,* the error takes root. Its erroneous use was further cemented by Ogden Nash in the couplet:

> The cow is a creature of bovine ilk
> One end moo; the other end milk.

Eke is a more complex case. It is most often seen in the phrase *eke out a living,* and is generally intended to convey the notion of scratching along with very little. Whilst not strictly wrong, it is a special case of the more general meaning *to supplement.* Originally, a person would *eke out a livelihood* by doing odd jobs: the odd jobs supplemented whatever other income was available. Likewise, a person would *eke out a speech* with a bit of rhetorical padding, just as I am eking out this article by talking about eking.

Julian Burnside

AUSTRALIAN RIGHTS CONGRESS

THE **AUSTRALIAN RIGHTS CONGRESS** will be held 16–18 February 1995 at Darling Harbour, Sydney. We are now offering full registration for the three-day Congress at a special subsidised price of $225.

A diverse range of organisations, and a significant number of individuals, have expressed a desire to attend this unique forum. Because of the broad appeal of this conference, the organising committee has reduced the registration fee so that as many organisations and individuals as possible may attend and contribute to this important event.

The speakers' panel attests to the importance that community leaders are placing on the Australian Rights Congress. Speakers will include: Brian Burdekin, Federal Human Rights Commissioner; Mick Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner; Rodney Croome, Tasmanian Gay and Lesbian Rights Group; Robert Fitzgerald, President, Australian Council of Social Services; Stuart Fowler, President, Law Council of Australia; Amanda Vanstone, Shadow Attorney-General and Shadow Minister for Justice and many others.

We invite you to attend the **Australian Rights Congress** and make your contribution. Please contact John Mulready on (02) 956 8333 or fax on (02) 956 5154 to register or for further information.

VERBATIM

County Court of Victoria

WorkCover List 20.9.94
Coram: Judge Rendit

Mr. A. Sandbach of counsel desperately searching through *Williams — Civil Procedure* for a rule allowing a jury trial to be listed before a judge alone.
Mr. Sandbach: in desperation, *sotto voce*: "Oh dear!"
Judge Rendit: "Mr. Sandbach I will thank you not to be quite so familiar in my court."
Much mirth in the court-room.

County Court of Victoria

Ander v. *CIC Workers Compensation Insurance*
Coram: Judge Shillito
R. Gorton Q.C. and A. Moulds for Plaintiff
Gillies Q.C. and McTaggart for Defendant
Gillies cross-examining Psychiatrist

Have there been previous suicide attempts? . . . Not that I know of . . .
Not that you know of? . . . Not that I recall just off . . .
You would have taken detailed histories from her as to her depressive condition. Are you saying that you have not got any other history of suicide — yes, suicide attempt as my junior helpfully corrects me?
Suicidal ideas, yes? . . . There's a big difference between a suicidal idea and a suicidal drive and actually having a suicide of course.
Of course. But you knew she had a history of at least one suicide? . . . I knew she had a history of an overdose, yes.
I have attempted — I don't learn from my junior, Your Honour? . . . I'm glad they're writing that down word for word, Your Honour.
Yes, I might propel myself into medical immortality? . . . You might.
In other words, I suggest to you that she's just spinning in a vortex of bizarre and unreal thought processes? . . . Spinning in a vortex of unreal thought processes? Look, if I left you my card, would you like to see me professionally?

County Court of Victoria

R. v. *Emerson*
Coram: Judge Campton
22 March 1994
J. Saunders for Crown
D. Drake for Accused

On the fourth day of the hearing Drake extended his cross-examination ("filibustered" says Saunders). The jury came back at 2.28 p.m.
Mr. Drake: "I have no further questions of this witness. Lunch prevented me from thinking of any further questions, Your Honour.
His Honour: "Lunch can always be an inspiration."
On the sixth day of hearing Drake called his client asking him to try on some overalls found near the scene and identified by a Crown witness as being worn by the offender.
Mr. Drake: "I wonder if the witness could now be shown the overalls, Your Honour. We will be inviting him to put those overalls on (overalls handed to witness). Would you take your coat off please? Would you put the overalls on? . . . (Witness complies). Right, how do they fit around the crotch? . . .. Ah-hem.
Saunders: "Is that a relevant question or are you just curious?"

County Court of Victoria

Geelong Sittings

The defendant pleaded guilty to one count of assault arising out of an incident in which he put his arm around the victim without her consent.
A Victim Impact Statement tendered to the court complained, amongst other things, of sleepless nights, a reluctance to go outside, and loss of appetite since the episode. The statement also included the following:

"My dog was severely traumatised by this incident (consulted Dr. Robert Holmes, animal psychologist) and her reaction has caused me great anguish".

County Court of Victoria

R. v. *Peter Patrick Clune*
21 September 1994
Coram: Judge Hassett
R. Elston and R. Barry for DPP
B. Lindner for Accused

Accused arraigned for the third of three separate trials has pleaded not gully.
His Honour: Mr. Clune, the reason my associate asked you at the beginning of that procedure whether you were Peter Patrick Clune was because that's part of the procedure, it's not because she is very poor at identifying people. I think she knows you by now. Have a seat.

Supreme Court of Victoria

Appeal Division
State Electricity Commission of Victoria v. *CC Construction*
Coram: Ormiston, Nathan and Vincent JJ.
26 September 1994

The case concerned a number of industrial awards relevant to one of the Loy Yang B contracts. One of the awards contained a number of trade classifications one of which was "carpenter diver".

Vincent J.: Dr. Jessup, could you possibly satisfy my curiosity, although I realise it irrelevant, and tell me what a carpenter diver is?
Dr. Jessup: I don't have the faintest idea, Your Honour.
Nathan J.: I suspect it might be a carpenter who works under water in contradistinction to that one who long ago walked on it.

Repetitive But Not Prolix

Extract from pleading filed and delivered by large Sydney law firm:
"16. Further and in the alternative, the applicants repeat paragraphs 1 to 15 hereof".

Supreme Court of Western Australia

R v. *Angus*
Coram: Owen J.
20 August 1994
Trowell prosecuting
Percy for the Accused

Trowell: How are you feeling just now? — All right.
Have you ever been questioned that long before? — No.
What did you think of it? — Scary.
Mr. Percy was scary, was he? — Yep.
He has that effect on a lot of us.

ADVICE TO POTENTIAL READERS

MOST OF US ARE WELL AWARE OF THE standard advice to friends, acquaintances, etc. who wish to discuss the possibility of coming to the Bar. For instance:

Don't.

Make sure that you can survive for at least a year without income from the Bar.

You will not receive any briefs from your old firm.

No one who went through university with you will brief you (because they believe that a contemporary of theirs either couldn't be experienced enough or can't be allowed to know they need your assistance).

Pick a first division Clerk if you want to move on at the Bar.

Pick a Junior list if you want to start out with plenty of work.

It is presently disastrous for beginners.

The Bar will not survive and so on.

What we never do is advise them of conversational mores between counsel such as:

"What do you think of X?" means "I don't like X/I don't think X is very good and I want you to agree".

"He/she is OK" means "I cannot think of anything negative at the moment".

"I've been opposed to X" means "I have won against X" (we would not remember a loss against X).

"I've never seen X in action" means "I've been opposed to X but lost and do not wish to discuss it".

"I've never been opposed to X" means "I've been beaten by X each time we've been opposed".

"I'd rather not comment" means "I think X is reasonably competent at the very least but I am not going to admit that".

"A bit garrulous" means "X repeatedly shouts me down".

"Argumentative" means "I can't bully X".

"Slippery" means "X is totally untrustworthy".

"A bit sharp" means "X occasionally pulls swifties".

"A little smart" means "Last time X outsmarted me in the swifty stakes".

"I wouldn't like to say" means "X is bloody good at what he/she does".

"A bit ambitious" means "How come X gets all the work I think I should be doing?"

"A good bloke/nice girl" means "X does work I don't wish to do and does it reasonably well".

"Not a bad operator" means "X is my best friend and put to it I'd have to admit X is at least as good as I am".

"A bit restricted in what he/she does" means "They are a specialist in an area I am not interested in".

"A bloody good operator" means "They are universally recognised as being tops in their area and I would be foolish not to concede it".

"Has a few problems" means either "They can't keep off the booze and I do not want to put the boot in" or "They are up before the Ethics Committee for the fifth time this year and I do not wish to say anything unless you know the story already".

"Why?" means "Whatever I say will get back to them".

"Strictly between us/Cone of silence?/Strictly old boys eh?" means "I've got a great bit of gossip which I believe is probably untrue but it is too good a story not to tell".

"Why don't you ask Y?" means that "Last week X pulled a monty of a swifty on Y" or "Last week X king-hit Y as they were leaving court".

"A bit smooth" means "X finds it easier to converse with judges/magistrates etc. at Bar receptions".

"A bit eccentric" means "X is stark raving mad but not dangerously so".

"Mad" means "X is eccentric and brilliantly witty to boot".

"Is overconfident" means "X is quietly modest about her/his achievements".

"Shouldn't be at the Bar" means "I believe X is getting more briefs than me".

"Will do anything to get a brief" means "X is more effective than I at pressing the flesh/touting/telling jokes to the Clerk".

"Will do *anything* to get a brief" means "X will not hesitate to ring solicitors and tell them how good he/she is".

"Totally and absolutely crazy" means "X is eccentric but not funny".

"Completely unhinged" means "I think X is certifiably mad".

"Has independent means" means "X is making no more money at the Bar than X is spending".

"Is tight" means "X will not go to lunch more than once a week".

"Has got their priorities mixed up" means "X prefers to go home at 5p.m. rather than have a drink in the Essoign Club".

"Is a bit pushy" means "X buys lunch for solicitors at every opportunity".

"I think X is a fair, competent counsel who is a credit to the Bar" mean that you should not have had those last three drinks because you are now imagining things.

FAVOURITE LEGAL ANECDOTES

Dear Sirs,

IN RESPONSE TO YOUR INVITATION I enclose the following. I note that the first may not qualify as a "legal" anecdote save that "rumours of a lawsuit" are usually sufficient to provoke salivation in your legal readers. With regard to the second there can be no doubt that a confession to an indictable crime by a reigning monarch (committed before she became a reigning monarch) raises interesting constitutional issues, one of which is can she be a defendant to a criminal prosecution brought by the Crown? (Can she be prosecuted for theft of her father's property?)

1. The writer James Jones (*From there to Eternity*, *The Thin Red Line*, etc.) and his family were members of the expatriate American literary set resident in Paris after WWII:

   There were also tricks. Their friend Jean Castel owned a popular bar and restaurant down a side street in St Germain. For a long time this establishment and its owner had been terrorized by an old Romanian woman, who stood outside in a dirty flowing dress playing a squeaky mandolin, occasionally shouting obscenities through the door-way at Mr. Castel inside. Castel complained about this woman to anyone who would listen. She was ruining his business and her damnable music was driving him insane, he sad, but what could he do? There were even rumours of a lawsuit. Castel announced to his friends that he was going to take a much needed vacation in Tahiti — a long plane ride indeed from Paris. About twenty-five of his friends, led by the Joneses, put up $100 a piece and bought the Romanian woman a round-trip ticket to Tahiti the day before Castel was to leave Paris. He took his plane, and many hours later landed at the airport in Tahiti. He descended the ramp, and almost collapsed at the sight which greeted him: the Romanian woman strumming her mandolin and saying: "Welcome to Tahiti, Monsieur Castel".

   Willie Morris, *James Jones: A Friendship* (1978), Doubleday.

2. On VE Day (8 May 1945) the Princesses Elizabeth and Margaret joined the exuberant London throng celebrating. Many years after the event, Elizabeth, as Queen, added a touch of her own to the memories of VE Day. She met Hammond Innes at a literary party:

   Innes said that for some extraordinary reason they started talking about police helmets. "How would you know about them, Ma'am?" she was asked, and replied, "Of course, I do, I knocked one off on VE Day".

   The Oxford Book of Royal Anecdotes (ed. Elizabeth Longford, 1989).

BAR VIGNERONS BEST

At the recent Victorian Wines Show:

S.E.K. Hulme's Arthur's Creek Estate won the top gold medal in two of the three Cabernet Sauvignon classes, and a silver medal in the remaining class. His 1994 wine also won the Goulburn Valley Wine Association Trophy for the best Cabernet Sauvignon in the show. His two Chardonney entries both won silver medals.

Jeff Sher's Port Phillip Estate won a gold medal in the 1994 Pinot Noir class, and the Harvest Products trophy for the best Pinot Noir in the show.

HOCKEY

FOLLOWING THE INTRODUCTION OF French to "In Brief" it may be appropriate to advance the polyglot nature of Bar publications by some (albeit Hollywood) German to describe the recent efforts or, more accurately, antics of the Bar hockey team.

In the words of the inimitable Lilli von Stupp the Bar hockey team has "verloren," "verlassen," "verlumpt" and is indeed in all probability "verkackt".

Actually we didn't do too badly. We held RMIT to a 1-1 draw for 69 minutes of the annual practice game, but unfortunately in the first seven seconds and the last 55 seconds managed to allow three more goals, producing an unfair score line of 4-1.

The year did produce however its usual crop of regular events. There was the usual pre-first match exhortation by our mentor Balfe Q.C. (Rupert had the sense to go to Canberra following the first game and missed our efforts against the solicitors). There was the more alarming now annual major muscle pull by Michael Tinney in the first five minutes, thus depriving us of our former (now fading) star.

We did have a new star this year, however, in Philip Goldberg, who took time off from his efforts on the bench to play a startling and unaccustomed role as a full-back. His forays to the forward line left everyone breathless. Particularly Goldberg.

Our match against the solicitors was not the massacre of last year and the 4-2 defeat was an honourable effort. Indeed, had two umpiring decisions gone the other way we might even have struggled to a draw.

Nonetheless, as long as the solicitors engage in their unsporting and underhand practice of fielding a side that is in every respect younger, more skilful and better than ours, it is difficult to see the result being reversed.

Raiding parties must be sent out to corral at least two or three of their better players or the Scales of

Naughton's. The only place where we matched them.

The Bar attacks. A rare moment.

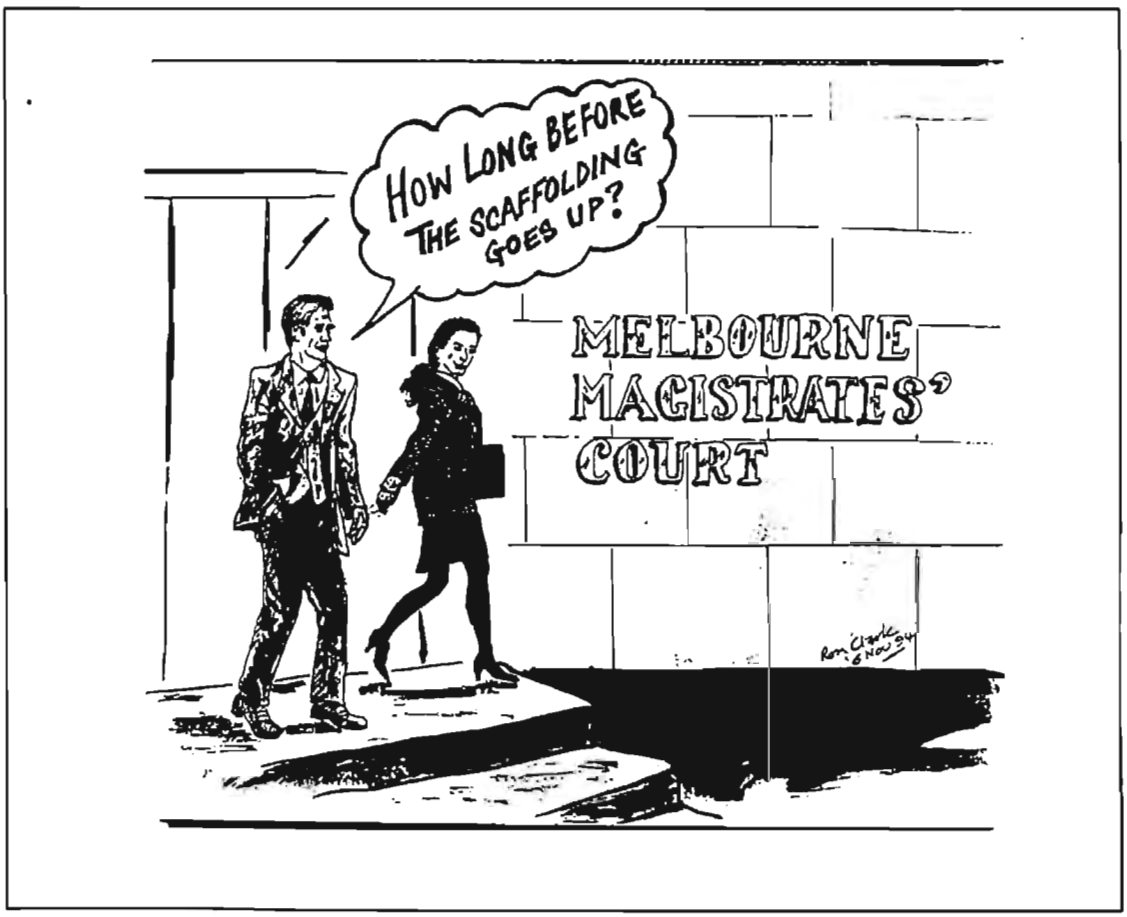
The Solly's first goal. Should never have been allowed.

Justice Cup will remain weighted firmly towards the solicitors well into the next century.

On a formal note, particular thanks are due to Richard Brear for the administrative arrangements for the games and to the umpires Alex Robinson and Andrew Kempe. Those who played for the Bar in one or both games were:
Lynch, Goldberg, Burke, Burchardt, Smith, Paul Norris (RMIT - a superb ring-in), M. Tinney, A. Tinney, Robinson, Collinson, Coldrey J. (another muscle sufferer), Brear, Dreyfus, Balfe Q.C. and Tsalanidis.

Most of both teams repaired to Naughton's for a drink and discussion of the game and it is to be assumed that Michael Tinney's remark, of a female opponent, that "she beat me all night" was a reference to the field of play rather than an indelicate admission.

Philip Burchardt



LAWYER'S BOOKSHELF

The Laws of Australia — Title 9 *Criminal Law Principles*

Title Editor: Brent Fisse
The Law Book Company Limited 1993

THIS IS THE FIRST COMPLETED OF A proposed four titles dealing with criminal law in this evolving legal encyclopaedia. The others will be (10) *Criminal Offences*, (11) *Criminal Procedure*, and (12) *Criminal Sentencing and Appeals*.

The work is designed as a point of first reference in legal research. Further inquiry is facilitated by a comprehensive reference to authority including unreported cases, specialist texts and journal articles. The volumes of this encyclopaedia are "loose-leaf" and the publisher says supplements will be issued "annually, or as required by changes to the law". In the meantime, there are cross references to *The Australian Digest* and *Legal Monthly Digest* to update the law.

I found this volume refreshingly easy to use. The "User's Guide" is quite understandable. The organisation of subject matter and the extensive indices are such that one can quickly find a numbered paragraph containing the concise yet authoritative statement of law required for legal practice. Often the paragraph will include an excerpt from a leading judgment and footnotes usually refer to the alternative reports of cases and particular pages of the judgments. Although the emphasis is on Australian authority, there is an impressive degree of international material referred to in the less settled areas of law. The text includes commentary as to questionable and contrasting lines of authority, although again the commentary will need to be checked against the updating services to establish its currency.

This particular criminal law title may be thought to have a more "theoretical" content than those to come. However, it is clear that this volume is deigned to be used with the other three and contains much that is of a practical nature. Be prepared to purchase all four. If you can't afford that, make it your first "port of call" in the library.

Kevin Armstrong

Trade Practices and Consumer Protection Cases and Materials

by John Duns and Mark Davison
Bufferworths, 1994
pp.iii–xxxv, 1–901,
Appendix (selected United States and European legislation) pp.902–905, Index pp. 907–931

THIS COMPREHENSIVE CASE AND MATERials text book is primarily aimed at providing "comprehensive materials for use in the growing numbers of courses which study the *Trade Practices Act* 1974 (Cth)".

In general each chapter deals with a discrete topic and contains extracts from appropriate cases and articles together with some commentary from the authors specifically relevant to the topic. In addition, at the end of each chapter there is a list of questions and a list of selected further reading.

The work is ideally suited to students of Trade Practices or Marketing Law. However for practitioners (lawyers, marketers, corporate managers) it is best used as an overview text which can direct a practitioner to further specific lines of inquiry in appropriate cases.

The book is comprehensive in that its focus is almost equally divided between restrictive trade practices and the consumer protection aspects of the *Trade Practices Act*.

A criticism of the work is that it does not contain a comparative list of sections enabling the user to quickly identify legislation under the State *Fair Trading Acts* and State sale of goods legislation so as to enable the quick cross-referencing from the *Trade Practices Act* to this parallel and complementary State legislation.

The book *Trade Practices and Consumer Protection Cases and Materials* is an ideal first stop for students and practitioners. It should be used as an adjunct to the Butterworths Annotated Acts publication — *Trade Practices Act 1974* (1994 edition). The work is a generalist text, not really a reference for the expert or applicable to the specifics of professional or business practice. It is what it purports to be — a general introductory source of cases and materials relevant to an understanding of the scope and operation of the *Trade Practices Act* 1974.

P.W. Lithgow

Marine Pollution Laws of the Australasian Region

by Michael White Q.C.
Federation Press
pp.i–xxvii, 1–334

THE AUTHOR'S PREVIOUS WORK WAS AS editor and contributor to a compilation of essays covering various general areas of Maritime Law. (*Australian Maritime Law* edited by M.W.D. White, 1991, Federation Press) This new work is as specific as the author's previous work was general.

Rarely will a lawyer in general practice ever need to concern himself with the legislation, conventions and general laws surrounding marine pollution. However, the statutes and conventions governing marine pollution and protection of the sea certainly warrant this thorough and interesting work produced by White Q.C.

This book covers the topic from a historical perspective as well as setting out the full scheme of statutes and conventions applying in Australia, New Zealand and surrounding areas. The laws and conventions governing this area of the law deal not only with prevention but also with liability (and limitation of liability) in the aftermath of a marine pollution disaster.

By far the most interesting parts of this book are those which involve the recounting of specific maritime disasters. In particular the *Kirki* incident off the coast of Western Australia in 1991 and the *Haven* incident off the coast of Italy in 1991 are dealt with in detail. These incidents are used to illustrate the application of the statutory regimes and conventions. This is a particularly effective mode for dealing with the topic and converts what would otherwise be a dry discussion of the subject into an interesting and informative work. Control of, and prosecution for, marine pollution is becoming more relevant as people become more environmentally aware, as the world's bulk carrying fleet ages and as many ships entering Australasian waters are increasingly crewed by inexperienced and unqualified labour.

Sam Horgan

The Annotated Insurance Contracts Act

by Peter Mann and Candace Lewis
The Law Book Company Limited,1994
pp.vii–xxii, 1–321, Index pp.323–329

THIS WORK, *THE ANNOTATED INSURANCE Contracts Act*, is similar in format to other Law Book Company publications, most notably *The Annotated Trade Practices Act* by R.V. Miller (now in its 15th edition) and the *Annotated Mergers and Acquisitions* by D.D. McDonough (now in its 3rd edition).

The scope of the work is not confined simply to the *Insurance Contracts Act* 1984, but also includes the *Insurance (Agents & Brokers) Act* 1984, the Insurance Contracts Regulations and the Insurance (Agents & Brokers) Regulations, all of which have been annotated.

The *Insurance Contracts Act* includes the amendments to that Act brought about by Act No. 49 of 1994 and the amendments to the *Insurance (Agents & Brokers) Act* introduced by Act No. 48 of 1994. The changes introduced by these Acts come into operation on 7 April 1994 and 1 October 1994 respectively. Consequently this work is completely up-to-date.

The annotations in general draw substantially on the various Australian Law Reform Commission (ALRC) reports which underlie these various statutes. In addition to reference to the ALRC reports and general commentary, appropriate case law is cited and discussed. Where necessary, short extracts from judgments are reproduced.

In the preface, it is noted that "undoubtedly the Acts will be further amended and clarified by case law. It is the intention of the authors to keep this book up-to-date with subsequent additions as the need arises."

Given the relative dearth of case law in respect of many of the sections of these Acts it can only be hoped that the authors are able to provide timely subsequent editions incorporating both further statutory amendments and judicial interpretation of these pieces of legislation.

The style used does make for ease of use. The work has all parts of the Acts and Regulations and annotations referred to by a marginal number. By using the marginal numbers the reader can quickly find the appropriate section of text referred to in the Index or cross-referencing in the text.

This book is sure to find a wide appeal to lawyers and those involved in the insurance industry generally.

P.W. Lithgow

Australian Family Law in Context: Commentary and Materials

by Dr. Stephen Parker, Patrick Parkinson and Dr. Juliet Behrens
The Law Book Company Limited, 1994
pp.v– xxxv 1–938
Price: $95 (softcover)

Child Support: A Practitioners Guide

by Jan Bowen
The Law Book Company Limited, in association with the Child Support Agency, 1994
pp.v–xviii, 1–293

THESE RECENT PUBLICATIONS BY THE Law Book Company are not intended for practitioners with expertise in the area of family law.

Australian Family Law in Context is primarily a casebook for undergraduate students and lecturers. It follows the usual casebooks format of commentary and questions on extracted material. What should be of interest and relevance to family law practitioners is the extensive range of materials (other than case law and legislation) which have been reproduced in this work, including articles by judges, feminists, economists, psychologists and sociologists, the latest reports and tables from the Australian Bureau of Statistics, discussion papers of the Family Law Council, and the reports and working papers of various committees and law reform commissions.

Jan Bowen's new book is a wonderfully simple step-by-step guide for solicitors and barristers who have little or no knowledge of the operation and workings of the *Child Support (Assessment) Act* 1989. *Child Support: A Practitioner's Guide* clearly and basically explains how this complicated piece of legislation works, including the methods for calculating child support assessments. So straightforward and to the point is this work that Jan Bowen's text is in fact shorter than the appendices to her book (which include a complete reproduction of the *Child Support (Assessment) Act* 1989, a glossary and various forms which are used in applications).

Anna Ziaras

CONFERENCE UPDATE

6–7 January 1995: Kuala Lumpur — *LawAsia Insurance Law Standing Committee Seminar.* Contact Mr. John Heeley, Secretary-General, LawAsia (09) 221 2303.
7–14 January 1995: Aspen, Colorado — *Second International Conference on Professional, Personal and Practice Development.* Contact Mr. Michael Houghton (02) 629 7094.
13–14 February 1995: Sydney — *Fourth Annual National Medico-Legal Congress.* Contact IIR Pty. Ltd. (02) 954 5844.
16–17 February 1995: San Francisco — *Computer Law Association — 3rd International Pacific Rim Conference.* Contact Peter Knight (Clayton Uzt) (02) 353 4200.
16–18 February 1995: Sydney — *Australian Rights Congress* (see p.87). Contact John Mulready (02) 956 8333.
20–22 February 1995: Hong Kong — *American Bar Association Litigation Section Conference.*
23–25 February 1995: Law Council and Leo Cussen Institute *Annual Superannuation Conference for Lawyers.* Contact Dianne Rooney (03) 602 3111.
1–3 April 1995: Barossa Valley — *Association Internationale des Juristes Du Droit de la Vigne at Du Vin.* Contact (08) 364 1005.
26–28 April 1995: Melbourne — *Australian Insurance Law Association National Conference.* Contact (03) 826 0288.
3–5 May 1995: San Francisco — *Inter-Pacific Bar Association Fifth Annual Conference.* Contact Mr. Phillip Bushby, Lane & Lane (02) 391 3800.
17–21 May 1995: Perth — *12th National Convention of Taxation Institute of Australia.*
21–26 May 1995: Crete — *5th Greek Australian International Legal and Medical Conference.* Contact (03) 699 3955.
10–13 June 1995: Edinburgh — *International Bar Association Section on General Practice 8th Biennial Conference.*
16–20 August 1995: Beijing — *Fourth Biennial LawAsia Conference.* Contact Mr. John Heeley, Secretary-General LawAsia (09) 221 2303.
24–28 September 1995: Brisbane — *29th Australian Legal Convention.* The full convention programme will be available in April 1995. Contact Convention Secretariat, 29th Australian Legal Convention, P.O. Box 1280, Milton, Queensland 4064, (07) 369 0477.